NORTH CAROLINA COURT OF APPEALS REPORTS

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1. Appointed and sworn in 16 September 1994.
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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

PEGGY S. BRYANT, PLAINTIFF v. THALHIMER BROTHERS, INC. AND SCRUGGS COLVIN, DEFENDANTS

No. 9121SC814

(Filed 21 December 1993)

1. **Intentional Infliction of Mental Distress § 2 (NCI4th)— statute of limitations—acts more than three years before claim filed**

Evidence of sexual harassment and retaliation which occurred more than three years prior to the filing of plaintiff's claim against her supervisor and employer for intentional infliction of emotional distress did not constitute evidence of complete and separate torts but was evidence of elements of the claim itself and was not barred by the three-year statute of limitations. Furthermore, plaintiff's claim was not barred by the statute of limitations where she presented evidence of specific incidents which occurred within three years of the filing of her claim and of medical treatment for emotional distress that she received during that time as a result of her supervisor's conduct.

Am Jur 2d, Fright, Shock, and Mental Disturbance § 17.

2. **Evidence and Witnesses § 1174 (NCI4th)— summary judgment hearing—statements by attorney—not judicial admissions**

Statements made by plaintiff's counsel to the trial court during a summary judgment hearing to the effect that plaintiff

was not seeking damages for events occurring more than three years before the complaint was filed did not constitute judicial admissions and were not binding on the plaintiff in the subsequent trial.

Am Jur 2d, Evidence §§ 597, 615, 665.

3. **Intentional Infliction of Mental Distress § 3 (NCI4th)— sufficiency of evidence against supervisor—employer's ratification of supervisor's acts**

Plaintiff's evidence of conduct and intent was sufficient for submission to the jury of plaintiff's claim against her former supervisor for intentional infliction of emotional distress where it tended to show that when plaintiff rebuffed sexual advances by defendant supervisor, he began treating plaintiff unfairly, repeatedly threatened her and her job, and created situations in which she could not effectively do the work assigned to her; plaintiff received unfavorable evaluations, was required to hire staff persons she felt were unqualified, and was called names such as "Nazi," "Rambo," and "Gestapo" by defendant supervisor; and defendant supervisor's conduct caused plaintiff to seek medical attention from two doctors and to resign from her job. Furthermore, the evidence supported plaintiff's claim that defendant employer ratified the acts of defendant supervisor so that the employer was liable for his actions where it tended to show that plaintiff submitted twenty-two complaints about her supervisor to the employer's personnel manager and held conversations with other management personnel about defendant's conduct; plaintiff's discussions with management personnel which she thought were held in confidence were reported to defendant supervisor; management personnel told plaintiff that complaints of that nature were not welcome from employees; nothing was ever done about defendant supervisor's conduct toward plaintiff; plaintiff was told that she had a bad attitude and was placed on probation; and plaintiff thereafter resigned her job.

Am Jur 2d, Fright, Shock, and Mental Disturbance § 17.

4. **Jury § 68 (NCI4th)— jury less than twelve—stipulation—excusal of jurors for "guilty" rather than "innocent" reasons**

Where the parties in an action for intentional infliction of emotional distress stipulated at the beginning of the trial

that the trial could proceed with a jury of ten persons if necessary, the trial court did not abuse its discretion in the denial of defendants' motions for a mistrial and a new trial because the verdict was rendered by a ten-person jury after the trial court excused two jurors who had read a newspaper article reporting that the court had allowed defendants' pretrial motion to suppress evidence of the individual defendant's sexual involvement with other women employed by defendant employer. There was no merit to defendants' argument that their agreement to a jury of ten persons was only to allow the trial to proceed in the event of illness or emergency of jurors, an "innocent" reason, and not to allow a jury of less than twelve for the "guilty" reason that two jurors had read a newspaper article about evidence excluded by pretrial motion, since an agreement to have a verdict by less than twelve jurors does not depend on whether the jurors are excused for an "innocent" rather than a "guilty" reason.

Am Jur 2d, Jury § 124 et seq.

Appeal by defendants from judgment entered 25 January 1991 in Forsyth County Superior Court by Judge James A. Beaty, Jr. Heard in the Court of Appeals 15 September 1992.

This action arises out of a female employee's complaints against a male supervisor at Thalhimer Brothers in Winston-Salem. Plaintiff was employed by Thalhimers from September 1982 until her resignation in February 1987.

The plaintiff filed suit on 5 December 1989, seeking damages for intentional infliction of emotional distress, wrongful termination, and negligent retention. The complaint alleged that the defendant Scruggs Colvin, who was employed by Thalhimers as the regional manager in loss prevention in 1984, began harassing her sexually in early 1985.

The plaintiff further alleged that when she rebuffed the sexual advances of her supervisor, he began treating her unfairly in an attempt to force her resignation. From 1986 until her resignation, the complaint alleged that he repeatedly threatened her and her job, while creating situations in which she could not effectively do the work assigned to her. She received unfavorable evaluations, she was required to hire staff persons that she felt were unqualified, and she was called names such as "Nazi", "Rambo", and "Gestapo"

by the defendant. Plaintiff contended that during this period she complained to supervisory personnel with the corporation about these incidents of harassment and retaliation.

The defendants' answer denied the material allegations of the complaint and raised, *inter alia,* the affirmative defense of the three-year statute of limitations. The defendants asserted that the statute barred recovery for damages for events which occurred prior to 5 December 1986. Defendants moved for summary judgment on that basis. The motion was denied on 15 November 1990.

Just prior to trial, the defendants filed motions *in limine* seeking to exclude evidence of Defendant Colvin's prior sexual relationships with other employees of Thalhimers and to exclude evidence of events that was barred by the statute of limitations. Additionally, they filed a motion to compel admissions based on representations made by plaintiff's counsel during the earlier summary judgment hearing to the effect that the plaintiff was not seeking damages for events occurring prior to 5 December 1986. The motion to exclude the evidence of past relationships was allowed, while the motion to exclude the incidents prior to December 1986 and the motion to compel admissions were denied.

Jury selection was completed on 9 January 1991. The next day, an article appeared in the Winston-Salem Journal which reported the evidence of the prior sexual relationships of Defendant Colvin and that it had been excluded from the trial. Two of the jurors had read the article and were excused by the judge. Three other jurors were aware of the article, and one juror had been told by her husband not to read the article. Defendants moved for a mistrial, having produced evidence that the plaintiff's counsel had released the excluded evidence to the newspaper. That motion was denied. The trial proceeded with ten jurors.

At the close of plaintiff's evidence, defendants moved for a directed verdict which was denied and subsequently renewed at the close of all the evidence. At that time, the trial court allowed the motion with respect to the wrongful termination claim.

The claim for intentional infliction of emotional distress went to the jury on 23 January 1991. The trial judge denied the defendants' request for an instruction on the three-year statute of limitations. The following day, the jury returned a verdict for the plaintiff of $25,000.00 in compensatory damages and $225,000.00 in punitive

damages. On 1 February 1991, the defendants filed motions for judgment notwithstanding the verdict and a new trial. These motions were denied by the trial judge. Defendants appeal from the judgment entered upon the jury verdict.

Kennedy, Kennedy, Kennedy & Kennedy, by Harold L. Kennedy, III, Harvey L. Kennedy and Annie Brown Kennedy, for plaintiff-appellee.

Haynsworth, Baldwin, Johnson and Greaves, P.A., by Charles P. Roberts III and Gregory P. McGuire, for defendant-appellants.

ORR, Judge.

We note at the onset that we are in our discretion addressing the merits of the defendants' first argument pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. The issue has not been raised properly. As a result of incorrect pagination, the page stating the argument and referencing the assignment of error has been omitted. Ordinarily, if a party fails to include references to the assignment of error, the question is deemed abandoned and will not be considered on appeal. However, "[t]o prevent manifest injustice to a party, or to expedite a decision in the public interest . . .", Rule 2 allows us to waive this requirement and proceed to the merits. *See State v. Shelton*, 53 N.C. App. 632, 635, 281 S.E.2d 684, 688 (1981), *appeal dismissed and cert. denied*, 305 N.C. 306, 290 S.E.2d 707 (1982).

I.

The defendants have raised eight assignments of error for review by this Court. Initially, we address those issues which revolve around the applicable statute of limitations and the exclusion of evidence of conduct of Defendant Colvin which occurred prior to 5 December 1986.

Defendants first contend that the trial court committed reversible error in denying their motions for directed verdict and judgment notwithstanding the verdict because the plaintiff's claim arising out of the defendants' conduct prior to 5 December 1986 was barred by the three-year statute of limitations applying to claims of intentional infliction of emotional distress. Secondly, they argue that plaintiff's counsel made admissions during the arguments on preliminary motions that effectively foreclosed plaintiff seeking damages for events occurring prior to 5 December 1986.

Third, they argue that the trial judge committed error in refusing to instruct the jury on the applicable statute of limitations. Finally, they assert that the trial court's denial of the defendants' motion *in limine* to exclude evidence of events prior to 5 December 1986 was reversible error.

We hold that the evidence of conduct occurring prior to the 5 December 1986 date was not evidence of complete and separate torts, but rather was evidence of the elements of the claim itself and therefore, was not barred by the statute of limitations. Accordingly, we overrule the defendants' assignments of error based on the statute of limitations.

A.

[1] The defendants assert that the plaintiff's claim for intentional infliction of emotional distress is barred by the three-year statute of limitations found at N.C. Gen. Stat. § 1-52(5). *See also Waddle v. Sparks*, 100 N.C. App. 129, 394 S.E.2d 683 (1990), *aff'd in part and reversed in part on other grounds*, 331 N.C. 73, 414 S.E.2d 22 (1992).

It is well settled in North Carolina that in determining whether the evidence is sufficient to withstand a motion for a directed verdict, the plaintiff's evidence must be taken as true and all the evidence must be viewed in the light most favorable to her, giving her the benefit of every reasonable inference which may be legitimately drawn therefrom, with conflicts, contradictions, and inconsistencies being resolved in the plaintiff's favor. *Hornby v. Pennsylvania National Mutual Casualty Insurance Co.*, 62 N.C. App. 419, 303 S.E.2d 332, *cert. denied*, 309 N.C. 461, 307 S.E.2d 364 (1983). Where more than a scintilla of evidence has been presented by the plaintiff which supports each element of his *prima facie* case, a directed verdict should be denied. *Snead v. Holloman*, 101 N.C. App. 462, 400 S.E.2d 91 (1991). A motion for a judgment notwithstanding the verdict is essentially the renewal of the directed verdict motion, and the standards are the same. *Miller v. Cannon Motors, Inc.*, 40 N.C. App. 48, 257 S.E.2d 925 (1979). Both motions serve to test the sufficiency of the evidence presented at trial, first after the plaintiff's case in chief and then again after the jury's decision.

In order to prove a claim for intentional infliction of emotional distress, the plaintiff is required to show that the defendant (1)

engaged in extreme and outrageous conduct, (2) which was intended to cause and did cause (3) severe emotional distress. *Hogan v. Forsyth Country Club*, 79 N.C. App. 483, 340 S.E.2d 116, *review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). The tort may also lie where a "defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 330 (1981). The statute of limitations for the tort of intentional infliction of emotional distress is three years. *Id.* at 444, 276 S.E.2d at 330. "Civil actions can only be commenced . . . [within the three-year period], after the cause of action has accrued, ..." N.C. Gen. Stat. § 1-15(a) (1983).

The recent decision by the North Carolina Supreme Court, *Waddle*, 331 N.C. 73, 414 S.E.2d 22, held that where the plaintiff could not show that "any of the specific incidents" took place within the statutory period, she could not survive a motion for summary judgment. In *Waddle*, suit was filed on 20 April 1988. Both plaintiffs alleged intentional infliction of emotional distress in response to repeated harassment and sexual innuendoes by the defendant Sparks. The purported harassment began sometime in 1983. Both the defendants pleaded the statute of limitations as an affirmative defense in their answer and moved for summary judgment on that basis after depositions of the plaintiffs were taken. The co-plaintiff, Simpson, could not produce evidence of *any* specific acts of harassment within three years of the filing of the suit. "Not only could she not remember a day or month when any of defendant's alleged comments of a sexually suggestive nature occurred, but she also failed to recall the year they occurred." *Waddle*, 331 N.C. at 86, 414 S.E.2d at 29. "If plaintiff Simpson could have testified that any of the specific incidents with Sparks occurred as late as February of 1986, her evidentiary forecast . . . would have been sufficient to survive a summary judgment motion based on the statute of limitations." *Id.* at 87, 414 S.E.2d at 29.

The issue in *Waddle*, as to the plaintiff Simpson, was whether there was sufficient evidence of each element of the tort to create an issue for the jury to decide at trial. Simpson could not show *any* evidence of one of the elements of the tort, and therefore, summary judgment was appropriate. However, the Court in no way suggested that the prior occurrences would have been excluded at trial, nor was the issue of exclusion of evidence before the Court. Moreover, in the case at bar, there were two incidents

occurring on or after 5 December 1986. Therefore, there was sufficient evidence to create an issue to be decided at trial, certainly when combined with evidence of the incidents of alleged conduct which took place in 1985.

The defendants rely on the rule of *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325, which established that three years is the applicable statute of limitations for claims of intentional infliction of emotional distress and that evidence of the defendants' intentional torts against the plaintiff which took place prior to the applicable limitations period may not be considered in determining damages. However, both the law and the facts of *Dickens* are distinguishable from the case at bar.

In *Dickens*, the plaintiff alleged intentional infliction of emotional distress in his complaint which was filed more than one year and less than three years after the incident complained of took place. The action arose out of a single occurrence during which the defendant not only committed an assault and battery (governed by the one-year statute of limitations of G.S. § 1-54(3)) against the plaintiff, but also made significant threats of future harm. The defendant argued that the action was only one for assault and battery, although cast as one for intentional infliction of emotional distress. They further argued that even if the plaintiff had alleged a cause of action for emotional distress, that it, too, was governed by the one-year statute. The Supreme Court disagreed, finding that the more general language of G.S. § 1-52(5) controlled the intentional infliction claim and that the plaintiff's showing was sufficient to create an actionable claim for emotional distress. The Court concluded that "[a]lthough the assaults and batteries serve to color and give impetus to the future threat and its impact on plaintiff's emotional condition, plaintiff may not recover damages flowing directly from the *assaults and batteries* themselves." *Dickens*, 302 N.C. at 455, n. 11, 276 S.E.2d at 336 (emphasis added). The Court further stated that, "[a]lthough plaintiff's recovery for injury, mental or physical, directly caused by the assaults and batteries is barred by the statute of limitations, these assaults and batteries may be considered in determining the outrageous character of the ultimate threat and the extent of plaintiff's mental or emotional distress caused by it." *Id.* Thus, while the Court did not allow damages for the separate torts, it did allow the *evidence* of the extreme and outrageous conduct of the defendant as an *element*

of the plaintiff's emotional distress claim, even though an assault and battery claim was barred.

In the case *sub judice*, the evidence presented at trial tended to indicate that incidents between the plaintiff and Defendant Colvin began in early 1985, soon after he was hired by Thalhimers in 1984. According to the plaintiff's testimony, the first conversation of a sexual nature was on a trip to Sears in Hanes Mall in Winston-Salem to pick up supplies for the Hanes Mall Thalhimers location. The defendant asked her if she'd ever had an affair with anyone. She responded that she had not. The plaintiff also testified to the following:

> A. He told me he liked women with large breasts.
>
> Q. When he made that statement to you, can you tell the ladies and gentlemen of the jury what he was looking at?
>
> . . .
>
> A. He was looking down at my breast area.

On another occasion of sexually related conduct, the plaintiff testified that

> [w]e were moving the desk. And I was on one side and he was on the other. And I had hold of the desk and he came around on my side and he rubbed his penis across my hand. And I don't know how, but it got caught in my ring and I jerked my hand away because was—it just flew all over me, embarrassed me. I was just humiliated. I mean it just—it just embarrassed me to death.

The plaintiff also testified that the next day

> he called me down to the office. And he was sitting on my desk facing me. And he told me to pull my pants down because he wanted to see a bee sting. And he didn't smile. He had that same dirty grin on his face.

She told him at that time that he made her sick to her stomach. He then "jerked my door open and slammed it and left." Except for the last incident, which plaintiff testified could have been an accident, the defendant never physically touched the plaintiff.

On 24 September 1985, the plaintiff submitted some twenty-two complaints about Mr. Colvin to Tida Williams, personnel

manager. She told Ms. Williams that she would be hiring an attorney to bring harassment charges against Colvin. Ms. Williams recorded the complaints and the conversation with the plaintiff in a file memorandum and spoke to Colvin about his behavior.

Incidents continued between the plaintiff and the defendant throughout 1986 until her resignation in 1987. According to the plaintiff's testimony, the occurrences ceased to be sexual in nature, but began to follow a retaliatory scheme. She testified that, "He would call me and hang up on me. He wouldn't say bye. He would slam the phone down." She further stated that the defendant's behavior "got worse and worse until I left the company." She testified that he called her "a hangman, gestapo, Nazi, . . . any kind of demoralizing name."

The evidence indicated that the plaintiff notified upper management again in early 1986 about Colvin's behavior towards her. Shortly after she spoke with those individuals, Colvin came into her office and told her that he knew of her accusations. She testified that the defendant clenched his fists "and put his finger up in front of me and he told me he was going to get me fired."

The plaintiff testified that after the above meeting, Mr. Colvin's behavior became "more extreme and more intent." She testified that once he called her office ten times in thirty minutes and that on another occasion, she was required to hire unqualified employees and then was told she had improperly trained them when they were asked to resign.

The plaintiff stated that she called Steve Loomis, Vice-President of Loss Prevention, on 15 November 1986, to discuss Colvin's continued harassment. On 3 December 1986, Mr. Loomis and Mr. Colvin met with the plaintiff. She testified that during that meeting she became aware that all of the management personnel with whom she had spoken had also discussed her confidential conversations with Colvin. At the meeting, Loomis said that she had a serious attitude problem. She had not previously met Loomis (except briefly at a meeting), nor had she ever been under his supervision. Loomis told her that her accusations against Colvin were not true. She testified that Loomis and Colvin began walking "around me and around me. And when I would try to say something, he [Colvin] would tell me to shut up. He said 'you are here to listen and not to talk.' " She further testified that Loomis called her a "gestapo

and Nazi" and that Colvin would then laugh. She became so upset during that meeting that she could not recall how it ended.

The plaintiff testified that approximately two weeks later, on 16 December 1986, Tida Williams, Steve Loomis, and Colvin arrived late in the day without notice and delivered to her a completed performance evaluation. She was told to sign the document even though the evaluation was negative and she disputed the contents. On 10 January 1987, the plaintiff was called into Thalhimers' personnel office by Mr. Colvin and was placed on probation. Tida Williams, the Personnel Manager, was present and was taking notes. On 5 February 1987, the plaintiff resigned. At the time of her resignation, she had been under a doctor's care since December. She stated in her resignation letter the following:

> My reasons for my resignation are: I cannot return to Thalhimers' because I feel it would be harmful to my mental and physical health. This is due to the direct actions of Bud Colvin, my present supervisor, and also comments made to me—against me and to me by Steve Loomis, vice president of loss prevention, in the past few months.
>
> . . .
>
> When I went to the company and complained to them about serious problems with Bud Colvin, I was punished for this. Bud Colvin even told me that he was going to get me! I was spoken to over and over again as if I was <u>nothing</u>.
>
> Steve Loomis called me a "hangman, Rambo, and the final blow, the gestapo!" Bud Colvin has also called me these words before.
>
> . . .
>
> I feel I have lost my self esteem and self worth as an employee and as a person. All these months of <u>extreme stress</u> has caused me <u>mental and physical harm</u>. It has also affected my personal life at home.

(Emphasis in original.) It is clear that the plaintiff presented evidence of specific incidents occurring within three years of the filing of the suit against Thalhimers. Both the evaluation meeting and the probationary meeting occurred within that period. The evaluation meeting was a direct result of the meeting two weeks before be-

tween Loomis, Colvin, and the plaintiff. Further, the plaintiff then produced evidence that the actions of her employer that occurred in December caused her to seek medical attention from two doctors shortly thereafter.

In order to survive the defendants' motion for directed verdict, the plaintiff, in addition to showing the intentional acts of the defendants, was also required to produce evidence of "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." *Waddle*, 331 N.C. at 83, 414 S.E.2d at 27, 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 in original).

Since "[t]he claim [for intentional infliction of emotional distress] exists 'when a defendant's conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind,' " *Hogan*, 79 N.C. App. at 487, 340 S.E.2d at 119; conversely, the tort does not come into existence until the continued conduct of the defendant causes extreme emotional distress. While as defendants point out in their brief, "[p]laintiff was aware of each of the acts of Defendant Colvin at the time it occurred," the plaintiff could not create a cause of action at the time if *no cause of action* had accrued. If she brought suit in September of 1985, having suffered no emotional distress, she might very well have met the same result on summary judgment as the plaintiff in *Waddle*.

Indeed, prior to the plaintiff's visits to medical professionals, she would have been unable to meet the necessarily high standard set forth in *Waddle*. In reversing the Court of Appeals' decision in *Waddle*, the Supreme Court stated that the plaintiff Waddle showed no forecast of severe emotional distress, "any *medical documentation* . . ." or "evidence of 'severe and disabling' psychological problems within the meaning of the test laid down in *Johnson v. Ruark*." 331 N.C. at 85, 414 S.E.2d at 28 (emphasis added). The Court concluded that plaintiff Waddle "failed to forecast sufficient evidence of the 'severe emotional distress' element of the tort . . ." and therefore that summary judgment against the plaintiff was appropriate.

In the case at bar, the defendants argue that the acts of Defendant Colvin that occurred prior to December 1986 are barred by the three-year statute. However, this assertion is premised on the action being complete at the time of each of those events and that the events constituted a separate tort in and of themselves. If all of the elements of the tort were not present, then no cause of action for intentional infliction of emotional distress existed at that time.

As indicated in *Waddle*, actions such as the one in the case *sub judice* often take years to manifest the severe emotional results required to complete the tort. To preclude the evidence of the very actions giving rise to the resulting damage defies common sense. The statutes of limitations serve to bar *claims*, not *evidence* of contributing factors to an ultimate claim that has not yet come into existence. "As our courts have frequently noted, in no event can a statute of limitations begin to run until the plaintiff is entitled to institute action. . . . Ordinarily, the period of the statute of limitations begins to run when *the plaintiff's right* to maintain an action *for the wrong alleged* accrues. The cause of action accrues *when the wrong is complete. . . .*" *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 594, 284 S.E.2d 188, 191, *decision modified on other grounds*, 306 N.C. 364, 293 S.E.2d 415 (1981) (emphasis in original). Obviously, outrageous conduct by the defendant alone would confer no cause of action on the plaintiff in the case until she suffered extreme emotional distress caused by his actions.

In the instant case, only one cause of action accrued at the time that the actions of the defendant did in fact cause emotional distress of the calibre set out in *Waddle*. Prior to the last few months of the plaintiff's employment, there was insufficient evidence of the third prong of an intentional infliction claim and thus no separate and complete tort. Evidence of the elements of the tort would not be barred by the statute of limitations of G.S. § 1-52(5) unless the elements were part of a completely separate cause of action that was in fact time barred. To parse out the intentional or reckless acts of a defendant due to the statute of limitations, when those acts have not yet caused the damage required to complete the tort, would allow persons to continually harass potential plaintiffs until such time as the emotional damage became severe enough to cause the extreme result, then exclude much of their conduct giving rise to the damage.

Whether certain evidence should be admitted rests in the able hands of the trial court and its application of the Rules of Evidence. In summary, we hold that the trial court properly admitted the evidence of defendants' actions during 1985 and 1986 as evidence of the first element of the tort of intentional infliction of emotional distress. We also hold that, based on the above reasoning, the trial judge's denial of the defendants' motion *in limine* was correct. Accordingly, we overrule the defendants' assignment of error with respect to the pretrial motion. Further, for the same reasons, we hold that the trial court properly instructed the jury on the issues to be decided at trial.

B.

[2] The defendants also allege that if the statute of limitations does not operate to preclude recovery for events occurring on or before 5 December 1986, then the arguments of the plaintiff's counsel made during pretrial hearings constitute judicial admissions and serve to limit the cause of action to the later events. We disagree and accordingly overrule this assignment of error.

"A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of the dispute." *Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 604, 276 S.E.2d 375, 379 (1981). "Such an admission is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence." *Id.* A stipulation as to the law is not binding on the parties or the court. *State ex rel. Carringer v. Alverson*, 254 N.C. 204, 118 S.E.2d 408 (1961). Generally, admissions are "ordinarily made by a pleading [or lack thereof], or by a response [or failure to respond] to a pretrial demand for admissions, or by stipulation entered into before or at trial." 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 166 (2d ed. 1982); *see also* § 171. "[I]n the absence of express authority, an attorney generally has no power, by stipulation, agreement, or otherwise, to waive or surrender the substantial legal rights of his client . . . ." *Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860 (1957) (counsel's statements that he did not rely on a theory stated in the complaint where the complaint alleged only that theory was not binding on party).

The defendants argue that the statements made to the trial court by plaintiff's counsel during the summary judgment hearing had the effect of constituting an admission. The attorney's statements

all concerned the legal effect of the statute of limitations on their client's claim. Specifically, the attorneys told the trial judge repeatedly that they were not attempting to recover for damages arising out of events that occurred prior to the three-year statutory proscription.

Notwithstanding the resolution of this issue that appears in Part A of this opinion, those statements made by counsel during summary judgment arguments were not judicial admissions and were not binding on the plaintiff in the subsequent action. The statements were not formal concessions nor were they intended to withdraw a particular fact from the realm of dispute. Rather, the comments were intended to respond to the court's questions regarding the defendants' summary judgment motion. "Stipulations will receive a reasonable construction so as to effect the intentions of the parties, but in ascertaining the intentions of the parties, the language employed in the agreement will not be construed in such a manner that a fact which is obviously intended to be controverted is admitted or that a right which is plainly not intended to be waived is relinquished." *Outer Banks*, 302 N.C. at 605, 276 S.E.2d at 380.

We hold that these principles of law apply in the instant case, and that statements of counsel did not constitute admissions to be used against the plaintiff in the subsequent trial. We accordingly overrule this assignment of error.

II.

[3] Defendants contend in their fourth assignment of error that even assuming *arguendo* that the conduct of the defendants was not excluded by the statute of limitations; as a matter of law, there was insufficient evidence to establish the plaintiff's claim for intentional infliction of emotional distress. They further argue that the evidence does not support the claim that Thalhimers ratified the acts of Defendant Colvin and therefore Thalhimers could not be held liable for his actions. We find this argument without merit and accordingly affirm the trial court's decision.

As indicated in Part I of this opinion, there was ample evidence presented at trial from which the jury could reasonably determine that Colvin's acts were extreme and outrageous, and that his actions intended to cause the plaintiff emotional distress. As pointed out in *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431,

436, 378 S.E.2d 232, 235 (1989), *disc. review improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990), "once conduct is shown which may be reasonably regarded as extreme and outrageous, it is for the jury to determine, upon proper instruction, whether the conduct complained of is, in fact, sufficiently extreme and outrageous to result in liability."

Further, as to the defendants' contention that the plaintiff failed to produce sufficient evidence of defendants' intent, as noted earlier, the claim for intentional infliction of emotional distress may also lie where the defendant's actions indicate a reckless indifference to the likelihood that they will cause emotional distress to the plaintiff.

Likewise, we find that the record indicates that the plaintiff testified regarding repeated conversations with various supervisory personnel along the management chain at Thalhimers and that as early as 1985 reported to the personnel manager that Colvin was harassing her. She stated that discussions she thought were held in confidence were reported to Colvin. She further testified that "nothing was done" during the subsequent eighteen months that she worked for Thalhimers. Testimony also indicated that supervisors told her that complaints of that nature were not welcome from employees. "The jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts. Such course of conduct may involve an omission to act." *Brown* at 437, 378 S.E.2d at 236 (citations omitted).

We find that the trial court correctly sent the case to the jury and was also correct in accepting its verdict. Ample evidence was presented to the jury on the issues of conduct, intent, and ratification by Colvin and his employer to establish a *prima facie* case of intentional infliction of emotional distress. We accordingly affirm the trial court's decision and overrule this assignment of error.

III.

[4] In their fifth assignment of error, defendants appeal the trial court's denial of their motions for mistrial and a new trial. They contend that the verdict was rendered by a ten-person jury thereby denying their client's constitutional right to a jury of twelve persons. Alternatively, they argue that the misconduct of the plaintiff's counsel that resulted in the elimination of two of the jurors was

grounds for a mistrial and new trial. We find no error in the trial court's decision.

Defendants admit in their brief to this Court that the trial judge on the first morning of the trial before any evidence was presented "inquired of counsel for both parties as to whether they would agree to a jury down to ten persons and the counsel for both parties agreed." However, they argue that the agreement by defendants to a jury of ten persons was in order to allow the trial to proceed in the event of illness or emergency of jurors, an "innocent reason", rather than because two jurors read newspaper reports regarding evidence excluded by pretrial motion. They contend that plaintiff's counsel intentionally "leaked" information to the press after pretrial motions hearings, and that information was in turn inaccurately reported by the Winston-Salem Journal, and the jurors reading the newspaper article (who were excused by the trial court) inherently tainted the entire trial proceedings.

We do not agree with this argument. The disputed newspaper article reported that "[i]n pretrial motions, McGuire and lead counsel Charles Roberts asked Judge James A. Beaty, Jr. to prevent Mrs. Bryant's attorneys from using evidence that they say will show Colvin was sexually involved with other women at other Thalhimers stores in North Carolina. Beaty ruled that no such evidence could be introduced unless . . . [the plaintiff's counsel] can show it is relevant." The article continued with a report of the plaintiff's first day of testimony.

The defendants argued to the trial judge that plaintiff's counsel told the reporter the basis of the excluded evidence even though the defendants were aware that the motions were argued in open court the previous day and that those motions were a part of the public record. Plaintiff's counsel denied the allegation and stated that he had only told the reporter that the motion was granted. The trial court polled the jury with regard to the newspaper article and determined that two jurors who had read the article should be excused. Those jurors were excused over the defendants' objection.

During the discussions following the trial court's questioning of the jury, counsel for the defendants stated to the trial court that they "would prefer to proceed with the full jury than to have it reduced by either of those gentlemen," even though admittedly they had stipulated to a jury of less than twelve. However, they requested that they be allowed to withdraw their stipulation because

the loss of the two male jury members was the result of an alleged violation of ethical rules by plaintiff's counsel. We do not feel that an agreement to have a verdict by less than twelve jurors should depend on whether the jurors are excused by the court for an "innocent" reason or a so called "guilty" reason. The purpose of a jury trial is to ensure that the issues are fairly decided for all parties; it appears here that the actions of plaintiff's counsel, while not approved by this Court, did not jeopardize the proceedings.

"[A] trial judge in a civil case has the power, in his discretion, to order a mistrial at any time before the verdict is returned." *Elks v. Hannan*, 68 N.C. App. 757, 758, 315 S.E.2d 553, 554 (1984). Additionally, "[t]he granting or denial of a motion for a new trial . . . is generally regarded as resting within the sound discretion of the trial judge, and his ruling will not be disturbed on appeal in the absence of a manifest abuse of such discretion, or as sometimes stated, unless it is clearly erroneous." *Stone v. Griffin Baking Co.*, 257 N.C. 103, 105, 125 S.E.2d 363, 365 (1962). In the instant case, the trial court individually polled all the jurors before concluding that the trial could proceed fairly with the ten remaining jurors. He further ensured that those remaining on the jury were made aware of their responsibility to render a fair and impartial decision through curative instructions at the close of the evidence. Based on our review of the record, we find no abuse of discretion by the trial judge in refusing the motions for a mistrial and a new trial.

We have reviewed the defendants' remaining assignments of error and find no merit in those contentions.

No error.

Judges WELLS and GREENE concur.

LIGGETT GROUP INC., PLAINTIFF v. ERNEST C. SUNAS, DEFENDANT

No. 9114SC957

(Filed 21 December 1993)

1. **Appeal and Error § 89 (NCI4th)— partial summary judgment— ownership of patent—substantial right affected—appealable**

The grant of partial summary judgment for plaintiff in an action involving ownership of a patent for a tobacco quick-aging process was immediately appealable as affecting a substantial right where the trial court effectively decided that ownership of the process rested with plaintiff by granting summary judgment on the first of plaintiff's six claims. This determination was fundamental to the disposition of plaintiff's remaining claims.

Am Jur 2d, Appeal and Error § 62.

2. **Labor and Employment § 55 (NCI4th)— employee invention— ownership of patent—summary judgment for employer—error**

The trial court erred in granting summary judgment for plaintiff-employer on its first cause of action in a declaratory judgment action in which plaintiff sought to have its employee assign to it ownership of a patent for a quick-aging process for tobacco. The parties appear to agree that defendant invented the quick-aging process; there was no written contract detailing defendant's duties as an analytic chemist; the affidavits and depositions establish that defendant was not originally hired to invent; the record is devoid of any evidence of an agreement between defendant and plaintiff that a handbook on which plaintiff relied was incorporated into defendant's terms of employment; the handbook was first issued in 1976, years after defendant began his employment, and the contents appear to have been unilaterally implemented by plaintiff; the affidavit of a former employee of the Research Department contradicts the existence of any policy with regard to assignment of inventions between 1952 and 1973; while it is not clear whether defendant was directed to experiment with the quick-aging of tobacco earlier, there is no disagreement that plaintiff was told to continue work on the process in 1981; and the determination of whether defendant reduced his theory to practice only after being set to experimenting

with the view of making an invention in 1981 was a determination for a trier of fact.

Am Jur 2d, Master and Servant §§ 111-120.

3. **Labor and Employment § 65 (NCI4th); Fraud, Deceit, and Misrepresentation § 38 (NCI4th)— promise to rehire if early retirement taken—employment at will—summary judgment not proper**

The trial court erred by entering summary judgment dismissing a counterclaim for fraudulent misrepresentation where each of the requisite elements was adequately pled by the employee and evidence was offered to support each element. A counterclaim for fraudulent misrepresentation is not barred merely because it concerns a promissory representation; fraud can be predicated upon a promissory representation when the promise is made with the intent to deceive and the promisor has no intent of performing his promise. Although the employer argues that the counterclaim is barred by the terminable-at-will doctrine, the employee is claiming that he was fraudulently induced into accepting early retirement and is not suing for wrongful discharge.

Am Jur 2d, Fraud and Deceit § 481 et seq.; Master and Servant § 33.

4. **Unfair Competition § 1 (NCI3d)— inducement to accept early retirement—unfair and deceptive practices—not applicable**

Employer-employee relationships do not fall within the scope of N.C.G.S. § 75-1.1 and the trial court properly entered summary judgment on a counterclaim for unfair and deceptive practices alleging the fraudulent inducement of retirement.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 696, 697, 714.

Practices forbidden by state deceptive trade practice and consumer protection acts. 89 ALR3d 449.

Appeal by defendant from orders entered 22 January 1991 and 14 May 1991 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 13 November 1992.

Newsom, Graham, Hedrick, Bryson & Kennon, by William P. Daniell and Joel M. Craig, for plaintiff-appellee.

Upchurch & Galifianakis, by Nick Galifianakis, and Lee L. Corum for defendant-appellant.

JOHN, Judge.

This action for declaratory and injunctive relief and for compensatory and punitive damages arises out of the issuance on 9 May 1989 of U.S. Letters Patent No. 4,827,949 (the patent) to defendant Ernest C. Sunas (Sunas), a retired employee of plaintiff Liggett Group Inc. (Liggett). Sunas contends the trial court erred by entering partial summary judgment on 22 January 1991 which (1) ordered Sunas to assign the patent to Liggett, and (2) dismissed his counterclaims. He also argues the trial court erred by denying his motion for a new hearing and to amend the summary judgment order. We agree in part and reverse the entry of summary judgment as to Liggett's initial claim and as to one of Sunas' counterclaims.

The pleadings, depositions, affidavits and other materials before the trial court indicate Sunas, from 1954 until his retirement in 1987, worked as an analytic chemist in the Research Department of Liggett, a Durham-based corporation engaged in the manufacture of tobacco products. Throughout his employ, Sunas served as an employee-at-will with no written contract.

The function of Liggett's Research Department was to study problems facing the tobacco industry with an aim towards developing new products and reducing manufacturing costs. One concern centered upon the cost of storing cured tobacco which must be properly aged before it can be manufactured into cigarettes. "Aging" is the chemical process where, over time, tobacco aroma and taste characteristics are enhanced resulting in tobacco suitable for consumer uses.

In the 1970s, Liggett began to experience financial difficulties, and a large number of Research Department employees consequently were discharged. Concerned about both his future and that of Liggett, Sunas began to consider ways of improving Liggett's fortunes. In 1979, while watching his mother-in-law bake bread, Sunas hypothesized that the same chemical process which creates a "wonderful aroma" in baking bread could be used to age tobacco

rapidly. If so, this would have financial benefit for Liggett by reducing storage costs.

Sunas began researching the chemical process at work in baking bread, commonly known as the "Maillard reaction." He eventually formulated an experiment by which he heated unaged tobacco treated with a simple sugar mixture. After a single experiment conducted on 19 February 1981, Sunas contacted Robert Kersey, Liggett's Director of Research. Kersey, impressed with the results, authorized Sunas to continue work on this method of quick-aging tobacco.

After further experimentation and refinement, Liggett's management approved a patent application for the quick-aging process. Sunas prepared a description and forwarded it to Liggett's patent counsel. The initial patent application designated Sunas, Kersey, and R.H. Wallick as co-inventors, but Sunas objected to inclusion of the others. A revised patent request was prepared listing Sunas as sole inventor, but at some point Liggett decided against patenting the procedure. Nevertheless, Sunas continued to work on refining it and making it commercially useful.

In November 1986, Liggett offered some of its employees, including Sunas, a special early retirement program whereby the employee would receive an increase in pension benefits by taking early retirement. At the time of this limited offer, Sunas was 66 years old and the mandatory retirement age at Liggett was 70. Sunas accepted the program and retired on 1 March 1987. Sunas claims, and Liggett denies, he was induced to accept early retirement by a verbal promise to be re-hired as a special consultant earning $200 per day.

After learning he would not be re-hired, Sunas decided to patent the quick-aging process and employed a Durham law firm as his patent counsel. In preparing a description, Sunas used copies of the original Liggett patent request forms he had retained. He also utilized an official Liggett laboratory notebook regarding the procedure which he had obtained after his retirement.

Sunas never notified Liggett he was seeking a patent, but an application was ultimately submitted to the U.S. Patent Office in September of 1987. Thereafter, Sunas began to contact Liggett's competitors in an effort to lease the process. Following an initial rejection of the application and subsequent modification thereto,

Sunas was issued Patent No. 4,827,949, entitled "Method of Treating Tobacco and Tobacco Produced Thereby."

On 23 June 1989, after receiving notice of Sunas' patent, Liggett instituted the instant lawsuit alleging six (6) claims: (1) a request for declaratory relief ordering Sunas to assign the patent to Liggett; (2) misappropriation of the quick-aging process; (3) breach of confidentiality by informing others of the process; (4) breach of fiduciary duties; (5) misappropriation of trade secrets; and (6) a request for injunctive relief to prohibit Sunas and others from utilizing the patented process.

After the trial court ordered temporary injunctive relief, Sunas answered the complaint, denying all material allegations and asserting several counterclaims.

On 18 October 1990, Liggett moved for summary judgment. By order entered 22 January 1991, the trial court granted Liggett partial summary judgment which (1) ordered Sunas to assign the patent to Liggett, and (2) dismissed all of Sunas' counterclaims, but (3) expressly withheld determination regarding Liggett's remaining claims.

On 28 January 1991, Sunas moved for (1) a new hearing and (2) an amendment to the summary judgment order. By order entered 14 May 1991, these motions were denied.

I.

[1] Initially, we must resolve Liggett's motion, filed in this Court, seeking dismissal of Sunas' appeal as interlocutory. A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal. N.C.R. Civ. P. 54(b) (1990); *Britt v. American Hoist & Derrick Co.*, 97 N.C. App. 442, 444, 388 S.E.2d 613, 615 (1990). Such a prohibition promotes judicial economy by preventing fragmentary appeals. *Blue Ridge Sportcycle Co. v. Schroader*, 53 N.C. App. 354, 358, 280 S.E.2d 799, 801-02 (1981).

Nonetheless, in two instances a party is permitted to appeal interlocutory orders: *first*, where there has been a final determination of at least one claim, and the trial court certifies there is no just reason to delay the appeal, Rule 54(b); *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 490-91, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989); and *second*,

if delaying the appeal would prejudice a "substantial right." *Knauff Ins.*, 93 N.C. App. at 24, 376 S.E.2d at 491. As the court below made no certification, the first avenue of appeal is closed.

Regarding the second, it has been frequently noted the substantial right test is much more easily stated than applied. *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982). There are few general principles governing what constitutes a "substantial right" and thus it is usually necessary to consider the particular facts of each case and the procedural context in which the interlocutory decree was entered. *Id.; Knauff Ins.*, 93 N.C. App. at 24, 376 S.E.2d at 491. A substantial right, however, is considered affected if "there are overlapping factual issues between the claim determined and any claims which have not yet been determined" because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues. *Knauff Ins.*, 93 N.C. App. at 26, 376 S.E.2d at 492.

In the case *sub judice*, because of the close relationship between the claim of Liggett adjudicated by the trial court and those which remain, we believe a "substantial right" is involved. By granting summary judgment on Liggett's first claim, thereby ordering Sunas to assign the patent, the trial court effectively decided ownership of the patented quick-aging process rested with Liggett. This determination is fundamental to the disposition of Liggett's remaining claims. If Liggett prevailed at trial on those counts, and upon Sunas' subsequent appeal this Court held ownership of the process to be a jury question, Sunas would thereby likely be awarded a new trial on all (6) six of Liggett's claims. Requiring such adjudication of the same claims in two separate trials would result in needless expense to the parties as well as to our court system. Upon the circumstances presented, we conclude the grant of summary judgment on Liggett's first claim is immediately appealable as affecting a substantial right. *Roberts v. Heffner*, 51 N.C. App. 646, 650, 277 S.E.2d 446, 449 (1981).

Without deciding whether a substantial right is affected, we also elect to review the trial court's dismissal of Sunas' counterclaims. This Court is free to exercise its discretion and rule on an interlocutory appeal where our decision would expedite the administration of justice. *Green v. Duke Power*, 305 N.C. at 608, 290 S.E.2d at 596.

II.

[2] Turning to the substantive issues raised by this appeal, we first examine whether the trial court erred in granting summary judgment on Liggett's first claim.

Summary judgment for Liggett was proper only if the pleadings and evidence before the trial court demonstrated there existed no genuine material issue of fact and that Liggett was entitled to judgment regarding ownership of the quick-aging process as a matter of law. N.C.R. Civ. P. 56(c) (1990); *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62, 414 S.E.2d 339, 341-42 (1992). The burden of establishing a lack of any triable issue of fact resides with Liggett as movant and thus all evidence must be viewed in the light most favorable to Sunas. *Roumillat*, 331 N.C. at 62-63, 414 S.E.2d at 342.

Liggett urges us to affirm the trial court, contending it correctly determined as a matter of law Liggett's right to the patented quick-aging process. We disagree and hold the issue of ownership under the facts of this case should be determined by the trier of fact.

The question of who owns patented inventions, employer or employee, is not novel. Although our own appellate courts have not considered this problem frequently, the basic rules governing its resolution are well established. In such controversies, inventorship provides the starting point for determining ownership of patent rights. *See* Ernest B. Lipscomb, *Walker on Patents* § 3.2 (3d ed. 1984). In the case *sub judice*, the parties appear to agree Sunas invented the quick-aging process.

The preliminary question being thus uncontroverted, the contract of employment between the inventor Sunas and his employer determines their respective rights to Sunas' invention. *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 187, 77 L.Ed. 1114, 1118, *amended by*, 289 U.S. 706, 77 L.Ed. 1462 (1933); *Speck v. N.C. Dairy Foundation, Inc.*, 311 N.C. 679, 686, 319 S.E.2d 139, 143 (1984). The fact of employment, standing alone, does not endow an employer with exclusive ownership rights to an invention, even though the invention may occur during working hours. 30 C.J.S. *Employer-Employee* § 117, at 185-86 (1992). In *Speck*, our Supreme Court declared that, absent contrary agreement, the employer owns an invention if: (1) the employee is "hired to invent, accomplish

a prescribed result, or aid in the development of products," or (2) the employee is set to experimenting with the view of making an invention and accepts payment for such work. *Speck*, 311 N.C. at 686-87, 319 S.E.2d at 143-44.

In the case *sub judice*, as in *Speck*, there was no written contract detailing Sunas' duties as an analytic chemist. Furthermore, the affidavits and depositions presented in this case establish Sunas was not originally hired to invent.

However, Liggett argues the existence of a company policy constituted an express contract between it and Sunas as part of his oral employment agreement. Liggett points to the provisions contained in an employee handbook and to sworn statements of certain supervisory employees regarding a "longstanding (albeit unwritten) custom and policy that all inventions made in the course of employment were property of the company." This contention is unavailing for several reasons. *First*, the record is devoid of any evidence indicating agreement between Sunas and Liggett that the handbook was incorporated into Sunas' terms of employment. *Second*, the handbook was first issued in 1976, years after Sunas began his employment, and the contents thereof appear to have been unilaterally implemented by Liggett. *Third*, this Court in *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985), *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986), held "unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it." *Id.* at 259, 335 S.E.2d at 83-84. *Finally*, the affidavit of a former employee of the Research Department offered by Sunas contradicts the existence of any policy with regard to assignment of inventions between 1952-1973.

Since Sunas was not "hired to invent" and since there exists at best a question of fact as to the existence of an express agreement or policy that Liggett owned any inventions, summary judgment determining the patented quick-aging process belongs to Liggett was appropriate only if the second approach set forth in *Speck* has application.

Under this second approach, "[i]t matters not in what capacity the employee may originally have been hired[;] if he be set to experimenting with the view of making an invention, and accepts pay for such work, . . . what he accomplishes by the experiments belongs to the employer." *Speck*, 311 N.C. at 686, 319 S.E.2d at

144 (quoting *Houghton v. United States*, 23 F.2d 386, 390 (4th Cir. 1928)). Thus, we must initially consider the evidence as to when Sunas was "set to experimenting."

Liggett contends Sunas was directed to experiment with the quick-aging process in September of 1980. This argument is based upon a written memorandum to Liggett's Vice-President of Research from Sunas dated 30 September 1980 in which Sunas requested to pursue research on "sugar-amino acid reactions" and to "[s]tudy the possibility of upgrading less desirable tobaccos by 'in situ' production of their flavorants." While Liggett's argument finds support in the evidence, we cannot hold as a matter of law Sunas was set to experimenting on the quick-aging process in 1980.

Preliminarily, it is controverted whether Liggett ever responded to Sunas' September 1980 query. More importantly, the contents of the document itself raise a factual dispute concerning whether it encompassed matters relating to the quick-aging process. The subject is denominated "Improve Aroma & Taste of Our Cigarettes," and Sunas' request makes no reference to the quick-aging process. Indeed, the critical terms "rapid," "accelerated," "quick," or "forced aging" are contained nowhere therein. Additionally, according to Sunas' affidavit introduced at the hearing, the memorandum pertains to matters unrelated to the quick-aging process, *i.e.*, the development of analytical procedures for identification of certain flavor compounds in tobacco used by Liggett at that time.

While the effect of the 30 November 1980 memorandum is thus unclear, there appears no disagreement Liggett directed Sunas to experiment with quick-aging of tobacco on 19 February 1981. On that date, Sunas approached his supervisor with the results of his initial quick-aging experiment and was told to continue work on the process. Accordingly, we must examine whether the evidence conclusively shows the quick-aging process was invented *after* 19 February 1981. If Liggett directed Sunas to develop the quick-aging process and Sunas *thereafter invented the process*, then under *Speck* the patented process would belong to Liggett as a matter of law and summary judgment for Liggett was proper.

Establishing the exact moment an invention comes into existence is ordinarily difficult and best left to the finder of fact. *See Walker on Patents* § 3.11. While not readily susceptible to definition, "invention" is generally considered to occur when two components, one mental and one physical, are present. *Walker on*

Patents § 3.12, at 224; 60 Am. Jur.2d *Patents* § 77, at 87 (1987). The mental component is satisfied at the moment the inventor completely conceives his invention. 69 C.J.S. *Patents* § 53, at 253 (1951); *Walker on Patents* § 3.11. The physical component is satisfied when the inventor reduces his idea to practice, thereby embodying it in some physical form. *Walker on Patents* § 3.12, at 224. Discerning the exact instant of "reduction to practice" is often problematical. Over one hundred years ago, in deciding whether Alexander Graham Bell sufficiently reduced his idea of the telephone to practice, the Supreme Court observed:

> The law does not require that a discoverer or inventor, in order to get a patent for a process, must have succeeded in bringing his art to the highest degree of perfection. It is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practical way of putting it into operation.

The Telephone Cases, 126 U.S. 1, 536, 31 L.Ed. 863, 990 (1888). Commentator Lipscomb offers perhaps the most practical test for when an inventor's idea is "reduced to practice": "[t]he efforts of the inventor must have passed beyond experiment and beyond the reach of possible or probable failure, must have attained certainty by embodiment in the intended form, and must be capable of producing the desired result." *Walker on Patents* § 3.12, at 227.

Moreover, when the invention is a process, such as in the present case, "reduction to practice" occurs at the moment the process is successfully performed. *Corona Cord Tire Co. v. Dovan Chemical Corp.*, 276 U.S. 358, 383, 72 L.Ed. 610, 619 (1928). While the inventor's efforts must necessarily have passed beyond "[c]rude and imperfect experiments," *Seymour v. Osborne*, 78 U.S. 516, 552, 20 L.Ed. 33, 41 (1871), it is not required at this point that the process be perfect and incapable of improvement, *Land v. Regan*, 342 F.2d 92, 98 (C.C.P.A. 1965), or that it be embodied in a commercially acceptable form. *Id.* at 97; 60 Am. Jur.2d *Patents* § 81, at 90.

Evidence in the case *sub judice* indicated Sunas' process, conceived in his mother-in-law's kitchen, involved the application of sugars, amino acids and other chemicals to unaged tobacco. It was then heated, inducing a chemical reaction known as the "Maillard reaction" which artificially and quickly aged the tobacco. The evidence, viewed in the light most favorable to Sunas, shows he

was able to invoke the Maillard reaction successfully in his first experiment on 19 February 1981, thereby proving his scientific theory by "quick-aging" a small quantity of unaged tobacco. Sunas concedes, and other evidence indicates, further experimentation was needed to determine what combination of chemicals would yield the most desirable flavors in the most cost-efficient fashion. Additionally, the quick-aging process was not employed under production conditions until 1984. However, as noted above, reducing an idea to practice does not require the process to be embodied in a commercially acceptable form. *See* discussion of *Land v. Regan, supra.* We hold the evidence presented is *not* susceptible to the single conclusion that Sunas reduced his theory to practice (thereby "inventing" the quick-aging process) only after being "set to experimenting with the view of making an invention" on 19 February 1991, but rather that determination of this issue is for the trier of fact. Accordingly, we hold the trial court erred in granting summary judgment for Liggett on its first cause of action.

III.

Sunas contends the trial court also erred by dismissing his counterclaims. While not models of clarity, the counts in Sunas' counterclaim under our liberal pleading rules arguably state claims for: (1) breach of contract based upon Liggett's failure to rehire Sunas; (2) fraudulent misrepresentation based upon Liggett's intentionally inducing him to retire; (3) intentional infliction of emotional distress based upon several alleged wrongful acts; (4) unjust enrichment based upon Liggett wrongfully depriving Sunas of the quick-aging process; and (5) unfair or deceptive practices under N.C.G.S. § 75-1.1, -16 (1988).

A.

On appeal, Sunas asserts only that the evidence shows "the consultant agreement induced him to accept early retirement." This brief argument will not permit appellate review of each counterclaim. Under our appellate rules, "[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(5). We have consistently interpreted this rule as requiring a question to be both presented *and argued* in the appellant's brief. *In re Environmental Management Comm'n.*, 80 N.C. App. 1, 18, 341 S.E.2d 588, 598, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 139 (1986). Even broadly construed, Sunas' argument in his appellate brief encom-

passes only two claims: (1) fraud and (2) unfair and deceptive practices based upon Liggett fraudulently inducing him to accept early retirement. Accordingly, any questions concerning the dismissal of Sunas' remaining counterclaims are deemed abandoned.

B.

[3] The essential elements of Sunas' first claim, *fraudulent misrepresentation*, are as follows: (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with the intent to deceive; (4) which the injured person reasonably relies upon; (5) resulting in damage to the injured party. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468, 343 S.E.2d 174, 178 (1986); *Briggs v. Mid-State Oil Co.*, 53 N.C. App. 203, 207, 280 S.E.2d 501, 504 (1981). Unlike the plaintiff in *Briggs*, Sunas has adequately plead each of these requisite elements, and has also offered evidence (including affidavits from himself and his spouse as well as that of Peter N. Marinos) which when viewed in the most favorable light tends to support each element.

We further note Sunas' counterclaim for fraudulent misrepresentation is not barred merely because it concerns a *promissory representation*—Liggett's promise to rehire Sunas if he took early retirement. Fraud can be predicated upon a promissory representation when the promise is made with the intent to deceive and the promisor has no intent of performing his promise. *Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 204-05, 377 S.E.2d 285, 289, *disc. review denied*, 324 N.C. 578, 381 S.E.2d 774 (1989). Sunas has sufficiently alleged these elements and produced sufficient evidence to withstand summary judgment on his claim based upon fraud.

However, Liggett argues Sunas' counterclaim for fraud is in any event barred by application of the terminable-at-will doctrine. At first blush, we are inclined to agree. For the duration of his employ, Sunas was an employee-at-will, subject to termination with only limited exception. *See Tompkins v. Allen*, 107 N.C. App. 620, 421 S.E.2d 176 (1992) (summarizing North Carolina law on wrongful discharge of terminable-at-will employees), *disc. review denied*, 333 N.C. 348, 426 S.E.2d 713 (1993). However, under authority of *Walton v. Carolina Telephone and Telegraph Co.*, 93 N.C. App. 368, 378 S.E.2d 427, *disc. review denied*, 325 N.C. 230, 381 S.E.2d 792 (1989), we are constrained to hold otherwise.

The plaintiff-employee in *Walton* alleged defendant (CTT) induced him to leave NEC and accept employment with CTT by promising favorable seniority status. CTT later refused to grant plaintiff senior status explaining this was prohibited under existing union agreements. Plaintiff subsequently lost his job because his seniority status was insufficient to withstand a lay-off. This Court ruled the employment-at-will doctrine did not bar plaintiff's action: the employee "is not suing for wrongful discharge; his complaint asserts that he was fraudulently induced to come to work for CTT." *Walton*, 93 N.C. App. at 380, 378 S.E.2d at 434.

As in *Walton*, Sunas is not suing for wrongful discharge; he claims he was fraudulently induced into accepting early retirement. Under these circumstances, any attempt to distinguish *Walton* would involve imperfect line-drawing and could only add confusion to the law in this area. Accordingly, we hold the terminable-at-will doctrine will not, under the facts of this case, bar Sunas' action for fraudulent misrepresentation and the trial court erred by entering summary judgment dismissing this counterclaim.

C.

[4] With regard to Sunas' counterclaim for unfair and deceptive practices, we have previously held employer-employee relationships do not fall within the scope of G.S. 75-1.1. *American Marble Corp. v. Crawford*, 84 N.C. App. 86, 88, 351 S.E.2d 848, 849-50, *disc. review denied*, 319 N.C. 464, 356 S.E.2d 1 (1987). Accordingly, the trial court properly entered summary judgment on this counterclaim.

To summarize, the trial court's entry of summary judgment in favor of Liggett on Count I of Liggett's complaint and on Sunas' counterclaim for fraudulent misrepresentation is reversed; the entry of summary judgment as to Sunas' remaining counterclaims is affirmed. In view of these holdings, we find it unnecessary to examine Sunas' remaining contentions.

Affirmed in part, reversed in part.

Judges EAGLES and ORR concur.

LLOYD STUART SURLES v. ELAINE S. SURLES AND DAVID ALAN BLACKMAN

LLOYD STUART SURLES v. ELAINE S. SURLES AND DAVID ALAN BLACKMAN

No. 9111DC1292
No. 9211DC32

(Filed 21 December 1993)

1. Divorce and Separation § 350 (NCI4th)— child custody—intervention by natural father—custody awarded to mother—no error

The trial court did not err by awarding custody of two children to the defendant-mother where the mother's current husband had intervened and claimed to be the biological father of one of the children. The trial court properly considered all relevant evidence relating to the best interests and welfare of the minor children, made twenty-six findings of fact regarding plaintiff's obsessive-compulsive behavior and its effect on the children, and made ten findings relating to the intervenor, six of which related to his ability to create a nurturing and healthy relationship with the children as a member of defendant's household rather than to the paternity of the younger child. While it would be error for a court to allow intervention as of right in a custody and visitation suit by an individual based upon a claim as a biological parent absent a jury determination to that effect, the intervention here was by permission of the court under N.C.G.S. § 1A-1, Rule 24(b) and the court's findings and conclusions supporting that permission were not excepted to by plaintiff.

Am Jur 2d, Divorce and Separation § 974 et seq.

2. Divorce and Separation § 345 (NCI4th)— child custody—adultery of mother—finding that mother fit and proper

The trial court did not err in a child custody proceeding by finding that the mother was a fit and proper person to have custody of her daughters even though the court also found that the defendant-mother had had sexual relations with the intervenor at the time of the younger daughter's concep-

tion and while married to plaintiff. Adultery is not a sufficient reason to deny custody.

Am Jur 2d, Divorce and Separation § 979.

3. **Divorce and Separation § 348 (NCI4th)— visitation—conditioned on controlling obsessive-compulsive behavior—no error**

The trial court did not err by conditioning plaintiff's visitation with his minor children on his ability to control his obsessive-compulsive behavior when with the children where ample evidence was presented from which the court could have concluded that plaintiff's behavior could jeopardize the children's welfare.

Am Jur 2d, Divorce and Separation § 980.

4. **Appeal and Error § 176 (NCI4th)— custody action—appeal—determination of attorney fees**

The trial court had jurisdiction to hear a motion for attorney fees in a child custody action after notice of appeal where the court had expressly reserved the issue of attorney fees at the time it rendered judgment as to the custody matters.

Am Jur 2d, Appeal and Error § 352 et seq.

5. **Divorce and Alimony § 552 (NCI4th)— child custody—attorney fees—ability to pay**

The trial court did not abuse its discretion in a child custody action by concluding that plaintiff had the ability to pay an award of attorney fees to defendant where there was a supporting finding based on evidence provided by plaintiff.

Am Jur 2d, Divorce and Separation § 1061.

6. **Divorce and Alimony § 546 (NCI4th)— child support—attorney fees—motion subsequent to appeal—no error**

The trial court did not err by awarding defendant attorney fees in a custody action where plaintiff contended that the court erred by failing to consider that defendant made no request for attorney fees and has the ability to pay at least a portion of her expenses. A request for attorney fees may be raised by a motion in the cause and the court's findings support the conclusions of law.

Am Jur 2d, Divorce and Separation § 1061.

Judge WYNN concurring.

Appeals by plaintiff from orders for child custody, child support, and award of attorney's fees entered 31 October 1991 in Harnett County District Court by Judge William A. Christian. Heard in the Court of Appeals 7 December 1992.

The plaintiff and defendant were married on or about 1 July 1978. Two children, Morgan Faith and Sara Brook, were born of that marriage prior to the couple's separation on or about 1 May 1990. On that date, the parties executed a separation agreement which provided for the joint custody of the children.

On 23 August 1990, the plaintiff filed a complaint seeking custody and child support from the defendant. The defendant filed her answer and counterclaim on 29 October 1990, alleging that the plaintiff was not a "fit and proper" parent for the children, and for the first time alleging that the younger child, Sara Brook, was not the biological child of the plaintiff. The defendant prayed for custody and child support for both children.

On 10 December 1990, David A. Blackman moved to intervene as of right in the above custody action. In that motion, he claimed that he was the natural father of Sara Brook Surles, and as such, sought visitation rights pursuant to N.C. Gen. Stat. § 50-13.2(b)(1). On the same day by separate motion, Blackman also moved for temporary and permanent custody of the child. The trial court in the intervention action found as a fact that "the odds of David A. Blackman being the biological father of SARA BROOK SURLES is 96,879 to 1 . . . ." The court also found that:

> Defendant [Mrs. Surles] claims that paternity has been established under N.C.G.S. § 110-132; David A. Blackman has executed a voluntary support agreement for the support of SARA BROOK SURLES, . . . in a separate proceeding in Wake County, North Carolina, David A. Blackman has executed and filed with the Clerk a written acknowledgment of paternity and an affirmation of paternity by the mother, and at the in chambers hearing . . . the Court received in evidence a judgment of paternity entered by the District Court in Wake County, ...

The Court further found that "it is not clear from the record that the parent-child rights of the Plaintiff . . . and the child . . . were protected in that proceeding." Mr. Blackman's motion to intervene was granted on 16 December 1990. The plaintiff did not appeal the intervention.

On 11 December, the defendant, Mrs. Surles, moved to continue the custody action. The continuance was granted; however, the trial court, on its own motion, with the defendant's consent, modified the previous custody order and awarded "exclusive custody of the minor children [to the plaintiff] without any visitation being granted to the defendant pending a hearing on the merits." The court also ordered that psychological evaluations be completed on each child and ordered completion of discovery within thirty days.

Various delays prevented calendaring of the trial, and on 13 February 1991, the plaintiff made a motion in the cause seeking child support from the defendant. The next day, the defendant filed a similar motion requesting visitation with the children. On 2 March, the defendant, Mrs. Surles, was allowed visitation every other weekend, and on 16 March, she was ordered to pay $248.00 each month in child support.

Trial was held in Harnett County District Court beginning 13 May 1991. Subsequent to the trial, the court entered an order on 31 October 1991, granting custody to Mrs. Surles and allowing visitation of both of the minor children to the plaintiff and visitation of Sara Brook to the intervenor.

On 26 June 1991, plaintiff filed notice of appeal to this Court. On 23 July 1991, the defendant filed a motion for attorney's fees in the custody litigation. The motion was argued on 12 September 1991, and the trial judge ordered the plaintiff to pay to defendant $13,812.50 in attorney's fees. Both orders were entered by the trial court on 31 October 1991. From the order awarding attorney's fees, as well as the order granting custody to the defendant, the plaintiff appeals. The appeals were consolidated by order of this Court on 17 June 1992.

Reid, Lewis, Deese & Nance, by Renny W. Deese, for plaintiff-appellant.

Armstrong & Armstrong, P.A., by Marcia H. Armstrong, for defendant-appellee.

Harris, Mitchell, Hancox & VanStory, by Ronnie M. Mitchell and Kathleen G. Sumner, for intervenor-appellee.

ORR, Judge.

The plaintiff argues three issues in his appeal of the custody award. First, he asserts that the trial court erred in considering

the paternity issue in determining the custody of the children born of the marriage. Secondly, he argues that the trial court erred in failing to find facts and make conclusions of law regarding his spouse's conduct during the marriage, and finally, he contends that the court erred in conditioning plaintiff's visitation of the minor children only "so long as plaintiff can control his obsessive and ritualistic behavior to the extent that it does not affect the minor children." As to the first issue, we conclude that evidence of paternity may properly be considered in determining the best interests of the children. We also find that the plaintiff's second and third assignments of error are without merit and affirm those portions of the trial court's decision.

I.

A.

[1] Plaintiff's first assignment of error raises the issue of whether evidence submitted by an alleged biological father may be considered in determining custody of minor children of a marriage when the husband of the marriage asserts that he is the natural father of the children and seeks custody of both children born during the marriage.

The plaintiff relies on the ancient common law principal that a mother's children born of a marriage are presumed to be the husband's children: "*pater is est quem nuptiae demonstrant*". *Goodright v. Moss*, 98 Eng. Rep. 1257 (1777). *See also* Tiana M. Hinnant, Note, *Family Law—Lovers' Triangle Turns Bermuda Triangle: The Natural Father's Right to Rebut the Marital Presumption*, 25 Wake Forest L. Rev. 617 (1990). However, the appeal in the case *sub judice* arises out of a custody dispute heard pursuant to N.C. Gen. Stat. § 50-13, rather than in the course of a paternity hearing. The trial court's entire objective in these cases is to determine the best environment for the child or children. As is the case here, these decisions are often difficult, but even where parents love their children, "a parent's love must yield to another, if, after judicial investigation, it is found that the best interest of the child is subserved thereby." *Greer v. Greer*, 5 N.C. App. 160, 163, 167 S.E.2d 782, 784 (1969). Of necessity in these cases, the trial court is vested with wide discretion. *Sheppard v. Sheppard*, 38 N.C. App. 712, 248 S.E.2d 871 (1978), *cert. denied*, 296 N.C. 586, 254 S.E.2d 34 (1979). "He has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not be

upset on appeal absent a clear showing of abuse of discretion." *Falls v. Falls*, 52 N.C. App. 203, 209, 278 S.E.2d 546, 551, *cert. denied*, 304 N.C. 390, 285 S.E.2d 831 (1981). "He can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges." *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979).

Further, the trial court must decide custody mindful that "the welfare of the child is the paramount consideration to which all other factors, including *common law preferential rights* of the parents, must be deferred or subordinated . . . ." *Plemmons v. Stiles*, 65 N.C. App. 341, 345, 309 S.E.2d 504, 506 (1983) (emphasis added). Before awarding custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody "will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a). Findings of fact as to the characteristics of the competing parties must be made to support the necessary conclusions of law. These findings may concern *"physical, mental, or financial fitness or any other factors brought out by the evidence* and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978) (emphasis added).

Voluminous evidence was presented by the parties during the trial. At the close of all the evidence, the trial court in the instant case made extensive findings of fact including the following:

> 4. Plaintiff and Defendant are the natural parents of the minor child: Morgan Faith Surles, born 23 November 1987.
>
> 5. Defendant is the natural mother of the minor child: Sara Brook Surles, born 3 July 1989.
>
> 6. Intervenor Plaintiff, Defendant and the minor child, Sara Brook Surles, submitted to blood testing to determine whether or not Intervenor Plaintiff is the biological father of Sara Brook Surles. The results of the ABO, HLS-A, HLA-B and DNA tests establish that the probability of Intervenor Plaintiff being the biological father of Sara Brook Surles is 96,879 to 1.
>
> . . .
>
> 8. After she was three (3) month[s] pregnant with Sara Brook Surles, Defendant had sexual intercourse with the Plaintiff.

> Prior to this act, Plaintiff and Defendant had not had sexual intercourse for approximately two (2) years.
>
> . . .
>
> 10. Based upon the evidence presented, this Court is convinced that Intervenor Plaintiff is the biological parent of Sara Brook Surles.
>
> 11. Plaintiff has during the marriage developed excessive ritualistic behavior concerning cleanliness, the fear of germs and the fear of being contaminated by body fluids. This behavior has become more excessive from 1988 to the present. This Court is concerned with this character of the Plaintiff and believes from the evidence presented that Plaintiff suffers from Obsessive Compulsive Disorder as defined . . . by the DSM-3-R. . . . The Court is of the opinion that if Plaintiff's excessive and ritualistic behavior is unchanged, it can have an adverse impact on the minor children.

Findings of Fact Numbers 12 through 29 reflected the evidence presented of the behavior of the plaintiff which indicated this disorder.

The court further found with respect to the plaintiff:

> 30. Plaintiff insisted on giving the minor child Morgan Faith Surles baths even after Defendant had already given the child a bath. Plaintiff has scrubbed Morgan Faith Surles to such an extent that the child screamed and cried and her vaginal area was red and raw. The court finds that this behavior is not in the best interest of the child.
>
> 31. The minor children have been subject to Plaintiff's ritualistic and obsessive behavior and have shown such behavior in their play. When playing with her kitchen, Morgan Surles would copy the ritual of turning the stove on and off. Morgan Surles has an excessive need to wash herself and the toys with which she is playing. One of Brook Surles favorite toys is a baby wipe which she uses to clean things. Morgan Surles has shown an unusual concern about her personal safety at night and unusual need to have the premises secured before going to sleep.
>
> . . .

33. It is likely that Plaintiff has an Obsessive Compulsive Disorder. Regardless of whether or not Plaintiff has an Obsessive Compulsive Disorder, his excessive and ritualistic behavior has adversely affected the minor children and is likely to continue to adversely affect the minor children if they live with Plaintiff.

. . .

37. Except for a period of thirty (30) minutes during Christmas, from 11 December 1990 until March 1991, Plaintiff made no effort, and refused to allow the children to see Defendant or members of Defendant's immediate family.

38. Plaintiff has displayed vindictiveness towards the Defendant, has called Defendant vulgar names in the presence of the minor children, has wrongfully accused Defendant of improper sexual conduct in the presence of the children and has tried to defame Defendant in the community to the detriment of the minor children. This behavior on the part of Plaintiff has not been in the best interest of the children.

39. Plaintiff employed at least five (5) private detectives to follow Defendant.

. . .

58. Because of the problems that Plaintiff has demonstrated concerning the issues of sexuality (excessive concern with contracting aides [sic], compulsive cleaning of the child's vaginal area), it is in the best interest of the children to be in the primary care, custody and control of the Defendant so that she can properly deal with the issues of sexuality with her daughters.

59. In light of the history of this case and the obsessive and ritualistic behavior of the Plaintiff and his unyielding attitude as it relates to custody of the children, the Court finds it is in the best interest of the children to be in the primary care, custody and control of the Defendant.

60. As long as Plaintiff can control his obsessive and ritualistic behavior and his vindictiveness towards the defendant to the extent that it does not adversely effect the minor children, he is a fit and proper person to visit with the minor children . . . .

With respect to the defendant, the trial court found the following:

> 41. Defendant has a MBA degree from Campbell University and is currently employed by the State of North Carolina and has the ability to financially provide for the minor children. Defendant's working hours are approximately 8:00 a.m. until 4:30 p.m.
>
> 42. Defendant has proper daycare arrangements for the children while she is at work. Defendant has flexibility with her job so that she can attend to the needs of the children.
>
> 43. Defendant has extended family members and friends which can assist her with the minor children.
>
> 44. Defendant has the ability and sensitivity to nurture the children and to provide for their emotional, spiritual, mental, educational, social and physical needs.
>
> . . .
>
> 49. Defendant has not shown any vindictiveness towards the Plaintiff and has shown a desire to cooperate with Plaintiff and his family members to promote the best interest of the children.

We find no error in awarding the custody of both children to the defendant mother. The trial court made twenty-six findings of fact regarding the plaintiff's obsessive compulsive behavior and its effect on the children; he made ten findings relating to the intervenor. Of those ten findings, six did not relate to the paternity of the younger child, but rather to his ability to create a nurturing and healthy relationship with the children as a member of the defendant's household. (The defendant and the intervenor were married on 27 July 1991, shortly after this hearing.)

The plaintiff relies on *In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1984), for the proposition that in order to overcome the presumption of the legitimacy of a child born during lawful wedlock, there must be a jury trial resolving the issue of paternity. His argument continues that this determination must take place before one who claims to be the biological father is allowed to intervene in a custody dispute between the husband and wife.

We find *Locklear* does not control in this case. However, we agree with plaintiff to the extent that it would be error for a Court to allow intervention as of right in a custody and visitation

suit by an individual based upon a claim as a biological parent, absent a jury determination to that effect. However, in this case, the trial judge allowed Blackman to intervene by permission of the Court under Rule 24(b). Rule 24(b) states in pertinent part that

> *anyone* may be permitted to intervene in an action[:]
>
> (1) [w]hen a statute confers a conditional right to intervene; or
>
> (2) [w]hen an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

N.C. Gen. Stat. § 1A-1, Rule 24(b) (emphasis added). The Court set out specific findings and conclusions as to why intervention was permissively allowed, none of which were excepted to by the plaintiff. Therefore, we need not review the correctness of the trial court's allowance of Blackman's motion to intervene.

Based on the above reasoning, we find that the trial court properly considered all relevant evidence relating to the best interests and welfare of the minor children and find no error in awarding custody of both children to the defendant mother.

B.

[2] The plaintiff also assigns as error the trial court's failure to find facts and reach conclusions based on the "defendant's infidelity and immoral conduct . . . on the grounds that such issue was litigated." We note that defendant's actions during the course of the marriage were not disputed; in fact, the actions of the defendant and the intervenor were raised in prior motions and readily admitted by the parties. The trial court in fact made findings based on the evidence presented that the defendant had sexual relations with the intervenor at the time of Brook's conception.

As pointed out by both plaintiff and defendant, adultery is not a sufficient reason to deny custody. *Paschal v. Paschal*, 21 N.C. App. 120, 203 S.E.2d 337 (1974); *Green v. Green*, 54 N.C. App. 571, 284 S.E.2d 171 (1981). The trial court found that the children's mother was a fit and proper person to have custody of her daughters. Those findings are binding on this Court where they are supported by the evidence presented. "[T]he trial judge

is not required to find *all* the facts shown by the evidence . . . . It is sufficient if enough *material* facts are found to support the judgment." *In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971) (emphasis in original). We find that the findings of fact in the case at bar amply support the court's conclusions of law, and it was unnecessary to make further findings regarding the relationship of the defendant with the intervenor.

C.

[3] Lastly, the plaintiff argues that the trial court erred in conditioning the visitation of the minor children on his ability to control his obsessive compulsive behavior when with the children. We disagree.

"While a noncustodial parent has a right to reasonable visitation, that right is limited to avoid jeopardizing the child's welfare." *Woncik v. Woncik*, 82 N.C. App. 244, 250, 346 S.E.2d 277, 280 (1986). Ample evidence was presented at trial from which the trial court could have concluded that the behavior of the plaintiff, particularly his concern with sexual hygiene, could jeopardize the children's welfare. The defendant was not required to prove that the plaintiff suffered from the disorder before the trial judge could condition visitation.

" '[U]pon appellate review of a case heard without a jury the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary.' " *Chandler v. Chandler*, 108 N.C. App. 66, 73, 422 S.E.2d 587, 592 (1992). We find no abuse of discretion here and accordingly overrule this assignment of error.

II.

A.

[4] Plaintiff has also appealed the award of attorney's fees in the above custody action in a separate action before this Court. He argues that the trial court was without jurisdiction to allow the defendant's motion once notice of appeal to this Court was given by the plaintiff. We disagree.

The trial in this case commenced on 13 May 1991 and concluded on 3 June 1991. At the close of the trial, after the court had rendered its decision, defendant made a motion for counsel fees. The court responded that, "I would like you to make a formal

motion, serve it on counsel, and set forth any propositions that you might have in regard to that particular matter." There was no objection or comment by plaintiff's counsel. On 26 June 1991, the plaintiff filed Notice of Appeal to this Court for a determination on the custody issues. The hearing on attorney's fees was conducted on 12 September 1991, and the trial court made its decision that day. The custody order and the order granting attorney's fees were signed by the trial judge on 31 October 1991.

The plaintiff acknowledges that he could have waited until after the order was signed by the judge on 31 October but was not required to wait until the final entry of judgment. However, had his first appeal proceeded without entry of final judgment, this Court would have been without jurisdiction to hear the matters before it.

> An announcement of judgment in open court constitutes the rendition of judgment, not its entry. Rendition of judgment merely marks the beginning of the time during which a party may give timely notice of appeal. While timely notice of appeal generally divests the trial court of jurisdiction, notice of appeal does not remove the authority of the trial court to enter its written judgment where it conforms substantially with the court's oral announcement. . . . [E]ntry of judgment by the trial court is the event which vests jurisdiction in this Court, and the judgment is not complete for the purpose of appeal until its entry.

Searles v. Searles, 100 N.C. App. 723, 726, 398 S.E.2d 55, 56 (1990) (citations omitted).

The trial court in the case *sub judice* expressly reserved the issue of attorney's fees at the time it rendered judgment as to the custody matters before it, and accordingly, it retained the authority to consider the issue since attorney's fees were within the court's "oral anouncements". The subsequent orders entered on 31 October 1991 therefore "conformed substantially" with those statements. We therefore reject the plaintiff's argument that the court had no jurisdiction to hear the motion for attorney's fees.

B.

[5] The plaintiff also raises on appeal the trial court's conclusion that the plaintiff had the ability to pay the award of attorney's fees. He contends that insufficient evidence was presented from

which the trial court could conclude that he was able to pay the defendant's costs of litigation.

However, on the contrary, the trial court found as a fact that:

> Plaintiff introduced a financial affidavit showing that he has assets with a net fair market value of $89,000.00. Plaintiff has gross monthly income of $3000.00 from his employment with First Federal Saving Bank. Plaintiff testified at the custody hearing in this cause that he has a farm which he intends to sell. Additionally, Plaintiff has access to funds through his relationship with BB&T Bank in Fuquay.

From this finding alone, based on the evidence provided by the plaintiff himself, the trial court could conclude that the plaintiff had the ability to pay the attorney's fee award.

The award of counsel fees lies within the discretion of the trial court. *Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E.2d 636 (1984). We find no abuse of discretion in the instant case with respect to the evidence supporting the court's conclusion that the plaintiff had the ability to pay the award.

C.

[6] The plaintiff also argues that the trial court erred in awarding attorney's fees by failing to consider that defendant made no request for attorney's fees and does have the ability to pay at least a portion of her expenses relating to this litigation. However, as plaintiff himself points out, "[a] request for attorney's fees may be properly raised by a motion in the cause subsequent to the determination of the main action." *In re Baby Boy Scearce*, 81 N.C. App. 662, 663, 345 S.E.2d 411, 413, *cert. denied*, 318 N.C. 415, 349 S.E.2d 595 (1986). *Scearce* dealt directly with attorney's fees arising out of a custody dispute pursuant to N.C. Gen. Stat. § 50-13.6 and is dispositive to the case at bar. The trial court's findings of fact support his conclusions of law in the order for attorney's fees and therefore will not be disturbed on appeal.

In light of the aforementioned disposition of the case, we find it unnecessary to review the plaintiff's last assignment of error.

Affirmed.

Judge JOHNSON concurs.

Judge WYNN concurs in a separate opinion.

Judge WYNN concurring.

Upon review of the trial court's order awarding custody to the defendant mother Elaine S. Surles, I conclude that the trial court erred as a matter of law by finding that intervenor David Blackman is the biological father of Sara Brook Surles. It is the law of North Carolina that in order to overcome the presumption of legitimacy of a child born during lawful wedlock, there must be a jury trial resolving the issue of paternity. *In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985). By including in its findings of fact the statement that Blackman is the biological parent of the child, the court essentially rendered a determination of paternity without a jury, in violation of *Locklear*.

Having so concluded, I would nonetheless find such error harmless. The trial court made sufficient findings of fact as to the other circumstances surrounding the custody decision, including the suitability of both the plaintiff and the defendant, to justify its award of custody to the defendant.

ADA T. SMITH; ADA KELLY SMITH HINES AND HUSBAND, LOVIT HINES; DARIA ELIZABETH HINES GOLD AND HUSBAND, BRUCE GOLD; LOVIT HINES, JR. AND WIFE, MARGARET HINES; KELLY HINES BLAU AND HUSBAND, ANDREW J. BLAU; STEPHANIE BLAU BUONOPANE AND HUSBAND, ROB BUONOPANE; ERIC ANDREW BLAU (UNMARRIED); CHRISTOPHER LOVIT BLAU (UNMARRIED); JANE ELIZABETH SMITH YEARGAN (WIDOW); SANDRA MAY CRESSWELL YEARGAN (WIDOW); JULIA ANNE YEARGAN (UNMARRIED); KEITH YEARGAN AND WIFE, MARY STUART YEARGAN; KEANE YEARGAN AND WIFE, CYNTHIA YEARGAN; MARIE SMITH WALLACE (DIVORCED); MARIE ANNE WALLACE LAW AND HUSBAND, JERRY LAW; DEBORAH KRISTINE LAW EVERETT AND HUSBAND, RAYMOND EVERETT; MARVIN SIMEON HONEYCUTT AND WIFE, DONNA JOHNSON HONEYCUTT; SUE WORTHINGTON SMITH (WIDOW); BONNY SUE SMITH (UNMARRIED); JAMES THOMAS SMITH AND WIFE, DOROTHY COBB SMITH; WILLIAM RUSSEL SMITH AND WIFE, DR. CAROL ADAMS; FRANCES HOWARD SMITH; ALFRED LEWIS SMITH AND WIFE, JEAN NEWKIRK SMITH; JOSEF-ANN SMITH (DIVORCED); JOAL NEWKIRK SMITH AND WIFE, BRENDA SMITH; KELLY SMITH LEWIS AND HUSBAND, KIRBY LEWIS; SCOTTY LEVON SMITH (DIVORCED), PETITIONERS v. SAM B. UNDERWOOD, JR.; SANDRA LEE HONEYCUTT (DIVORCED); KENNETH

BRIAN GOLD, BY AND THROUGH HIS GUARDIAN AD LITEM, CHARLES HARDEE; DARIAN BRUCE GOLD, BY AND THROUGH HIS GUARDIAN AD LITEM, CHARLES HARDEE; CAITLIN ELIZABETH HINES, BY AND THROUGH HER GUARDIAN AD LITEM, CHARLES HARDEE; SHARON LEIGH YEARGAN, BY AND THROUGH HER GUARDIAN AD LITEM, CHARLES HARDEE; DAVID ALLEN YEARGAN, BY AND THROUGH HIS GUARDIAN AD LITEM, CHARLES HARDEE; SARAH ELIZABETH YEARGAN, BY AND THROUGH HER GUARDIAN AD LITEM, CHARLES HARDEE; HEATHER CHIVON YEARGAN, BY AND THROUGH HER GUARDIAN AD LITEM, CHARLES HARDEE; SUSAN TIFFANY WALLACE LAW, BY AND THROUGH HER GUARDIAN AD LITEM, CHARLES HARDEE; SARA ANNE LAW, BY AND THROUGH HER GUARDIAN AD LITEM, CHARLES HARDEE; SAMANTHA DAWN HONEYCUTT, BY AND THROUGH HER GUARDIAN AD LITEM, CHARLES HARDEE; LEAH MARIE SMITH, BY AND THROUGH HER GUARDIAN AD LITEM, CHARLES HARDEE; AND UNBORN AND/OR UNKNOWN HEIRS OF W. H. SMITH, BY AND THROUGH THEIR GUARDIAN AD LITEM, CHARLES HARDEE, RESPONDENTS

No. 923SC369

(Filed 21 December 1993)

1. **Evidence and Witnesses § 866 (NCI4th)— petition for removal of trustee—conversations with clerk of court—explanation of subsequent conduct—admissible**

The trial court did not err in an action for removal of a co-trustee when it allowed into evidence testimony regarding an oral understanding between respondent and two deceased clerks of court. Respondent stated that he had not filed any accountings in his thirty-seven years as co-trustee as a result of discussions with the two deceased clerks, who had told him that it was not necessary for him to file an accounting. Respondent did not use the deceaseds' comments for the truth of the matter asserted, but to explain his subsequent conduct. N.C.G.S. § 8C-1, Rule 801(c).

Am Jur 2d, Evidence § 497 et seq.

2. **Evidence and Witnesses § 2695 (NCI4th)— action to remove trustee—testimony between deceased clerks and trustee—Dead Man's Statute—not applicable**

The Dead Man's Statute, N.C.G.S. § 8C-1, Rule 601(c), was not applicable in an action to remove a co-trustee where respondent introduced evidence that he had not filed accountings as a result of conversations with two deceased clerks of court. Respondent was not attempting to introduce the oral

communications between himself and the deceased in his own behalf against any party in an action representing the deceased.

Am Jur 2d, Witnesses § 303 et seq.

3. **Evidence and Witnesses § 82 (NCI4th)— action to replace trustee—evidence of trustee's conversations with clerks of court—relevant**

Statements by respondent in an action to replace him as co-trustee were relevant where they aided the court in understanding the co-trustee's conduct concerning his failure to file accountings and to obtain approval for communications, which was at issue in this case. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Evidence §§ 251, 252.

4. **Trusts § 11 (NCI3d)— action to remove trustee—findings—review**

Under N.C.G.S. § 36A-28, the Court of Appeals was unable to review whether the record contained sufficient evidence to support the trial court's findings of fact in an action to remove a co-trustee.

Am Jur 2d, Trusts §§ 257-259.

5. **Trusts § 11 (NCI3d)— action for removal of co-trustee—conclusion that respondent continues to be suitable—abuse of discretion**

There was a clear abuse of discretion by the trial court in retaining respondent as a co-trustee where the court found that respondent never filed an accounting of the trust; the clerk of superior court never approved the commissions paid to the co-trustees; respondent was not cooperative with the co-trustee in allowing the examination of the documents and records of the trust; and trust matters were confused and commingled with other corporate matters. N.C.G.S. § 36A-35.

Am Jur 2d, Trusts §§ 257-259.

Judge JOHN dissenting.

Appeal by petitioners from orders entered 27 January 1992 and 10 February 1992 by Judge Darius B. Herring, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 11 March 1993.

Petitioners filed a petition for removal of a co-trustee on 30 October 1991 along with applications and orders appointing Guardian Ad Litems for minor children and any unborn and/or unknown beneficiaries. Petitioners also sought reimbursement for attorney's fees, costs and expenses. Respondent, Sam B. Underwood, filed a timely answer on 15 November 1991, seeking dismissal of the petition and reimbursement for attorney's fees, costs and expenses. No answer was filed by respondents, Charles Hardee, Guardian Ad Litem or Sandra Honeycutt. A hearing was held before Clerk of Court Sandra A. Gaskins in Pitt County Superior Court on 12 December 1991. The petition to remove the co-trustee was denied.

Notice of appeal to the Pitt County Superior Court was filed by petitioners on 27 December 1991 along with a civil action against respondent and others, seeking damages, and injunctive relief in the form of an accounting and access to trust documents. Petitioners filed a supplemental petition to remove a co-trustee and a motion for preliminary injunction on 7 January 1992. Petitioners' motion for preliminary injunction was consolidated with the appeal of the petition on 2 January 1992 by Judge David E. Reid, Jr. and both matters were continued until 16 January 1992. A hearing was held on 16 and 17 January 1992 and judgment was entered by Judge Darius B. Herring, Jr. affirming and modifying the Clerk's order. Judge Herring denied the motion for preliminary injunction and ordered *ex mero motu* that Underwood provide formal accounting for both trusts and that he make all documents available to his co-trustee. Judge Herring reserved the issue of attorney's fees for determination at a future date and upon separate application of the parties allowed attorney's fees, expenses and costs to both petitioners and respondent to be paid from W. H. Smith Trust Fund and the Ada T. Smith Trust Fund.

Petitioners filed a timely notice of appeal appealing the orders entered by Judge Herring denying the petition to remove and awarding respondent attorney's fees, expenses and costs. Respondent also filed a timely notice of appeal from the order of Judge Herring awarding petitioners attorney's fees, expenses and costs.

Bass, Bryant, Deese & Moore, by William E. Moore, Jr. and John Walter Bryant, for petitioners-appellants.

Ward and Smith, P.A., by Louise W. Flanagan, A. Charles Ellis, and Ryal W. Tayloe, for respondent-appellee, Sam Underwood.

JOHNSON, Judge.

The facts pertinent to this appeal are as follows: Mr. W. H. Smith died testate in Pitt County on 9 June 1954. His Last Will and Testament provided that two trusts be created, one for the benefit of his wife, the Ada T. Smith Trust, and one for the benefit of his children and their descendants, the W. H. Smith Trust. Both trusts terminate at the death of Ada T. Smith. Sam B. Underwood, Jr., respondent, and Robert Lee Smith, Mr. W. H. Smith's oldest son, were appointed co-trustees of both trusts under the Will.

The maintenance of the trusts was uneventful until 1983 when Mr. Underwood advised Mrs. Ada Smith to begin making annual gifts of her trust property in an amount less than $10,000.00 to each of her children. Mr. Underwood then suggested to the heirs and Mrs. Ada Smith that the Smith Heirs Corporation be formed so that land from the trusts could be conveyed into the corporation. In 1985, Mr. Underwood suggested the formation of another corporation, the Smith Corporation, which was to have been a "Subchapter S" Corporation pursuant to IRS Regulations. This new "S" Corporation could receive and disperse trust property consisting of land formerly owned by Mr. W. H. Smith.

In December 1988, Mr. Underwood called a meeting of the beneficiaries of the two trusts and the corporate shareholders of both the Smith Corporation and the Smith Heirs Corporation, most of whom share an interest in each entity, to inform them that he had sold the land known as the Warren-Tucker Subdivision. The Warren-Tucker Subdivision, formerly trust property, was at the time owned by the two corporations and the W. H. Smith Trust. Mr. Underwood did not discuss negotiations regarding the sale of the land with the co-trustee; however, the co-trustee did sign the deed at the close of the transaction.

The land was sold for $2,350,000.00, and Mr. Underwood received a commission in the amount of $72,650.00 for arranging the sale of the land. His co-trustee did not share in the commission. Although the agreement prepared by Mr. Underwood, in which he designated himself as trustee, referenced a commission fee in the amount of .0025 from each payment collected by Mr. Underwood, Mr. Underwood did not collect that commission.

Annually, Mr. Underwood sent a letter to the beneficiaries which represented an accounting of the W. H. Smith and the Ada

T. Smith Trust Funds. The letter basically stated the amount of the check that came from each trust fund and the amount that was taxable. A K-1 tax form was sent along with the letter. Although an "accounting" was provided by Mr. Underwood to the beneficiaries, he did not provide an accounting to the clerk of court because the clerk of court, at the time of Mr. W. H. Smith's death, informed him that he did not have to file an accounting. Mr. Underwood also never obtained approval from the clerk of court for his co-trustee commission fees as set out in the Will of W. H. Smith.

In 1991, the heirs/shareholders started to become dissatisfied with Mr. Underwood's services when they received a check for 1990 disbursements in an amount that was considerably lower than normal. They confronted Mr. Underwood who explained that the decrease in the check amount was due to a tax problem. The heirs/shareholders became increasingly dissatisfied with Mr. Underwood when tax problems occurred with the Smith "S" Corporation. Mr. Underwood would not allow Tom Smith, the President of the Smith "S" Corporation, access to pertinent documents regarding the corporation.

On 26 July 1991, the heirs/shareholders sent Mr. Underwood a letter firing him in all capacities, requesting that he resign as co-trustee immediately and again requesting that he release pertinent documents to Tom Smith. Respondent received the letter but refused to resign. Petitioners brought this action.

Petitioners' Assignments of Error

[1] By petitioners' first assignment of error, petitioners contend that the trial court erred when it allowed into evidence testimony regarding an oral understanding between respondent and two deceased clerks of court. More specifically, petitioners argue that findings of fact 21 and 25 are based on the aforementioned testimonial evidence that is inadmissible hearsay, violative of North Carolina General Statutes § 8C-1, Rule 601(c) (1992) and irrelevant to the issues in this case. We disagree.

We turn to petitioners' first contention that the testimony was violative of the hearsay rule. "Hearsay is a statement, other than one made by the declarant while testifying at a trial or a hearing, offered in evidence to prove the truth of the matter asserted." North Carolina General Statutes § 8C-1, Rule 801(c) (1992). When evidence of such statements by one other than the witness

testifying is offered for a proper purpose other than to prove the truth of the matter asserted, it is not hearsay and is admissible. "Specifically, statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made." *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990).

In the instant case, Mr. Underwood testified that he discussed filing an accounting with two deceased clerks of court and both told him that it was not necessary for him to file an accounting. As a result, Mr. Underwood stated that he had not filed any accountings in his thirty-seven years as co-trustee. We find from the evidence that respondent did not use the deceaseds' comments for the truth of the matter asserted. Instead, he used their statements to explain his subsequent conduct. Therefore, we find no merit in petitioners' argument.

[2] Petitioners also argue that the deceaseds' statements should not have been allowed into evidence because admission of the statements were violative of the North Carolina General Statutes § 8C-1, Rule 601(c) which states in pertinent part:

> Upon the trial of an action, or hearing upon the merits of a special proceeding, a party or a person interested in the event, . . . shall not be examined as a witness in his own behalf or interest, . . . against the executor, administrator or survivor of a deceased person, . . . concerning any oral communication between the witness and the deceased person[.]

This statute is not applicable in the instant case because respondent is not attempting to introduce the oral communications between himself and the deceased in his own behalf against any party in an action representing the deceased. As such, this argument is meritless.

[3] Petitioners further argue that the statements made by respondent were irrelevant. The test for relevancy is whether the evidence has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. North Carolina General Statutes § 8C-1, Rule 401 (1992). We find respondent's statements were relevant because they aided the court in understanding the co-trustee's conduct concerning his failure to file accountings and obtain approval for com-

munications, which is at issue in this case. We find no merit in petitioners' argument.

Having considered petitioners' arguments on the testimony of respondent and finding the trial court made no error in admitting the testimony, we determine that findings of fact numbers 21 and 25 were supported by substantial competent evidence. This assignment of error is overruled.

[4] By petitioners' second and third assignments of error, they contend that the record does not contain sufficient evidence to support finding of fact number 23, that the beneficiaries of the trust funds received annual accounting, and finding of fact number 33, that the trusts appeared to have been honestly and diligently maintained.

North Carolina General Statutes § 36A-28 (1991) governs the standard of review for findings of fact in trust cases. It provides:

> Upon an appeal taken from the clerk to the judge, the judge shall have the power to review the findings of fact made by the clerk and to find the facts or to take other evidence, but the facts found by the judge shall be final and conclusive upon appeal to the appellate division.

From a reading of the statute, we are without authority to review fact findings made by a trial judge in proceedings to remove a trustee. As such, we are bound by those facts and are unable to review whether the record contains sufficent evidence to support the trial court's findings of fact. Therefore, we overrule petitioners' assignments of error two and three.

[5] By petitioners' fourth assignment of error, petitioners contend that the trial court abused its discretion in retaining respondent as a co-trustee for testamentary trusts and in concluding that he is still suitable to continue as co-trustee.

North Carolina General Statutes § 36A-35 (1991) states in pertinent part:

> Any beneficiary, cotrustee or other person interested in the trust estate may file a petition in the office of the clerk of superior court of the county having jurisdiction over the administration of the trust for the removal of a trustee or cotrustee who fails to comply with the requirements of this Chapter or a court order, or who is otherwise unsuitable to continue

> in office. . . . Upon proper notice and hearing, the clerk may, in the exercise of his [/her] discretion, order the removal of the trustee or cotrustee and appoint a successor. . . .

On appeal from the decision of the clerk, the superior court judge is vested with the authority and discretion to remove or not remove the trustee. North Carolina General Statutes § 36A-27 (1991). When matters of law are left to the discretion of the trial judge, appellate review is limited to whether there was a clear abuse of discretion and the evidence before the trial court shows that the decision of the trial court could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

It was the trial court's conclusion that respondent "continues to be a suitable person to continue as Co-Trustee," and therefore, should not be removed from his position as co-trustee of W. H. Smith's testamentary trusts. In examining the trial court's findings of fact as well as the evidence, we find the decision of the trial court could not have been the result of a reasoned decision and as such, there was a clear abuse of discretion.

The following findings of fact made by the trial court compel the removal of respondent as co-trustee: finding of fact No. 21, the trial court found that respondent never filed an accounting of the trust; finding of fact No. 25, the trial court found the clerk of superior court never approved the commissions paid to the co-trustees; finding of fact No. 31, the trial court found that respondent has not been cooperative with the co-trustee in allowing the examination of the documents and records of the trust; and finding of fact No. 32, the trial court found that trust matters have been confused and commingled with other corporate matters. We find it is an abuse of discretion for the trial court to find these matters and then conclude, as a matter of law, that respondent should continue as a co-trustee.

Additionally, the evidence in the record tended to show that respondent violated North Carolina General Statutes § 36A-107 (1991) in failing to give an accounting to the clerk of court; that respondent failed to provide a proper accounting of the W. H. Smith and Ada Smith Trust Funds to the beneficiaries as mandated by the Will of W. H. Smith; that respondent failed to maintain the trust fund in an honest and diligent manner by commingling funds; and that respondent failed to obtain approval from the clerk

of court concerning co-trustee commissions as mandated by the Will of W. H. Smith.

We find the trial court's findings of fact and the evidence tend to show that the conclusion of the trial court that respondent "continues to be a suitable person as Co-Trustee" was not a reasoned decision and therefore, a clear abuse of discretion. Accordingly, respondent should be removed as co-trustee of the W. H. Smith Trust Fund and the Ada Smith Trust Fund.

By petitioners' fifth assignment of error, petitioners argue that the trial court erred in awarding attorney's fees to respondent.

North Carolina General Statutes § 6-31 (1986) states in pertinent part:

> In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally for mismanagement or bad faith in such action or defense. . . .

As we have made a determination that respondent should be removed as co-trustee, we find the issue of attorney's fees should be remanded so that the lower court can make an award of attorney's fees consistent with our findings.

Because petitioners' sixth assignment of error and respondent's cross-appeal also pertain to the issue of attorney's fees and we have remanded that issue, we will not address those assignments of error.

We reverse the trial court's decision as to the issue of removal of the co-trustee and remand the issues of attorney's fees.

Judge COZORT concurs.

Judge JOHN dissents by separate opinion.

Judge JOHN dissenting.

I respectfully dissent from the majority's ruling regarding removal of respondent Underwood as co-trustee, and vote to uphold the trial court's conclusion he "continues to be a suitable person to continue as Co-Trustee" as well as its consequent decision ("in its discretion") not to remove him.

The majority properly observes N.C. Gen. Stat. § 36A-28 (1991) provides "the facts found by the judge shall be final and conclusive" upon appeal to this Court. Despite this, the majority, "[i]n examining the trial court's findings of fact *as well as the evidence*," states it finds an abuse of discretion on the part of that court in concluding the eighty year old respondent herein "continues to be a suitable person to continue as Co-Trustee."

When on appeal it is contended a conclusion of law is not supported by facts found, we need only inquire whether the particular conclusion was "*proper in light of such facts.*" *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted); *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983) (citation omitted), *disc. review denied*, 310 N.C. 744, 315 S.E.2d 703 (1984). In the case *sub judice*, the trial court, having heard the evidence and determined what weight to attach to it, as well as having observed the witnesses and their demeanor and assessed the weight and credibility of their testimony, made the following "conclusive" findings of fact:

> 11. The approximate value of the Ada T. Smith Trust in 1954 was One Hundred Thousand and No/100 Dollars ($100,000.00) to One Hundred Twenty-Five Thousand and No/100 Dollars ($125,000.00).
>
> 12. Each and every year since the inception of the Ada T. Smith Trust, income has been generated by the Trust . . . .
>
> 13. In 1969, Ada T. Smith began exercising the power . . . to have portions of the corpus of the Ada T. Smith Trust conveyed to her, free and discharged of the Trust as [follows: between 1969 and 1988, properties having a total value in excess of Seven Hundred and Five Thousand, Nine Hundred and Fifteen and No/100 Dollars ($705,915.00)].
>
> 14. The corpus of the Ada T. Smith Trust at the present time (Dec. 1991) consists of . . . two tracts of land, the value

> . . . being approximately Three Hundred Fifty Thousand and No/100 Dollars ($350,000.00), and stocks valued at approximately Twenty-Five Thousand and No/100 Dollars ($25,000.00).
>
> 15. The Respondent, Sam B. Underwood, Jr., and [the Co-Trustee] . . . made the investment decisions with regard to the corpus of the Ada T. Smith Trust.
>
> 16. In 1954, at the inception of the W. H. Smith Trust, the corpus of the . . . Trust had a value of approximately One Hundred Forty-Thousand and No/100 Dollars ($140,000.00).
>
> 17. In each and every year since the inception of the W. H. Smith Trust, the said Trust has generated income for the beneficiaries thereof.
>
> 18. In 1990, the income of the W. H. Smith Trust was approximately Fifty Thousand and No/100 Dollars ($50,000.00).
>
> 19. At the present time (Dec. 1991), the W. H Smith Trust corpus consists of land, stocks, and notes payable, with a total value of approximately One Million and No/100 Dollars ($1,000,000.00).
>
> 20. The Respondent, Sam B. Underwood, Jr. and [the Co-Trustee] . . . made the investment decisions with regard to the corpus of the W. H. Smith Trust.
>
> . . . .
>
> 23. Each and every year since the inception of the Ada T. Smith Trust and the W. H. Smith Trust, the beneficiaries of the trusts have received checks for their respective interests in the net income of the trusts and have been provided an accounting of the same. Further, the beneficiaries of the trusts have been provided a United States income tax Form K-1 showing their net trust income.
>
> . . . .
>
> 33. [D]uring the existence of both of the aforesaid Trusts, . . . both . . . appeared to have been honestly and diligently maintained and operated.

In the "light of such facts," *Norris*, 65 N.C. App. 275, 310 S.E.2d at 29, I respectfully contend the trial court's conclusion of law respondent is a suitable person to remain in the position

of co-trustee was proper and amply supported by its findings. We should not, at this stage, second-guess the court's reasoning and attempt to impose any differing opinion we may have; it was in a better position than we to assess co-trustee's honesty and diligence over the course of more than thirty years.

Furthermore, while the majority properly acknowledges removal of a trustee is a discretionary decision, I believe close reading of the *White* decision it cites indicates a result different from the majority's holding herein:

> A trial court may be reversed for abuse of discretion *only* upon a showing that its actions are *manifestly unsupported by reason.* 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 v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted) (emphasis added). Although the majority suggests the decision not to remove the co-trustee is "manifestly" irrational, I respectfully submit the trial court's "conclusive" findings, including that the trusts have rendered income to the beneficiaries each year and that the value of the corpus of each trust has increased substantially since 1954, demonstrate that the court's decision was neither irrational nor arbitrary, but rather resulted from a reasoned balancing of the competing facts found by the court.

According "great deference," *id.*, to the "conclusive" findings supporting the court's determination as well as to the discretionary decision to retain this co-trustee requires, I respectfully contend, the action of the trial court to be affirmed in this instance. I vote to do so with respect to the court's order in its entirety.

STATE OF NORTH CAROLINA v. EDWARD OTIS DEMERY

No. 9322SC262

(Filed 21 December 1993)

1. **Homicide § 284 (NCI4th)— second-degree murder—evidence sufficient**

The evidence was sufficient to deny defendant's motions for dismissal in a prosecution for second-degree murder.

Am Jur 2d, Homicide § 425 et seq.

2. **Evidence and Witnesses § 2210 (NCI4th)— murder—bloodstains—blood group profiles**

An SBI agent who testified in a murder prosecution as to blood-grouping tests done on bloodstains at the scene and on defendant's blood was testifying within his expertise and established a sufficient foundation for the purpose of calculating the incidence of defendant's and victim's blood factors in the population at large.

Am Jur 2d, Expert and Opinion Evidence § 300.

3. **Evidence and Witnesses § 2172 (NCI4th)— second-degree murder—blood-grouping tests—statistical information—not hearsay**

An SBI agent's testimony about blood-grouping tests did not violate the hearsay rule in a murder prosecution where the agent relied on statistical information concerning the frequency of blood group factors or characteristics in the North Carolina population which had been compiled by the SBI with blood provided by the Red Cross and blood obtained in criminal cases. The statistics on which the agent relied are commonly used and accepted in this field in North Carolina and similar statistics are commonly used and accepted in forensic serology throughout the country.

Am Jur 2d, Expert and Opinion Evidence § 32 et seq.

4. **Constitutional Law § 349 (NCI4th)— murder—bloodstains—blood-grouping testimony—no violation of right to confront adverse witnesses**

A murder defendant's Sixth Amendment right to confront adverse witnesses was not violated by the testimony of an

SBI agent regarding blood grouping tests where the only part of the testimony not based on the agent's personal knowledge was the statistical database, which was admissible under N.C.G.S. § 8C-1, Rule 703.

Am Jur 2d, Criminal Law §§ 720 et seq., 956 et seq.

5. **Evidence and Witnesses §§ 2847, 3081 (NCI4th)— murder—statements of witnesses to police—written versions unexamined by witnesses—recollection refreshed—impeachment**

The trial court did not err in a murder prosecution by allowing the State to use typewritten versions of oral statements given by two witnesses to officers where the witnesses had not reviewed the statements before trial. The statements were not used as substantive evidence, but to refresh the witnesses' recollections or to impeach portions of courtroom testimony inconsistent with the statements. A statement used to refresh a witness's recollection need not be signed by him or even be his own prior statement and the witness who was impeached acknowledged the prior statement at trial. Moreover, defendant waived objections to these statements by using them on cross-examination or by failing to object to their use.

Am Jur 2d, Witnesses §§ 456, 600 et seq.

6. **Evidence and Witnesses § 668 (NCI4th)— murder—witnesses' statements—no plain error**

There was no plain error in a murder prosecution from the use of testimony from an SBI agent regarding statements by witnesses where defendant either did not object to the agent's testimony or did not make a sufficiently specific objection to preserve defendant's right of appeal, so that the agent's testimony is reviewable only for plain error, and there was substantial evidence against defendant which in no way depended upon the statements or the agent's testimony as to the contents of those statements.

Am Jur 2d, Appeal and Error § 548.

Appeal by defendant from second degree murder conviction entered 9 September 1992 by Judge James M. Long in Davidson County Superior Court. Heard in the Court of Appeals 17 November 1993.

Attorney General Michael F. Easley, by Special Deputy Attorney General Norma S. Harrell, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Susan G. White, for defendant-appellant.

WYNN, Judge.

Wayne Koonts lived in the Pines Mobile Home Park outside Lexington, North Carolina. He owned and rented several trailers in the park. Defendant rented a trailer from Koonts for $70 weekly. In March 1987 defendant was behind in his rent. Koonts had tried to evict him several months earlier. (The case was dismissed when Koonts was late to court.) Defendant had promised to pay up the back rent two weeks at a time until he was caught up, but he had not done so. On Friday, 6 March 1987, defendant came to Koonts's trailer to use the telephone, and Koonts asked him about the rent. Defendant said he did not have it, but would try to have it during the weekend. Koonts asked defendant to give him what he had then, and defendant gave Koonts $100.00. Koonts said he would give defendant a receipt when defendant paid him the rest of the money.

On Sunday evening, 8 March 1987, defendant was at his trailer with Thadis Brooks and Ernie Wayne Jacobs. Brooks and defendant were distantly related by blood, and Brooks had known defendant all his life. Jacobs was defendant's nephew. He lived part of the time with defendant and part of the time with Brooks. On this evening, Koonts came to defendant's trailer and asked for the rent. Brooks testified that Koonts appeared friendly, but Jacobs testified that Koonts seemed to get angry or upset during the conversation. Jacobs testified that he gave defendant $20 to give to Koonts. Defendant gave the money to Koonts and said they would get "squared away" with the remaining amount. After Koonts left, defendant said that he had paid Koonts all the money he had and that he was "broke." Jacobs testified that defendant appeared upset after Koonts left the trailer. Brooks described defendant as embarrassed and frustrated that he had to borrow money to pay the rent.

Sometime after Koonts left, defendant, Jacobs, and Brooks went to the trailer of Debbie Presnell. They telephoned defendant's sister in Lumberton. Various witnesses testified that the conversation included statements that defendant and Jacobs were locked

up "for killing an old man," that Brooks needed $600 because they had killed a man, that they had cut a man up, or similar statements. The three were all laughing and joking at the time. Defendant's sister, Sheila Cummings, testified that Brooks called her on 8 March 1987; that he said defendant was in jail in South Carolina for rape, asking for $300; that defendant then got on the telephone and told her not to pay any attention to it; and that Brooks and defendant were laughing and teasing her.

Jacobs testified that defendant, Brooks, and he went back to defendant's trailer, and he and Brooks were picked up by Patricia Demery. Jacobs also testified that just before they drove away, defendant said, "I'm going to get him," referring to Koonts.

Jacobs and Brooks were gone all night on an out-of-state truck haul.

On the afternoon of Monday, 9 March 1987, Koonts was found dead on the floor of his bedroom. Koonts's wallet was lying on top of his receipt book, which was lying face up and open on his kitchen table, which is where he normally sat to write receipts. The wallet, which usually contained money, contained papers but no money. The receipt book contained a partially complete receipt in Koonts's writing with the number "20" filled in in the place for the trailer number and the word "March" written out, but the rest incomplete. The partially completed receipt followed the last completed receipt, which was dated 7 March 1987. Trailer number 20 was defendant's trailer. There was no receipt in the book for $100 from defendant on 6 March 1987. Koonts generally collected the rent on Fridays. He normally kept rent money in his trailer or in his wallet until he could go to the bank.

Koonts's body had 32 separate wounds. The majority were in the facial area. There were also wounds on the top of his skull, the back of his head, his neck, along his rib cage, on his hands and on his knee. The wounds were caused by a sharp instrument. Although the deceased had gray hair, there was a very dark hair, longer than the deceased's, on the bed. Defendant's hair was black and worn shoulder-length at the time of the killing.

There was blood on the wall behind the victim's head and underneath his body. According to tests performed at the State Bureau of Investigation ("SBI"), there was blood on the victim's bottom sheet, on a pillow case, on six areas of his bedspread and

on a quilt taken from his bed. Defendant's blood was typed for eight different factors, as was the victim's blood. The victim's blood differed from the defendant's in several factors. Of the six areas of bloodstain on the bedspread, two were the same as defendant's blood on all eight factors. Two others were the same as his on all factors the SBI was able to check. One stain was insufficient for analysis. The sixth area was sufficient to analyze on six factors. It differed from defendant's blood in two of the factors, but was consistent with the victim's blood. The blood on the quilt could have been the victim's but not the defendant's. The blood on the bottom sheet was consistent with defendant's blood, but not with the victim's. Neither Jacobs's nor Brooks's blood matched the blood which could not have been the victim's. A forensic serologist testified that defendant's blood profile would be expected to occur in .2% of the population, while the victim's would occur in 8.2% of the population.

On 9 March 1987, a green army fatigue-type jacket and jeans, which is what defendant had been wearing on 8 March, were removed from a washing machine in defendant's trailer; the washer was full of water and contained soap powder. There was apparently nothing else in the washer.

On 9 March 1987, after Brooks and Jacobs returned from their trip, defendant had a scratch on his arm which was not there before they left. Defendant told Brooks that a dog had jumped up on him. When blood and hair samples were taken from defendant on 13 March 1987, defendant had a substantial cut on his thumb which had scabbed over but not healed. Defendant said he had cut himself sharpening a knife.

Patricia Demery found a knife pushed down at the side of the sofa at the home she shared with Brooks approximately a week after Koonts's death. This knife was found to be consistent with Koonts's wounds. Defendant had slept on that couch during the weekend of the murder.

In a conversation several months after his arrest, defendant told Brooks that he had the people at the sheriff's office "fooled." Brooks testified that the statement did not indicate an admission of guilt, only that he was tired of people harassing him.

Defendant presented testimony of an Anthony Fowler that on 9 March 1987, a man named Sherwood McBride told him he

had just killed a man. However, analysis of Sherwood McBride's blood revealed that he could not have contributed the blood on the bottom sheet or the four stains on the bedspread which could not have been the victim's.

I.

[1] Defendant moved for dismissal at the conclusion of the state's evidence and at the conclusion of all the evidence.

On a motion to dismiss, 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. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985). "[T]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . ." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

We find that the evidence that was presented tending to show that defendant was the perpetrator was sufficient to justify the trial court's denial of defendant's motion. We need not reiterate this evidence, as it is set forth in the factual section above.

II.

[2] At trial, SBI Agent David Spittle testified that defendant's blood profile was the same as .2% of the population and the victim's blood profile was the same as 8.2% of the population. Defendant challenges this evidence as being beyond the scope of the witness's expertise, lacking an adequate foundation, violating the hearsay rule, and violating the defendant's right to confront witnesses against him.

First, we find Spittle's testimony to be within his expertise. As a forensic serologist, Agent Spittle had a bachelor's degree in biology with a chemistry minor, a master's degree in biology, and post-graduate work in pharmacology. He had received on-the-job training in forensic serology with the Federal Bureau of Investigation before beginning employment with the SBI in 1979. He had also attended schools and seminars relating to forensic

serology. Although he had never taken a formal statistics course, he was acquainted with the use of statistics in his employment.

Agent Spittle testified as to how population percentages of specific blood group profiles are calculated and that he had received instructions concerning such calculations during the course of his employment. Using statistics about the population provided to him by the SBI, the results of the blood tests he himself performed, and a hand-held calculator, he then calculated the blood type percentages to which he testified.

Our courts have repeatedly upheld similar testimony by SBI forensic serologists. In *State v. Payne*, 328 N.C. 377, 398, 402 S.E.2d 582, 594 (1991), we upheld testimony of an SBI agent who was an expert in the "field of blood analysis" that approximately 1% of the state's population has the same blood profile as the victim. In *State v. Huffstetler*, 312 N.C. 92, 105-06, 322 S.E.2d 110, 119 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed.2d 169 (1985), we upheld testimony by an SBI serologist that .6% of the United States population has the same blood characteristics as the victim and as blood found on the defendant's clothing. *See also State v. Ziglar*, 308 N.C. 747, 304 S.E.2d 206 (1983). We hold that Agent Spittle's testimony was within the scope of his expertise.

Defendant next argues that Spittle did not lay a proper foundation for his testimony because he did not establish that his statistical data, which included Lumbee Indians within the Caucasian population, would accurately assess the coincidence factors of a Lumbee Indian such as defendant.

However, there was no need for Spittle to establish such a fact. The State was not trying to prove anything about the incidence of defendant's blood type among Lumbee Indians. Rather, it sought to prove the incidence of defendant's blood type in the population at large. In testifying that the defendant's blood profile was of a type found in .2% of the population and that the victim's blood profile was of a type found in 8.2% of the population, Spittle explained that eight different blood factors were tested for both the defendant and the victim; that the population percentage was reached by using the frequency of each factor in the population and then multiplying those factors together; and that the various factors in the blood are not interdependent but are independently inherited. Spittle thereby established a sufficient foundation for the purpose

of calculating the incidence of defendant's and victim's blood factors in the population at large.

[3] Defendant next argues that Agent Spittle's testimony violated the hearsay rule. He contends that Spittle merely reiterated data compiled by others and that such information was inadmissible hearsay because it does not fall within the hearsay exception provided in Rule 703 of the Rules of Evidence:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C. Gen. Stat. § 8C-1, Rule 703 (1992).

In *State v. Huffstetler*, 312 N.C. at 106, 322 S.E.2d at 120, our Supreme Court adopted and applied the standard for testimony by serologists and other experts previously articulated for physician experts in *State v. Wade*, 296 N.C. 454, 462, 251 S.E.2d 407, 412 (1979):

> (1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence. The opinion, of course, may be based on information gained in both ways. (2) If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of his opinion.

Spittle relied on statistical information concerning the frequency of blood group factors or characteristics in the North Carolina population. This information had been compiled by the SBI, with blood provided by the Red Cross and blood obtained in criminal cases. The statistics on which he relied are commonly used and accepted in his field in North Carolina, and similar statistics are commonly used and accepted in forensic serology throughout the country. In *Payne*, our Supreme Court held that testimony that the serologist's opinion "was based on statistics from SBI studies conducted between 1979 and 1983 and from scientific journals, both of which he testified are generally relied on by other experts in

his field," "laid a sufficient foundation to support admission of his expert opinion" in compliance with Rule 703. *Payne*, 328 N.C. at 398, 402 S.E.2d at 594. Here, as in *Payne*, the statistics were "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences," *id.*, as allowed by Rule 703.

[4] Defendant further argues that his Sixth Amendment right to confront adverse witnesses was violated because Agent Spittle's testimony was based completely on hearsay. However, Agent Spittle's testimony was not based completely on hearsay. The only part of his testimony that was not based on his personal knowledge was the statistical database upon which he relied and which is admissible under Rule 703. The rest of his testimony was based on personal knowledge. Spittle himself conducted blood tests of the defendant, victim, and soiled materials and calculated the frequencies of the defendant's and victim's blood profiles occurring in the population. Defendant's Sixth Amendment right was not violated because "[t]he admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination." *State v. Huffstetler*, 312 N.C. at 108, 322 S.E.2d at 120-21.

III.

[5] Defendant next contends that during his trial, the State impermissibly used written statements given by Jacobs and Brooks. When Jacobs and Brooks returned from their interstate truck haul the day after the murder, they gave oral statements to the police recounting their interaction with defendant prior to the victim's death. At trial, the prosecution used typewritten versions of these statements during direct examination of Jacobs and Brooks. The statements were prepared by police officers from their handwritten notes, and neither witness reviewed the written statements at any time before trial. Defendant contends that the State's use of the statements violates the hearsay exception for recorded recollection, N.C. Gen. Stat. § 8C-1, Rule 803(5), because the statements were not shown to have been adopted by the witnesses when the matter was fresh in their memories.

The record, however, indicates that the State did not use the witnesses' statements as substantive evidence. Rather, the prior statements were used either to refresh the witnesses' recollections,

or, in the case of Brooks, to impeach portions of his courtroom testimony which were inconsistent with them.

A statement used to refresh a witness's recollection need not be signed by him or even be his own prior statement:

> If upon looking at *any* document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, *for it is not the memorandum that is the evidence but the recollection of the witness.*

State v. Smith, 291 N.C. 505, 517, 231 S.E.2d 663, 671 (1977). Jacobs's prior statement was used exclusively to refresh his recollection. Jacobs testified that he had made truthful statements to the police, that because of the passage of time he couldn't remember the events in question very well, and that his memory at the time of those events was better than it was at the time of trial. The record reflects that once Jacobs read the statement to himself, he was able to testify as to what had happened. This is a proper use of a statement to refresh recollection.

Furthermore, defendant waived any objection as to Jacobs's statement by using it extensively himself on cross-examination, *State v. Adams*, 331 N.C. 317, 328, 416 S.E.2d 380, 385-86 (1992), and by failing to object to the use of the statements to refresh Jacobs's memory. N.C. R. App. P. 10(b)(1) (1993); N.C. Gen. Stat. § 8C-1, Rule 103 (1992).

As for Brooks, we note initially that defense counsel failed to object to the use of Brooks's prior statements either to refresh his memory or to impeach him. The defendant thereby waived any right to raise these objections on appeal. N.C. R. App. P. 10(b)(1) (1993); N.C. Gen. Stat. § 8C-1, Rule 103 (1992). Nevertheless, defendant's contentions would also fail on their merits. Throughout Brooks's testimony, his prior statement was used either to refresh his recollection or, when his testimony differed from the statement, to impeach him. It is permissible to use a prior statement to impeach a witness where there is proof that on another occasion he has made statements inconsistent with his testimony. *State v. Penley*, 277 N.C. 704, 178 S.E.2d 490 (1971); *State v. McKeithan*, 293 N.C. 722, 239 S.E.2d 254 (1977); 1 Henry Brandis on North Carolina Evidence § 46. At trial, Brooks acknowledged having made the prior statement. We have carefully scrutinized the trial transcript

and conclude that Brooks's statement was only used to refresh his recollection or, where appropriate, to impeach him, and not as substantive evidence.

IV.

[6] Finally, defendant argues that during his trial, the State impermissibly used testimony from Agent Tom Sturgill. Agent Sturgill was part of a police team that questioned Jacobs on 10 March 1987 and was the officer who took Brooks's statement on 11 March 1987. At trial, Agent Sturgill testified as to what Jacobs and Brooks had said to the police. Defendant argues that the State improperly used this testimony to impeach the witnesses and to bolster the State's substantive evidence against him.

We note initially that during Agent Sturgill's testimony concerning Brooks's statement, defendant made no objections, thus waiving any right to appeal that would arise from that testimony. N.C. Gen. Stat. § 8C-1, Rule 103 (1992); N.C. R. App. P. 10(b)(1) (1993); *See State v. Williamson*, 333 N.C. 128, 138, 423 S.E.2d 766, 771 (1992).

When Agent Sturgill was asked about what Jacobs had said in the 10 March 1987 interview, defendant did object and an off-the-record discussion occurred. However, testimony then resumed. No entry was made in the record as to the reason for that initial objection, and no further objection was made to any part of Sturgill's testimony about Jacobs's statement. Where a statement contains both corroborative and non-corroborative evidence, the defendant must object specifically to the inadmissible portions. "Objections to evidence *en masse* will not ordinarily be sustained if any part is competent." *State v. Brooks*, 260 N.C. 186, 189, 132 S.E.2d 354, 357 (1963). *See also State v. Harrison*, 328 N.C. 678, 682, 403 S.E.2d 301, 304 (1991). Defendant's objection was therefore not sufficiently specific to preserve his right of appeal.

Sturgill's testimony as to both witnesses' prior statements is thus reviewable only for plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Under the plain error standard, the appellate court must be "convinced that absent the error the jury would have reached a different verdict." *State v. Reid*, 322 N.C. 309, 313, 367 S.E.2d 672, 674 (1988). *See also State v. Harrison*, 328 N.C. at 687, 403 S.E.2d at 306 (Erroneous admission of prior state-

ment of one witness is not plain error where testimony of another witness established the same facts).

There is substantial evidence against defendant which in no way depends upon the written statements of Brooks and Jacobs nor upon the testimony of Sturgill as to the contents of those statements. Given the weight of this other evidence, we find that Sturgill's testimony did not constitute plain error requiring a reversal.

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

No error.

Judges LEWIS and McCRODDEN concur.

STATE OF NORTH CAROLINA v. RONNY DALE BARNETT

No. 9327SC362

(Filed 21 December 1993)

1. Burglary and Unlawful Breakings § 74 (NCI4th)— first-degree burglary—insufficient evidence of nighttime

The State presented insufficient evidence that the offense was committed in the nighttime to support defendant's conviction of first-degree burglary where the evidence tended to show that someone broke into the victims' home between 10:00 p.m. on 3 April 1992 and 6:30 a.m. on 4 April 1992; no evidence was presented as to the condition of light outside when the female victim awoke at 6:30 a.m. and found her purse gone and the back door open; judicial notice was taken that civil twilight began at 5:41 a.m. and the sun rose at 6:07 a.m. on 4 April 1992; and the breaking and entering thus could have occurred at any time up until 6:30 a.m., a time after which the sun rose. However, the jury, in convicting defendant of first-degree burglary, necessarily found facts which establish felonious breaking and entering, and the verdict will be considered a verdict of felonious breaking and entering.

Am Jur 2d, Burglary § 51.

Sufficiency of showing that burglary was committed at night. 82 ALR2 643.

2. Criminal Law § 133 (NCI4th)— guilty pleas—propriety of acceptance—later statements irrelevant

The trial court did not err in accepting defendant's pleas of guilty to four consolidated counts of breaking and entering and larceny and one count of breaking and entering where the court informed defendant of every right listed in N.C.G.S. § 15A-1022(a) and the maximum possible sentence; the court determined that defendant understood the charges and was satisfied with his trial counsel; and defendant's responses to the court before it accepted his guilty plea did not indicate any misunderstanding requiring further inquiry by the trial court. Defendant's statements expressing reservations about his pleas after they had been accepted by the trial court were not relevant to a determination as to whether the pleas were properly accepted by the court.

Am Jur 2d, Criminal Law §§ 486-491.

3. Larceny § 24 (NCI4th)— larceny and possession—same pocketbook—arrest of judgment on possession charge

Defendant could not properly be convicted and sentenced for both larceny and possession of stolen goods where the same pocketbook was involved in both charges, and judgment must be arrested on the possession charge.

Am Jur 2d, Larceny §§ 7, 13.

4. Criminal Law § 965 (NCI4th)— motion for appropriate relief—remand for determination by trial court

Where the materials before the Court of Appeals are insufficient to justify a ruling on defendant's motion for appropriate relief on the ground of ineffective assistance of counsel, the motion must be remanded to the trial court for the taking of evidence and a determination of the motion. The order of the trial court on the motion for appropriate relief will be subject to review by writ of certiorari. N.C.G.S. § 15A-1422(c)(3).

Am Jur 2d, Coram Nobis § 44 et seq.

Appeal by defendant from judgments entered 17 November 1992 in Gaston County Superior Court by Judge Zoro Guice, Jr. Heard in the Court of Appeals 30 November 1993.

Attorney General Michael F. Easley, by Special Deputy Attorney General Lorinzo L. Joyner, for the State.

Funderburk, Gheen & Cloninger, by Stephen T. Gheen, for defendant-appellant.

GREENE, Judge.

Ronny Dale Barnett (defendant) was indicted, tried, and convicted by a jury of one count of first-degree burglary, one count of felonious larceny, and one count of felonious possession of stolen goods during the 16 November 1992 criminal session of Gaston County Superior Court. After the convictions, defendant entered guilty pleas to felonious breaking and entering, five counts, and felonious larceny, four counts. For the first-degree burglary offense, defendant was sentenced to life, and for the larceny and possession of stolen goods offenses, he was sentenced to ten years each, to run consecutively with the first-degree burglary count, but concurrently with each other. The trial court consolidated four counts of felonious breaking and entering with the four counts of felonious larceny and sentenced defendant to ten years for each consolidated felony, to run consecutively with each other, but concurrent to the term of life for first-degree burglary. For the one count of felonious breaking and entering unaccompanied by a larceny charge, defendant received ten years to run consecutively to the other breaking and entering sentences, but concurrently to the term of life for first-degree burglary. Defendant appeals from all judgments and sentences.

The State's evidence tends to show the following: Between the hours of 10:00 p.m. on 3 April 1992 and approximately 6:30 a.m. on 4 April 1992, someone broke into the home of Alvin and Barbara Howery (the Howerys), who lived with their daughter, Sara Howery (Ms. Howery), in Gastonia, Gaston County, North Carolina. On 3 April 1992, Ms. Howery and her mother retired to bed around 10:00 p.m. after Ms. Howery made sure the back door of the house was locked. Ms. Howery testified that between 2:00 a.m. and 3:00 a.m. on 4 April 1992, her dog was barking loudly, and although Ms. Howery testified she usually arose to quiet her dog, she did not on that particular occasion. When Ms. Howery

awoke on 4 April 1992 around 6:30 a.m., she discovered the back door open and her pocketbook missing and called the police around 7:00 a.m. It is undisputed that no one saw defendant enter the Howerys' home, no latent fingerprints were found at the home, and a K-9 search in the general area around the home produced no evidence implicating defendant, who lived next door to the Howerys. On 4 April 1992, defendant went to a local convenience store around 8:00 a.m. and attempted to sell Ms. Howery's pocketbook. A consent search of defendant's residence did not produce any other fruits of the crime. At the close of the State's evidence, defendant moved to dismiss each of the charges, which motion was denied.

Defendant presented evidence of an alibi defense, claiming that he had been at a girlfriend's house from 9:00 p.m. on 3 April 1992 until around 7:00 a.m. on 4 April 1992. He testified that he found Ms. Howery's purse a block or two from his home at which time he remembered he was supposed to baby-sit for his other girlfriend with whom he shared a child and decided to give this other girlfriend the pocketbook. Defendant did not stay at this second girlfriend's home because he did not need to baby-sit and did not give his second girlfriend the pocketbook because she was not at home. Defendant testified he tried to sell Ms. Howery's purse to the clerk at the convenience store to buy some food and beer. At the close of all the evidence, defendant renewed his motion to dismiss the charges, which was again denied by the trial court.

After the convictions on the burglary, larceny, and possession of stolen goods charges, defendant plead guilty to the consolidated breaking and entering and larceny charges, four counts, and the one count of breaking and entering. Defendant answered the trial judge affirmatively and without equivocation when asked if he understood the nature and elements of the charges, the pleas and their effect, the possibility of a maximum sentence of ninety years, the right to remain silent and that any statement defendant made could be used against him, the right to plead not guilty and be tried by a jury and be confronted by the witnesses against him, and whether defendant entered the pleas with his own free will fully understanding what he was doing and whether he was satisfied with his trial counsel's legal services. Defendant answered in the negative when the trial court asked if he was under the influence of drugs or alcohol, but informed the trial court that he was under

medication. After defendant answered these questions, the following exchange took place:

> THE COURT: Do you have any questions about what has just been said to you or about anything else connected with your cases?
>
> THE DEFENDANT: No, sir. Your Honor, I have been convicted of a felony. This is my first time, sir.
>
> THE COURT: But do you have any questions about what I've just said to you or about anything else connected with your cases?
>
> THE DEFENDANT: No, sir, but I would like to say this—
>
> ([trial counsel] confers with the defendant at the defense table. Discussion is off the record).
>
> THE DEFENDANT: No, sir.

After this exchange, defendant stipulated that there was a factual basis to support the pleas and consented to the State's giving a shorthand statement of the facts supporting the guilty pleas. After the State's shorthand statement, the court accepted defendant's guilty pleas and ordered them recorded.

After accepting the pleas, the court took evidence of aggravating factors from the State and mitigating factors from defendant to consider in the sentencing. During this stage, defendant's trial counsel indicated to the court that defendant wished to address the court. After receiving permission to address the trial court, defendant stated:

> I really ain't understanding what happened; but I have been charged with these things; and it has come to a fact that I have to plead to make my life sentence better; and if there is any way possible, sir, you can take it into consideration and look into it—these three that I'm pleading into, sir—really, I don't know what I'm pleading into . . . .

The trial judge then asked if defendant had a problem with controlled substances to which defendant stated he thought he had a "drinking problem." The court proceeded to the sentencing stage after which defendant again addressed the court and stated that "I don't fully understand it, sir. [My trial counsel] said that I had a life sentence—anything I had to do without that wouldn't be

more than life." The defendant also asked "can I not come back to court—and I just misunderstand this, sir."

On 15 December 1992, the trial court appointed appellate counsel due to a conflict order concerning defendant's trial counsel's ability to represent defendant at the appellate level. Subsequently, on 22 December 1992 and 15 February 1993, extensions of time to serve the proposed Record on Appeal were allowed. On 12 April 1993, defendant filed a Motion for Appropriate Relief alleging ineffective assistance of counsel.

The issues presented are whether (I) the State produced sufficient evidence of the element of nighttime to establish burglary; (II) a defendant's statement after a guilty plea is accepted is relevant for purposes of N.C. Gen. Stat. § 15A-1022; (III) consolidating convictions for judgment cures the prohibition against convictions on both possession of stolen goods and larceny for the same goods; and (IV) the evidence before this Court is sufficient to justify this Court's ruling on defendant's motion for appropriate relief.

I

TRIAL

The offense of first-degree burglary consists of six elements: (1) the breaking, (2) and entering, (3) in the nighttime, (4) into a dwelling house or sleeping apartment of another, (5) which is actually occupied at the time of the offense, and (6) with the intent to commit a felony therein. *State v. Davis*, 282 N.C. 107, 116, 191 S.E.2d 664, 670 (1972). If, however, the breaking and entering into a dwelling house or sleeping apartment of another with the intent to commit a felony therein occurs during the daytime, the offense committed is felonious breaking and entering, and not burglary. *State v. Cox*, 281 N.C. 131, 187 S.E.2d 785 (1972). In North Carolina, there is no statutory definition of nighttime; however, our courts adhere to the common law definition of nighttime as that time after sunset and before sunrise "when it is so dark that a man's face cannot be identified except by artificial light or moonlight." *State v. Frank*, 284 N.C. 137, 145, 200 S.E.2d 169, 175 (1973); *State v. Ledford*, 315 N.C. 599, 607, 340 S.E.2d 309, 315 (1986). Therefore, to survive the motion to dismiss, the State must have produced substantial evidence of nighttime, *see State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990), that is,

such relevant evidence that a reasonable mind might accept as adequate to support the conclusion that when the breaking and entering of the Howerys' house occurred, it was that time "when it is so dark that a man's face cannot be identified except by artificial light or moonlight." *See State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

[1] The evidence, in the light most favorable to the State, *see Lynch*, 327 N.C. at 215, 393 S.E.2d at 814, shows someone broke into the Howerys' home between 10:00 p.m. on 3 April 1992 and around 6:30 a.m. on 4 April 1992 when Ms. Howery awoke to find her purse gone and her back door open. Her dog barked at some time between 2:00 a.m. and 3:00 a.m. on 4 April 1992, but she did not arise to see why her dog was barking. The State did not present any evidence as to the condition of light outside when Ms. Howery arose on 4 April 1992, but we take judicial notice that on 4 April 1992 in Gaston County, civil twilight began at 5:41 a.m., and the sun rose at 6:07 a.m. *See* the schedule for sunrise and sunset in Gastonia, Gaston County, North Carolina computed by the Nautical Almanac Office, United States Naval Observatory; *see also State v. Garrison*, 294 N.C. 270, 280, 240 S.E.2d 377, 383 (1978) (our Supreme Court takes judicial notice of U.S. Naval Observatory report to affirm nighttime element in burglary conviction). Because the breaking and entering could have occurred at any time up until 6:30 a.m. on 4 April 1992, a time after which the sun rose, the evidence is only sufficient to raise a "suspicion or conjecture" that the breaking and entering of the Howerys' home occurred at nighttime. *See State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (motion to dismiss should be allowed where evidence only raises suspicion or conjecture of commission of offense). Thus, the State failed to produce such relevant evidence that a reasonable mind might accept as adequate to support the conclusion that when the breaking and entering occurred, it was that time "when it is so dark that a man's face cannot be identified except by artificial light or moonlight." Because the State failed to produce evidence sufficient to permit the jury to determine defendant's guilt of first-degree burglary, he is entitled to have the charge of burglary against him dismissed. *State v. Smith*, 307 N.C. 516, 518, 299 S.E.2d 431, 434 (1983).

Although the evidence is insufficient to sustain a conviction of first-degree burglary, the jury, in convicting defendant of first-degree burglary, necessarily found facts which establish felonious

breaking and entering, i.e., the breaking and entering of a building with intent to commit any felony or larceny therein. N.C.G.S. § 14-54(a) (1993); *Cox*, 281 N.C. at 135, 187 S.E.2d at 788; *State v. Dawkins*, 305 N.C. 289, 290-91, 287 S.E.2d 885, 887 (1982); *State v. Jolly*, 297 N.C. 121, 254 S.E.2d 1 (1979); *see also State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981) (when jury found defendant guilty of first-degree rape it necessarily found facts supporting conviction of second-degree rape); *State v. McClain*, 112 N.C. App. 208, 435 S.E.2d 371 (1993) (by finding defendant guilty of first-degree rape and first-degree sexual offense, jury necessarily found defendant guilty of second degree rape and second degree sexual offense). Therefore, "[t]he verdict [guilty of first-degree burglary] **must** . . . be considered a verdict of felonious breaking and entering, a lesser degree of the crime of burglary, and a violation of G.S. 14-54(a) . . . ." *Cox*, 281 N.C. at 136, 187 S.E.2d at 788 (emphasis added).

II

GUILTY PLEAS

Defendant does not have an appeal as a matter of right under N.C. Gen. Stat. § 15A-1444 to challenge the trial court's acceptance of his guilty pleas, N.C.G.S. § 15A-1444 (1988); *State v. Bollinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987); however, on this issue, we allow defendant's petition for writ of certiorari which he appropriately filed in this Court on 30 November 1993 pursuant to N.C. R. App. P. 21.

N.C. Gen. Stat. § 15A-1022, which governs the duties of a superior court judge when accepting a plea of guilty or no contest, provides in pertinent part:

> [A] superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:
>
> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
>
> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;

> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
>
> (6) Informing him of the maximum possible sentence on the charge, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge . . . .

N.C.G.S. § 15A-1022(a) (Supp. 1993). Section 15A-1022 goes on to provide that "[t]he judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice." N.C.G.S. § 15A-1022(b). The statute and federal and state constitutions mandate that the court determine the plea was voluntary and the informed choice of the defendant by inquiring personally of the defendant about his plea. *Bryant v. Cherry*, 687 F.2d 48 (4th Cir.), *cert. denied*, 459 U.S. 1073, 74 L. Ed. 2d 637 (1982); *State v. Williams*, 65 N.C. App. 472, 481, 310 S.E.2d 83, 88 (1983).

[2] Defendant argues that the trial court did not perform its duties required by Section 15A-1022 to determine, before accepting a plea, that the plea was freely and voluntarily given and the product of informed choice. Therefore, defendant contends the court erred in accepting defendant's pleas of guilty to the four consolidated counts of breaking and entering and larceny and the one count of breaking and entering. Because Section 15A-1022 relates only to the duties of a trial judge **prior** to "accept[ing] a plea of guilty," we look only at the record relating to the court's examination of defendant prior to its approval of his tendered pleas of guilty. *See State v. Wynn*, 278 N.C. 513, 180 S.E.2d 135 (1971). Accordingly, we do not address the effect of any reservations defendant may have expressed after the court accepted his pleas as those reservations are properly addressed by a pre-sentencing motion to withdraw a plea of guilty, a post-sentencing motion to withdraw a plea of guilty, or a motion for appropriate relief. *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990). Although defendant's present motion for appropriate relief does not address the trial court's failure to inquire into defendant's reservations after the trial court accepted his guilty pleas, defendant may, before the trial court, amend his motion to contest this failure on grounds found in either Section 15A-1415(b)(3) or (b)(8).

The portion of the record before the trial court accepted defendant's pleas of guilty reflects only a careful examination concerning the voluntariness of defendant's pleas as required by Section

15A-1022(b). The court informed defendant of every right listed in Section 15A-1022(a) and the maximum possible sentence, and determined defendant understood the charges and was satisfied with his trial counsel. Defendant's responses to the court before it accepted his guilty pleas did not indicate any misunderstanding. Because the trial court complied with Section 15A-1022 in determining that defendant's pleas were voluntarily given and a product of informed choice and because defendant's answers did not indicate any misunderstanding requiring further inquiry by the trial court, the trial court did not err in accepting defendant's guilty pleas.

III

SENTENCING

[3] Our Supreme Court, having determined that the crimes of larceny, receiving, and possession of stolen goods are separate offenses and that the Legislature did not intend to punish an individual for receiving and possession of the same goods he stole, held that a defendant may be tried and indicted on charges of larceny, receiving, and possession of the same property, but he may be convicted of only one of those offenses. *State v. Perry*, 305 N.C. 225, 236-37, 287 S.E.2d 810, 817 (1982). Therefore, because the pocketbook was the "goods" involved in both the charge for larceny and the charge for possession of stolen goods, the trial court erred in failing to arrest judgment for defendant's conviction of felonious possession of stolen goods. This error was not cured when the trial court consolidated the convictions for judgment.

IV

MOTION FOR APPROPRIATE RELIEF

[4] N.C. Gen. Stat. § 15A-1418(a) provides that a motion for appropriate relief on grounds found in N.C. Gen. Stat. § 15A-1415 may be made in the appellate division when a case is in the appellate division for review. One ground found in Section 15A-1415(b), "[t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina," includes defendant's claim of ineffective assistance of counsel. *State v. Watkins*, 89 N.C. App. 599, 608, 366 S.E.2d 876, 881, *disc. rev. denied*, 323 N.C. 179, 373 S.E.2d 123 (1988). N.C. Gen. Stat. § 15A-1418(b) provides:

> When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with the determination of the case.

N.C.G.S. § 15A-1418(b) (1988). Although the statute authorizes the appellate court to initially determine a motion for appropriate relief, *State v. Jolly*, 332 N.C. 351, 420 S.E.2d 661 (1992), where the materials before the appellate court, as in this case, are insufficient to justify a ruling, the motion must be remanded to the trial court for the taking of evidence and a determination of the motion. *State v. Burney*, 301 N.C. 223, 277 S.E.2d 690 (1980); *State v. Wiggins*, 334 N.C. 18, 431 S.E.2d 755 (1993); *State v. Hurst*, 304 N.C. 709, 285 S.E.2d 808 (1982). Because we have decided defendant's underlying appeal and because we have remanded the motion for appropriate relief to the trial court, the order of the trial court on the motion for appropriate relief will be subject to review by writ of certiorari. N.C.G.S. § 15A-1422(c)(3) (1988).

For these reasons, we reverse the first-degree burglary conviction, arrest judgment on the conviction for felonious possession of stolen goods, and remand for entry of a judgment of guilty of felonious breaking and entering. We find no error with the trial court's acceptance of defendant's guilty pleas. Furthermore, we remand defendant's motion for appropriate relief to the trial court.

Reversed in part, affirmed in part, and remanded.

Judges COZORT and WYNN concur.

COY D. BARBEE AND VIRGINIA T. BARBEE v. ATLANTIC MARINE SALES & SERVICE, INC. AND MAKO MARINE, INC.

MAKO MARINE, INC. v. ATLANTIC MARINE SALES AND SERVICE, INC. AND CHRISTOPHER FLOYD

No. 9226SC1141

(Filed 21 December 1993)

1. **Appeal and Error §§ 147, 418 (NCI4th)— peremptory instruction—no objection—no assignment of error**

A defendant's arguments on appeal concerning peremptory instructions in a case arising from the sale of a boat were not reviewed where defendant failed to object at trial and, in one case, did not assign error to the peremptory instruction in the record on appeal.

Am Jur 2d, Appeal and Error §§ 545 et seq., 693-696.

2. **Unfair Competition § 1 (NCI3d)— sale of boat—unfair or deceptive acts—evidence sufficient**

The trial court properly submitted the issue of unfair and deceptive acts or practices in an action arising from the sale of a boat where there was sufficient evidence for the jury to conclude that once the defendant realized that the problem with plaintiffs' boat could not be remedied, it seized upon the commercial use exclusion in a bad faith attempt to avoid responsibility for the defective boat.

Am Jur 2d, Consumer and Borrower Protection § 295.

3. **Unfair Competition § 1 (NCI3d)— sale of a boat—unfair or deceptive practices—attorney fees—evidence sufficient**

There was ample evidence in the record to support the trial judge's findings and those findings in turn support the award of attorney fees in an action for unfair and deceptive practices arising from the sale of a boat. The record is rife with evidence of defendant's intractability, which is sufficient to support the court's findings on the issues of willfulness and refusal to resolve the matter, and the affidavits adequately support the court's finding on the reasonableness of the fees, revealing the time spent by the attorneys and their support staffs, the complexity of the issues, the length and complexity

of the trial, the customary hourly fee for each of the attorneys, and the level of experience of each of the attorneys.

Am Jur 2d, Consumer and Borrower Protection § 302.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts. 35 ALR4th 12.

4. **Unfair Competition § 1 (NCI3d)— sale of boat—unfair or deceptive practices—claim not barred by statute of limitations**

A claim for unfair or deceptive practices arising from the sale of a boat was not barred by the four year statute of limitations of N.C.G.S. § 75-16.2 where plaintiffs' claim could not have accrued before they bought the boat, the boat was purchased on 15 May 1988, and this action was instituted on 27 February 1990.

Am Jur 2d, Consumer and Borrower Protection § 294.

5. **Unfair Competition § 1 (NCI3d)— sale of boat—unfair or deceptive practices—breach of implied warranty—double recovery**

Plaintiff was allowed a double recovery in an action arising from the sale of a boat where the court entered judgment against defendant, the manufacturer of the boat, for treble damages on an unfair or deceptive practices claim and against Atlantic, the seller of the boat, for breach of implied warranty, but also entered an order that defendant fully indemnify Atlantic. The court's order that defendant indemnify Atlantic for any liability makes it clear that defendant was being held liable for violation of N.C.G.S. § 75-1.1 and the breach of warranty.

Am Jur 2d, Consumer and Borrower Protection §§ 302, 304.

Appeal by defendant Mako Marine, Inc. from judgment entered 9 April 1992 by Judge F. Fetzer Mills in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 1993.

This appeal arises out of plaintiffs' claims against defendant Atlantic Marine Sales and Service, Inc. (Atlantic) for an allegedly defective boat which Atlantic sold to plaintiff and against defendant Mako Marine, Inc. (defendant), which manufactured the boat. After a jury trial, the trial court entered judgments in favor of the plaintiffs against defendant, ordered defendant to indemnify Atlantic for any liability it might have to plaintiffs and ordered defendant

to pay attorney's fees to plaintiff and Atlantic. From these judgments, defendant appeals.

Hedrick, Eatman, Gardner & Kincheloe, by John F. Morris and Jeffrey D. Penley, and Blair, Conaway, Bograd & Martin, by Bentford E. Martin and Brien D. Stockman, for appellant, Mako Marine, Inc.

Horack, Talley, Pharr & Lowndes, P.A., by Robert C. Stephens and James H. Pulliam, for plaintiff-appellees, Coy D. Barbee and Virginia T. Barbee.

Parker, Poe, Adams & Bernstein, by William E. Poe and Frank A. Hirsch, Jr., for defendant-appellee, Atlantic Marine Sales & Service, Inc.

McCRODDEN, Judge.

This case tests the propriety of (I) the trial court's instructions to the jury, (II) its submission to the jury of issues of unfair and deceptive acts or practices under Chapter 75 of the General Statutes, (III) the court's award of attorney's fees under the same chapter, (IV) its refusal to dismiss plaintiff's action on the basis that the statute of limitations had run, and (V) the amount of damages the trial court ordered it to pay.

The pertinent facts in this case are as follows. In 1985, defendant manufactured and sold to Atlantic a model 285-B boat hull, a 28-foot craft intended to be powered by outboard engines. Atlantic outfitted the hull with engines and accessory equipment. It never titled the boat and used it only as a demonstration model before selling it to plaintiffs on 15 May 1988. Plaintiffs purchased the boat with the intention of chartering it for fishing and diving. Almost immediately after purchasing the boat, they complained to Atlantic that excessive water was accumulating in the stern of the boat when it was idling or anchored in the open sea. As water flowed into the boat, the stern of the boat was pushed deeper in the water, allowing more water to flow over the back wall of the boat, known as the transom. As the boat filled with water, the scuppers, holes in the bottom of the transom out of which water in the boat is supposed to drain, went below the waterline and were rendered ineffective. At that point, the only way to drain the boat was to drive it fast enough to plane, bringing the scuppers above the waterline.

Atlantic contacted defendant to inform it of the problem and defendant offered several suggested solutions to the problem. Each of these suggestions, however, proved ineffective. After repeated attempts to remedy the problem, plaintiffs' son, who was the principal operator of the boat, wrote to defendant stating that he thought the problem could be solved by keeping water out of the boat, instead of trying to remove it more quickly. Defendant responded to the letter by saying that it was "the inherent nature of water to pass over the transom on an outboard powered boat" and recommended two modifications intended to minimize the amount of water entering the boat. Plaintiffs rejected both of these suggestions. Atlantic requested that defendant send a representative to examine the boat and assess the problem. On 25 July 1989, Marty Bistrong, defendant's vice president of sales, visited Atlantic's marina. He refused, however, to ride in the boat or to examine the problem. Thereafter, David Floyd, Atlantic's vice-president, contacted defendant on plaintiffs' behalf. Defendant informed Floyd that since the boat was being used as a charter boat, a fact Bistrong had observed during his visit, it would do nothing further for plaintiffs. Defendant suggested instead that plaintiffs trade the model 285-B boat for a new or different model, a suggestion plaintiffs declined to follow.

On 27 February 1990, plaintiffs filed this action, alleging breach of an implied warranty of fitness for a particular purpose, breach of an implied warranty of merchantability, violation of the Magnuson-Moss Warranty Act, breach of contract, breach of express warranty, violations of N.C. Gen. Stat. § 75-1.1 (1988) (unfair and deceptive acts or practices), and negligent failure to warn of known dangerous defects in the design of the boat hull. Defendant cross-claimed against Atlantic which in turn sought indemnity from defendant and Chapter 75 damages for its efforts in effecting a remedy for the alleged design defects. The court directed verdicts in favor of Atlantic on its crossclaim for indemnity against defendant, in favor of Atlantic on plaintiffs' claim of breach of express warranty against it, and in favor of Atlantic and defendant on plaintiffs' Magnuson-Moss, breach of contract and negligence claims. It submitted to the jury the balance of the issues. After verdicts in plaintiffs' favor, the trial court entered judgments against defendant in the amounts of $178,732.65 for violations of N.C.G.S. § 75-1.1, which represented treble damages pursuant to N.C. Gen. Stat. § 75-16 (1988); $49,980.00 for attorney's fees pursuant to N.C. Gen.

Stat. § 75-16.1 (1988); and $59,557.55 for breach of warranty. The court also ordered defendant to compensate Atlantic $37,185.00 for a violation of N.C.G.S. § 75-1.1 and $43,238.00 for attorney's fees.

I.

[1] The first set of arguments we review pertains to the trial court's peremptory instruction on the existence of an express warranty. Defendant did not assign error to the court's peremptory instruction on the existence of an express warranty in the record on appeal, and indeed, failed to object to the court's submission of this issue to the jury. Under N.C.R. App. P. 10(a), we must confine our consideration to errors assigned in the record on appeal. Moreover, under Rule 10(b), a party may not assign error to any portion of the jury charge unless he objects thereto before the jury retires. The trial court must be given the opportunity to correct any allegedly erroneous statement in its instruction. *See Rudd v. Stewart*, 255 N.C. 90, 96, 120 S.E.2d 601, 606 (1961). In the instant case, therefore, defendant not only failed to assign error, but it failed to lay the foundation for assigning error. We decline its invitation to exercise our discretion under N.C.R. App. P. 2 to suspend or vary the requirement of this rule, and we consequently reject the first part of defendant's argument.

For similar reasons, we also decline to review the second portion of defendant's attack on the jury instructions. Despite the trial court's request for corrections, defendant made no objection to the instructions to which it has assigned error, thus failing to provide a foundation for its assignment.

II.

[2] We next consider defendant's set of arguments concerning the court's submission to the jury of issues of unfair and deceptive acts or practices under N.C.G.S. § 75-1.1. Defendant argues that there was insufficient evidence as a matter of law to support the findings of the jury as to each of the four issues of fact submitted by the court.

N.C.G.S. § 75-1.1 declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. . . ." Unfair practices are not subject to a single definition. Generally, however, "a practice is unfair when it offends established public policy as well as when

the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Whether an act or practice is unfair or deceptive is to be determined by all the facts and circumstances surrounding the transaction. *Id.*

In an action for unfair and deceptive acts or practices the jury is to find the facts of the occurrence, *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975), determine in what amount, if any, the plaintiff was injured, and decide whether the occurrence was the proximate cause of those injuries. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 184, 268 S.E.2d 271, 273-74 (1980). It is then up to the trial court to decide whether the defendant's behavior was unfair or deceptive. *Hardy*, 288 N.C. at 310, 218 S.E.2d at 346-47.

In this case the trial court submitted to the jury four issues of fact, to each of which the jury returned an affirmative answer. The jury also found that plaintiffs had suffered damages in the amount of $59,577.55 as a proximate result of defendant's actions. In its judgment, the trial court stated that any one of the four factual situations, standing alone, would constitute an unfair and deceptive practice. Defendant does not contend that the court abused its discretion in so doing. The inquiry posed by defendant's argument is, therefore, whether there was sufficient evidence to support the jury's findings as to any one of the four bases.

We find that there was ample evidence to justify the jury's affirmative answer to the following question:

> Did Mako Marine do any one or more of the following in selling a 1985 Mako 285-B style hull to Atlantic for $35,273 on June 24, 1985 which Atlantic, in turn, sold to the Barbees on May 15, 1988 for $37,464:
>
> > . . . .
> >
> > . . . Represent that the boat would be covered by Mako's warranty, then after the boat was purchased by the Plaintiffs Barbee, unreasonably refuse to remedy the major defect, which permitted water to come over the transom and remain in the boat to the point that the boat was rendered useless for its intended purpose?

The plaintiffs' evidence tended to show that they complained about water accumulating in the stern of the boat from the time they

bought the boat until July 1989, when Bistrong visited Atlantic's marina. David Floyd testified that after Bistrong's visit, defendant refused to take any further action, insisting that the boat was being used commercially and was thus excepted from the written warranty. In response to plaintiffs' pleas, defendant suggested only that plaintiffs trade the boat. Defendant, however, made no offer of concession, such as offering to credit the price plaintiffs had paid for their boat toward a new boat. Kevin Rogers, defendant's former warranty manager, testified that the written warranty, which by its terms did not cover boats used commercially, applied only to boats manufactured after 1987, two years after defendant sold its boat to Atlantic. This was sufficient evidence for the jury to conclude that once the defendant realized that the problem with plaintiffs' boat could not be remedied, it seized upon the commercial use exclusion in a bad faith attempt to avoid responsibility for the defective boat. Thus, the court properly submitted the issue of unfair and deceptive acts or practices.

III.

[3] Defendant next argues that the court's award of attorney's fees in favor of plaintiff and Atlantic was erroneous since the fees were not reasonable and they were not supported by sufficient findings of fact.

A prevailing party in an action under N.C.G.S. § 75-1.1 may recover a reasonable attorney's fee upon a finding by the trial court that "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit. . . ." N.C.G.S. § 75-16.1. The award or denial of attorney's fees under section 75-16.1 is within the sole discretion of the trial judge. *Borders v. Newton*, 68 N.C. App. 768, 770, 315 S.E.2d 731, 732 (1984). The court must make specific findings of fact that the actions of the party charged with violating Chapter 75 were willful, that he refused to resolve the matter fully, and that the attorney's fee was reasonable. For us to determine whether such award is reasonable, the record on appeal must contain findings of fact that support the award. *Lapierre v. Samco Development Corp.*, 103 N.C. App. 551, 561, 406 S.E.2d 646, 651 (1991). "Appropriate findings include findings regarding the time and labor expended, the skill required to perform the services rendered, the

customary fee for like work, and the experience and ability of the attorney." *Id.*

In this case, the court made the following statements in its judgment:

> [E]ach act separately enumerated under 10(a)-(d) is willful and constitutes adequate grounds for the award of attorneys' fees to the [plaintiffs] and Atlantic from [defendant] pursuant to N.C.G.S. § 75-16.1. The Court also concludes in its discretion after due deliberation that there has been an unwarranted refusal by [defendant] to fully resolve the matter which constitutes a basis of this suit.
>
> . . . .
>
> After reviewing the Affidavits of [plaintiffs' attorneys] and of [Atlantic's attorneys], and deliberating on the case presented, I conclude that the attorneys' fees and expenses in the amount of $49,980.00 [for plaintiffs] and in the amount of $43,238.00 for Atlantic and Floyd were reasonable in light of the complexity of the facts and legal issues presented to the jury and the length of these proceedings.

During the hearing, the trial court also adopted the affidavits of the attorneys as his findings on the issue of the reasonableness of the fees.

The record is rife with evidence of defendant's intractability, and such evidence is sufficient to support the court's findings on the issues of willfulness and refusal to resolve the matter. Likewise, the affidavits adequately support the court's finding on the reasonableness of the fees. They reveal the time spent by the attorneys and their support staffs, the complexity of the issues, the length and complexity of the trial, the customary hourly fee for each of the attorneys, and the level of experience of each of the attorneys. There was ample evidence in the record to support the judge's findings and those findings in turn support the award.

IV.

[4] Defendant's fourth argument, that plaintiffs' Chapter 75 claim was barred by the statute of limitations, is meritless. The applicable statute of limitation provides, in pertinent part, that "[a]ny civil action brought under this Chapter to enforce the provisions thereof

shall be barred unless commenced within four years after the cause of action accrues." N.C. Gen. Stat. § 75-16.2 (1988). In general, a cause of action accrues when "the right to institute and maintain a suit arises." *Motor Lines v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962). Of course, plaintiffs could not have instituted an action against defendant for unfair and deceptive acts or practices, and their cause of action therefor could not have accrued, before they purchased the boat. Since plaintiffs purchased the boat on 15 May 1988 and instituted this action on 27 February 1990, N.C.G.S. § 75-16.2 does not bar their action.

V.

[5] Defendant finally argues that the court's entry of judgments against defendant for treble damages on the N.C.G.S. § 75-1.1 claim and against Atlantic for breach of implied warranty combined with the order that defendant fully indemnify Atlantic allowed plaintiffs double recovery. We agree.

Although the judgment on the breach of warranty claim was actually entered against Atlantic, the court's order that defendant indemnify Atlantic for any liability makes it clear that the defendant was being held liable for violation of N.C.G.S. § 75-1.1 and the breach of warranty.

The injury plaintiffs suffered because of the breach of warranty was compensated by the award for the Chapter 75 claim. Indeed, the jury found that the plaintiffs had suffered precisely the same amount of damages, $59,577.55, for each of those claims. The court, having found that the defendant's acts constituted an unfair and deceptive practice, properly trebled that amount and entered judgment thereon. However, by also entering judgment on the breach of warranty claim, which was based on the selfsame course of conduct, the court improperly allowed plaintiffs double recovery, *see Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified on other grounds and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981), and we must vacate the judgment in favor of the plaintiffs on the breach of warranty claim.

In summary, we vacate that portion of the judgment awarding plaintiffs damages against Atlantic and ordering indemnity by defendant on the breach of implied warranty claim. We affirm the balance of the trial court's actions.

Reversed in part, affirmed in part.

Judges JOHNSON and COZORT concur.

LAURA HACKETT, PLAINTIFF v. THERESA J. BONTA, DEFENDANT

No. 924SC1147

(Filed 21 December 1993)

Arbitration and Award § 14 (NCI4th) — automobile accident — liability coverage — UIM coverage — motion to compel arbitration

The trial court erred by denying plaintiff's motion to compel arbitration and in granting defendant's motion to stay arbitration where both plaintiff and defendant have automobile liability insurance policies with State Farm; plaintiff was a passenger in defendant's vehicle when defendant drove across the center line of a highway and struck another vehicle, injuring two of its passengers; plaintiff suffered injuries allegedly causing approximately $20,000.00 in medical expenses and approximately $388,000.00 in other damages; plaintiff informed State Farm that her injuries exceeded the limits of defendant's liability policy and that she would proceed against her underinsured coverage; plaintiff filed a complaint against defendant alleging negligence; settlement offers were exchanged; plaintiff demanded arbitration under her UIM policy and State Farm refused to arbitrate. A provision under plaintiff's UIM policy specifically stated that "We [State Farm] will pay under this coverage only after the limits of liability under any applicable liability bonds or policies have been exhausted by payments of judgments or settlements . . ."; prior to the time plaintiff filed suit against defendant, State Farm had refused plaintiff's demands for settlement in the amount of $25,000.00 under defendant's liability policy; plaintiff filed suit against only defendant Bonta on 29 August 1990; thereafter, plaintiff made repeated demands for payment under defendant's liability policy, all of which were declined by State Farm; plaintiff could not reasonably assume that the limits of defendant's policy ($25,000.00) had been exhausted until the 17 February 1992 offer (of $75,000.00) because State Farm assigned

one attorney to handle both claims; and the arbitration rights under plaintiff's UIM policy were not triggered prior to State Farm's 17 February 1992 offer. Plaintiff's demand for arbitration was not untimely or unreasonably delayed by plaintiff.

Am Jur 2d, Arbitration and Award § 71 et seq.

Appeal by plaintiff from orders entered 27 July 1992 and 26 August 1992 by Judge George R. Greene in Onslow County Superior Court. Heard in the Court of Appeals 7 October 1993.

Both plaintiff and defendant have automobile liability insurance policies with State Farm Mutual Automobile Insurance Company (hereinafter "State Farm"). State Farm insures defendant Theresa J. Bonta, the driver, pursuant to a personal automobile policy with liability limits of $25,000.00/$50,000.00. Plaintiff Laura Hackett, a passenger in defendant Bonta's vehicle, has $100,000.00 in uninsured/underinsured (UM/UIM) coverage for each of her two vehicles under a personal automobile policy with State Farm.

On the evening of 17 February 1990, plaintiff was a passenger in defendant's vehicle. While driving near Wilmington, defendant drove across the center line of the highway and struck another vehicle, injuring two of its passengers. As a result of the collision, plaintiff suffered injuries allegedly causing approximately $20,000.00 in medical expenses and approximately $388,000.00 in other damages.

By a letter dated 30 March 1990, plaintiff's counsel informed State Farm that "this claim will be worth more than $25,000," referring to the limits of defendant's liability policy. By a letter dated 6 April 1990, plaintiff's counsel described plaintiff's injuries, stated that these "injuries exceed[ed] the $25,000.00 insurance available" under defendant's policy, and inquired as to "the extent of the other parties' injuries." By a letter to State Farm dated 15 June 1990, plaintiff's counsel stated that "our client's injuries are well in excess of the $25,000 and for that reason [we] wish to settle this claim so we may proceed against our client's underinsured coverage." The record does not contain a reply by State Farm. By a letter dated 20 July 1990, plaintiff's counsel again demanded payment in the amount of $25,000.00 under defendant's policy. Plaintiff also stated that there was $200,000.00 in coverage under plaintiff's UIM policy and that documentation for that claim

was being gathered pursuant to State Farm's request. The record reflects that throughout this time, State Farm had assigned one insurance adjuster to negotiate both the claim against defendant's liability policy and the claim against plaintiff's UIM policy. Plaintiff's counsel informed State Farm *inter alia* in the 20 July 1990 letter that assigning one adjuster for both claims was a conflict of interest impeding the settlement process. By a letter dated 27 July 1990, State Farm, referring to plaintiff's 15 June 1990 and 20 July 1990 demand letters, informed plaintiff's counsel that it needed more information regarding plaintiff's claim and that

> [w]e do not feel that we have a conflict since we do not as a company subrogate against our own insureds when we make payments under the underinsured motorist coverages for another State Farm insured. As of July 27, 1990 [State Farm's] Wilmington [office] still does not have the information necessary to evaluate the two claims in that area. If it is necessary for us to exhaust the liability limits under the Bonta policy to conclude the two claims in Wilmington we will do so, and this will obviously increase State Farm's liability to your client under her own underinsured motorist coverage as there will be no offset or the offset will be less than some prorated amount.

On 30 July 1990, State Farm retained attorney Glenn Bailey.

On 29 August 1990, plaintiff filed a complaint against defendant Bonta alleging negligence. Mr. Bailey filed an answer on defendant's behalf denying negligence and demanding a jury trial. Both parties conducted discovery. Trial was scheduled for 16 March 1992.

By a letter dated 17 February 1992, Mr. Bailey forwarded plaintiff's counsel a letter stating as follows:

> RE: Laura Hackett v. Theresa J. Bonta
> In the Superior Court of Onslow County,
> Civil File No. 90-CVS-2200
>
> Dear Dick [A. Mu, plaintiff's counsel]:
>
> With this letter we are offering $75,000.00 in settlement of the above case. If this is rejected, we would welcome a more realistic demand.

This letter did not specify the policy under which State Farm was offering settlement, though the amount offered exceeded the maximum payable to one victim pursuant to defendant's liability

policy. An affidavit submitted by plaintiff's counsel states that this was State Farm's "first offer to settle this matter." On 14 March 1992, plaintiff's counsel transmitted to Mr. Bailey a letter rejecting the offer, offering a covenant not to execute judgment in excess of defendant Bonta's insurance coverage in return for $25,000.00 (defendant's liability policy limits), complaining of Mr. Bailey's conflict of interest, setting forth a counteroffer in the amount of "$165,000.00 as a compromise settlement under the UIM coverage of her [plaintiff's] policy," and stating that "[i]f State Farm is not willing to settle for $165,000.00 we demand arbitration of all issues of Laura Hackett's [plaintiff's] right to damages pursuant to her policy." In demanding arbitration for the UIM claim, the provision upon which plaintiff relied reads as follows:

> PART C—UNINSURED MOTORISTS COVERAGE—COVERAGE U
>
> . . . .
>
> ARBITRATION
>
> If we and an *insured* do not agree:
>
> 1. Whether that person is legally entitled to recover damages under this Part; or
>
> 2. As to the amount of the damages;
>
> the *insured* may make a written demand for arbitration. In this event, arbitration will be conducted in accordance with the Rules of the American Arbitration Association. Judgment on the award decided by the arbitrators may be entered in any court having jurisdiction. Each party agrees the arbitration award is binding.
>
> If an *insured* elects not to arbitrate:
>
> 1. Our liability will be determined only in a legal action against us; and
>
> 2. We may require the *insured* to join the owner or operator of the vehicle as a party defendant. We may not require this in any action to determine if a vehicle is an *uninsured motor vehicle*.
>
> . . . .
>
> Note: The following endorsement applies when the endorsement number appears in the declarations.

6273CC.4 UNINSURED/UNDERINSURED MOTORISTS COVERAGE— NORTH CAROLINA (Coverage U1)

. . . .

I. Part C. is amended as follows:

A. The following is added to the first paragraph of the Insuring Agreement:

We will pay under this coverage only after the limits of liability under any applicable liability bonds or policies have been exhausted by payments of judgments or settlements, unless we:

1. Have been given written notice in advance of a settlement between an *insured* and the owner or operator of the *uninsured motor vehicle*, as defined in Section 5 of the definition of *uninsured motor vehicle*; and

2. Consent to advance payment to the *insured* in the amount equal to the tentative settlement.

State Farm refused to arbitrate. On 16 March 1992, plaintiff filed a motion to compel arbitration and filed a motion for a continuance of the trial due to defendant's disclosure of "an expert witness during the week prior to trial which surprised plaintiff and did not allow her sufficient time to take a discovery deposition of said witness." A hearing for both motions was scheduled for 30 March 1992. On 30 March 1992, the trial court granted plaintiff's motion for a continuance. Though the record is unclear, Mr. Bailey's affidavit states that on that same date plaintiff withdrew the motion to compel arbitration "without hearing" and subsequently "file[d] suit against the carrier, the prayer of which was only that arbitration be compelled, and later took a voluntary dismissal of that suit." The affidavit of plaintiff's counsel states that "[n]o decision was made [sic] in the motion to compel arbitration, and it was re-calendared for July 27, 1992. Plaintiff filed a separate action to compel arbitration after defendant refused to arbitrate. However, when plaintiff learned that the AAA [American Arbitration Association] would proceed with arbitration without an order to compel, plaintiff dismissed this case. . ." Mr. Bailey's affidavit states that plaintiff filed a written demand for arbitration with the AAA and that defendant objected to the scheduling of arbitration.

On 15 June 1992, State Farm, through William R. Cherry, Jr., as counsel, filed notice of its "appearance pursuant to the terms and conditions of G.S. 20-279.21(b)(4) as an unnamed party, though not named in the caption of the pleadings, and electing to defend in the name of the named defendant without appearing as a party herein." Plaintiff claims that on that same day "State Farm, as the UIM carrier, also served on plaintiff a motion to stay arbitration with no reference to affidavits in support of its motion." Plaintiff claims that thirty-five days later State Farm mailed affidavits to plaintiff in support of its motion to stay arbitration and that the affidavits were not received until nine days following their mailing, which was two days after the hearing was held. Plaintiff contends that these affidavits contain allegations which are erroneous and which were prejudicial to her motion to compel arbitration.

On 27 July 1992, the trial court entered an order granting State Farm's motion to stay arbitration and denying plaintiff's motion to compel arbitration. Plaintiff filed a motion to reconsider the 27 July 1992 order, alleging that she had an inadequate opportunity under G.S. 1A-1, Rule 6(d) and (e) to respond to State Farm's affidavits. On 26 August 1992, the trial court denied plaintiff's motion for reconsideration. Plaintiff appeals.

Brumbaugh & Mu, by Richard A. Mu, for plaintiff-appellant.

Marshall, Williams & Gorham, by William Robert Cherry, Jr., for defendant-appellee State Farm Mutual Automobile Insurance Company.

Hamilton, Bailey, Way & Brothers, by Glenn S. Bailey, for defendant-appellee Theresa J. Bonta.

EAGLES, Judge.

Plaintiff appeals from the trial court's 27 July 1992 and 26 August 1992 orders. After careful review, we reverse and remand for entry of an order compelling arbitration.

I.

In her first two assignments of error, plaintiff contends that the trial court committed reversible error in denying plaintiff's motion to compel arbitration and in granting defendant's motion to stay arbitration "on the grounds that plaintiff's insurance con-

tract with defendant State Farm Mutual Insurance Company grants plaintiff a contractual right to arbitrate." We agree.

This is an interlocutory appeal arising from the denial of plaintiff's motion to stay the proceedings and compel arbitration. Initially, we note that a trial court's " 'order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.' " *Bennish v. N.C. Dance Theater*, 108 N.C. App. 42, 44, 422 S.E.2d 335, 336-37 (1992) (*quoting Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991)); *Sims v. Ritter Constr., Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983); G.S. 1-277(a); G.S. 7A-27(d)(1).

Our Supreme Court has held that:

> Waiver of a contractual right to arbitration is a question of fact. *E.g., Davis v. Blue Cross of Northern California*, 25 Cal. 3d 418, 158 Cal. Rptr. 828, 600 P.2d 1060 (1979); *Doers v. Golden Gate Bridge Etc. Dist.*, 23 Cal. 3d 180, 151 Cal. Rptr. 837, 588 P. 2d 1261 (1979). Because of the strong public policy in North Carolina favoring arbitration, *see* N.C. Gen. Stat. § 1-567.3 (1983); *Thomas v. Howard*, 51 N.C. App. 350, 355-56, 276 S.E.2d 743, 747 (1981), courts must closely scrutinize any allegation of waiver of such a favored right. *See Keating v. Superior Court*, 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192 (1982), *dismissed in part and rev'd in part on other issues sub nom. Southland Corp. v. Keating*, 465 U.S. 1, 79 L.Ed.2d 1 (1984); *Doers v. Golden Gate Bridge Etc. Dist.*, 23 Cal. 3d 180, 151 Cal. Rptr. 837, 588 P.2d 1261. *See also Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L.Ed.2d 765, 785 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."). Because of the reluctance to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration. *See, e.g., Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 331 (4th Cir. 1971) (" 'waiver . . . may not rest mechanically on some act such as the filing of a complaint or answer but must find a basis in prejudice to the objecting party' ") (quoting

Batson Y. & F. M. Gr., Inc. v. Saurer-Allma GmbH-Allgauer M., 311 F. Supp. 68, 73 (D.S.C. 1970)).

Cyclone Roofing Co. v. LaFave Co., 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) (footnote omitted). *See also Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986); *Bennish*, 108 N.C. App. 42, 422 S.E.2d 335. Here, our close scrutiny leads us to conclude that given the terms of plaintiff's policy with State Farm and given State Farm's actions, plaintiff's demand for arbitration of her UIM claim was timely made.

State Farm contends that because plaintiff filed suit against defendant Bonta (another State Farm insured) several months prior to her (plaintiff's) written demand for arbitration, she thus nullified the effect of her demand to arbitrate under the terms of her own UIM policy. We disagree.

We note that plaintiff has two potential claims under two separate State Farm policies: the first is a claim against *defendant Bonta's* personal automobile liability policy with State Farm, while the second is a claim arising under the UIM coverage of her (plaintiff's) own personal automobile policy with State Farm. We further note that despite the existence of these separate claims brought forward by its own named insured, State Farm initially refused to assign two different adjusters and subsequently refused to assign two different attorneys to handle the respective claims against each policy. The North Carolina State Bar has issued an ethics opinion ruling that "an attorney may not represent the insured, her liability insurer, and the same insurer relative to underinsured motorist coverage carried by the plaintiff." *See* N.C. R.P.C. 154 (proposed 21 October 1992; approved 15 January 1993). State Farm contends that "[i]t should be noted that by letter dated July 27, 1990, the defendant-appellee State Farm had clearly stated to counsel for the plaintiff-appellant that the company did not subrogate against their own insureds when payment was made under the underinsured motorist coverage for another State Farm insured." Nevertheless, we do not find this argument persuasive as to the issue of plaintiff's right to arbitration under the express terms of her UIM policy.

Plaintiff argues that by the express terms of her UIM policy she "did not have a right to seek payment from her State Farm UIM coverage (and thus arbitrate) until State Farm, as the liability carrier, offered to pay the limits of the Bonta liability policy. State

Farm refused to tender the liability limits until 18 months after suit was filed, in spite of demands by plaintiff which provided an objective basis for State Farm to conclude that the value of plaintiff's claim exceeded those liability limits." We agree.

A provision under Coverage U1 of plaintiff's UIM policy, *supra*, specifically stated that "We [State Farm] will pay under this coverage only after the limits of liability under any applicable liability bonds or policies have been exhausted by payments of judgments or settlements. . . ." Prior to the time plaintiff filed suit against defendant, State Farm had refused plaintiff's demands for settlement in the amount of $25,000.00 under defendant's liability policy. Plaintiff filed suit against only defendant Bonta on 29 August 1990. Thereafter, plaintiff made repeated demands for payment under defendant's liability policy, all of which were declined by State Farm. Because State Farm assigned one attorney to handle both claims, until the 17 February 1992 offer (of $75,000.00) plaintiff could not reasonably assume that the limits of defendant's policy ($25,000.00) had been exhausted. Accordingly, we conclude that the arbitration rights under plaintiff's UIM policy were not triggered prior to State Farm's 17 February 1992 offer. We further note that Part C of plaintiff's UIM policy specifically states that if State Farm and "an insured do not agree: 1. Whether that person is legally entitled to recover damages *under this Part*; or 2. As to the amount of damages" then the insured is entitled to make a written demand for arbitration. Nothing in plaintiff's UIM policy states that plaintiff's filing of a complaint against another State Farm insured for liability arising from the same insured event results in a waiver of plaintiff's right to arbitrate under her own UIM policy. By the terms of plaintiff's UIM policy, plaintiff's action against defendant was not inconsistent with, and did not prejudice, her right to seek arbitration under the terms of her (plaintiff's) own policy. In sum, we conclude that plaintiff's demand for arbitration was not untimely or unreasonably delayed by plaintiff. Because of our disposition of this issue, we need not address the remaining issues raised by plaintiff.

We hold that the trial court erred and that the cause must be submitted to arbitration pursuant to plaintiff's timely demand under the terms of the insurance contract. Accordingly, the trial court's 27 July 1992 and 26 August 1992 orders are reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges ORR and GREENE concur.

CITY OF NEW BERN, A NORTH CAROLINA MUNICIPAL CORPORATION, PLAINTIFF v. THE NEW BERN-CRAVEN COUNTY BOARD OF EDUCATION, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF NORTH CAROLINA; THE TRUSTEES OF CRAVEN COMMUNITY COLLEGE, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF NORTH CAROLINA; CRAVEN REGIONAL MEDICAL AUTHORITY, A PUBLIC BODY AND A BODY CORPORATE AND POLITIC WHICH HAS ITS PRINCIPAL OFFICE AND PLACE OF BUSINESS IN THE CITY OF NEW BERN, CRAVEN COUNTY, NORTH CAROLINA; THE COUNTY OF CRAVEN, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF NORTH CAROLINA; AND LACY H. THORNBURG, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, DEFENDANTS

No. 923SC730

(Filed 21 December 1993)

1. Constitutional Law § 24 (NCI4th)— enforcement of building codes—jurisdiction transferred—local acts—unconstitutional

The trial court did not err in declaring unconstitutional as local acts three statutes which transferred exclusive jurisdiction of the enforcement of various building codes from the City of New Bern, North Carolina, to Craven County. The acts are local whether the "reasonable classification" test of *McIntyre v. Clarkson*, 254 N.C. 510, or the "general public interest" test of *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, is applied because there is no rational basis for separating governmental units and imposing a transfer of jurisdiction over the enforcement of building codes from the city to the county and it is clear that the contributions made to the public by the Craven County Board of Education, Craven Community College, and Craven Regional Medical Authority are essentially concentrated in the New Bern area. Finally, the legislation serves to strip the power of city inspectors to enforce the State Building Code, a purpose directly related to health and sanitation.

Am Jur 2d, Constitutional Law §§ 319-321.

2. **Constitutional Law § 24 (NCI4th)— jurisdiction over building code enforcement—local act—unconstitutional—prospective application of decision**

The trial court did not err by applying its ruling of unconstitutionality prospectively only where the trial court had held three statutes transferring jurisdiction for enforcement of building codes from the city to the county to be unconstitutional local acts. Defendants reasonably relied on the invalid statutes and acted in good faith in carrying out the mandate of the General Assembly.

Am Jur 2d, Constitutional Law §§ 319-321.

Appeal by defendants except for the Attorney General, and cross-appeal by plaintiff from order entered 24 February 1992, by Judge G. K. Butterfield in Craven County Superior Court. Heard in the Court of Appeals 3 June 1993.

Ward, Ward, Willey & Ward, by A. D. Ward, for plaintiff cross-appellant-appellee.

Henderson, Baxter & Alford, P.A., by David S. Henderson and Benjamin G. Alford, for defendant appellant-appellee, New Bern-Craven County Board of Education.

Ward and Smith, P.A., by Kenneth R. Wooten and Anne D. Edwards, for defendant appellant-appellee, Craven Community College.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Fred M. Carmichael and Rudolph A. Ashton, III, for defendant appellant-appellee, Craven Regional Medical Authority.

Sumrell, Sugg, Carmichael & Ashton, P.A., by James R. Sugg and Jimmie B. Hicks, Jr., for defendant appellant-appellee, Craven County.

COZORT, Judge.

[1] The question presented by this appeal is whether the trial court erred in declaring unconstitutional three statutes which transfer exclusive jurisdiction of the enforcement of various building codes from the City of New Bern, North Carolina, to Craven County. We find the statutes to be unconstitutional pursuant to N.C. Const. art. II, § 24. We thus affirm. The facts and procedural history follow.

On 26 June 1986, the North Carolina General Assembly enacted Chapter 805 of the 1985 Session Laws entitled "AN ACT TO PROVIDE FOR ENFORCEMENT OF BUILDING AND OTHER CODES BY THE COUNTY OF CRAVEN AS TO PROPERTY OF THE NEW BERN-CRAVEN COUNTY BOARD OF EDUCATION RATHER THAN BY CITIES IN THAT COUNTY." The act vested Craven County with exclusive jurisdiction over the inspection of buildings of the New Bern-Craven County Board of Education. Previously, inspections of school facilities in New Bern were handled by city inspectors; school buildings outside the city limits were inspected by county officials. A similar provision, Chapter 341 of the 1987 Session Laws, was passed in 1987 regarding Craven Community College, which is located within the city limits of New Bern. A third provision, Chapter 934 of the 1987 Session Laws, was passed in 1988 with respect to the local hospital, Craven Regional Medical Authority, which is also located inside the city limits of New Bern. The provisions read:

Chapter 805

The General Assembly of North Carolina enacts:

Section 1. Craven County shall have the exclusive jurisdiction as against any city as defined by G.S. 160A-1 for the administration and enforcement of all laws, statutes, code requirements and all other applicable regulations promulgated by the State or any city respecting building, construction, fire and safety codes as the same relate to or are legally applicable to the New Bern-Craven County Board of Education.

Sec. 2. This act is effective upon ratification.

In the General Assembly read three times and ratified, this the 26th day of June, 1986.

Chapter 341

The General Assembly of North Carolina enacts:

Section 1. Craven County shall have exclusive jurisdiction as against any city as defined by G.S. 160A-1 for the administration and enforcement of all laws, statutes, code requirements, and all other applicable regulations adopted by the State or any city respecting building, construction, fire and safety codes

as the same relate to or are legally applicable to the Board of Trustees of Craven Community College.

Sec. 2. This act is effective upon ratification.

In the General Assembly read three times and ratified this 12th day of June, 1987.

Chapter 934

"The General Assembly of North Carolina enacts:

"**Section 1.** Craven County shall have the exclusive jurisdiction as against any city as defined by G.S. 160A-1 for the administration and enforcement of all laws, statutes, code requirements and all other applicable regulations promulgated by the State or any city respecting building, construction, fire and safety codes as the same relate to or are legally applicable to any property owned or leased by the Craven Regional Medical Center.

Sec. 2. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 23rd day of June, 1988.

The City of New Bern filed a declaratory judgment action on 8 November 1988 to have the three statutes governing the inspections of buildings declared unconstitutional. The trial court entered an order on 16 January 1989 dismissing the action with prejudice, holding that no justiciable controversy existed which would permit the court to take jurisdiction over the matter. Plaintiff appealed. The North Carolina Supreme Court allowed the plaintiff's petition for discretionary review prior to determination by the Court of Appeals. On 3 April 1991, the Supreme Court reversed the dismissal of the lawsuit and remanded it to the Superior Court of Craven County for further proceedings. *City of New Bern v. New Bern-Craven County Bd. of Educ.*, 328 N.C. 557, 402 S.E.2d 623 (1991). The case was heard without a jury on 4 November 1991. In a judgment filed 24 February 1992, the trial court held that the three statutes in controversy were unconstitutional. The defendants, except for the Attorney General of North Carolina, appealed.

Our scope of reviewing the constitutionality of acts passed by the General Assembly is:

> It is well settled in this State that the Courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.

Glenn v. Board of Educ., 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936).

> The presumption is that an act passed by the Legislature is constitutional, and it must be so held by the courts unless it appears to be in conflict with some constitutional provision. The legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts. As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts—it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts.

State v. Warren, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960) (citations omitted). The trial court determined that the acts were violative of § 24 of Article II of the North Carolina Constitution, which reads in pertinent part:

> *Prohibited subjects.* The General Assembly shall not enact any local, private, or special act or resolution:
>
> (a) Relating to health, sanitation, and the abatement of nuisances[.]

Because we conclude the three acts in question are "local," and related to "health" and "sanitation," we agree with the trial court's determination that the acts are prohibited subjects of legislation and therefore unconstitutional.

A statute is either "general" or "local," there being no middle ground. *Smith v. County of Mecklenburg*, 280 N.C. 497, 506, 187 S.E.2d 67, 73 (1972). In *McIntyre v. Clarkson*, 254 N.C. 510, 518, 119 S.E.2d 888, 893-94 (1961), our Supreme Court held:

> Within the meaning of constitutional prohibitions against local laws, a law is local where, by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, where it embraces

> less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed, and where the classification does not rest on circumstances distinguishing the places included from those excluded.

Until recently, the "reasonable classification" test outlined in *McIntyre* was applied consistently to issues surrounding constitutional prohibitions against the enactment of local, special, or private legislation. The *McIntyre* test required that the classification be based on a "reasonable and tangible distinction and operate the same on all parts of the state under the same conditions and circumstances." *Id.* at 519, 119 S.E.2d at 894. *See also*, *Adams v. Dep't of N.E.R.*, 295 N.C. 683, 249 S.E.2d 402 (1978).

In *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 360 S.E.2d 756 (1987), however, our Supreme Court articulated a somewhat different test to determine whether legislation is local or general. The act in *Emerald Isle* provided that the Department of Natural Resources would acquire certain property adjacent to a vehicular area with beach access in order to build a parking area, walkways and other public facilities which had beach access. The town was to be responsible for maintaining the area following its construction. The statute established a single beach access area in one locality to be maintained by a local unit of government. In finding the act was not "local," the Court stated:

> [W]e find that, instead of applying a reasonable classification analysis, our attention should focus on the extent to which the act in question affects the general public interests and concerns. In doing so, we are aware that "a statute will not be deemed private merely because it extends to particular localities or classes of persons." *Yarborough v. Park Commission*, 196 N.C. 284, 291, 145 S.E.2d 563, 568 (1928).

Id. at 651, 360 S.E.2d at 763.

In this case, we reach the same result whether the "reasonable classification" test of *McIntyre* or the "general public interest" test of *Emerald Isle* is applied. We find the acts are local. Here, the General Assembly has singled out certain units of local government for special treatment. We discern no rational basis for separating governmental units and imposing a transfer of jurisdiction over the enforcement of building codes from the city to the

county. Consequently, under the "reasonable classification" test, the acts are local. The acts are also local under a "general public interest" analysis. According to the newer test, we must determine whether the acts seek to promote the general public's interest and concerns. Although defendants argue strenuously that their respective entities serve a broad range of public interests and promote the general public welfare, we find the services provided by each defendant to be primarily local. In some ways, every local governmental unit, by its very nature, serves some public interest. In the present case, however, it is clear the contributions made to the public by the Craven County Board of Education, Craven Community College, and Craven Regional Medical Authority are essentially concentrated in the New Bern area. It follows, then, that the acts are considered local under the "general public interest" test as well.

To be declared unconstitutional, not only must the legislative enactment be "local," but it must also relate to the matters prohibited by N.C. Const. art. II, § 24. *Floyd v. Lumberton Bd. of Educ.*, 71 N.C. App. 670, 324 S.E.2d 18 (1984). Our analysis therefore necessarily turns to the question of whether the acts relate to "health, sanitation, [or] the abatement of nuisances." Defendants argue that the acts being reviewed must be more than tangentially related to health and sanitation; the legislation must deal directly with health and sanitation. The trial court made in part the following findings:

> 16. That the several codes addressed in each of said acts include the North Carolina State Building Code, which consists of Volume I, "General Construction"; 1A, "Administration and Enforcement," 1B, "N.C. Uniform Residential Building Code," and 1C, "Accessibility Code"; Volume II, "Plumbing"; Volume III, "Mechanical"; Volume IV, "National Electric Code"; Volume V, "Fire Prevention"; and Volume VI, "Gas"; much of which, by their very terms, relate to health and sanitation.
>
> 17. That the duties and responsibilities of municipal inspection departments and individual inspectors therein are set forth in G.S. 160A-412, "Duties and Responsibilities," which provides, in part:
>
> > "The duties and responsibilities of an inspection department and of the inspectors therein shall be to enforce within their territory or [*sic*] jurisdiction State and local laws relating to

> "(1) The construction of buildings and other structures;
>
> "(2) The installation of such facilities as plumbing systems, electrical systems, heating systems, refrigeration systems, and air conditioning systems;
>
> "(3) The maintenance of buildings and other structures in a safe, sanitary, and healthful condition;
>
> "(4) Other matters that may be specified by the city council."

One of the stated purposes of the North Carolina Building Code, found in N.C. Gen. Stat. § 143-138, is:

> All regulations contained in the North Carolina State Building Code shall have a reasonable and substantial connection with the public health, safety, morals, or general welfare, and their provisions shall be construed liberally to those ends.

N.C. Gen. Stat. § 143-138(c) (1990). The acts subject to this appeal dictate the selection of officers who shall administer health laws. The legislation serves to strip the power of city inspectors to enforce the State Building Code, a purpose directly related to health and sanitation. We find the acts directly affect health and safety by transferring enforcement power from one governmental unit to another. Because the three acts in question are local and address health and safety, we find the trial court did not err in declaring them unconstitutional.

[2] The primary issue raised by plaintiff's cross-appeal concerns the trial court's decision to apply its ruling of unconstitutionality in a prospective fashion only. Plaintiff's complaint filed on 8 November 1988 sought a determination that the acts in question "were enacted by the North Carolina General Assembly in violation of the Constitution of North Carolina, and are, therefore, null and void." Plaintiff argues the prospective application of the judgment is "unconscionable and inconsistent with the law." We disagree.

"Both the United States Supreme Court and North Carolina Supreme Court have 'recognized that in some cases it would be inequitable to apply newly announced rules retroactively if prior to the enunciation of the rules parties had reasonably relied on certain principles in ordering their affairs. In such a case the rule is not applied retroactively.'" *Fulton Corp. v. Justus*, 110 N.C.

App. 493, 504-05, 430 S.E.2d 494, 501 (1993) (quoting *Swanson v. State of N.C.*, 329 N.C. 576, 581, 407 S.E.2d 791, 793 (1991)). "[A] test of reasonableness and good faith is to be applied in determining the effect which a judicial decision that a statute is unconstitutional will have on the rights and obligations of parties who have taken action pursuant to the invalid statute." *Insurance Co. v. Ingram*, 301 N.C. 138, 149, 271 S.E.2d 46, 52 (1980). Here, the defendants reasonably relied on the invalid statute and acted in good faith in carrying out the mandate of the General Assembly. We find the trial court did not err by directing the effect of the statute's unconstitutionality to have only a prospective application.

The trial court's judgment of 24 February 1992 was stayed by this Court by the issuance of a temporary stay on 9 March 1992 and by the issuance of a writ of supersedeas on 23 March 1992. This Court's mandate shall issue 20 days after the filing date specified at the beginning of this opinion. Effective with the issuance of this Court's mandate, the writ of supersedeas is dissolved and the trial court's judgment declaring the statutes null and void shall take effect.

We have reviewed the plaintiff's remaining assignments of error presented on cross-appeal and find them to be without merit. In conclusion, we hold that 1985 N.C. Sess. Laws ch. 805 (1986 Session), 1987 N.C. Sess. Laws ch. 341 (1987 Session), and 1987 N.C. Sess. Laws ch. 934 (1988 Session) violate N.C. Const. art. II, § 24. The judgment of the trial court is

Affirmed.

Judges WELLS and JOHN concur.

W. A. McFARLAND AND BLANCHE J. McFARLAND, PLAINTIFFS v. BETSY Y. JUSTUS, SECRETARY OF REVENUE, DEFENDANT

No. 9214SC635

(Filed 21 December 1993)

1. **Judgments § 351 (NCI4th)— finding of fact—incorrect terminology—consideration on appeal**

An error in terminology did not prevent the Court of Appeals from accurately deciding the questions before it where the trial court incorrectly found that federal adjustments to plaintiff's tax return constituted corrections to "taxable income" rather than "net income." This was technical, nonprejudicial error.

Am Jur 2d, Judgments § 201.

2. **Taxation § 28.5 (NCI3d)— income tax—adjustment to federal return—failure to adjust state return—statute of limitations**

The trial court correctly concluded that plaintiffs' failure to notify the Secretary of Revenue of changes made by the IRS extended the statute of limitations for assessment where defendant examined plaintiffs' 1984 income tax return in 1989 and assessed additional tax. N.C.G.S. § 105-159.

Am Jur 2d, Taxpayers' Actions § 37.

3. **Taxation § 28.5 (NCI3d)— income tax—finding of income from condemnation sale—supported by evidence**

The trial court did not err by finding that plaintiffs had not made a sale of real property in 1982 and that the proceeds from the condemnation of a portion of a farm constituted income in 1984 where plaintiff contended that the Department erroneously failed to exclude the gain on a 1982 sale erroneously reported on their 1984 return; there was evidence that revenue agents had searched courthouse records but had not located any sale of real property by plaintiffs in 1982; plaintiffs had not reported any income from a land sale on their 1982 North Carolina return; and plaintiffs abandoned their earlier position and testified that the gain stemmed from a federal condemnation begun in 1978 or 1979 in which an additional amount was paid in 1982, but their evidence did not show that they had ever paid taxes on the gain.

Am Jur 2d, State and Local Taxation §§ 483 et seq., 603 et seq.

Appeal by plaintiffs from judgment entered 3 January 1992 by Judge J. Milton Read, Jr. in Durham County Superior Court. Heard in the Court of Appeals 13 May 1993.

This is an action by plaintiffs, W. A. McFarland and Blanche J. McFarland, pursuant to North Carolina General Statutes § 105-267 (1989) for refund of individual income taxes assessed for their 1984 tax year by the Secretary of Revenue and paid under protest.

William V. McPherson, Jr. for plaintiffs-appellants.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for defendant-appellee.

JOHNSON, Judge.

In 1984, plaintiffs W. A. McFarland and Blanche J. McFarland sold Fairntosh Farm for $3,902,154.00. They reported sale proceeds upon their 1984 federal income tax return, but did not disclose the sale on their North Carolina return for that year. On 23 July 1987 the federal government audited plaintiffs' 1984 return and made two adjustments: (1) It reduced their net operating loss deduction from $1,727,665.90 to $1,361,934.83 ($365,731.07), and (2) assessed $165,296.00 in federal alternate minimum tax.

Afterwards the Internal Revenue Service (IRS) forwarded defendant, Secretary of Revenue Betsy Justus, a copy of its corrections, denominated "Income Tax Examination Changes." Plaintiffs did not report the federal changes to defendant.

On 28 November 1989, defendant examined plaintiffs' 1984 income tax return. Defendant's audit report for tax year 1984 determined that gain from the sale of Fairntosh Farm was includible in plaintiffs' 1984 net income, and proposed an assessment of $148,549.54 in tax, $62,390.81 in interest, and $37,137.39 in negligence penalties. Defendant's audit report for tax year 1986 adjusted plaintiffs' return by removing the gain from the 1984 sale of Fairntosh Farm.

Plaintiffs paid the assessment on 1 December 1989 and filed a claim for refund on 21 December 1989 on the basis that (1) the redetermination of their North Carolina income tax liability was

barred by the three year statute of limitations contained in North Carolina General Statutes § 105-241.1 (1989), and (2) the redetermined taxable income included the gain from the 1982 disposition which was erroneously reported on their 1984 return. By letter dated 23 April 1990, the Secretary of Revenue denied the claim for refund on the grounds: (1) that by reason of the IRS examination changes, the three year statute of limitations was extended under North Carolina General Statutes § 105-159 (1989), and (2) the auditor did not find any information to support their claim that the 1982 gain was erroneously reported on their 1984 return.

On 1 June 1990, plaintiffs filed this civil action for the refund of individual income taxes assessed for their 1984 tax year by the Secretary of Revenue. On 4 November 1991, Judge J. Milton Read heard the case without a jury. On 3 January 1992, Judge Read entered a judgment in which the trial court held that the IRS adjustments to plaintiffs' net operating loss deduction and the imposition of federal alternative minimum tax as set forth in the IRS examination reports made North Carolina General Statutes § 105-159 applicable so as to extend the statute of limitations for assessment, and that plaintiffs had made no sales of real estate or farmland in 1982, so that the gain shown on their 1984 return was taxable income to them in 1984. Plaintiffs filed timely notice of appeal.

[1] We note from the outset that the trial court incorrectly found that the federal adjustments constituted corrections to "taxable income." Prior to 1989, a correction to "net income" triggered North Carolina General Statutes § 105-159. With the adoption of the Internal Revenue Code in 1989 as the predicate for North Carolina taxation, net income was changed to "taxable income." 1989 N.C. Sess. Laws, ch. 728, s. 1.31. As plaintiffs' tax return was filed in 1984, the trial court should have used the term "net income" instead of "taxable income" in reference to the adjustments made by the IRS.

When findings are actually antagonistic, inconsistent or contradictory such that the reviewing court cannot safely and accurately decide the question, the judgment cannot be affirmed. *Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E.2d 636 (1984). We find the trial court's reference to "taxable" rather than "net" income was technical, nonprejudicial error. The trial court's error does not prevent this Court from accurately deciding the questions before us.

[2] We now turn to plaintiffs' assignments of error. By plaintiffs' first assignment of error, plaintiffs argue that the trial court erred in entering a judgment in favor of the Secretary of Revenue who dismissed the McFarlands' action on the basis that the assessment of plaintiffs' taxes were not barred by the statute of limitations. We disagree.

Specifically, plaintiffs contend the words "net income" should be "construed in accordance with the definition in North Carolina General Statutes § 105-140, that is, North Carolina gross income less the deductions set forth in the individual income tax division, so that North Carolina General Statutes § 105-159 extended the statute of limitations only if the adjustments made by the IRS would result in a change in the McFarlands' North Carolina net income." Defendant, however, contends that "net income" meant income computed for purposes of any federal tax assessed on the U.S. 1040 Individual Income Tax Return, regardless of whether it would result in a change in plaintiffs' North Carolina net income.

North Carolina General Statutes § 105-159[1] states in pertinent part:

> If the amount of the net income for any year of any taxpayer under this Division, as reported or as reportable to the United States Treasury Department, is changed, corrected, or otherwise determined by the Commissioner of Internal Revenue or other officer of the United States of competent authority, such taxpayer, within two years after receipt of internal revenue agent's report or supplemental report reflecting the corrected or determined net income shall make return under oath or affirmation to the Secretary of Revenue of such corrected, changed or determined net income. In making any assessment or refund under this section, the Secretary shall consider all facts or evidence brought to his [/her] attention, whether or not the same were considered or taken into account in the federal assessment or correction. *If the taxpayer fails to notify the Secretary of Revenue of assessment of additional tax by the Commissioner of Internal Revenue, the statute of limitations shall not apply.* The Secretary of Revenue shall there-

1. North Carolina General Statutes § 105-159 as in effect prior to 1989. North Carolina General Statutes § 105-159 was amended by the Tax Fairness Act of 1989 [1989 N.C. Sess. Laws 1989, ch. 728, s. 1.31]. By its terms the Tax Fairness Act was not applicable to tax years beginning before 1 January 1989.

> upon proceed to determine, from such evidence as he [/she] may have brought to his [/her] attention or shall otherwise acquire, the correct net income of such taxpayer for the fiscal or calendar year, and if there shall be any additional tax due upon from such taxpayer *the same shall be assessed and collected*; and if there shall have been an overpayment of the tax the said Secretary shall, within 30 days after the final determination of the net income of such taxpayer, refund the amount of such excess: Provided, that any taxpayer who fails to comply with this section as to making report of such change as made by the federal government within the time specified shall be subject to all penalties as provided in G. S. 105-236, in case of additional tax due, and shall forfeit his [/her] rights to any refund due by reason of such change. . . . (Emphasis added.)

This statute imposes a positive duty upon taxpayers beyond the requirements as to their original return. *Knitting Mills v. Gill, Comr. of Revenue*, 228 N.C. 764, 47 S.E.2d 240 (1948).

In *State v. Patton*, 57 N.C. App. 702, 292 S.E.2d 172 (1982) and *Knitting Mills*, 228 N.C. 764, 47 S.E.2d 24, both Courts addressed the issue of whether a defendant's failure to report a federal tax audit brought him within the purview of North Carolina General Statutes § 105-159. In each case, the Court based its determination of the taxpayers' liability pursuant to North Carolina General Statutes § 105-159 on whether the taxpayers reported the changes or corrections made in their federal net income to the Secretary of Revenue. Neither Court predicated the application of North Carolina General Statutes § 105-159 upon whether the taxpayers' North Carolina income tax return was altered by the adjustment in their federal income tax return.

From the case law and the plain intent of the statute, the legislature intended a taxpayer to report any corrections or changes in their federal net income made by the Commissioner of Internal Revenue or other officer of the United States to the Secretary of Revenue. The change to the taxpayers' federal net income by a federal agent brings the taxpayer within the purview of North Carolina General Statutes § 105-159. The statute does not impose an additional requirement that the taxpayer's North Carolina net income also be affected before the statute governs. Had the legislature intended this additional requirement, it would have so

worded the statute. The Secretary's authority to make assessments or refunds is predicated on changes made in the taxpayer's liability to the Federal authority. *Knitting Mills*, 228 N.C. 764, 47 S.E.2d 240.

Applying the aforementioned law to the facts, the evidence revealed that a change was made to plaintiffs' federal income tax return and that plaintiffs failed to report this change to defendant. The IRS notified defendant of the change in plaintiffs' federal income tax return.

On 28 November 1989, defendant examined plaintiffs' 1984 income tax return, and assessed additional tax based upon plaintiffs' realized gain from the sale of Fairntosh Farm. Although defendant's assessment in 1989 for additional taxes was initiated more than three years after the date set for filing plaintiffs' 1984 return, the assessment is not barred by the three year statute of limitations found in North Carolina General Statutes § 105-241.1. Plaintiffs' failure to notify the Secretary of Revenue of the assessment of additional taxes by the Commissioner of Internal Revenue pursuant to North Carolina General Statutes § 105-159 extends the statute of limitations. Accordingly, we find the trial court correctly concluded that plaintiffs' failure to notify the Secretary of Revenue of changes made by the IRS extended the statute of limitations for assessment.

[3] By plaintiffs' second assignment of error, plaintiffs contend that the trial court's findings that plaintiffs had not made a sale of real property in 1982, and its determination that the proceeds from the condemnation of a portion of Fairntosh Farm constituted income to them in 1984, was not supported by the evidence, was contrary to the greater weight of evidence presented at trial, and constituted a misapplication of North Carolina income tax law, so that it was error to deny plaintiffs the refund of $12,221.24 in tax plus interest arising from the erroneous inclusion of the gain realized in determining their 1984 liability. We disagree.

If the trial court's findings of fact are supported by competent evidence then they must be left undisturbed on appeal. *Lemmerman v. A. T. Williams Oil Co.*, 318 N.C. 577, 350 S.E.2d 83, *reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986).

On Schedule B to plaintiffs' 1984 North Carolina return, plaintiffs reported a gain of $174,589.11 arising from the sale of real estate and showed the date of disposition as March 1982; this gain, carried forward on their return, produced a net gain from sale

of real estate, stocks, bonds, etc. of $189,009.11. Defendant, in her audit of plaintiffs' 1984 tax return, brought forward the $189,009.11 figure as an item and divided it, $94,504.55 to Mr. McFarland and $94,504.56 to Mrs. McFarland, so that it included the net income upon which the tax due was computed.

In their claim for refund, plaintiffs assigned the following as one of the bases:

> Further, the taxpayers contend that the Department erroneously failed to exclude the gain on a 1982 sale erroneously reported on the taxpayers' 1984 return from their corrected 1984 net taxable income in arriving at the amount of the assessment.

The Secretary denied plaintiffs' claim for the partial refund on the basis that "the auditor did not find any information during the examination to support your claim."

At trial, defendant's supervisory auditor Bill Garrett testified that revenue agents had searched courthouse records in Durham, Person, Granville and Orange counties and at the register of deeds office, but had not located any sale of real property by plaintiffs in 1982. Mr. Garrett also testified that plaintiffs had not reported any income from a land sale on their 1982 North Carolina return.

In addition, the evidence showed that plaintiffs abandoned their earlier position set forth in their formal refund claim and in their complaint that the gain was from a 1982 sale. Instead, plaintiff William McFarland testified that the $174,589.00 gain stemmed from a federal government condemnation of Fairntosh Farm commenced in late 1978 or early 1979. He testified that approximately $1,600,000.00 was deposited by the federal government with the court and an additional $600,000.00 was paid in 1982. Plaintiffs' evidence did not show that plaintiffs had ever paid North Carolina taxes on the $174,589.11 gain.

The trial court from the aforementioned testimony determined and the evidence supported a finding that there was no sale of the property in 1982. Additionally, plaintiffs failed to establish that such income was for a period other than that originally filed. Accordingly, plaintiffs' argument is overruled.

We affirm the decision of the trial court.

Judges GREENE and WYNN concur.

IN THE MATTER OF: AMELIA LUCILLE GUYNN

No. 9224DC1114

(Filed 21 December 1993)

1. Parent and Child § 109 (NCI4th)— termination of parental rights—mental illness—inability to care for child

The trial court's termination of respondent mother's parental rights on the ground that she is incapable of providing proper care and supervision of her child due to mental illness was supported by clear, cogent and convincing evidence where the evidence tended to show that both parents did not know how to prepare formula or care for the child after the child was born; the mother was hospitalized because of suicidal tendencies; shortly after the mother returned to the home, the child was removed from the home and custody was awarded to DSS because of concern for the child's safety; neither parent interacted with the child during visits with the child; the mother was diagnosed as having adjustment problems, depression, suicidal ideation, and borderline personality disorder; borderline personality disorder is an emotional disorder which has significantly and detrimentally affected her ability to care for her child; this disorder is evidenced by her unstable and intense interpersonal relationships, problems with shoplifting, binge eating, use of alcohol, inappropriate sexual relationships, difficulty in appropriate use of money, drastic mood shifts, inappropriate intense anger, lack of control of anger, and recurrence of suicidal threats and self-mutilating behavior; this illness will continue throughout the child's minority and will prohibit the mother from ever providing a stable home for her child; and the mother will not be able to care for the child even if she is given appropriate help.

Am Jur 2d, Parent and Child §§ 7, 28 et seq.

2. Parent and Child § 109 (NCI4th)— termination of parental rights—mental illness or retardation—provision of services not condition precedent

The DSS is not required to establish that it made diligent efforts to remedy the parents' mental deficiencies and to reunite the family in order to commence a termination of parental

rights proceeding based upon mental illness or retardation. N.C.G.S. § 7A-289.32(7).

Am Jur 2d, Parent and Child §§ 7, 28 et seq.

3. Discovery and Depositions § 55 (NCI4th)— refusal to compel discovery—absence of prejudice

Respondent father was not prejudiced by the trial court's failure in a termination of parental rights proceeding to compel the guardian ad litem to provide a list of services offered to him where respondent father obtained that information from DSS.

Am Jur 2d, Depositions and Discovery § 361 et seq.

Appeal by respondents from judgment entered 4 May 1992 by Judge Alexander Lyerly in Watauga County District Court. Heard in the Court of Appeals 5 October 1993.

On 23 April 1990, the Watauga County Department of Social Services (DSS) filed a petition alleging the dependency of Amelia Lucille Guynn (the minor child). DSS amended the petition on 27 April 1990, alleging that the minor child was a neglected juvenile. After a hearing, on 26 September 1990, the trial court determined that the child was a neglected child. Thereafter on 23 May 1991, DSS filed a petition to terminate the parental rights of Gerald Guynn (the father) and his wife, Tammy Guynn (the mother). The father filed a counterclaim demanding custody of the minor child and the provision of additional services by DSS. Following a special session of juvenile court, the trial court entered an order terminating the parental rights of both respondents, pursuant to N.C. Gen. Stat. § 7A-289.32(7) (Supp. 1992). From this order, respondents appeal.

Paletta and Hedrick, by Jeffery M. Hedrick, for respondent-appellant, Gerald Guynn.

David Allen Gouch, Jr. for respondent-appellant, Tammy Guynn.

Eggers, Eggers & Eggers, by Rebecca Eggers-Gryder, for petitioner-appellee Watauga County Department of Social Services.

Diane S. Griffin for Guardian Ad Litem.

McCRODDEN, Judge.

In this appeal, both parents urge reversal of the judgment on several bases. We shall consider the mother's contention (I) that the trial court erred in finding that there was clear, cogent, and convincing evidence that she was incapable of providing proper care and supervision of the child due to her mental illness. Additionally, we shall review the contention of both respondents (II) that the court erred in failing to interpret section 7A-289.32(7) to require, as a condition precedent to termination, that the agency establish diligent efforts to remedy the parents' mental deficiencies and reunite the family before DSS may terminate their parental rights. Finally, our opinion will address the father's argument (III) that the court erred in refusing to compel discovery from the guardian *ad litem*.

I.

[1] DSS's action to terminate respondents' parental rights requires proof that the parents, because of mental retardation or mental illness, are incapable of providing for the proper care and supervision of the minor child and that there is a reasonable possibility that such incapacity will continue throughout the minority of the child. N.C.G.S. § 7A-289.32(7). N.C. Gen. Stat. § 7A-289.30(e) (1989) requires that the trial court base its findings of fact on "clear, cogent and convincing evidence," a requirement which establishes an intermediate standard of proof, greater than the preponderance of the evidence standard, but less than the requirement of proof beyond a reasonable doubt. *In re Montgomery*, 311 N.C. 101, 109-110, 316 S.E.2d 246, 252 (1984). Once a petitioner has established by clear, cogent, and convincing evidence one of the grounds for termination listed in N.C.G.S. § 7A-289.32, the trial court has the discretion to terminate parental rights. N.C. Gen. Stat. § 7A-289.31(a) (1989); *id.* at 110, 316 S.E.2d at 252. In a termination case in which the appealing party raises questions about the evidence, our task is to review the evidence to determine whether there is clear, cogent, and convincing evidence to support the findings of fact and to decide whether those findings support the conclusions of law. *Id.* at 111, 316 S.E.2d at 253.

Evidence presented at the termination hearing tended to show the following. The minor child was born 6 January 1990 in Boone, North Carolina. DSS became involved with the minor child on 10 January 1990, after a neglect complaint was filed alleging that

the child was not being fed properly. DSS visited the parents' home about 11:00 a.m. to find the child unattended, crying, and sucking her fingers. DSS found no formula in the house and learned that neither parent had fed the child since 3:00 a.m. When formula was provided to the respondents, neither parent could properly mix it.

The minor child was hospitalized on 22 January 1990 at Watauga County Hospital for failure to thrive because she had lost forty percent of her birth weight. She remained in the hospital until 7 February 1990. The child was diagnosed with a mild form of pyloric stenosis, a condition in which a stomach muscle did not properly function, causing her to vomit. During the child's hospitalization, the hospital staff instructed respondents on parenting skills and observed their interaction with the minor child. The hospital staff observed only marginal bonding between the parents and the minor child, noting that the parents did not provide adequate cuddling, comforting, or eye contact with the child. Instead, they observed the parents watching television.

After being discharged from the hospital, the child remained at the respondents' home until DSS was summoned there because respondents were fighting and the mother was suicidal. The mother was subsequently hospitalized on 27 March 1990, in the psychiatric ward of Cannon Memorial Hospital in Banner Elk, and the parents voluntarily placed the minor child in foster care. Following the mother's release from Cannon Hospital on 9 April 1990, the child was returned to her parents on 12 April 1990. In April 1990, the mother informed DSS that they could "keep the damn[ed] baby," and then on 19 April 1990, the child was removed from respondents' home and custody was awarded to DSS because DSS was concerned for the child's safety.

DSS set up a visitation schedule for the child to visit respondents in their home. When the visits were at the parents' home, they often failed to interact with the child, slept during the visit, and terminated the visit early. Beginning on 6 June 1990, visitation occurred in the office of the guardian *ad litem* in Boone. Neither respondent asked to visit the child from 26 September 1990 until 3 January 1991, at which time DSS initiated a visit because the child was being moved out of county. The mother had the opportunity to attend the 3 January 1991 visit, but failed to do so. The father visited the child but interacted with her only minimally.

Furthermore, he failed to ask any questions about the child's development or well-being.

Three subsequent visits took place, on 19 March 1991, 1 May 1991, and 17 July 1991. DSS initiated the 19 March visit and both parents attended. During this visit, the parents made no effort to hold the child and again failed to ask questions about their daughter. Respondents requested the 1 May visit, and the father initiated the last visit on 17 July 1991. For the 17 July visit, he agreed to plan the entire visit, *i.e.*, the activities and meals. Nonetheless, he brought no food, water, or diapers for the child and failed to check her diaper throughout the six-hour visit. His interaction with the child was inappropriate in that he carried her everywhere, even though she was able to walk.

During the hearing for termination of respondents' parental rights, the mother was not present on the 12 and 14 November 1992 sessions, claiming she was suffering from stress and anxiety. She later admitted that she had not visited a doctor and chose not to be present at the hearing.

The trial judge made findings and concluded that the mother, due to mental illness, was incapable of providing proper care and supervision of the minor child. She now contests the trial court's findings and conclusions, arguing that there was not clear, cogent, and convincing evidence supporting its determination. We find, however, that there was clear, cogent, and convincing evidence supporting the court's findings. In addition to the overview of evidence presented above, there was further evidence that the mother has been under the care of a psychotherapist since 1986 and has frequently used the emergency services of New River Mental Health. Some of these emergency contacts involved suicide threats. On 27 September 1991, the mother came to New River Mental Health's emergency room, saying that she was upset and drinking again. She complained of difficulty in sleeping, eating, and functioning, and called herself a "timebomb." On 25 October 1991, the mother again came to New River Mental Health and reported that she felt the tug of Satan and needed the child's father to help her. She further reported, "Sometimes I see the devil's face and must tell him to back down."

Following a psychological examination by Warren Johnson, Gail Hawkinson, and Murray Hawkinson of New River Mental Health, the mother was diagnosed as having adjustment problems, depres-

sion, suicidal ideation, and borderline personality disorder. Borderline personality disorder is an emotional illness which has significantly and detrimentally affected her ability to care for her daughter. The disorder was evidenced by her unstable and intense interpersonal relationships, problems with shoplifting, binge eating, use of alcohol, inappropriate sexual relationships, difficulty in appropriate use of her money, drastic mood shifts, inappropriate intense anger, lack of control of anger, and recurrence of suicidal threats and self-mutilating behavior. The illness will continue throughout the child's minority, and as a result, the mother will never be able to provide a stable home for her child. Even if the mother was given appropriate help, she could not care for the child. From this evidence, we conclude that there was clear, cogent, and convincing evidence supporting the court's determination that, as a result of mental illness, the mother is incapable of properly caring for and supervising the child. The trial court did not err in finding a ground, N.C.G.S. § 7A-289.32(7), permitting termination.

II.

[2] Respondents' parental rights were terminated pursuant to N.C.G.S. § 7A-289.32(7), which provides:

> The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .
>
> (7) That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. 7A-517(13), and that there is a reasonable probability that such incapability will continue throughout the minority of the child.

Our Courts have never decided the question, raised now by the respondents, of whether N.C.G.S. § 7A-289.32(7) requires that DSS provide diligent services as a condition precedent to termination. Unlike N.C.G.S. § 7A-289.32(3) (under which termination on the basis of willful placement of a child in foster care, with no reasonable progress in parenting skills, requires a showing of diligent efforts by DSS), there is no language in section 7A-289.32(7) requiring DSS to provide services to the parents prior to commencing a proceeding for termination. Since section 7A-289.32(7) does not

require DSS to provide services to a parent, we must determine whether we should incorporate a diligent efforts mandate in a statute devoid of such language. Although respondents have offered cogent reasons why it may make sense to require diligent efforts in a termination proceeding based upon mental illness or mental retardation, we find these reasons insufficient to permit us to read such a requirement into a statute that otherwise omits the provision. *See Matter of L. Children*, 499 N.Y.S.2d 587, 593 (Fam. Ct. 1986). We agree with the *Matter of L. Children* Court, which stated that "if due diligence is to be a requirement of [the mental retardation ground for termination], that is a matter for the Legislature, the courts having no right to expand statutory terms." *Id.* at 594.

III.

[3] Finally, we address respondent father's contention that the trial court erred in refusing to compel discovery from the guardian *ad litem*. After the guardian *ad litem* failed to object to discovery requests and respondent father moved to compel their response, the guardian *ad litem* maintained that the requested information was confidential. Respondent father alleges that he was prejudiced by the guardian *ad litem's* refusal to provide a list of services offered to him. We find this argument without merit since respondent father obtained that information from DSS and, therefore, suffered no prejudice.

Although the trial judge may terminate a parent's rights upon a finding of any one of the separately enumerated grounds, the trial judge is never required to terminate a parent's rights even though one or more of the conditions authorizing termination exists. N.C.G.S. § 7A-289.31(a); *In re Becker*, 111 N.C. App. 85, 97, 431 S.E.2d 820, 828 (1993). Since we determine that the court properly concluded that grounds for termination existed, as set forth in N.C.G.S. § 7A-289.32(7), we hold that the court did not abuse its discretion in finding that it was in the best interests of the child to terminate both parents' parental rights.

Accordingly, we affirm the judgment of the trial court.

Affirmed.

Judges Johnson and Cozort concur.

WILLIAM D. MARTIN, EMPLOYEE-PLAINTIFF, APPELLANT v. PIEDMONT ASPHALT & PAVING CO., EMPLOYER-DEFENDANT, AND THE PMA GROUP, CARRIER-DEFENDANT, APPELLEES

No. 9210IC1319

(Filed 21 December 1993)

1. **Master and Servant § 69.3 (NCI3d)— workers' compensation—agreement approved by Industrial Commission—binding award**

Where the parties' Form 21 agreement for the payment of workers' compensation to plaintiff was approved by the Industrial Commission, the agreement thereby became a binding award of the Commission.

Am Jur 2d, Workers' Compensation § 634 et seq.

2. **Master and Servant §§ 77, 94.2 (NCI3d)— workers' compensation—termination by Form 24 application—absence of authority**

An award of compensation by the Industrial Commission may be changed only upon statutory grounds. Therefore, compensation for "necessary" weeks could not be terminated by administrative approval of a Form 24 Application to Stop Compensation filed by the employer or its insurance carrier. This decision shall have only prospective application.

Am Jur 2d, Workers' Compensation § 651 et seq.

On certiorari from the North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 1993.

Plaintiff was injured on 13 September 1989 while working for the employer-defendant. The parties entered into an Industrial Commission Form 21 Agreement which was approved by the Commission on 1 November 1989. This agreement reflects that plaintiff's average weekly wage was $330.00. The carrier-defendant paid plaintiff weekly disability benefits of $220.00 under the Form 21 Award until 7 August 1990, when the claims adjuster stopped payments to plaintiff and mailed a Form 24 Application of Employer or Insurance Carrier to Stop Payment of Compensation (hereinafter Form 24) to the Chief Claims Examiner, alleging that the claimant was seen working with no difficulties. The carrier mailed a copy of the Form 24 to the plaintiff. The adjuster did not send plaintiff a copy of the "attachments" to the Form 24, a two-page typed

private investigative report, which was not signed, identified, or authenticated.

On 23 August 1990, Chief Claims Examiner Martha Barr approved the carrier's application to set aside plaintiff's Form 21 Award and disability benefits, thereby officially terminating compensation to plaintiff. On 3 July 1991, plaintiff filed a Form 33 Request for Hearing seeking past due and continuing benefits and medical care. On 22 August 1991, defendants filed a Form 33R Response to Hearing Request. A hearing was subsequently scheduled for 5 November 1991. At this hearing, the Deputy Commissioner heard testimony from plaintiff and from the witnesses called by the defendants. Pursuant to an order of 15 November 1991, which held the evidence open for a period of sixty (60) days, the parties took the deposition testimony of several witnesses on the question of whether plaintiff was or was not disabled. Additionally, the evidence was held open in order to allow plaintiff to take the deposition testimony of Chief Claims Examiner Martha Barr regarding the Form 24 procedure. After the hearing, plaintiff moved for a ten-percent penalty under N.C. Gen. Stat. § 97-18(e), and attorneys' fees under G.S. § 97-88.1.

On 3 June 1992 Deputy Commissioner Nance entered an Opinion and Award which held that plaintiff was continuously disabled from 7 August 1990 and therefore entitled to temporary total disability benefits from that date "until further order of the Industrial Commission." The Award did not address plaintiff's statutory and constitutional arguments concerning the Fórm 24 adjudication and procedure, or plaintiff's motions for attorneys' fees and a penalty.

In a letter dated 3 September 1992, Deputy Commissioner Nance informed the parties that she was holding in abeyance a decision on plaintiff's constitutional challenges to the Form 24 "pending ultimate resolution of this question by the Court of Appeals or Supreme Court" in one of two other cases before the Commission involving these issues. Plaintiff then appealed to the Full Commission, seeking review of the Form 24 procedure and Rules 404 and 703 on statutory and constitutional grounds.

Plaintiff simultaneously appealed to the Court of Appeals. On 19 November 1992, plaintiff served a proposed Record on Appeal on counsel for the defendants. On 24 November 1992, before defendants were required to serve objections, amendments, or a proposed alternative Record on Appeal, the Commission entered an Order

of Dismissal of plaintiff's appeal to the Court of Appeals. Relying on this Order of Dismissal, defendants did not serve objections, amendments, or a proposed alternative Record on Appeal. Plaintiff then submitted a Record on Appeal to the Court of Appeals and the case was docketed. Defendants moved this Court to dismiss the appeal on the alternative grounds that this Court lacks jurisdiction since there has been no final order entered by the Industrial Commission from which appeal may be taken; or that if this Court has jurisdiction, the appeal should be dismissed for lack of a justiciable issue.

Meanwhile, plaintiff has received no compensation for his disability since 7 August 1990.

Walden & Walden, by Daniel S. Walden and Margaret D. Walden, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo and Paige E. Williams, for carrier defendants-appellees.

WELLS, Judge.

Plaintiff's attempted appeal is from an order of a Deputy Commissioner, and not from a final order of the Full Commission, and is therefore not an appeal of right. *See* G.S. § 7A-29; G.S. § 97-86. Simultaneously with the docketing of his attempted appeal, plaintiff properly filed with this Court a Petition for a Writ of Certiorari to review the questions presented in his attempted appeal. Because there are matters of important public policy presented by the record in this case, pursuant to the provisions of G.S. § 7A-32(c) and Rule 21(a)(1) of the Rules of Appellate Procedure, we deem it appropriate to issue certiorari to review the actions and proceedings of the Industrial Commission presented by this record.

[1] We begin by reiterating that subsequent to his work-related injuries, plaintiff's employer agreed to pay him compensation of $220.00 per week beginning 14 September 1989 and continuing for "necessary" weeks. This agreement was approved by the Industrial Commission, and thereby became an award of the Commission. *See* G.S. § 97-17; *see also Buchanan v. Mitchell County*, 38 N.C. App. 596, 248 S.E.2d 399 (1978), *disc. review denied*, 296 N.C. 583, 254 S.E.2d 35 (1979). Such an award has the same binding effect as if plaintiff's claim had been adjudicated by a Commission hearing and award. *Brookover v. Borden, Inc.*, 100 N.C. App. 754,

398 S.E.2d 604 (1990), *disc. review denied*, 328 N.C. 270, 400 S.E.2d 450 (1991).

[2] The record before us reflects that the Industrial Commission has established an administrative procedure which allows and condones the termination of compensation by an employer and the employer's insurance carrier by the mere filing of an Industrial Commission created form (Form 24) notifying the "Commission" and the employee that compensation is being terminated.

In this case, the Form 24 Application to Stop Compensation was "on the grounds that claimant was seen working with no difficulty: see attached." What was "attached" to the Form 24 was a type-written, unsigned document which purported to be a report of observation of plaintiff working on the engine of a used motor vehicle located in the yard of plaintiff's residence, and the observation that there were numerous used motor vehicles, along with "engine parts," scattered about the premises.

The record reflects that the Industrial Commission receives about 150 such Form 24s each week. When these are received at the Commission, they go to the desk of the Chief Claims Examiner, who, at the time pertinent to this case, was Ms. Martha Barr. The Form 24 applications are "processed" by the Chief Claims Examiner without reference to any other proceedings. Some are "approved," some are "denied." In this case, the Form 24 bears a stamp noting "APPROVED—August 23 1990—NORTH CAROLINA INDUSTRIAL COMMISSION." The stamp also reflects the handwritten date of 8-23-90 and Ms. Barr's initials. Pursuant to this application, defendants stopped payment of plaintiff's compensation as of 7 August 1990.

The Form indicates on its face that a copy was mailed to plaintiff at his home address. The bottom of the form bears the following:

> NOTICE TO EMPLOYEE: IF THERE IS ANY REASON WHY PAYMENT OF COMPENSATION TO YOU SHOULD NOT CEASE, YOU SHOULD NOTIFY THE INDUSTRIAL COMMISSION STATING SUCH REASON IN WRITING IMMEDIATELY UPON RECEIPT OF THIS NOTICE.

The Form 24 practice at the Commission is apparently carried out pursuant to Commission rules:

RULE 404. TERMINATION OF COMPENSATION

(1) Payments of compensation undertaken pursuant to an award of the Industrial Commission shall continue until the terms of the award have been fully satisfied; provided, however, that in cases where the award is to pay compensation during disability, *there is a rebuttable presumption that disability continues until the employee returns to work.*

(2) No insurance carrier or employer shall cease payment of compensation before the terms of the award have been fully complied with, unless and until such insurance carrier or employer has received approval of a proper request filed with the Industrial Commission. The reasons supporting such request shall be stated in full on the form prescribed, with supporting documents attached. A copy of the form, *together with all attachments* and supporting documents shall be mailed to or served upon the employee *or* his current attorney of record, if any. *If defendant seeks to terminate compensation through a Form 24 application, it shall file it within twenty-one (21) days of the date defendant contends it was entitled to terminate compensation, or within a reasonable time of receipt of evidence alleged in support of the application. The request must be mailed to the Commission within five days of said date. The request and any response shall be addressed to the Commission's Chief Claims Examiner.*

(3) *The Chief Claims Examiner will await a response from the plaintiff for 14 days from the date the request is received,* and will take such action with reference thereto as appears to be proper under the circumstances; and, where indicated, will place the case upon the hearing docket to be heard in the usual manner. *The disappointed party may seek relief as provided in Rule 703, Appeals from Administrative Decisions.*

(4) No request to discontinue the payment of compensation shall be approved without a hearing if the effect of such approval is to set aside the provisions of the agreement under which compensation is being paid.

It is clear from the record in this case and the wording of the foregoing Rule that the Commission has exceeded its authority. Once an award is made by the Commission, it can be changed only upon statutory grounds. For example, under G.S. § 97-27,

payment of awarded compensation may be suspended for the period an employee refuses to submit to an employer-requested or a Commission-ordered medical examination. *See also* G.S. § 97-32 (refusal to accept suitable employment). More pertinent to the question in this case, pursuant to the terms of G.S. § 97-47, an employer may seek to have an award amended based upon a change of the employee's disability condition.

There is, however, no statutory authority for the "Administrative" termination of an award, and we therefore hold that the Commission's "Form 24" proceedings in this case were unlawful, and that the termination of plaintiff's compensation was unlawful and therefore invalid.

Plaintiff has raised other questions which we deem inappropriate or not necessary to address for resolution of this case under our writ.

In conclusion, we treat the "Approval" of the Form 24 on 23 August 1990 as an invalid order of the Commission and hold that plaintiff is entitled to the payment of his previously awarded compensation. Upon remand, the Commission shall issue such further order as may be appropriate to secure payment of plaintiff's previously awarded compensation, consistent with this opinion.

We have carefully weighed and considered the impact of our decision upon those affected—injured workers, employers and their insurance carriers. It is our judgment that our decision shall have prospective operation. *See generally, Insurance Co. v. Ingram, Comr. of Insurance*, 301 N.C. 138, 271 S.E.2d 46 (1980), *reh'g denied*, 301 N.C. 728, 274 S.E.2d 227 (1981). Form 24 proceedings pending before the Commission as of the date of certification of our opinion shall be terminated consistently with our opinion. Form 24 applications received on and after the date of certification of our opinion shall be rejected.

Reversed and remanded.

Chief Judge ARNOLD and Judge JOHNSON concur.

JACKSONVILLE DAILY NEWS CO., A NORTH CAROLINA CORPORATION v. THE ONSLOW COUNTY BOARD OF EDUCATION

No. 904SC1172

(Filed 21 December 1993)

State § 1.1 (NCI3d)— Open Meetings Law—pay raise for board of education members

A county board of education was required by the Open Meetings Law to deliberate its action to give its members a pay raise at a meeting open to the public. Therefore, the board of education violated the Open Meetings Law where the record shows that the board voted in public session to delete from its budget pay raises for members of the board; when additional funds became available, the board chairman determined that pay raises could be implemented and should be made retroactive; the chairman telephoned all members of the board but one to obtain their approval; and retroactive pay raises were put into effect without being considered at a public meeting. N.C.G.S. §§ 115C-4, 143-318.10.

Am Jur 2d, Municipal Corporations § 61.

Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR3d 1070.

Appeal by plaintiff from judgment of Judge Napoleon B. Barefoot entered 17 August 1990 in Onslow County Superior Court. Heard in the Court of Appeals 16 May 1991.

Cameron and Coleman, by W. M. Cameron, III, for plaintiff appellant.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Fred M. Carmichael, Rudolph A. Ashton, III, and Elliot Zemek, for defendant appellee.

COZORT, Judge.

Plaintiff newspaper brought an action against the Onslow County Board of Education alleging that the Board had violated N.C. Gen. Stat. § 143-318.9, *et. seq.* (1990), commonly referred to as the "Open Meetings Law," by approving a pay raise for Board members in a proceeding other than a meeting open to the public. The trial

court concluded that the Board did not violate the Open Meetings Law. We reverse.

Before beginning our recitation of the facts, we note that effective appellate review was made more difficult by the filing of an incomplete record on appeal. The record lacks minutes of meetings, budget documents and other documents pertinent to the issues raised. We have, however, pieced together enough of the facts to resolve the issues presented.

At some point prior to 22 June 1987, the Onslow County Board of Education (Board) prepared a proposed budget and request for funds for fiscal year 1987-1988 and submitted the proposal to the Onslow County Board of Commissioners (Commissioners) for its approval. As required by N.C. Gen. Stat. § 115C-429(a) (1987), the Board requested $5,425,031.00 for the fiscal year. Although the record does not contain the proposed budget submitted by the Board, the parties do not dispute that this initial document contained line items for teachers' salary supplements, for employer's matching costs and for increased salaries for Board members. In the budget ordinance adopted by the Commissioners, the Commissioners appropriated $4,786,000.00 to the school system. The budget contained a provision increasing each Board member's salary by $150.00 per month. According to the minutes of the 22 June 1987 school board meeting, the County Commission appropriated to the school system $639,031.00 less than requested by the Board.

On 22 June 1987, the Board met to consider the County Commission's reduction in the Board's budget request. According to the minutes of the 22 June meeting, the Board voted to reduce its proposed budget by "six hundred thousand dollars ($600,000.00) for teacher supplement plus thirty-nine thousand and thirty-one dollars ($39,031.00) for employer's matching costs and to delete nine thousand dollars ($9,000.00) for increase in the salaries of board of education members." Apparently, the Board then adopted a budget resolution containing line items for all expenditures for the upcoming fiscal year. Since the Board's original proposed budget was not included in the record, we are unable to determine how the budget reflects the reductions voted on by the Board. However, we note that beside the "Salary-Supplement" line, the dollar amount designated is "0," and beside the "Salary-School Board Member" line appears "$34,800," an increase of $9,000.00 from 1986-1987.

Sometime between 22 June 1987 and 19 April 1988, the Board received additional funds from the federal government. When these funds arrived, the Chairman of the Onslow County Board of Education requested that the County Commission appropriate to the Board an additional $250,000.00 to supplement the federal funds received so that the Board could "restore in full the teacher supplements." According to an amendment to the budget resolution dated 11 April 1988, the Board restored the teacher salary supplements and employer's matching costs. This document does not mention the increase in Board member salaries which the Board declined to adopt at the 22 June 1987 meeting.

The record shows that on 19 February 1988, Board chairman Fred Hargett sent a letter to the superintendent of Onslow County Schools authorizing him to increase the monthly salaries of Board members by $150.00. In addition, Hargett authorized the superintendent to make the salary increase retroactive to the beginning of the fiscal year. Hargett testified that the "Board never really took action" on the pay raises. Hargett testified at his deposition that he contacted each board member, except for one, and informed them that he was executing the Board's pay raise. Checks representing the retroactive pay raise were delivered to Board members in early April 1988.

At the Board's 19 April 1988 meeting, the Board went into executive session to discuss an exchange student matter. According to deposition testimony, at the end of the executive session, before the general public was allowed into the Board's meeting room, a question was raised regarding the Board's salary increases. A heated discussion of the Board's salary increase arose and members of the press who were outside the meeting room overheard conversations regarding the raises. The minutes of the 19 April meeting indicate that, after the public was allowed back into the meeting room, Board members made no further comments regarding the raises.

On 26 April 1988, plaintiff filed suit against the Board seeking (1) a declaration that the Board violated the Open Meetings Law, (2) judgment declaring the pay raise "null and void," and (3) injunctive relief enjoining further violations of the Open Meetings Law. The case was tried in April 1990. In an order entered 10 August 1990, the trial court concluded that all actions by the Board concerning the implementation of the raises "were not in the nature of

activities requiring an open meeting." The court also concluded that the discussions between Board members at the 19 April 1988 executive session did not violate the Open Meetings Law. The trial court entered judgment for defendant and directed plaintiff to pay to defendant $4,689.50 in attorney fees. Plaintiff appeals.

Plaintiff contends the actions taken by the Board violated the Open Meetings Law. We agree.

"[I]t is the public policy of North Carolina that the hearings, deliberations, and actions of [public] bodies be conducted openly." N.C. Gen. Stat. § 143-318.9 (1990). Onslow County Board of Education is a "public body" as defined in N.C. Gen. Stat. § 143-318.10 (1990). Further, N.C. Gen. Stat. § 115C-4 (1987) provides that meetings of school boards must be held in conformity with the Open Meetings Law.

Though the record is somewhat confusing, it appears that the Board voted in public session on 22 June 1987 to delete from their budget pay raises for members of the Board. When additional funds became available, the Board Chair determined that the pay raises could be implemented and should be made retroactive. Instead of considering such action at a public meeting, the Chair telephoned all members of the Board but one to obtain their approval. Thus the record reflects that the adoption of retroactive pay raises was never considered at a public meeting.

We hold that an action by the Board to give itself a pay raise must be deliberated at a meeting open to the public. We find that such deliberations and actions are exactly the type of "deliberations" and "actions" that the General Assembly intended be conducted openly at a public meeting. *See, e.g., News & Observer Publishing Co. v. Board of Educ.*, 29 N.C. App. 37, 50, 223 S.E.2d 580, 588 (1976).

We hold that the trial court erred by concluding that all actions of the Board were "valid and not in the nature of activities requiring an open meeting." As reflected in the minutes of Board meetings, the only action taken at an open meeting and recorded in the minutes for the public's perusal is the Board's act of deleting the scheduled raises from the budget proposal. The budget amendment dated 11 April 1988 does not mention the Board's salary increase. These public records of the Board's actions must control our decision.

The Board argues that it did take action to accept its raise at a public meeting. The Board contends that the minutes do not properly reflect the action taken by the Board at the 22 June 1987 meeting. The Board argues that it decided to make its salary increase contingent upon receipt of additional funds from the County Commission. The minutes reveal no such contingency, and the Board approved the minutes at its 7 July 1987 meeting. While we do not hold that a public body may not revise minutes which do not accurately reflect what occurred at a meeting, to allow the Board to do so in this situation would be to allow the Board to circumvent the purpose of the Open Meetings Law.

In its complaint, plaintiff newspaper requested, among other things, that the trial court declare the pay raise null and void. At oral argument, counsel for plaintiff stated the plaintiff's goal is not to make the Board members return the pay raises. Rather, plaintiff seeks a declaration from the court that the Board's action was not proper. We agree with plaintiff that the proper result in this case is a declaration that the Board violated the Open Meetings Law; no purpose would be served by voiding the Board's action in such a manner as to require return of the monies by the Board members. *See* N.C. Gen. Stat. § 143-318.16A (1992). We note, however, that plaintiff, as prevailing party, is entitled to a reasonable attorney's fee under N.C. Gen. Stat. § 143-318.16B (1990). The cause should be remanded for that purpose.

In conclusion, the trial court's judgment is reversed. The cause is remanded to the superior court of Onslow County for (1) entry of judgment for plaintiff declaring the defendant's action in violation of Article 33B of Chapter 143 of the General Statutes, and (2) awarding a reasonable attorney's fee to the plaintiff.

Reversed and remanded.

Judges ORR and WYNN concur.

Report per Rule 30(e).

DEBORAH P. PHELPS, APPELLANT v. STEPHEN VASSEY, THE CITY OF FAYETTEVILLE/PUBLIC WORKS COMMISSION, APPELLEES

No. 9212SC1310

(Filed 21 December 1993)

1. Rules of Civil Procedure § 56 (NCI3d) — summary judgment — affidavits — initially produced at hearing — not considered — no error

The trial court did not err in an action for sexual harassment and emotional distress by refusing to consider affidavits produced for the first time at the summary judgment hearing. Although plaintiff contended that there were extenuating circumstances in that defense counsel's office was closed when she attempted to serve the affidavits, the affidavits were signed and notarized on the day of the hearing and could not have been served prior to that time.

Am Jur 2d, Summary Judgment § 17.

2. Intentional Infliction of Mental Distress § 2 (NCI4th) — sexual harassment — no ratification by employer — summary judgment for employer

The trial court did not err by granting summary judgment for defendant Public Works Commission on a claim arising from sexual harassment where plaintiff worked in the customer service department at Fayetteville's Public Works Commission; plaintiff's immediate supervisor was Meshaw; Vassey, who was accused of the harassment, had supervisory power over plaintiff as the Director of Customer Service and as Meshaw's supervisor; Meshaw approached plaintiff and asked if she was having any problems with sexual advances from Vassey; Meshaw encouraged plaintiff to report the harassment to the PWC manager; plaintiff was reluctant but eventually submitted a written report to the director of personnel who forwarded the report to the manager; the manager met with plaintiff and plaintiff subsequently received a letter from the manager indicating that Vassey had been reprimanded and that he would be terminated if he ever harassed plaintiff again; and plaintiff was not subsequently subjected to sexual harassment. There was no charge that the acts were authorized by the PWC; plaintiff introduced insufficient evidence to show that Vassey was acting within the scope of his employment;

and plaintiff failed to show any version of facts from which a reasonable jury could infer that PWC had ratified the sexual harassment of plaintiff.

Am Jur 2d, Job Discrimination §§ 782, 783, 806, 809.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress. 52 ALR4th 853.

Appeal by plaintiff from judgment entered 24 April 1992 by Judge D.B. Herring, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 29 October 1993.

C. Leon Lee, II for plaintiff.

Reid, Lewis, Deese & Nance, by Renny W. Deese and Rebecca F. Person, for defendant City of Fayetteville/Public Works Commission.

LEWIS, Judge.

By this appeal we are asked to determine the liability, if any, of the City of Fayetteville's Public Works Commission ("PWC") for the alleged sexual harassment of Deborah P. Phelps ("plaintiff") by Stephen Vassey ("Vassey"). At all times pertinent to this appeal, plaintiff worked in the customer service department at PWC. Although plaintiff's immediate supervisor was Judy Meshaw ("Meshaw"), Vassey had supervisory power over plaintiff as the Director of Customer Services and as Meshaw's supervisor. During August 1990, Meshaw approached plaintiff and asked if she was having any problems with Vassey as far as sexual advances. Plaintiff indicated that she had felt sexually harassed since Christmas of 1989 due to unwanted flirting and dirty jokes told by Vassey. Plaintiff also indicated that Vassey had repeatedly touched her in an improper manner and that he kicked her chair. The record also reveals that Vassey encouraged plaintiff to follow him home after a company picnic where he began forcibly kissing her despite her pleas to stop. When Meshaw learned of these incidents she encouraged plaintiff to report them to Timothy Wood ("Wood"), the PWC manager. However, plaintiff was reluctant to discuss the issue further, and it was not until 14 October 1990 that plaintiff, with the help of another employee who also complained of harassment by Vassey, finally submitted a written report to Shirley White

("White"), the Director of Personnel at PWC. White forwarded plaintiff's complaint to Wood, who thereafter met with plaintiff to discuss the alleged acts of sexual harassment. Plaintiff subsequently received a letter from Wood indicating that Vassey had been reprimanded and that if he ever harassed plaintiff again he would be terminated. Plaintiff concedes that she has not been subjected to any sexual harassment since October 1990.

Plaintiff instituted this action on 24 January 1991 naming Vassey and PWC as defendants and seeking damages for sexual harassment and emotional distress. This matter was heard by Judge Herring on 20 April 1992 on PWC's motion for summary judgment. After considering the pleadings, depositions and interrogatories, Judge Herring concluded that there was no issue of material fact and granted summary judgment in favor of PWC. Plaintiff then took a voluntary dismissal as to Vassey and appealed Judge Herring's ruling to this Court.

[1] The first issue presented for consideration is whether Judge Herring erred in refusing to consider the affidavits of plaintiff and her doctor which were presented for the first time at the summary judgment hearing. N.C.G.S. § 1A-1, Rule 56(c) provides that a party opposing a motion for summary judgment may file affidavits prior to the day of the hearing. It is undisputed that plaintiff failed to file her affidavits prior to the day of the hearing, but she contends that extenuating circumstances should relieve her from this obligation. According to plaintiff's brief, she attempted to serve the affidavits on PWC's counsel on Friday, 17 April 1992, but because that day was Good Friday defendant's counsel's office was not open and the affidavits were not served. It is plaintiff's contention that since PWC's counsel chose to close its office on a day that was not a State holiday, she should not be penalized.

Although plaintiff's argument is creative, we need not reach this issue. In our review of the record, we note that the affidavits which plaintiff attempted to serve were both signed and notarized on 20 April 1992. Since North Carolina recognizes a presumption as to the legality of a written instrument before a certifying officer, *see Moore v. Moore*, 108 N.C. App. 656, 424 S.E.2d 673, *aff'd in part*, 334 N.C. 684, 435 S.E.2d 71 (1993), we are faced with the inescapable conclusion that the affidavits were not signed until 20 April 1992, making it impossible for them to have been served on 17 April 1992 as urged by plaintiff. Therefore, since the af-

fidavits were signed and notarized on the date of the summary judgment hearing, there was no way in which they could have been served prior to the hearing and the trial court did not err in refusing to consider such.

[2] The second issue is whether the trial court erred in granting summary judgment for PWC. Plaintiff contends that summary judgment should not have been granted because PWC did not take sufficient action to remove plaintiff from the harassing atmosphere once it learned of the accusations. We disagree. Previous sexual harassment cases have established that there are three situations in which an employer may be liable for the actions of its employee: 1) if the harassment was expressly authorized, 2) if the harassment was in the scope of the employee's employment and in furtherance of the employer's business, and 3) if the harassment was ratified by the employer. *See Brown v. Burlington Indus., Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989). In this case, there has been no charge that Vassey's acts were authorized by PWC. Therefore we will concentrate on the last two possibilities.

In *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986), this Court, in addressing an agent's scope of employment, stated:

> [i]f the act of the employee was a means or method of doing that which he was employed to do, though the act be unlawful and unauthorized or even forbidden, the employer is liable for the resulting injury, but he is not liable if the employee departed, however briefly, from his duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do.

Id. at 491, 340 S.E.2d at 122. It has also been said that to be within the scope of employment "an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of the employment." *Brown* at 436, 378 S.E.2d at 235. Intentional acts, such as sexual harassment, are rarely considered to be within the scope of employment. *Id.* at 437, 378 S.E.2d at 235.

Plaintiff, here, has offered no evidence to suggest that Vassey was in any way acting within the scope of his employment or that he was furthering the business of PWC. In fact, all the evidence

points to the opposite conclusion. As to the incidents which occurred at work and at the picnic, there is no evidence to suggest that Vassey was acting other than in his own interests. *See Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990) (principal's sexual assault on a student was advancing a personal interest and was not one within the scope of employment). Accordingly, we hold that plaintiff has produced insufficient evidence to show that Vassey was acting in the scope of his employment.

The only remaining way PWC could be liable for Vassey's sexual harassment would be by ratification. In order to show ratification, the plaintiff must establish that the "employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, show[ed] an intention to ratify the act." *Brown* at 437, 378 S.E.2d at 236. Ratification can be shown by any course of conduct which reasonably tends to show an intention on the part of the principal to ratify the agent's unauthorized acts. *Carolina Equip. Co. v. Anders*, 265 N.C. 393, 144 S.E.2d 252 (1965). This course of conduct may include an omission to act. *Brown* at 437, 378 S.E.2d at 236.

In *Brown*, this Court found no error on the issue of ratification because the plaintiff's manager failed to report acts of sexual harassment once they were brought to his attention as company policy required. This Court held that the manager's omission was a factor from which the jury could infer ratification. *Id.* at 438, 378 S.E.2d at 236. Important to the Court's rationale was that the designation of manager implies general power and permits an inference that a person is vested with control of a business and that the manager's acts are those of the company. *Id.* at 437, 378 S.E.2d at 236. The designation of manager was also critical in *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986), where ratification was found when evidence was shown that plaintiff complained to her general manager but the general manager did nothing.

The evidence in this case shows that the only person who knew about plaintiff's problem with Vassey was Meshaw, who approached plaintiff. Even though Meshaw was plaintiff's direct supervisor, she had no authority to hire or fire Vassey because he was her supervisor. There is also no evidence to suggest that PWC had a policy in place requiring Meshaw to report her knowledge of alleged sexual harassment. All of the evidence indicates that

Meshaw's discussions with plaintiff were personal and private and that she encouraged plaintiff to report the incidents to someone who had the authority to act. We do not believe that Meshaw's knowledge and authority was such that a jury could infer a course of conduct on the part of PWC tending to show ratification.

The public policy of North Carolina must be to stop sexual harassment in the work place and to encourage the swift and sure actions such as PWC took to warn and promise termination if such behavior continues. To that end, we note that once plaintiff formally reported her allegations they were immediately and effectively handled by Wood who reprimanded Vassey and indicated that he would be terminated if the incidents continued. This is hardly the type of inaction found in either *Brown* or *Hogan*. We find that plaintiff has failed to show any version of the facts from which a reasonable jury could infer that PWC had ratified Vassey's sexual harassment of plaintiff. Accordingly the judgment of the trial court is

Affirmed.

Judges WYNN and McCRODDEN concur.

MAHLON S. MOORE, ET AL, PLAINTIFFS v. RICHARD WEST FARMS, INC., ET AL, DEFENDANTS

No. 922SC1093

(Filed 21 December 1993)

Trial § 6 (NCI3d) — trespass — boundary dispute — agreement to be bound by independent survey — binding stipulation

The trial court did not err in entering an order based on the results of a survey in a trespass action where plaintiffs made a clear and definite agreement with all parties in open court to be bound by the results of a survey conducted by an independent surveyor appointed by the court. This agreement amounts to a stipulation between the parties from which plaintiffs did not seek relief in the manner required by *Norfolk Southern Railway Co. v. Horton*, 3 N.C. App. 383, 389, 165 S.E.2d 6, 10 (1969). Although plaintiffs contended that this

was a consent order to which they had not consented, the record shows that the trial court determined the boundary between the properties and entered its order establishing the boundary based on the results of a survey conducted by an independent surveyor, not based on the consent of the parties.

Am Jur 2d, Stipulations §§ 7, 8.

Appeal by plaintiffs Mahlon S. Moore, *et al.* from order entered 27 May 1992 by Judge William C. Griffin in Washington County Superior Court. Heard in the Court of Appeals 1 October 1993.

Plaintiffs own a parcel of land that is adjacent to a parcel of land owned by defendants. On 20 November 1989, plaintiffs filed a complaint against defendants for trespassing on their land. In their complaint, plaintiffs alleged that in February of 1989, defendants trespassed onto their land and removed two fences. Further, plaintiffs alleged that defendants had continued to trespass on their land and that Defendant Ethel West had advised the general public that defendants would tear down certain buildings located on plaintiffs' property.

On 19 December 1989, defendants filed their answer denying that they trespassed on plaintiffs' land. Further, defendants disputed plaintiffs' allegation that a boundary line between the two parcels had been established, and they filed a counterclaim against plaintiffs alleging that plaintiffs had trespassed on defendants' land and cut and removed valuable wood and timber from such land without defendants' permission.

On 28 October 1991, defendants filed a motion to dismiss this action on the ground that plaintiffs were required to bring this action in two previous suits defendants had brought against plaintiffs for wrongful cutting of defendants' timber. On 11 June 1991, plaintiffs filed a motion for a preliminary injunction alleging that Defendant Harvey West had advised plaintiffs that he would remove any structures which he considered to be on his property within three weeks, that the boundary line of the property was in dispute, and that in order to maintain the status quo, all parties should be enjoined from further action concerning the disposition of the property until such time as this case could be tried and the court determine a boundary line.

Judge William C. Griffin entered a preliminary injunction on 3 July 1991, effective until a hearing on the merits of the case, ordering the parties to this action not to damage any personal property or structures, mobile or permanent, on the area in dispute between the parties. On 27 May 1992, Judge Thomas Watts entered an order establishing the boundaries of the property in question based on a survey ordered by the court pursuant to the purported consent of the parties. From this order, plaintiffs appeal.

Dal F. Wooten for plaintiff-appellants.

Maynard A. Harrell, Jr. for defendant-appellees.

ORR, Judge.

The order signed by Judge Thomas Watts on 27 May 1992 from which plaintiffs appeal contains the following findings of fact:

> 2. That this matter was called for trial on October 28th, 1991 and a jury was selected to hear said case. However, said jury was never impanelled[.]
>
> 3. That prior to the impanelling of said selected jury, by consent of the parties and by order of Honorable William C. Griffin, Jr., Judge presiding, a Court appointed surveyor was ordered to conduct a survey of the properties in dispute being the subject matter of this case. That by consent of said parties, the survey of said Court ordered surveyor would be binding on the parties herein.
>
> 4. That pursuant to said consent and by order of the court, Hersey A. Kight . . . was ordered to prepare said survey.
>
> 5. That pursuant to said order, Hersey A. Kight completed and filed with the court on November 25, 1991 a survey of the property in question. The original survey is attached hereto and made a part hereof if fully copied herein. . . .
>
> 6. That by consent of the parties, the expense of said survey was to be shared equally between said parties.

Based on these findings, the trial court ordered:

> 1. That the survey of Hersey A. Kight . . . be and is hereby recorded and does hereby establish the boundaries between Plaintiffs and Defendants as to the property subject to this lawsuit. . . .

2. That the expense of said survey being $650.00 is to be shared equally between Plaintiffs and Defendants.

On appeal, plaintiffs contend that this order is not binding upon them because they did not consent to the trial court's entry of this order. For the reasons stated below, we disagree.

At trial, Judge William C. Griffin, Jr. asked the parties to consent to be bound by a survey done by a surveyor appointed by the court. The following conversation is reflected in the transcript:

> COURT: . . . Let the record show that [the] parties have . . . the attorneys have conferred with the parties and with each other and also with Mr. Leggett and Mr. Rea, who are surveyors for the sides . . . in this matter, and that they have indicated to the Court, the attorneys have indicated the parties would agree that the Court appoint a third surveyor independent and unknown to anybody and that each side would agree to pay half the costs of the survey and each side would agree to be bound by the results of that survey.
>
> Is that correct . . . ?
>
> [ATTORNEY FOR PLAINTIFFS]: The plaintiff agrees with that, Your Honor.
>
> COURT: Now, let me . . . ask one question. [Plaintiff] Mr. Mahlon Moore is present in Court, as you pointed out earlier. There are a number of other folks named as plaintiffs. Are all of these folks going to be bound by this survey?
>
> [ATTORNEY FOR PLAINTIFFS]: Yes sir.
>
> COURT: Everybody is going to be bound? . . . [I]t's a matter of record. You all are . . . saying to me, representing to me, the Court will be in a position to enforce the results of the survey. Is that correct?
>
> [ATTORNEY FOR PLAINTIFFS]: Yes sir.
>
> [ATTORNEY FOR DEFENDANTS]: Yes sir, Your Honor. I've talked to my clients and they are all present in Court.
>
> COURT: You've got Richard West, Inc. and a number of other folks here. The same question?
>
> [ATTORNEY FOR DEFENDANTS]: Yes sir.

COURT: All these folks agree to the same?

[ATTORNEY FOR DEFENDANTS]: Yes sir. The corporate officers are all present and all individuals are present and they agree to be bound by the survey.

Thus, the record reflects that the parties clearly and definitely agreed to be bound by a survey of the land in question done by an independent surveyor appointed by the court. This agreement amounts to a stipulation between the parties and is binding on the parties.

"A stipulation is an agreement between counsel with respect to business before a court . . . ." 83 C.J.S. *Stipulations* § 1, at 2. "Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged." *Rural Plumbing and Heating, Inc. v. H.C. Jones Construction Co., Inc.*, 268 N.C. 23, 32, 149 S.E.2d 625, 631 (1966). " 'While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. . . .' " *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961) (citation omitted). "Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position." *Rural Plumbing and Heating, Inc.*, 268 N.C. at 31, 149 S.E.2d at 631.

In the present case, plaintiffs made a clear and definite agreement with all parties in open court to be bound by the results of a survey conducted by an independent surveyor appointed by the court, which agreement has the effect of a stipulation. Subsequently, the court appointed such surveyor and entered an order determining the boundaries of the properties in question based upon the results of such survey. Plaintiffs did not seek relief from their stipulation which they now contend is not binding, and the law in North Carolina on this issue is that:

> "A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding, and, ordinarily, such relief may or should be sought by a motion to set aside the stipulation in the court in which the action is pending, on notice to the opposite party." . . . "Application to set aside a stipulation must be seasonably made; delay in asking for relief may defeat the right thereto."

Norfolk Southern Railway Co. v. Horton, 3 N.C. App. 383, 389, 165 S.E.2d 6, 10 (1969) (citations omitted).

Thus, plaintiffs are bound by their stipulation in open court that they would abide by the results of the survey conducted by the court appointed surveyor, and the trial court did not err in entering its order based on the results of this survey. *See id.* (affirming order based on stipulation to abide by result of parallel case); *See also Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984) (stipulation of parties to allow the court to enter final judgment on custody and visitation issues in accordance with the children's wishes was binding on the parties).

Plaintiffs argue, however, that the trial court's order was a "Consent Order" and because they did not consent to the terms of the order at the time the court entered the order, the order is not valid. We do not agree. Our review of the record shows that the trial court determined the boundary between the properties and entered its order establishing such boundary based on the results of a survey conducted by an independent surveyor, not based on the consent of the parties. The parties stipulated that they would be bound by this survey, the results of which were not known at the time the stipulation was made, and the court properly entered its order based on this stipulation.

Accordingly, we affirm the order of the trial court.

Affirmed.

Judges EAGLES and GREENE concur.

CAROLE VAN NYNATTEN v. FRED H. L. VAN NYNATTEN

No. 925DC1018

(Filed 21 December 1993)

1. Divorce and Separation § 417 (NCI4th)— child support payments—unilateral reduction—retroactive reduction by trial court—absence of compelling reason

Defendant father could not unilaterally reduce child support payments provided for in a consent order without apply-

ing to the court for modification, and the trial court could not retroactively reduce the child support payments absent a compelling reason as provided in N.C.G.S. § 50-13.10(a)(2). Even if the parties orally agreed that defendant's child support payments would be reduced after equitable distribution, this agreement would not constitute a compelling reason justifying defendant's failure to apply to the court before altering his child support payments.

Am Jur 2d, Divorce and Separation §§ 1071, 1072.

2. **Divorce and Separation § 295 (NCI4th)— proceeding involving child support—erroneous consideration of alimony issue**

In a proceeding instituted by plaintiff to hold defendant in contempt for failure to make child support payments required by a consent order wherein defendant moved for a reduction in child support payments, the trial court erred by addressing the issue of whether plaintiff waived the alimony provision of the consent order where neither party moved for modification of the alimony payments. A motion by a party to modify one provision of a consent order does not give the trial court the power unilaterally to modify a different provision of the order where such modification would otherwise require a motion by a party.

Am Jur 2d, Divorce and Separation § 731.

Appeal by plaintiff from order entered 18 March 1992 by Judge Jacqueline Morris-Goodson in New Hanover County District Court. Heard in the Court of Appeals 27 September 1993.

Shipman & Lea, by James W. Lea, III, for plaintiff-appellant.

Johnson & Lambeth, by Carter T. Lambeth, for defendant-appellee.

WYNN, Judge.

Plaintiff Carole Van Nynatten and defendant Fred H.L. Van Nynatten were married on 6 June 1970. They had three children. On 27 March 1989 plaintiff instituted an action for divorce, child custody, child support, temporary and permanent alimony, and equitable distribution of the parties' marital assets.

On 29 August 1989 the parties entered into a consent order. It provided that defendant would pay plaintiff $1,500 per month in temporary alimony and $1,000 per month in child support for their minor daughter Erika, until she reached the age of 18 or graduated from high school, whichever occurred later. The consent order provided that the alimony amount was temporary and would only continue until either party requested a hearing on permanent alimony. The order did not provide for modification of child support payments.

Defendant paid plaintiff $1,000 per month in child support from September 1989 through July 1991. On 30 July 1991, the trial court entered its equitable distribution order. This order and a subsequent order of 8 October 1991 provided that defendant would pay plaintiff $97,596, with interest, over a five-year period. These orders did not modify defendant's child support payments in any way. However, beginning with the August 1991 payment, defendant paid only $500 per month in child support. Defendant made this change unilaterally, without notifying plaintiff or filing a motion for modification with the court.

On 13 November 1991, plaintiff filed a motion to hold defendant in contempt for failure to comply with the consent order. In a reply and counter-motion of 12 March 1992, defendant moved to reduce his child support payments and asked that this reduction be made retroactive to 30 July 1991, the date of the equitable distribution order.

On 18 March 1992, the court granted defendant's motion. It assessed his new child support obligation under the North Carolina Child Support Guidelines at $791.21 per month, effective 1 April 1992, and relieved defendant from any child support arrearages accruing from August 1991 through March 1992.

Plaintiff appeals the grant of relief from child support arrearages.

[1] This case presents the question of whether child support payments may be reduced retroactively, absent a compelling reason. Through a plain reading of N.C. Gen. Stat. § 50-13.10, we conclude that they may not, and remand this case to the district court for entry of an order requiring defendant to pay child support arrearages from August 1991 through March 1992. *Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

N.C. Gen. Stat. § 50-13.10 provides that child support payments vest when they accrue. A vested past due payment is subject to divestment only if a party filed a written motion with the court and gave due notice to all parties before the payment was due. Notice and filing may occur after the payment is due only if the moving party is precluded "by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason" from filing a motion before the payment is due. N.C. Gen. Stat. § 50-13.10(a)(2) (1987). Even when such a reason exists, the party must file a motion "promptly after [he] is no longer so precluded." *Id.*

Defendant acted in clear violation of this statute. He unilaterally reduced his child support payments as of August 1991 and did not file a motion with the court until 12 March 1992.

These facts fall squarely under the analysis in *Craig v. Craig*. There, the defendant-father had unilaterally cut his child support payments in half when one of the two children in the plaintiff-mother's custody reached age 18. This Court held that, even though the plaintiff-mother had not objected to the reduction, the full amount continued to accrue and vest as it became due until defendant applied to the court for modification pursuant to N.C. Gen. Stat. § 50-13.10.

Here, defendant argues that he falls within the exception to the prompt filing requirement because he had a compelling reason for not filing and because plaintiff made a misrepresentation to him. He asserts that the parties had orally agreed that his child support obligation would be reduced after equitable distribution; that he thereby believed his child support payments had been reduced; and that this belief constituted a compelling reason not to file a motion with the court. Defendant further contends that plaintiff misrepresented to him that she also believed payments would be reduced after equitable distribution.

These arguments are meritless. Even if defendant believed plaintiff had agreed to some future reduction of child support, no specific reduction had ever been agreed upon. Indeed, the new amount of $500 per month appears to have been arbitrarily selected by the defendant. Defendant's claim that plaintiff misrepresented her position to him also is not credible. If defendant had believed that plaintiff agreed to his unilateral reduction in child support, service of the 13 November 1991 motion for contempt should have

indicated otherwise. Yet it took defendant nearly four months from service of that motion to file the motion he was required to make all along.

Moreover, even if an oral agreement existed, it would not justify noncompliance with the statute. In *Craig*, this Court held that even though child support normally terminates as a matter of law upon a child reaching age 18, where at least one child for whom support was ordered remains a minor, defendant still had to apply to the trial court for modification. Similarly, even if there had been an oral agreement here, defendant was still required to comply with the statute by applying to the court before altering his payments.

We hold that defendant's legal obligation to pay plaintiff $1,000 per month in child support extended until he filed his 12 March 1992 written motion and gave appropriate notice to the plaintiff. The trial court's 18 March 1992 order reducing his child support is to be applied prospectively only. Thus, defendant owes plaintiff retroactive child support from August 1991 through March 1992. We note that, although defendant moved for the reduction on 12 March 1992, he owes plaintiff the full March payment. The record reflects that, under the consent order, payments were due on the first day of each month. Because payments vest when they accrue, N.C. Gen. Stat. § 50-13.10, the March 1992 payment had already vested when defendant filed his motion. *Compare Hill v. Hill*, No. 100A92, 1993 WL 453763 (N.C. Nov. 5, 1993).

Plaintiff-appellant further assigns error to the trial court's finding that there was an oral agreement between the parties that child support would be reduced after the equitable distribution judgment was entered. We need not address this contention because, as noted above, we reach the same result whether or not such an agreement existed.

[2] Finally, plaintiff-appellant assigns error to the trial court's finding of fact that upon equitable distribution, plaintiff waived the alimony provisions of the August 1989 consent judgment. The August 1989 order provides that temporary alimony should be paid until there is a hearing on the issue of permanent alimony. Although no such hearing has been held, the trial court found as a fact that at the time of equitable distribution, plaintiff waived the alimony provision because she would now be receiving monthly payments pursuant to the equitable distribution.

Plaintiff contends that the court erred by addressing the alimony issue in this proceeding. She is correct. Plaintiff instituted this proceeding on a motion for contempt for failure to pay child support. Defendant counter-moved for a reduction in child support payments. At no point in the proceedings did either party move for modification of the alimony payments. A motion and a showing of changed circumstances are required to vacate or modify an alimony order. N.C. Gen. Stat. § 50-16.9 (1987). Here, the only motion before the trial court was one for modification of child support, not alimony. A motion by a party to modify one provision of a consent order does not give a trial court the power unilaterally to modify a different provision of the order, where such modification would otherwise require a motion by a party.

In *Conrad v. Conrad*, 35 N.C. App. 114, 239 S.E.2d 862 (1978), we reversed a trial court when it unilaterally suspended alimony payments without motion and notice to the other party. In *Conrad*, plaintiff initiated a contempt proceeding against defendant for failure to make alimony payments for August and September 1976. The trial court not only ordered defendant to pay the August payment but also, upon a finding that he thereafter lacked the means to comply, suspended all further monthly payments. We reversed, holding that modification of the alimony order absent a motion by defendant and notice to plaintiff violates the Fourteenth Amendment to the United States Constitution and Article I, Sec. 19 of the North Carolina constitution by depriving plaintiff of her property rights without due process. *See also Mann v. Mann*, 57 N.C. App. 587, 291 S.E.2d 794 (1982); *Lee v. Lee*, 37 N.C. App. 371, 246 S.E.2d 49 (1978). Likewise, in the subject case we reverse the order of the trial court modifying the alimony agreement.

Reversed and remanded for entry of an order requiring defendant to pay the full amount of arrearages which accumulated from April 1991 through March 1992.

Chief Judge ARNOLD and Judge JOHN concur.

TRANSTECTOR SYSTEMS, INC., PLAINTIFF v. ELECTRIC SUPPLY, INC., DEFENDANT, AND LITHONIA LIGHTING PRODUCTS COMPANY OF NEVADA, INC., THIRD-PARTY

No. 9318SC52

(Filed 21 December 1993)

1. **Appeal and Error § 125 (NCI4th)— motion to order production of evidence of debts—denied—appeal interlocutory**

Plaintiff's appeal was dismissed as interlocutory where the order at issue required the third-party cross-appellant to take certain actions with regard to evidence of debts due defendant "pending further orders of this court." The wording of the order clearly demonstrates that the order is interlocutory, since it was made during the pendency of the action and did not dispose of the case in a final manner.

Am Jur 2d, Appeal and Error § 130 et seq.

2. **Courts § 17 (NCI4th)— out-of-state corporation—personal jurisdiction—no authority to exercise**

The trial court erred by denying the motion of third-party Lithonia to dismiss for lack of authority to exercise personal jurisdiction where Lithonia is not a person served in an action pursuant to N.C.G.S. § 1A-1, Rules 4(j) or 4(j1), never made a general appearance, and is not involved in a counterclaim to an action it brought, so that plaintiff cannot argue that service of a summons is dispensed with under N.C.G.S. § 1-75.7. N.C.G.S. § 1-75.3(b).

Am Jur 2d, Courts §§ 118, 119.

Appeal by plaintiff and third-party appellee and cross-appellant from judgment entered 21 September 1992 by Judge Julius A. Rousseau, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 29 November 1993.

On 7 November 1991, plaintiff obtained a judgment against defendant in the amount of $28,055.36. On 10 December 1991, an execution was issued by the Clerk of Court on behalf of plaintiff.

On 21 February 1992, the Sheriff of Guilford County viewed the remaining physical assets of defendant. Pursuant to N.C. Gen. Stat. § 1-324.4, the sheriff ordered defendant to comply with the

requirements of the statute and produce all evidence of any debts due the corporation to the sheriff for the purpose of assignment to plaintiff. The sheriff was unable to find other property belonging to defendant to satisfy the judgment.

On 27 February 1992, the sheriff levied on some of defendant's goods. On 9 March 1992, the sheriff held an execution sale of the goods with the proceeds totaling $50.00. The cost of the sale was $250.00.

On 30 March 1992, the Clerk of Superior Court of Guilford County issued an execution to the Sheriff of Guilford County pursuant to a judgment obtained by third-party Lithonia against defendant in the amount of $133,497.15. Because the sheriff had previously levied upon and sold all tangible personal property which he could locate pursuant to plaintiff's execution, the sheriff made demand upon defendant pursuant to N.C. Gen. Stat. § 1-324.4 to satisfy Lithonia's execution from debts due defendant. In response, defendant delivered all evidence of debts due them to the sheriff with a transfer in writing in the form of a Response to Demand from Sheriff.

On 13 April 1992, the Clerk of Superior Court of Guilford County ordered every agent or person having charge or control of property of defendant to furnish to the sheriff the names of the directors and officers of defendant corporation and a schedule of all of its property, including debts due defendant, within ten days of the service of the order. Pursuant to this order and after service by the sheriff, defendant filed a Response to Demand from Sheriff in which defendant stated that the debts due them had previously been delivered to the sheriff pursuant to Lithonia's execution and demand, and that this transfer constituted an assignment of the debts due defendant as set forth in N.C. Gen. Stat. § 1-324.4.

On 29 June 1992, plaintiff filed a Motion to Show Cause as to why defendant should not be held in contempt for its failure to deliver the evidence of debts due them to plaintiff pursuant to the alleged demand by the sheriff prior to his levy on the personal property and the clerk's order of 13 April 1992. On 24 August 1992, the court denied plaintiff's motion. On 31 August 1992, plaintiff filed its Motion to Produce Evidence of Debts Due Corporation or in the Alternative to Sell Debts Due Corporation in which plaintiff named Lithonia as "third party." The trial court denied plain-

tiff's motion. Plaintiff appealed and third-party Lithonia Lighting Products Company of Nevada, Inc. cross-appealed.

Causey, Bodenheimer & Bradley, by Pete Bradley, for plaintiff-appellant Transtector Systems, Inc.

Keziah, Gates & Samet, by Andrew S. Lasine, for defendant-appellee Electric Supply, Inc.

Fisher Fisher Gayle Clinard & Craig, P.A., by Robert G. Griffin and John O. Craig, III, for third-party appellee and cross-appellant Lithonia Lighting Products Company of Nevada, Inc.

WELLS, Judge.

I. Plaintiff's Appeal

[1] Plaintiff appeals from Judge Rousseau's order dated 21 September 1992 which denied plaintiff's motion that defendant comply with the order issued by the sheriff on 21 February 1992 and with the order issued by the Guilford County Clerk of Superior Court dated 13 April 1992. Initially, we must decide whether this appeal is interlocutory and should be dismissed.

A judgment or order of a trial court is either interlocutory or is a final determination of the rights of the parties. N.C. Gen. Stat. § 1A-1, Rule 54(a) (1990). Interlocutory orders are those made during the pendency of a proceeding which do not finally dispose of the case but leave it for further action by the trial court in order to settle and determine the entire controversy. *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "An appeal from a nonappealable interlocutory order is fragmentary and premature and will be dismissed." *Hoots v. Pryor*, 106 N.C. App. 397, 417 S.E.2d 269, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992), *citing Cement Co. v. Phillips*, 182 N.C. 437, 109 S.E. 257 (1921).

Judge Rousseau's order required the third-party cross-appellant Lithonia to take certain actions with regard to the evidence of debts due defendant "pending further orders of this court." The wording of this order clearly demonstrates that the order is an interlocutory order, since it was made during the pendency of the action and it did not dispose of the case in a final manner. In order for an interlocutory order to be immediately appealable, it

must affect a substantial right and must threaten injury if not corrected before final judgment. *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990). Since plaintiff has not demonstrated that any substantial right is affected by this order, plaintiff's purported appeal of an interlocutory order is hereby dismissed.

II. Third-Party Lithonia's Cross-Appeal

[2] Third-party Lithonia cross-appeals and contends that the trial court erred in denying its motion to dismiss pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure because the court lacked authority to exercise personal jurisdiction over Lithonia. We agree and hold that the trial court's denial of this motion was error.

N.C. Gen. Stat. § 1-75.3(b) sets forth the requirements for personal jurisdiction over a party. The statute allows a North Carolina court to have personal jurisdiction over a party only if one or more of the jurisdictional grounds set forth in N.C. Gen. Stats. § 1-75.4 or § 1-75.7 are met and either: (1) service of process is made pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure; or (2) service of a summons is dispensed with under the conditions in N.C. Gen. Stats. § 1-75.7 and § 1-75.3(b).

Neither of the previously cited statutes allows a court of this State to exercise jurisdiction over Lithonia as the trial court has in this action. Lithonia is not a "person served in an action pursuant to Rule 4(j) or Rule 4(j1)." Plaintiff made no service of process upon Lithonia or substituted service as required by these rules. Since Lithonia never made a general appearance in this action and is not involved in a counterclaim to an action it brought, plaintiff cannot successfully argue that service of a summons is dispensed with under the conditions of N.C. Gen. Stat. § 1-75.7.

Since Lithonia was never properly brought within the jurisdiction of the trial court, we hold that their motion to dismiss should have been allowed. Accordingly, we reverse the trial court's denial of this motion.

Upon remand, the trial court shall enter an appropriate order dismissing this action as to Lithonia.

Dismissed in part; reversed in part and remanded.

Chief Judge ARNOLD and Judge EAGLES concur.

DALLAS L. ISENHOUR AND WIFE, SANDRA K. ISENHOUR v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, AND UNIVERSAL UNDERWRITERS GROUP

No. 9325SC97

(Filed 21 December 1993)

Insurance § 528 (NCI4th) — automobile insurance — UIM coverage — no stacking of personal and fleet policies

An injured motorist was not entitled to interpolicy stacking of the underinsured motorist benefits under his nonfleet personal automobile policy and his employer's fleet insurance coverage.

Am Jur 2d, Automobile Insurance § 322.

Appeal by plaintiffs from judgment entered 10 November 1992 by Judge Robert M. Burroughs in Catawba County Superior Court. Heard in the Court of Appeals 1 December 1993.

On 29 April 1989, Dallas Isenhour (Isenhour) was injured when his vehicle collided with a vehicle driven by Willie Kate Clark (Clark). On 12 March 1990, Isenhour filed a complaint against Clark alleging, among other things, negligence in failing to keep a proper lookout and driving in a reckless manner. Isenhour's wife, Sandra, asserted a claim for loss of consortium. At the time of the accident, both Clark and Isenhour were insured by Nationwide Mutual Insurance Company (Nationwide) under nonfleet personal automobile insurance policies. Isenhour's employer, Far East Motors, also had a fleet policy which may have covered Isenhour as a Far East Motors employee. The fleet policy was issued by the defendants, Universal Underwriters Insurance Company and Universal Underwriters Group, collectively, Universal.

Clark's policy with Nationwide had coverage limits of $50,000.00. As a result, plaintiffs' attorney notified Universal of their intent to seek additional compensation under the underinsured provision in Universal's policy with Far East Motors. Plaintiffs' attorney informed Universal in a 17 July 1991 letter of their demand for settlement of $1,200,000.00 and sent Universal copies of the complaint and other pertinent documents.

On 1 October 1991, plaintiffs' attorney notified Universal that the case was set on the 14 October 1991 trial calendar and that

Universal did not appear represented. Universal sent plaintiffs' attorney a letter in which it denied it was a party to the suit and produced its insurance policy for review. The trial court entered judgment in the underlying case on 10 March 1992 in the amount of $750,000.00 for Isenhour and $150,000.00 for Sandra. The judgment stated that plaintiffs could recover from Clark to "the extent of underinsured motorist's coverage provided by an underinsured motorist carrier other than Nationwide Mutual Insurance Company," as per a partial release negotiated by the parties. This partial release limited Nationwide's total liability under both policies to $75,000.00.

In subsequent correspondence, Universal stated that the maximum that may be available to Isenhour under their policy was $60,000.00 and denied that an umbrella provision in the policy applied to Isenhour's claim. Universal explained that the coverage parts for the underlying policy and the umbrella policy were separate and distinct forms of coverage, adding that underinsured motorist coverage is added only by specific endorsement. Universal stated that only $60,000.00 in underinsured motorist coverage existed via specific endorsement and underinsured motorist coverage had not been endorsed onto the umbrella provision. Accordingly, Universal claimed Isenhour was entitled to recover, if anything, $60,000.00 in underinsured motorist coverage.

On 8 June 1992, the Isenhours filed suit against Universal alleging (1) gross negligence, (2) violation of N.C. Gen. Stat. § 58-63-15(11) (1991), unfair and deceptive acts or practices, and N.C. Gen. Stat. § 75-16 (1988), and (3) liability by virtue of N.C. Gen. Stat. § 20-279.21(b)(4) (1989). The Isenhours further alleged the policy provided $1,060,000.00 in underinsured motorist coverage. Universal responded, denying liability and defending on the basis that (1) the policy is a fleet policy under G.S. § 20-279.21(b)(4) and cannot be stacked onto a nonfleet policy, (2) plaintiffs are not insureds under the policy, and (3) Universal was not a party to the judgment action, nor did it participate in the settlement agreement, and cannot be bound by that agreement.

Universal moved for summary judgment on 25 August 1992. On 10 November 1992, the trial court granted defendants' motion for summary judgment and dismissed the plaintiffs' claims. Judgment was based on this Court's holding in *Watson v. American National Fire Insurance Company*, 106 N.C. App. 681, 417 S.E.2d

814 (1992), *aff'd on other grounds*, 333 N.C. 338, 425 S.E.2d 696 (1993). From the entry of summary judgment, plaintiffs appeal.

Pritchett, Cooke & Burch, by David J. Irvine, Jr., and Lovekin & Ingle, P.A., by Stephen L. Lovekin and John D. Ingle, for plaintiff appellants.

Hutchins, Tyndall, Doughton & Moore, by Richard Tyndall and Kent L. Hamrick, for defendant appellees.

ARNOLD, Chief Judge.

Plaintiffs contend the trial court erred in allowing defendants' motion for summary judgment. Defendants, on the other hand, contend that summary judgment should be affirmed because the trial court correctly applied this Court's decision in *Watson*. Defendants are correct.

Defendants submitted two affidavits in support of their motion for summary judgment. In the first affidavit, Universal's underwriting manager stated that Universal's policy issued to Far East Motors was a fleet policy that insured a multiple and changing number of motor vehicles used in Far East Motor's business. In the second affidavit, Nationwide, which had issued policies to both Clark, the tortfeasor, and the Isenhours, stated that both policies were nonfleet personal automobile insurance policies.

On the basis of these two affidavits and this Court's decision in *Watson*, the trial court granted summary judgment. At all times pertinent to this appeal, G.S. § 20-279.21(b)(4), relating to underinsured motorist stacking, contained a proviso stating "this paragraph shall apply only to nonfleet private passenger motor vehicle insurance." The paragraph referred to in the proviso allows the owner, "in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies." G.S. § 20-279.21(b)(4).

In *Watson*, this Court, relying on the language in the proviso, held that fleet policies may not be stacked onto nonfleet policies under G.S. § 20-279.21(b)(4). *Watson v. American National Fire Insurance Co.*, 106 N.C. App. 681, 417 S.E.2d 814 (1992), *aff'd on other grounds*, 333 N.C. 338, 425 S.E.2d 696 (1993). In *Watson*, this Court stated that

> the appellee's policy is a fleet policy under *Sutton* and excluded from inter-policy stacking, since the stacking provisions of N.C.G.S. § 20-279.21(b)(4) cover only nonfleet private passenger motor vehicle insurance. *Aetna Casualty and Sur. Co. v. Fields*, 105 N.C. App. 563, 414 S.E.2d 69 (1992). We recognize that inter-policy stacking is permitted so as to provide the innocent victim of an inadequately insured driver with an additional source of recovery; however, to allow stacking of a victim's fleet policy onto the nonfleet policy of the insured-tortfeasor is a result contemplated neither by the insurer when it wrote the fleet policy nor the legislature when it wrote the statute.

Id. at 686, 417 S.E.2d at 818. *But see Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989) (stating that no reason exists to distinguish between fleet and nonfleet policies under interpolicy stacking).

Our Supreme Court granted discretionary review of *Watson*. On review, that Court determined that the insurance policy at issue was exempt, via N.C. Gen. Stat. § 20-279.32 (1993), from the requirements of the Financial Responsibility Act, encompassing G.S. § 20-279.21(b)(4), entitling the plaintiff to "only such coverage as is provided in the policy." *Watson*, 333 N.C. 338, 340, 425 S.E.2d 696, 697 (1993). The Supreme Court affirmed this Court's decision without modification or reversal, despite conflicting language in *Sutton* indicating approval of the type of stacking barred by this Court in *Watson*. Thus, we must assume *Watson* is still binding on this Court.

Watson, therefore, bars the coverage sought in this case and the trial court correctly granted summary judgment. In light of this determination, it is unnecessary to address plaintiffs' specific contentions regarding summary judgment.

Affirmed.

Judges WELLS and EAGLES concur.

EARL R. BUTZ, LINDA M. BUTZ, AND MARC BUTZ, PLAINTIFFS v. JIMMY DAVIS HOLDER, DEFENDANT

No. 9211SC252

(Filed 21 December 1993)

Negligence § 19 (NCI4th)— son injured in accident—negligence by defendant—emotional distress of parents not foreseeable

Plaintiff parents who went to their teenage son's fatal accident scene could not recover against defendant tortfeasor for negligent infliction of emotional distress where there was neither allegation nor forecast of evidence that defendant knew that plaintiff parents were subject to emotional or mental disorders or other severe and disabling emotional or mental conditions as a result of defendant's negligence and its consequences, since it was not reasonably foreseeable that defendant's negligence while driving an automobile would cause decedent's parents to suffer severe emotional distress.

Am Jur 2d, Negligence § 488 et seq.

Appeal by plaintiffs from order entered 16 December 1991 by Judge Giles R. Clark in Harnett County Superior Court. Heard in the Court of Appeals 5 January 1993.

Smith, Debnam, Hibbert & Pahl, by John W. Narron and Elizabeth B. Godfrey, for plaintiffs-appellants.

Savage & Godfrey, by David R. Godfrey, for plaintiffs-appellants.

Bailey & Dixon, by Gary S. Parsons and Denise Stanford Haskell, for defendant-appellee.

JOHNSON, Judge.

Our reasoning in *Butz v. Holder*, 112 N.C. App. 116, 434 S.E.2d 862 (1993) was based substantially on *Gardner v. Gardner*, 106 N.C. App. 635, 418 S.E.2d 260 (1992), *rev'd*, 334 N.C. 662, 435 S.E.2d 324 (1993) and *Sorrells v. M. Y. B. Hospitality Ventures of Asheville*, 108 N.C. App. 668, 424 S.E.2d 676, *rev'd*, 334 N.C. 669, 435 S.E.2d 320 (1993). Our Supreme Court has since issued opinions reversing both *Gardner* and *Sorrells*. Defendant timely petitioned for rehearing and we granted this petition.

We briefly revisit the facts of *Butz*. 13-year-old Dwayne John Butz was hit and killed by an automobile driven by defendant. At the time of the accident, which occurred on a bridge, decedent was riding his bicycle on Rural Road 1415 which was approximately one-half mile from his parents' home.

A neighbor went to decedent's home and informed plaintiff father, Earl R. Butz, of the accident; plaintiff father immediately went to the site of the accident where he learned his son had been killed. Decedent was covered with a sleeping bag in the road. Plaintiff mother, Linda M. Butz, and brother, Marc Butz, arrived shortly thereafter, separately.

During the months following the accident, as a result of emotional distress, plaintiff mother sought psychiatric and psychological care and plaintiff father developed high blood pressure.

We held in *Butz* "where plaintiffs father and mother of the decedent arrived at the scene of the accident shortly after its occurrence, defendant could have reasonably foreseen that negligence on defendant's part might be a direct or proximate cause of plaintiff parents' emotional distress. We hold that this issue of foreseeability as to the parents for negligent infliction of emotional distress is one for the jury." *Butz*, 112 N.C. App. at 120, 434 S.E.2d at 864.

We relied upon *Sorrells* in our previous *Butz* decision. *Sorrells* involved a 21-year-old son who was killed in an automobile accident, his body mutilated, after being negligently served alcohol by the defendant bartender. The action in *Sorrells* was brought by the parents of the decedent; our Court held that the issue of foreseeability in *Sorrells* was one for the jury. On appeal as of right, the Supreme Court reversed, holding that this accident was not reasonably foreseeable.

The Court noted that to state a claim for negligent infliction of emotional distress (NIED), "the plaintiff need only allege that: '(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress.' " *Sorrells*, 334 N.C. at 672, 435 S.E.2d at 321-22, *quoting Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). The factors to consider in making this foreseeability determination "include, *but are not limited to*: (1) 'the plaintiff's proximity to the negligent act' causing injury

to the other person, (2) 'the relationship between the plaintiff and the other person,' and (3) 'whether the plaintiff personally observed the negligent act.'" *Sorrells*, 334 N.C. at 672, 435 S.E.2d at 322, *quoting Ruark*, 327 N.C. at 305, 395 S.E.2d at 98. (Emphasis retained.) The Court stated that in NIED cases, the Court was "compelled to carry out a principle *only* to its necessary and logical results, and not to its furthest theoretical limit, in disregard of other established principles." (Citations omitted.) (Emphasis retained.) *Sorrells*, 334 N.C. at 673, 435 S.E.2d at 322. The *Sorrells* Court concluded as a matter of law "that the *possibility* (1) the defendant's negligence in serving alcohol to [decedent] (2) would combine with [decedent's] driving while intoxicated (3) to result in a fatal accident (4) which would in turn cause [decedent's] parents (if he had any) not only to become distraught, but also to suffer 'severe emotional distress' as defined in *Ruark*, simply was a possibility too remote to permit a finding that it was reasonably foreseeable." (Emphasis retained.) *Id.* at 674, 435 S.E.2d at 323.

In *Gardner*, decedent was a minor son who lived with the plaintiff, his mother. Decedent was killed while riding in a car being driven by the defendant, his father. When the plaintiff heard about the accident, she went to the emergency room and saw her son on a stretcher, his body covered except for his hands and feet. He died later in the day. Our Court held that the defendant therein "could have reasonably foreseen that his negligence might be a direct and proximate cause of the plaintiff's emotional distress[.]" *Gardner*, 334 N.C. at 664-65, 435 S.E.2d at 326.

On appeal, the Supreme Court noted that in *Gardner* the first and third of the *Ruark* requirements had been met, but that "the . . . requisite factor—that it was reasonably foreseeable defendant's conduct would cause plaintiff's severe emotional distress—is the crux of this appeal." *Gardner*, 334 N.C. at 666, 435 S.E.2d at 327. In looking at all of the factors suggested by *Ruark* for guidance, the *Gardner* Court held "that plaintiff's injury was not reasonably foreseeable and its occurrence was too remote from the negligent act itself to hold defendant liable for such consequences." *Id.* at 668, 435 S.E.2d at 328.

In light of *Sorrells* and *Gardner*, to find it foreseeable that defendant's negligence while driving an automobile would result in a fatal accident which would cause decedent's parents to suffer severe emotional distress is not proper on these facts.

Furthermore, the *Gardner* Court, in dismissing the plaintiffs' NIED claim stated that "there is neither allegation nor forecast of evidence that defendant *knew* plaintiff was subject to an emotional or mental disorder or other severe and disabling emotional or mental condition as a result of his negligence and its consequences." *Gardner*, 334 N.C. at 667, 435 S.E.2d at 328. (Emphasis added.) It appears from this language in *Gardner* that the Supreme Court has held that in any claim for NIED, the plaintiff must allege and through a forecast of evidence show that defendant *knew* that the plaintiff was subject to an emotional or mental disorder or other severe and disabling emotional or mental condition to say that the consequences of the alleged tortfeasor's negligence were reasonably foreseeable. In the instant case, there is neither allegation or forecast of evidence that the defendant *knew* plaintiff parents were subject to emotional or mental disorders or other severe and disabling emotional or mental conditions as a result of defendant's negligence. Therefore, pursuant to *Gardner*, the emotional distress suffered by plaintiff parents was not a foreseeable consequence of the actions of the defendant.

The decision of the trial court is affirmed.

Judges GREENE and MARTIN concur.

VANESSA FAIR, PETITIONER v. ST. JOSEPH'S HOSPITAL, INC., AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. 9328SC140

(Filed 21 December 1993)

1. Labor and Employment § 170 (NCI4th)— unemployment compensation denied—appeal—findings

A petitioner for unemployment compensation failed to properly object to findings in an Employment Security Commission denial of compensation; moreover, the findings were supported by competent evidence and were thus conclusive on appeal.

Am Jur 2d, Unemployment Compensation § 215 et seq.

2. Labor and Employment § 159 (NCI4th)— unemployment compensation—discharge due to fighting—not reflexive or impulsive conduct

The findings of fact supported the Employment Security Commission's conclusions of law that petitioner had violated a company rule against fighting and was disqualified for unemployment benefits where one of petitioner's co-workers "popped" her with a rubber band and petitioner reacted by shoving the co-worker into a medical cart and hitting her in the eye. Although petitioner argued that her conduct was merely reflexive and was not deliberate or intentional, petitioner's actions were purely retaliatory and combative and were not intended for self-preservation or to restrain her co-worker from further attacks.

Am Jur 2d, Unemployment Compensation § 77 et seq.

Employee's act or threat of physical violence as bar to unemployment compensation. 20 ALR4th 637.

Appeal by petitioner from judgment entered 19 November 1992 by Judge Robert D. Lewis in Buncombe County Superior Court. Heard in the Court of Appeals 3 December 1993.

Baley, Baley & Clontz, P.A., by Stanford K. Clontz, for petitioner.

T.S. Whitaker, Chief Counsel and V. Henry Gransee, Jr., Deputy Chief Counsel, for Employment Security Commission.

LEWIS, Judge.

Vanessa Fair ("petitioner") was discharged from her position as a health unit coordinator at St. Joseph's Hospital for fighting with a co-worker. The evidence shows that one of petitioner's co-workers "popped" her with a rubber band and that petitioner, reacting in the "heat of anger," assaulted the co-worker by shoving her into a medical cart and then hitting her in the right eye. Petitioner was thereafter discharged for wilfully and without good cause violating a company policy which prohibited fighting.

Petitioner made a claim for benefits under N.C.G.S. § 96-15(a) and a hearing was held before an appeals referee. The appeals referee determined that petitioner had wilfully and wantonly violated

a reasonable company rule against fighting and that she was therefore disqualified from unemployment benefits. Petitioner then appealed to the Employment Security Commission ("ESC") which affirmed and adopted the opinion of the appeals referee in its entirety. Petitioner then filed a petition for judicial review in Buncombe County Superior Court. After conducting a telephone conference, the trial court ruled that petitioner had not properly objected to the facts as found by the ESC and that the facts were thus presumed to be supported by competent evidence. The trial court also concluded that the ESC had properly applied the law to the facts of the case and affirmed the ESC's ruling. Petitioner now appeals to this Court. St. Joseph's is not a party to this appeal.

N.C.G.S. § 96-15(i) governs appeals to this Court from the ESC. The scope of our review is to determine whether the facts as found by the ESC are supported by competent evidence and if so, whether the findings of fact support the conclusions of law. *Reco Transp. Inc. v. Employment Sec. Comm'n*, 81 N.C. App. 415, 344 S.E.2d 294, *disc. rev. denied*, 318 N.C. 509, 349 S.E.2d 865 (1986). This Court may not consider the evidence itself for the purpose of finding facts. *In re Bolden*, 47 N.C. App. 468, 267 S.E.2d 397 (1980). If the findings of fact made by the ESC are supported by competent evidence then they are conclusive on appeal. *See Vanhorn v. Bassett Furniture Indus.*, 76 N.C. App. 377, 333 S.E.2d 309 (1985). However, even if the findings of fact are not supported by the evidence, they are presumed to be correct if the petitioner fails to except. *Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 291 S.E.2d 308 (1982).

[1] In her first assignment of error, petitioner claims that the trial court erred in finding that she had not properly objected to the facts as found by the ESC. Petitioner claims that it was not necessary for her to object specifically to the findings of fact because only finding of fact number 3, which states that petitioner wilfully and wantonly violated a company rule against fighting, precludes her from receiving unemployment benefits. Petitioner further claims that contrary to its label, finding of fact number 3 is actually a conclusion of law and that she is still entitled to judicial review of whether the ESC's conclusions of law are supported by the evidence.

In our review of the record, we agree that petitioner has failed to properly object to the ESC's findings of fact. Even if

petitioner had properly objected to the ESC's findings of fact, our review of the record reveals that the ESC's findings are supported by competent evidence and are thus conclusive on appeal. For the sake of argument we have assumed, without deciding, that petitioner is correct in her assertion that finding of fact number 3 is really a conclusion of law. Accordingly, we turn to petitioner's second assignment of error which deals with whether the ESC's findings of fact support its conclusions of law.

[2] The essence of petitioner's second assignment of error is that reflexive or impulsive conduct does not constitute misconduct as that term is defined in the Employment Compensation Act. N.C.G.S. § 96-14(2) (1993) defines misconduct connected with one's work as:

> conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

The only part of this definition which is applicable to the facts of this case is whether petitioner wilfully or wantonly disregarded the standards of behavior which her employer had a right to expect. Petitioner claims that since the ESC found she acted in the "heat of anger," that it was impossible for her to have deliberately violated her employer's rule against fighting. In support of this argument, petitioner cites the recent opinion of *Smith v. Kinder Care Learning Ctrs.*, 94 N.C. App. 663, 381 S.E.2d 193 (1989), *rev'd*, 326 N.C. 362, 389 S.E.2d 30 (1990) (per curiam). For the reasons discussed below, we disagree and find *Smith* distinguishable.

In *Smith*, a pregnant day care worker was discharged for violating a company rule against using physical punishment to discipline a child. The extent of the physical punishment used by the day care worker was that she struck the shoulder of an unruly child who had hit her in the stomach with a book bag to prevent the child from hitting her further. The day care worker was extremely upset about the incident and reported it, herself, to her superiors. The day care worker was subsequently discharged. On appeal, a majority of this Court held that the day care worker had engaged in job related misconduct which precluded her from

receiving employee benefits. However, Judge Eagles dissented from the majority opinion holding that the day care worker's actions were merely reflexive and not a deliberate disregard for her employer's interests. Judge Eagles, citing Black's Law Dictionary, defined deliberate to mean "willful rather than merely intentional" and said that "deliberate actions are those taken after weighing the consequences." *Id.* at 669, 381 S.E.2d at 196. Judge Eagles concluded that although the day care worker had exercised poor judgment, she had not engaged in the type of deliberate conduct to disqualify her from employment benefits. In a per curiam opinion, the Supreme Court reversed the majority opinion of this Court and adopted the dissent of Judge Eagles. It is the language of this dissent on which petitioner relies.

Although, at first blush, *Smith* seems similar to the facts of this case, we find that petitioner's conduct was much more excessive than that of the day care worker in *Smith*. The day care worker used a single act of physical force to restrain an undisciplined child who represented a threat to her own unborn child. We agree with the dissent in *Smith* that reflexive acts of self-preservation are not the type of misconduct that would disqualify an individual from employee benefits. However, in this case, the actions of petitioner were not intended for self-preservation, nor were they intended to restrain her co-worker from further attacks. Instead, petitioner's assault was purely retaliatory and combative. We find that this is the type of misconduct which would disqualify an individual from employment benefits.

Even though petitioner reacted "in the 'heat of anger' without concern or consideration for her job," we cannot think of any fight on the job which would occur other than in the heat of passion or in the heat of anger. Although petitioner may not have consciously considered how her actions would affect her job, she at least considered her option of whether or not to assault her co-worker. If we were to accept petitioner's argument that her conduct was merely reflexive, and that it was not deliberate or intentional, then employees who violated company policies against fighting would never be disqualified from benefits. Clearly, this is not the law of North Carolina. The ESC found that petitioner had been provided with a copy of her employer's work rules, that she was aware, or should have been aware, of the rule against fighting, and that she nevertheless assaulted her co-worker. This was a clear and deliberate disregard of the standards of behavior which her employer

had a right to expect from her. We find that the findings of fact support the ESC's conclusions of law, and accordingly the judgment of the trial court is

Affirmed.

Judges ORR and JOHN concur.

CUMBERLAND COUNTY BOARD OF EDUCATION, PLAINTIFF v. CUMBERLAND COUNTY BOARD OF COMMISSIONERS, DEFENDANT

No. 9212SC1171

(Filed 21 December 1993)

Appeal and Error § 175 (NCI4th); Schools § 70 (NCI4th)— amount appropriated for schools—mootness of appeal

An appeal under N.C.G.S. § 115C-431 from the trial of a dispute between a board of education and a board of county commissioners as to the amount appropriated by the commissioners to maintain a system of free public schools in the county for the 1992-93 school year is moot where that school year has ended.

Am Jur 2d, Appeal and Error § 760 et seq.

Appeal by defendant from judgment entered 24 August 1992 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 20 October 1993.

This appeal concerns the trial court's interpretation of N.C. Gen. Stat. § 115C-431, the dispute resolution statute contained in The School Budget and Fiscal Control Act (School Budget Act). The Cumberland County Board of Education (BOE) invoked the statute to question the sufficiency of an appropriation of funds by the Cumberland County Board of Commissioners (BOC) for the 1992-1993 budget. The disputed funds make up what is known as the local current expense fund.

Prior to 15 May 1992, the BOE submitted its budget request of 30.9 million for the 1992-1993 school year to the BOC. The BOC granted 26.9 million, 4 million below the requested amount. The

members of the BOE met and voted to meet with the BOC, as provided for in G.S. § 115C-431. On 2 July 1992, the two groups met and failed to resolve the budget dispute. The BOE met again on 6 July 1992 and decided to refer the matter to the clerk of superior court for arbitration, again, as provided in G.S. § 115C-431. The clerk of superior court found that an additional 2 million was necessary to maintain a system of free public schools and awarded 2 million to the BOE. The BOE appealed, again, to the superior court, contending the amount was still insufficient.

At trial, Maureen Clark, a member of the BOE, testified on their behalf. She stated that Cumberland County had the third largest school system in North Carolina and served 46,000 students. Ms. Clark explained that the BOE had developed a five year plan in an attempt to improve the school system. When the plan was conceived, local per pupil expenditures were below the state average. Ms. Clark testified that the BOC had agreed to fund the plan and, in fact, did fund the plan from 1990-1992. For the 1990-1991 school year, the BOC granted 25.9 million. In 1991-1992, the BOC granted 28.4 million. She stated that the 30.9 million requested for the 1992-1993 school year was based on funding in accordance with the five year plan. Ms. Clark indicated on cross examination that the five year plan could be paid for only with local money.

Dr. Larry Rowedder, superintendent of the Cumberland County schools, testified that the five year plan was essentially a budget plan which required an estimated 7.5 million more than the amount normally put into the budget over the next five years. The five year plan needed a minimum 4-5 percent increase in county funding to maintain the status quo, along with an additional 1.5 million to implement the plan. Dr. Rowedder also testified that the plan was an attempt by the BOE to bring their spending up to average in the state, something it was currently far below.

Ricky Lopes, finance officer for Cumberland County schools, identified the funds the BOE gets from local sources. Lopes testified that the budget had already been "knocked down" to a point at which, in the eyes of the committee, it was a "bare-bones-type" budget. Mr. Lopes informed the jury that statistical data revealed Cumberland County increased its local funds given to public school systems from 1985-1991 by 20.93 percent, whereas the average state increase was 43.96 percent. Mr. Lopes also stated that county revenues had increased 52 percent during the same period.

The BOC presented the testimony of Marshall Faircloth, a certified public accountant and member of the BOE. Mr. Faircloth, chairman of the BOE's Finance Committee, testified that 2 million was available in the school's fund balance, a separate account, to cover the shortfall. Mr. Faircloth indicated, however, that this availability was based on the belief that the BOC would adhere to the five year plan's funding as previously agreed upon. More specifically, he stated that depleting the fund balance would not be prudent absent a commitment from the BOC to fund the fourth and fifth year of the plan.

John Nalepa, finance director for Cumberland County, testified that it was his opinion that the BOE would have a fund balance of approximately 5.48 million as of 30 June 1992. Mr. Nalepa stated that, of the 28.4 million the BOC gave the school in the second year of the plan, 3.16 million was not spent and was put into the fund balance or savings account. Mr. Nalepa stated further that it was his opinion that the BOE needed less than 1 million in the fund balance to meet their cash flow needs.

Amy Cannon, senior budget analyst for Cumberland County, testified that the county is required to fund the maintenance and operation of physical facilities, supplies for the school buildings, liability insurance, and books and other instructional materials or supplies. She also pointed out that several items in the budget were paid for by the county, though not mandated by statute. Ms. Cannon testified that in her opinion the county was only mandated to pay 16 million to the BOE. Several more witnesses testified for the BOC. Their testimony dealt with ways in which, or funds from which, the BOE could make up any perceived shortfall in the budget. From a judgment that 29 million is needed to maintain a system of free public schools, the BOC appeals.

Tharrington, Smith & Hargrove, by Ann L. Majestic and Jonathan A. Blumberg, and Maynette Regan, for plaintiff appellee.

County Attorney G. B. Johnson and Deputy County Attorneys Robert H. Bartelt, Danny G. Higgins, and Douglas E. Canders for defendant appellant.

ARNOLD, Chief Judge.

The parties have presented several issues for our review. This matter is moot, however, and we cannot address the issues before

us. Generally, a court will not decide a moot case and state court mootness doctrine "represents a form of judicial restraint." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied, Peoples v. Judicial Standards Commission of North Carolina*, 442 U.S. 929 (1979). Our Supreme Court has stated that

> [w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.
>
> . . . If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.

Id. at 147-148, 250 S.E.2d at 912 (citations omitted). An exception to this doctrine exists, however, when the matter is "capable of repetition, yet evading review." *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711, *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770 (1989). We do not believe the exception is applicable in this case.

We recognize that our decision effectively blocks almost all appeals to this Court under G.S. § 115C-431 and that any appeal of a disputed budget for a particular year will likely be moot by the time it reaches this Court. The budgetary process requires the harmonious cooperation of both entities each year to provide for the financial well-being of Cumberland County schools. Protracted litigation will only impede this process. Solutions which provide a reasonable and practical dispute resolution method must be developed. The current procedure is unworkable and impractical. A procedure which provides for an expedited review of budget disputes and which terminates on a local level, without entangling the cumbersome machinery of the appellate courts, would be preferable. Our General Assembly, however, is the only body capable of providing these solutions.

For the reasons set forth above, this appeal is

Dismissed.

Judges WELLS and JOHNSON concur.

TIMMIE HILL BROOKS, PLAINTIFF v. BRUCE RICHARD HAYES, DEFENDANT

No. 9218DC1262

(Filed 21 December 1993)

1. **Evidence and Witnesses § 565 (NCI4th)— paternity—vasectomy—expert testimony about recanalization**

In a paternity action in which defendant contended that he could not be the father of plaintiff's two children because he had had a successful vasectomy before they were conceived, the trial court properly admitted testimony by a urologist that after a vasectomy, recanalization, which is the natural reconnection of the severed ends of the vas, is medically possible, that the vas can disconnect again without the patient ever knowing it, and that because of this phenomenon, a sterility test showing that no sperm is present is not a guarantee that a man was sterile before the test or will remain sterile after the test.

Am Jur 2d, Bastards § 104 et seq.

2. **Evidence and Witnesses § 565 (NCI4th)— paternity—use of centrifuge in sterility tests—standard practice—expert testimony**

A urologist was properly permitted to testify in a paternity action that the use of a centrifuge to detect sperm is standard practice because it is the only way to be sure that no sperm are present in a semen sample since this testimony explained how defendant's earlier tests which did not use the centrifuge could have failed to reveal the presence of sperm in the samples.

Am Jur 2d, Bastards § 104 et seq.

3. **Evidence and Witnesses § 565 (NCI4th)— paternity—surgical procedure reversing vasectomy—irrelevancy**

A urologist's testimony about a surgical procedure that accomplishes the same results as recanalization was irrelevant and improperly admitted in a paternity action where there was no evidence that such an operation had been performed on defendant.

Am Jur 2d, Bastards § 104 et seq.

4. Evidence and Witnesses § 2148 (NCI4th)— paternity—expert testimony that defendant is father—inadmissibility

The trial court in a paternity action erred by permitting plaintiff's genetics and paternity testing experts to express their opinions that defendant is the father of plaintiff's two children since this testimony does not aid the jury and tramples upon the jury's domain.

Am Jur 2d, Expert and Opinion Evidence §§ 1-12.

5. Illegitimate Children § 9 (NCI4th)— paternity—sufficiency of evidence

Plaintiff's evidence was sufficient for the jury in a paternity action, notwithstanding evidence by defendant that he underwent a successful vasectomy before plaintiff's children were conceived, where a urologist testified that the severed ends of the vas may be reconnected by a natural process known as recanalization, and plaintiff presented evidence that DNA test results tended to show that defendant is the children's father.

Am Jur 2d, Bastards § 104 et seq.

Appeal by defendant from judgment entered 1 May 1992 by Judge Thomas G. Foster, Jr. in Guilford County District Court. Heard in the Court of Appeals 15 November 1993.

Plaintiff sued defendant to establish that he is the father of her two children. Defendant denied the allegations, claiming that he could not be the father because he underwent a successful vasectomy several years before the children were conceived. After hearing the results of several DNA tests, the probability of paternity derived from those tests, and medical testimony regarding the possibility of intermittent periods of fertility after a vasectomy, the jury found that defendant was the children's father. The trial judge entered judgment and taxed defendant with costs. From this judgment defendant appeals.

Adams Kleemeier Hagan Hannah & Fouts, by Clinton Eudy, Jr. and Trudy A. Ennis, for plaintiff appellee.

White and Crumpler, by Fred G. Crumpler, Jr. and Clyde C. Randolph, Jr., for defendant appellant.

ARNOLD, Chief Judge.

At trial, plaintiff presented an expert urologist's testimony. Defendant argues that much of this testimony was erroneously allowed into evidence, especially testimony regarding the possibility of recanalization or intermittent recanalization after defendant's vasectomy.

[1] A vasectomy is performed by removing a portion of the canal through which sperm travels, called the vas. The urologist testified that after a vasectomy, recanalization, which is the natural reconnection of the severed ends of the vas, is medically possible. As a result of the recanalization, the patient is fertile again. A vasectomy patient would never know recanalization occurred unless he was tested or he impregnated a woman. The urologist further testified that the vas can disconnect again without the patient ever knowing it and that because of this phenomenon, a sterility test showing that no sperm is present is not a guarantee that a man was sterile before the test or will remain sterile after the test. Recanalization has been documented as long as eight and a half years after a vasectomy.

This testimony was properly allowed into evidence. Expert testimony is admissible when it informs the jury about matters not within the full understanding of lay persons. *State v. Jackson*, 320 N.C. 452, 460, 358 S.E.2d 679, 683 (1987). Plaintiff's urologist was qualified as an expert, and his testimony explaining recanalization was certainly helpful to the jury in determining if defendant could be the father of plaintiff's children. It provided an explanation for how defendant might have impregnated plaintiff after his vasectomy. The chance of recanalization was small, but that did not render this testimony inadmissible, nor was the testimony inadmissible because the urologist did not state there was a reasonable probability that defendant experienced intermittent recanalization. An expert is permitted to testify that a particular cause "could have" or "possibly" produced a particular result. *Barbecue Inn, Inc. v. Carolina Power & Light Co.*, 88 N.C. App. 355, 360, 363 S.E.2d 362, 366 (1988). In light of defendant's medical records which, according to the urologist, showed that defendant exhibited certain physical signs that identify a person at risk of recanalization, we hold that the urologist's testimony was properly allowed into evidence.

[2] The urologist's testimony that centrifuging is the standard medical procedure for sterility testing was also properly admitted. He testified that using a centrifuge to detect sperm is standard practice because it is the only way to be sure that no sperm are present in a semen sample. As an expert urologist, the witness was qualified to advise the jury of a medical standard. *See Elliott v. Owen*, 99 N.C. App. 465, 393 S.E.2d 347 (1990) (expert usually required to establish standard in malpractice lawsuit). In addition, the testimony was helpful to the jury. Prior to this lawsuit, none of defendant's sterility tests revealed the presence of sperm, but none of these tests incorporated the centrifuge technique. The urologist's testimony explained how these earlier tests could fail to reveal the presence of sperm when it was present.

[3] Defendant also argues that the urologist should not have been permitted to testify about a surgical procedure that accomplishes the same result as recanalization. We agree. Plaintiff did not contend that such an operation was performed on defendant, nor was there any evidence that such an operation was performed. The testimony was, therefore, irrelevant, and accordingly, it did not aid the jury in determining if defendant was the children's father. Because it was irrelevant, this testimony was improperly admitted. N.C.R. Evid. 402.

[4] Next defendant argues that plaintiff's genetics and paternity testing experts should not have been allowed to express their opinions that defendant is the children's father. We agree.

A genetics expert may not express an opinion on who is a child's father because the opinion does not aid the jury. *Jackson*, 320 N.C. at 460, 358 S.E.2d at 683. The jury is capable of deciding if a defendant is a child's father once the expert explains the scientific data that was gathered and provides the resulting probability figures. *Id. See also Lombroia v. Peek*, 107 N.C. App. 745, 749-50, 421 S.E.2d 784, 787 (1992). Allowing an expert to express an opinion as to who is the father tramples upon the jury's domain. *State ex rel. Williams v. Coppedge*, 105 N.C. App. 470, 476, 414 S.E.2d 81, 84, *rev'd on other grounds*, 332 N.C. 654, 422 S.E.2d 691 (1992). Although DNA tests may provide more accurate results than the older blood tests, the rationale behind prohibiting the expert from expressing an opinion as to fatherhood remains intact. We, therefore, hold that the trial court erred in allowing the two experts to express their opinions on this issue.

[5] Finally, we reject defendant's argument that he was entitled to a directed verdict. Because we hold that the urologist's testimony regarding recanalization was properly admitted and because the DNA test results tended to prove that defendant is the children's father, there was sufficient evidence to send the case to the jury.

Discussion of defendant's remaining arguments is unnecessary since we determine there must be a

New trial.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. WESLEY ROYAL HAYES, II

No. 9318SC299

(Filed 21 December 1993)

Criminal Law § 1510 (NCI4th) — restitution as probation condition — inability of defendant to pay

The trial court erred in conditioning defendant's probation on an amount of restitution that defendant clearly cannot pay where defendant was ordered to pay an embezzlement victim restitution of $208,899.00 at a rate of more than $3,000.00 per month over a five-year probationary period, and defendant presented evidence that he (1) earns approximately $800.00 a month bagging groceries and stocking food at a grocery store, (2) pays $350.00 per month in child support, (3) lives with his mother and shares a car with her, (4) is deaf in one ear and hard of hearing in the other, (5) has recently completed bankruptcy proceedings, and (6) has substantial medical problems, including a recent brain tumor. N.C.G.S. § 15A-1343(d).

Am Jur 2d, Criminal Law § 572.

Ability to pay as necessary consideration in conditioning probation or suspended sentence upon reparation or restitution. 73 ALR3d 1240.

Upon writ of certiorari to review judgment entered 17 December 1992 by Judge Melzer A. Morgan, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 29 November 1993.

Wall Furniture Company, which sells oriental rugs and furniture, hired the defendant, a certified public accountant with an accounting firm, as its bookkeeper/accountant in 1989. In April 1990, the company hired the defendant full-time as its own employee, rather than through the accounting firm. As the company's accountant, the defendant had complete control over the company's bookkeeping and finances. In the course of his duties, the defendant frequently presented blank checks to Mr. Wall, president of the company, ostensibly to pay corporate and payroll taxes. Defendant failed to pay the taxes. Instead, he made the checks out to himself and deposited them into his personal account.

In early 1991, while defendant was out of work for health reasons, Mr. Wall discovered accounting discrepancies. Mr. Wall fired the defendant and filed a complaint with the Guilford County Sheriff's Department. The Sheriff's Department then contacted the State Bureau of Investigation and Special Agent Dan Stone investigated the matter. An audit from June 1989 to February 1991 revealed that defendant embezzled $205,142.70, apparently depositing at least 109 checks in his personal account. The defendant also embezzled funds by inflating his wife's payroll checks and bonuses, unbeknownst to her, and depositing them into his own account. Defendant's wife worked at Wall Furniture Company as well. All together, the defendant embezzled approximately $208,899.70 from the company.

Pursuant to a plea arrangement, the defendant pled guilty to five counts of embezzlement. He received a thirty year suspended sentence and supervised probation on the condition that he pay restitution. After hearing evidence of defendant's bankruptcy, his medical problems, and his current income of approximately $800.00 a month, the trial court ordered restitution exceeding $3,000.00 monthly. Upon review, defendant questions only the amount of restitution ordered.

Attorney General Michael F. Easley, by Assistant Attorney General Floyd M. Lewis, for the State.

Harrison, North, Cooke & Landreth, by A. Wayland Cooke, for defendant appellant.

ARNOLD, Chief Judge.

The defendant here presents two valid assignments of error. He contends that the trial court erred in failing to consider, or ignoring, his financial resources in ordering restitution. The defendant further contends that the trial court erred in setting restitution greater than he can pay.

N.C. Gen. Stat. § 15A-1343(d) (1988), which governs when restitution is a condition of probation, reads in pertinent part as follows:

> (d) Restitution as a Condition of Probation.—As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party . . . for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, including all real and personal property owned by the defendant and the income derived from such property, his ability to earn, his obligation to support dependents, and such other matters as shall pertain to his ability to make restitution . . . .

Restitution is "compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action." *Id.* Furthermore, restitution is intended "to promote rehabilitation of the criminal offender," as well as to compensate victims of crime. *State v. Burkhead*, 85 N.C. App. 535, 536, 355 S.E.2d 175, 176 (1987).

In *State v. Smith*, the defendant was convicted of misdemeanor death by vehicle, given a two year suspended sentence with five years probation, and ordered to pay $500,000.00 in restitution. *State v. Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, *Smith v. North Carolina*, 490 U.S. 1100 (1989). This Court vacated the restitution order, which would have required the defendant to pay $100,000.00 per year, stating that "[c]ommon sense dictates that only a person of substantial means could comply with such a requirement." *Id.* at 168, 368 S.E.2d at 38.

In this case, the defendant presented evidence which showed that he (1) earns approximately $800.00 a month bagging groceries and stocking food at Harris Teeter, (2) pays approximately $350.00 per month in child support, (3) lives with his mother and shares a car with her, (4) is deaf in one ear and hard of hearing in the

other, (5) has recently completed bankruptcy proceedings, and (6) has substantial medical problems, including a recent brain tumor. The court ordered restitution of approximately $208,899.00, payable over a five year probationary period, necessitating payments of over $3,000.00 a month in order to comply with this condition. As in *Smith*, common sense dictates that this defendant will be unable to pay this amount. The trial court failed to heed the language of G.S. § 15A-1343(d) which provides that "the court may order partial restitution or reparation when it appears that the damage or loss caused by the offense or offenses is greater than that which the defendant is able to pay." While we applaud efforts to alleviate the harm done to crime victims, we hold that the trial court erred in conditioning probation on an amount of restitution the defendant clearly cannot pay. On remand, the trial court is to reconsider what amount, if any, defendant should be required to pay as restitution.

Accordingly, the judgment is

Vacated in part and remanded.

Judges WELLS and EAGLES concur.

IN THE MATTER OF: FORECLOSURE OF THE DEED OF TRUST EXECUTED BY ALYCE B. KITCHENS, TRUSTOR IN DEED OF TRUST SECURING AN INDEBTEDNESS IN THE ORIGINAL PRINCIPAL AMOUNT OF $24,715.54, DATED DECEMBER 7, 1990 AND RECORDED IN BOOK 293, PAGE 113, PITT COUNTY REGISTRY

No. 923SC963

(Filed 21 December 1993)

Mortgages and Deeds of Trust § 87 (NCI4th)— foreclosure—note given to avoid embezzlement prosecution—criminal proceedings instituted—no consideration

The trial court properly disallowed a foreclosure based upon findings that there was no valid debt and no default where the record supports findings that the notes and deed of trust were given to petitioner by Ms. Kitchens based upon the understanding and for the specific consideration that no

criminal proceedings would be instituted against her by virtue of her embezzlement, criminal proceedings were subsequently instituted, and restitution was made to petitioner. N.C.G.S. § 45-21.16.

Am Jur 2d, Mortgages § 696.

Appeal by petitioner from order entered 15 May 1992 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 14 September 1993.

Ward and Smith, P. A., by Ryal W. Tayloe and Andrew H. D. Wilson, for petitioner-appellant.

Gaylord, Singleton, McNally, Strickland & Snyder, by Vernon G. Snyder III, for respondent-appellee.

JOHNSON, Judge.

On 2 March 1992, J. Graham Clark, III, substituted trustee for a deed of trust executed by Alyce B. Kitchens, instituted foreclosure proceedings under the power of sale clause in the deed of trust by filing a notice of hearing as to the commencement of foreclosure proceedings with the Pitt County Clerk of Court in accordance with North Carolina General Statutes § 45-21.16 (1991). On 3 March 1992, notice of the hearing was properly served on Alyce B. Kitchens.

On 26 March 1992, the Assistant Clerk of the Superior Court of Pitt County entered an order disallowing the foreclosure. On 31 March 1992, petitioner Dr. George M. Klein, beneficiary under the deed of trust, was timely served with notice of the foreclosure hearing to be held in Pitt County Superior Court on 11 May 1992.

A hearing was held in this matter before Judge Quentin T. Sumner in Pitt County Superior Court on 11 May 1992. Judge Sumner rendered a decision in open court disallowing foreclosure based on his findings of fact and conclusions of law that (1) there was no valid debt, and (2) there was no default under the note and deed of trust. On 8 June 1992, petitioner timely filed notice of appeal to this Court.

The facts pertinent to this appeal are as follows: Sometime prior to 7 December 1990, Alyce B. Kitchens embezzled money from petitioner. In consideration of and in order to repay petitioner

for the amount embezzled, Ms. Kitchens voluntarily signed promissory notes and a deed of trust securing these notes on 7 December 1990. By the express terms of the notes, beginning on 1 January 1991, equal monthly installments of $100.00 were to be paid by the first day of each month directly to the office of petitioner. One monthly installment was made and petitioner notified the substitute trustee to institute foreclosure proceedings.

Petitioner contends that the trial court erred by entering an order disallowing foreclosure because the creditor has proven the four items necessary for a judge to allow a power of sale foreclosure. We disagree.

Under North Carolina General Statutes § 45-21.16, there are four issues before the clerk at a foreclosure hearing: the existence of a valid debt of which the party seeking to foreclose is the holder; the existence of default; the trustee's right to foreclose; and the sufficiency of notice to record owners of the hearing. *In re Foreclosure of Deed of Trust*, 55 N.C. App. 68, 284 S.E.2d 553 (1981), *disc. review denied*, 305 N.C. 300, 291 S.E.2d 149 (1982). Upon appeal from an order of the clerk disallowing the trustee to proceed with the sale, the judge is limited upon the hearing *de novo* to determining the four issues resolved by the clerk. *Id.*

Here, the judge made the following findings: that petitioner and Ms. Kitchens executed promissory notes and a deed of trust; that

> Alyce B. Kitchens executed the [notes and deed of trust] based upon the understanding and for the specific consideration that no criminal proceedings would be instituted against her by virtue of her embezzlement of certain funds during her employment with [petitioner]. That by virtue of the fact criminal proceedings subsequently were instituted against Alyce B. Kitchens, the [notes and deed of trust] were without consideration. That under and by virtue of her conviction under the aforesaid criminal proceedings, Alyce B. Kitchens has made court ordered payments of restitution to [petitioner] through the office of the Pitt County Clerk of Court *in amounts in* excess of those installment payments provided for under the aforesaid [notes and deed of trust].

We find the record supports the aforementioned findings. As such, we find the lower court was correct in finding (1) no valid debt

existed and (2) there was no default on the notes or deed of trust, thereby properly disallowing the foreclosure proceeding.

The decision of the trial court is affirmed.

Judges COZORT and McCRODDEN concur.

ALAN E. O'DONNELL, PLAINTIFF/APPELLANT v. CITY OF ASHEVILLE AND THE CIVIL SERVICE BOARD OF THE CITY OF ASHEVILLE, DEFENDANTS/APPELLEES

No. 9228SC1179

(Filed 21 December 1993)

Municipal Corporations § 369 (NCI4th)— Asheville police officer—denied promotion—appeal—pleadings—jurisdiction of superior court

A trial court dismissal of a petition for lack of subject matter jurisdiction was affirmed where plaintiff was a police officer in Asheville who was denied a promotion, the Civil Service Board affirmed the denial, and plaintiff petitioned the superior court, alleging that he was "eligible" for promotion. Under the Act, published in the Session Laws, a member of the classified service of the City of Asheville who is denied a promotion to which he or she should be entitled is entitled to a hearing before the Civil Service Board of Asheville and may appeal the decision of the Board to the superior court. The superior court is powerless to act unless plaintiff is, and alleges that he is, "entitled" to a promotion. Moreover, the granting of promotions is a discretionary matter in which the court will not interfere unless the administrative body violates the law; nothing in the record here indicates that the City or the Board violated any law.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 275 et seq.

Appeal by plaintiff from order entered 14 July 1992 by Judge Robert D. Lewis in Buncombe County Superior Court. Heard in the Court of Appeals 20 October 1993.

Plaintiff was hired by the Asheville Police Department (the Department) in July 1987. In October 1990, he applied for a promotion, but the application was denied. According to plaintiff's allegations, he met all requirements for, and completely qualified for, the promotion.

Plaintiff appealed to the City Manager, but the City Manager affirmed the denial. Asheville's Civil Service Board (the Board) remanded the grievance to the City Manager for reconsideration, but the denial was again affirmed. Plaintiff appealed once more to the Board, at which time the appeal was dismissed. Plaintiff petitioned the superior court seeking either (1) an order compelling the Board to conduct a hearing concerning the denial of his promotion, or (2) a trial de novo in superior court. The superior court dismissed the petition for lack of subject matter jurisdiction. From this order plaintiff appeals.

Whalen, Hay, Pitts, Hugenschmidt, Master, Devereux & Belser, P.A., by Barry L. Master and David G. Belser, for plaintiff appellant.

Nesbitt & Slawter, by William F. Slawter; and Associate City Attorney Martha Walker McGlohon, for defendant appellees.

ARNOLD, Chief Judge.

Plaintiff proceeds under 1953 Sess. Laws ch. 757 (the Act), and the amendments thereto, published at 1977 N.C. Sess. Laws ch. 415. Specifically, plaintiff refers to the following section:

> Whenever any member of the classified service of the City of Asheville is discharged, suspended, reduced in rank, transferred against his or her will, or *is denied any promotion or raise in pay which he or she should be entitled to*, that member shall be entitled to a hearing before the Civil Service Board of the City of Asheville to determine whether or not the action complained of is justified.

1977 N.C. Sess. Laws ch. 415, § 1 (emphasis added). The Act further provides that "[w]ithin 10 days of the receipt of notice of the decision of the [B]oard, either party may appeal to the Superior Court . . . for a trial de novo." *Id.* at § 6. In his order dismissing the petition, the superior court judge indicated that his decision was based upon plaintiff's failure to allege that he was "denied a promotion to which he would be entitled." Plaintiff contends that this

is a "hypertechnical" defect in pleading and that the petition was erroneously dismissed because defendants had sufficient notice of the facts to allow them to answer and prepare for trial. We agree with defendants that the petition was properly dismissed.

Plaintiff's failure to allege that he is entitled to a promotion is more than a harmless technical error. Without that allegation, the petition does not vest subject matter jurisdiction in the superior court, and whenever the court does not have subject matter jurisdiction, the judge must dismiss. N.C.R. Civ. P. 12(h)(3).

The outcome of this case turns on the distinction between "entitled" and "eligible." The Act provides a right to a hearing, and the right to a trial de novo, to a person who is "entitled" to a promotion. Without that entitlement, plaintiff has no right to demand a hearing, regardless of his qualifications. Likewise, the superior court is powerless to act unless plaintiff is, and alleges that he is, "entitled" to a promotion. *See Mullen v. Town of Louisburg*, 225 N.C. 53, 61, 33 S.E.2d 484, 489 (1945) (court will not interfere with local administrative board's discretion until a complainant's legal right is infringed).

Plaintiff appears eligible for promotion, but there is no indication that he is entitled to promotion. It further appears from the record that the granting of promotions is a discretionary matter. The court will not interfere in a purely discretionary matter unless the administrative body involved violates the law. *See, e.g., Wayne County Bd. of Educ. v. Lewis*, 231 N.C. 661, 58 S.E.2d 725 (1950); *Henry v. North Carolina Dept. of Transp.*, 44 N.C. App. 170, 260 S.E.2d 438 (1979), *disc. review denied*, 299 N.C. 330, 265 S.E.2d 396 (1980). Nothing in the record indicates that the City or the Board violated any law, so the superior court's decision is affirmed.

Affirmed.

Judges WELLS and JOHNSON concur.

J. C. MOORE, D/B/A KINSTON FISH AND PRODUCE, PETITIONER v. BOARD OF ADJUSTMENT FOR CITY OF KINSTON, RESPONDENT

No. 938SC50

(Filed 21 December 1993)

Municipal Corporations § 30.11 (NCI3d)— zoning—Neighborhood Trading District—flea market not permitted use

An open air flea market is not a permitted use in a Neighborhood Trading District because it does not come within the definition of "stores and shops conducting retail business" permitted by this zoning classification and does not have a fixed, establishment-like quality similar to other uses permitted by this classification.

Am Jur 2d, Zoning and Planning § 698 et seq.

Appeal by petitioner from order entered 6 October 1992 by Judge David E. Reid, Jr. in Lenoir County Superior Court. Heard in the Court of Appeals 29 November 1993.

Petitioner operated an open air flea market within a "B-1 Neighborhood Trading District" as defined by the Kinston zoning ordinance. He was notified by a zoning enforcement officer that the flea market was not an allowed use under the zoning ordinance and that he must stop operating the flea market immediately.

Petitioner appealed to the Board of Adjustment for the City of Kinston (the Board). The Board affirmed the zoning enforcement officer's interpretation of the zoning ordinance, concluding that "[a] 'Flea Market is not a listed permitted use in the B-1 Zoning District' of the Kinston Zoning Ordinance." Petitioner then petitioned the superior court to review the Board's decision. The superior court affirmed the Board's decision and ordered petitioner to cease operating the flea market. From this order petitioner appeals.

Perry, Perry, Perry & Grigg, by James S. Perry, for petitioner appellant.

Wallace, Morris, Barwick & Rochelle, P.A., by Vernon H. Rochelle and Martha B. Beam, for respondent appellee.

ARNOLD, Chief Judge.

The applicable section of the zoning ordinance reads in part: "The Neighborhood Trading District is established for the purposes

of providing accessible business areas for residents to obtain goods and services." Subsection (A) lists thirty-three permitted uses within the B-1 district, including "[s]tores and shops conducting retail business." Petitioner claims his flea market is included within the definition of stores and shops and is, therefore, a permitted use. We disagree.

Whether or not the flea market is a permitted use of property in the B-1 district is a matter of interpretation and, therefore, is a question of law subject to de novo review. *See Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment*, 334 N.C. 132, 137, 431 S.E.2d 183, 187 (1993). The canons of statutory construction apply to the interpretation of an ordinance, *Woodhouse v. Board of Comm'rs*, 299 N.C. 211, 225, 261 S.E.2d 882, 891 (1980), so we must give the words in the ordinance their ordinary and common meaning. *Raleigh Place Assocs. v. City of Raleigh, Bd. of Adjustment*, 95 N.C. App. 217, 219, 382 S.E.2d 441, 442 (1989). Furthermore, the words must be construed in context and given only the meaning that the other modifying provisions of the ordinance will permit. *See In re Hardy*, 294 N.C. 90, 95-96, 240 S.E.2d 367, 371-72 (1978). When the ordinance is interpreted in light of these canons, the phrase "stores and shops" does not include flea markets, and flea markets are therefore not a permitted use in the B-1 district.

Store is defined as a business establishment where goods are kept for retail sale, especially a retail establishment having a large diversified stock of goods. Webster's Third New Int'l Dictionary 2252 (1968). Examples are grocery stores and furniture stores. *Id.* Store is also defined as an establishment with a number of departments. *Id.* Shop has several related meanings: (1) a "handicraft establishment," or (2) "a small retail establishment or a department in a large one offering a specified line of goods or services," or (3) "a small retail establishment concentrating on exclusive or top quality merchandise." *Id.* at 2101.

Common sense and the common understanding of what a flea market is tell us that a flea market does not fit within these definitions of stores and shops. For example, the flea market is not a department store, nor is it an establishment where specified, exclusive, or top quality merchandise is sold. The flea market, as described by petitioner, is where individuals come to sell used items they no longer want, items one would find at a garage sale.

Based upon these distinctions alone, the flea market does not fit within the definition of store or shop.

There is a more compelling distinction however. The word "establishment" is used repeatedly to define store and shop. An establishment is a "more or less fixed and usually sizable place of business." *Id.* at 778. This definition connotes a quality of permanence, unlike the transient character of the vendors at flea markets. By petitioner's own admission, items for sale at the flea market are never left there through the week, or even overnight. The flea market operates only on week-ends, and the evidence indicates that the same vendors would not be present each week-end.

Furthermore, the context within which we find "stores and shops" in the ordinance prohibits us from interpreting stores and shops to include flea markets. *See Hardy*, 294 N.C. at 95-96, 240 S.E.2d at 371-72. The other permitted uses in the B-1 district have a fixed, or establishment-like, quality to them. For example, other permitted uses are financial institutions, indoor theaters, hotels and motels, restaurants, libraries, museums, churches, etc. The flea market does not fit within this context.

For these reasons, we conclude that the flea market is not a permitted use in the B-1 district and affirm the superior court's order.

Affirmed.

Judges WELLS and EAGLES concur.

DAVID A. DUNCAN, EMPLOYEE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY, EMPLOYER (SELF-FUNDED), DEFENDANT

No. 9310IC412

(Filed 21 December 1993)

Master and Servant § 49.1 (NCI3d)— workers' compensation—National Guard member—injury during routine weekend drill—employee of State

A member of the National Guard injured in a jeep accident while returning to his local unit after completing a routine weekend drill at Fort Bragg was an employee of the State who was entitled to workers' compensation for his injuries under N.C.G.S. § 97-2(2). The fact that the injured guardsman received his pay and also compensation benefits from the federal government is of no moment in light of the provision of the statute which expressly entitles members of the National Guard to "compensation for injuries arising out of and in the course of the performance of their duties at drill . . . ."

Am Jur 2d, Workers' Compensation § 181.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission filed 28 January 1993. Heard in the Court of Appeals 4 October 1993.

On 21 August 1988, plaintiff was a member of the North Carolina Army National Guard, assigned to Company B of the First Battalion, 120th Infantry Unit, in Whiteville. As part of his regular duties for the North Carolina Army National Guard, plaintiff was required once a month to attend a weekend drill, either at the local unit in Whiteville or at Fort Bragg, an United States Army Installation. On 21 August 1988, he was involved in an accident in one of the jeeps assigned to the local unit while returning to Whiteville after completing a required weekend drill at Fort Bragg. He filed this claim under the Workers' Compensation Act seeking to recover compensation for injuries he sustained in this accident. After a hearing, Deputy Commissioner Lawrence B. Shuping, Jr. concluded that plaintiff's injuries were compensable under the Workers' Compensation Act and awarded plaintiff compensation. The Full Commission (the "Commission") affirmed and adopted the opinion and award of the Deputy Commissioner.

From this opinion and award, defendant appeals.

Dallas M. Pounds for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Angelina M. Maletto, for defendant-appellant.

ORR, Judge.

The sole issue on appeal is whether plaintiff was an "employee" as defined in N.C. Gen. Stat. § 97-2(2) (1991) and thus entitled to compensation benefits from defendant under the Workers' Compensation Act. N.C. Gen. Stat. § 97-2(2) provides in pertinent part:

> The term "employee" shall include members of the North Carolina national guard, except when called into the service of the United States, and members of the North Carolina State guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor.

Defendant contends that plaintiff was not an employee under the foregoing section because the evidence shows that plaintiff (1) was called into the service of the United States for weekend drill, (2) was not on special duty under orders of the Governor, (3) was an employee of the federal government, and (4) had received all compensation benefits from the federal government to which he was entitled.

Recently we held in *Britt v. North Carolina Dep't of Crime Control & Public Safety*, 108 N.C. App. 777, 425 S.E.2d 11, *disc. review denied*, 333 N.C. 536, 429 S.E.2d 554 (1993) that a member of the National Guard was not "called into the service of the United States" when he attended mandatory initial basic training under orders of the United States Department of Defense. Citing *Baker v. State*, 200 N.C. 232, 156 S.E.2d 917 (1931), we noted " 'that the National Guard is an organization of the State militia, which does not become a part of the United States Army until the Congress declares an emergency to exist which calls for its services [on] behalf of the nation.' " *Britt*, 108 N.C. App. at 779, 425 S.E.2d at 13. In *Britt*, we concluded that when a member of the National Guard injured himself during initial basic training, not during a time of emergency, this injury arose out of and in the course of

the performance of his duties at drill, in camp, or on special duty under orders of the Governor thereby entitling him to compensation under N.C. Gen. Stat. § 97-2(2).

In the present case, the evidence is undisputed that plaintiff was injured while performing his duties as a member of the National Guard on a routine weekend drill. N.C. Gen. Stat. § 97-2(2) expressly entitles members of the National Guard "to compensation for injuries arising out of and in the course of the performance of their duties at drill . . . ." There is no evidence of the existence of an emergency situation. The fact plaintiff received his pay from the federal government and compensation from the federal government is of no moment in light of the express provision in our General Statutes for payment of compensation. Further, we note defendant was allowed a credit for the incapacitation pay plaintiff received from the federal government, and thus plaintiff did not receive double recovery.

We therefore hold the Commission properly concluded plaintiff was entitled to receive compensation for his injuries. We thus affirm the opinion and award of the Commission.

Affirmed.

Judges COZORT and LEWIS concur.

GOLDEN RULE INSURANCE COMPANY, PLAINTIFF v. JAMES E. LONG, INDIVIDUALLY AND AS COMMISSIONER OF INSURANCE FOR THE STATE OF NORTH CAROLINA, DEFENDANT

No. 9210SC677

ORDER

The following Order was entered:

The motion filed in this cause on the 21st day of December, 1993 and designated "Motion To Publish Opinion" is allowed.

By order of the Court this 23rd day of December, 1993.

The above order is therefore certified to the Clerk of Superior Court in Wake County, North Carolina and to the attorneys listed below.

Witness my hand and official seal this the 23rd day of December, 1993.

s/John H. Connell

Clerk of the Court of Appeals

GOLDEN RULE INSURANCE COMPANY, AN ILLINOIS CORPORATION, PLAINTIFF v. JAMES E. LONG, INDIVIDUALLY AND AS COMMISSIONER OF INSURANCE FOR THE STATE OF NORTH CAROLINA, DEFENDANT

No. 9210SC677

(Filed 3 August 1993)

1. State § 1 (NCI3d)— claim against Commissioner of Insurance—sovereign immunity—not waived

Sovereign immunity was not waived by the State for an action against the Insurance Commissioner arising from the denial of a rate increase by the purchase of liability insurance because the waiver of immunity extends only to injuries which are specifically covered by the insurance policy. The insurance purchased on behalf of the State covers bodily injury liability and property damage liability, neither of which is alleged in the case at bar.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 85.

2. Insurance § 26 (NCI4th); Public Officers and Employees § 36 (NCI4th)— rate increase—conditional approval—authority of Commissioner not exceeded—no personal liability

The Commissioner of Insurance did not exceed the scope of his authority and become personally liable by conditioning approval of Golden Rule's requested rate increase on a one-year guarantee of rates and anniversary date implementation restrictions.

Am Jur 2d, Insurance §§ 30, 828 et seq.

3. Unfair Competition § 1 (NCI3d); Public Officers and Employees § 36 (NCI4th)— Insurance Commissioner—conditional approval of rate increase—jurisdiction of unfair practices claim—no cause of action against State

The Insurance Commissioner did not exceed his authority and become personally liable by violating the Unfair Trade Practices Act in his conditional approval of a rate increase. Although unfair and deceptive acts in the insurance area are not regulated exclusively by Article 63 of Chapter 58 of the General Statutes, but are also actionable under N.C.G.S. § 75-1.1 (1988), that statute does not create a cause of action against state officers when they act as representatives of the State, as did the Commissioner in this matter.

Am Jur 2d, Consumer and Borrower Protection §§ 285, 287; Public Officers and Employees § 373.

Scope and exemptions of state deceptive trade practice and consumer protection acts. 89 ALR3d 399.

4. Insurance § 26 (NCI4th)— withdrawal of insurance company—negotiation with another company by Insurance Commissioner—not outside scope of authority

Plaintiff's allegations of political favoritism and discrimination against plaintiff in favor of Blue Cross/Blue Shield were not evidence that the Commissioner acted outside the scope of his authority and became personally liable where plaintiff had threatened to terminate its North Carolina policyholders unless its rate increase procedure was accepted and the Commissioner negotiated continuation coverage with BCBS for plaintiff's North Carolina customers. Plaintiff's allegation of discrimination does not constitute a

recognized cause of action and its assignment of error was deemed abandoned because it failed to provide citations of authority or the portions of the record on which it relied to support its argument.

Am Jur 2d, Insurance §§ 30, 828 et seq.

5. Public Officers and Employees § 35 (NCI4th)— Insurance Commissioner—denial of rate increase—no malice—no personal liability

There was insufficient evidence of malice to hold the Insurance Commissioner personally liable for the denial of a rate increase where plaintiff pointed to the Commissioner's communications with other insurance commissioners about plaintiff at a national meeting and to meetings with plaintiff in which plaintiff contends that the Commissioner became angry and told plaintiff's CEO that he would get plaintiff in the press if plaintiff continued to take the dispute public, threatened to leave the meeting, and remarked that plaintiff was holding the citizens of North Carolina hostage. The Court could not see how the Commissioner's discussions with other commissioners could be evidence of malice and, given the antagonistic relationship that had developed between the parties, the Commissioner's reaction at the meeting could not have been more predictable.

Am Jur 2d, Public Officers and Employees §§ 358 et seq., 375.

6. Appeal and Error § 421 (NCI4th)— brief—failure to include contentions and citations—argument abandoned

Plaintiff insurance company abandoned a claim under 42 U.S.C. § 1983 against the Insurance Commissioner personally by failing to include any discussion of that claim in its initial brief. Although plaintiff argued the merits of its claim in its reply brief to the Commissioner's official capacity brief, that argument did not mend the defect in plaintiff's initial brief. Furthermore, while plaintiff suggests that an argument on the merits of the § 1983 claim was unnecessary because summary judgment was granted on all claims on the basis of the Commissioner's qualified immunity, plaintiff's claim is still deemed abandoned because plaintiff did not present any argu-

ment as to why the Commissioner's qualified immunity defense should fail.

Am Jur 2d, Appeal and Error § 691 et seq.

7. **Pleadings § 364 (NCI4th)— motion to file second amended complaint—denied—undue delay—no abuse of discretion**

There was no abuse of discretion in an action arising from the denial of an insurance rate increase where the motion to file a second amended complaint was denied based on plaintiff's failure to exercise due diligence in filing the motion before the eve of trial and the likelihood of further delay and undue prejudice to defendant. Plaintiff did not file its motion to amend until almost two years and six months after the first amended complaint was filed; both parties had engaged in extensive discovery and various matters had been brought before the court; the motion was filed only 39 days prior to the trial date; and the trial court found that factual allegations raised for the first time in the proposed second amended complaint had been known by plaintiff 7 months earlier.

Am Jur 2d, Pleading § 310.

Appeal by plaintiff from judgment entered 24 January 1992 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 26 May 1993.

This action started with a series of rate increase requests by Golden Rule Insurance Company (Golden Rule) affecting two of its health insurance policy forms in North Carolina, GRI-H-1.1 (Policy 1.1) and GRI-H-1.2 (Policy 1.2). The North Carolina Department of Insurance (DOI) had approved each policy in 1985 and 1987 respectively.

In March 1988, Golden Rule applied to the DOI for a premium rate increase for Policy 1.1 to be implemented on 1 May 1988. In June 1988, the DOI authorized implementation of the rate increase. In July 1988, Golden Rule applied for a premium rate increase for Policy 1.2 to be implemented on 1 October 1988. In November 1988, the DOI notified Golden Rule that the requested rate increase was approved for implementation with certain restrictions.

In October 1988, Golden Rule applied for another premium rate increase for Policy 1.1 to take effect 1 January 1989. Golden

Rule requested an increase of 73.6%. DOI staff actuary Walter James reviewed the request and discovered that Golden Rule already had several rate increases on this policy during the preceding eighteen months, which was contrary to the DOI's policy against more than one rate increase per year. In order to approve the rate increase without compromising the DOI's policy the DOI ordered the rate increase effective on the policyholders' anniversary dates. Based on an assumption of anniversary date implementation, and a one-year guarantee of the approved rate, the DOI calculated that a rate increase of approximately fifty percent in total premium income was justifiable.

Golden Rule, by letter dated 11 January 1989, rejected the DOI's offer. Golden Rule informed Commissioner Long of its decision to treat the DOI's insistence on delayed implementation of the increase as a denial of its request and notified Long that it would be nonrenewing all North Carolina Golden Rule insureds under Policies 1.1 and 1.2. Golden Rule subsequently notified all brokers who handled Golden Rule insurance in North Carolina about the nonrenewal. It notified by letter dated 26 January 1989 certain Golden Rule policyholders of its nonrenewal of individual health policies to be effective 1 March 1989.

In late January 1989, a meeting was set up between Commissioner Long and Golden Rule to resolve the dispute. The meeting took place on 6 February 1989 between Long, DOI staff, and certain Golden Rule officials including the CEO Patrick Rooney. Just before the meeting, the DOI staff briefed Commissioner Long concerning the impasse based on the delayed implementation and one year guarantee of the approved rate. The following day Rooney sent Long two letters which raised new proposals relating to the manner in which future rate revisions were to be processed.

After discussing the new proposal with the DOI staff, Commissioner Long concluded that Rooney's proposals could not be lawfully met. Then applicable N.C. Gen. Stat. § 58-251.2 (1989) required that rate increases on individual health insurance policies be approved by the Commissioner of Insurance, whereas Rooney's proposal contained a file-and-use procedure of implementing rate increases based on a guaranteed loss ratio, with disputes to be settled by compulsory arbitration. Commissioner Long, therefore, rejected Golden Rule's proposal by letter dated 8 February 1989. Commissioner Long concluded that Rooney was no longer negotiating in

good faith for the rate increase and that Golden Rule would continue to terminate its North Carolina policies unless Long accepted Rooney's proposed procedure. Thus, Commissioner Long requested in the letter that by 15 February 1989, in accordance with N.C. Gen. Stat. § 58-25.1 (1986) (now N.C. Gen. Stat. § 58-2-190), Golden Rule provide the DOI with a list of policyholders who were being terminated.

In mid-January 1989, upon first learning about Golden Rule's intent to terminate its North Carolina policyholders, Chief Deputy Insurance Commissioner Allen Feezor suggested to Senior Deputy Insurance Commissioner Roger Langley that major health insurers be contacted about continuing coverage for terminated Golden Rule policyholders. Blue Cross/Blue Shield (BCBS) was contacted, but it was not until after the 6 February meeting between Long and Golden Rule that the DOI actually discussed continuation of coverage with BCBS. In mid-February, an agreement was reached whereby BCBS would provide comparable coverage to all terminated North Carolina Golden Rule insureds. Commissioner Long was later informed of the agreement.

On 17 February 1989, Commissioner Long sent a letter to the Golden Rule policyholders who had received notice of nonrenewal. The terminated policyholders were informed why DOI had not approved Golden Rule's rate increase request and that BCBS was offering them comparable substitute coverage. The letter, however, did not distinguish between Policy 1.1 and Policy 1.2. The following working day, 20 February 1989, Commissioner Long approved a similar letter to the North Carolina insurance agents of Golden Rule. The DOI also issued a press release approved by Commissioner Long announcing BCBS's agreement to substitute comparable coverage to terminated Golden Rule insureds.

On 23 March 1989, Golden Rule filed a Petition for Judicial Review and a Motion for Stay in Wake County Superior Court asking for unconditional approval of the requested rate increases for Policies 1.1 and 1.2. On 13 April 1989, the court ordered Commissioner Long immediately to enter a written order giving full, unconditional approval of the pending rate increase requests. Long complied with the court's Order. But that Order was vacated by this Court for lack of jurisdiction in *In re Golden Rule Ins. Co. v. North Carolina Dep't. of Ins.*, 99 N.C. App. 773 (1990) (reported without published opinion).

On 8 June 1989, plaintiff filed an amended complaint asserting several claims against Commissioner Long in both his individual and official capacities. The claims included: 1) defamation, 2) intentional interference with contractual relations, 3) violations of the Unfair Trade Practices Act, and 4) violations of 42 U.S.C. § 1983. On 13 December 1991, defendant made a motion for summary judgment both in his individual and official capacities. Plaintiff made a motion to file a second amended complaint. The court denied plaintiff's motion on 22 January 1992 and granted defendant's motion on 24 January 1992.

Curtis J. Dickinson; and Burford & Pugh, by Robert J. Burford, for plaintiff-appellant.

LeBouef, Lamb, Leiby & MacRae, by George R. Ragsdale, Kristin K. Eldridge and E. Daniels Nelson; and North Carolina Department of Insurance, by Ann W. Spragens, General Counsel, for defendant-appellee, individually; and Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Isham B. Hudson, Jr., for defendant-appellee, officially.

ARNOLD, Chief Judge.

[1] When a suit is brought against a public official in his official capacity the issue of sovereign immunity is raised. *See Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971). "The doctrine of sovereign immunity—that the State cannot be sued without its consent—has long been the law in North Carolina." *Smith v. State*, 289 N.C. 303, 309, 222 S.E.2d 412, 417 (1976). The doctrine proscribes, among others, "suits to prevent a State officer or commission from performing official duties or to control the exercise of judgment on the part of State officers or agencies." *Id.* at 310, 222 S.E.2d at 417.

Sovereign immunity is absolute unless the defendant expressly consents to be sued or waives immunity under a statutorily created waiver. *State v. Taylor*, 322 N.C. 433, 368 S.E.2d 601 (1988). Plaintiff cites several statutory provisions which it alleges authorize waiver of sovereign immunity up to the amount of the insurance available for the coverage of liability in the policy purchased. But the State's insurance policy at issue does not cover any cause of action related to this dispute. Rather, the insurance purchased on behalf of the State government as named insured covers bodily injury liability and property damage liability, neither of which is alleged in the

case at bar. Defendant has not waived sovereign immunity. The waiver of immunity extends only to injuries which are specifically covered by the insurance policy, and plaintiff alleges no injuries covered by the policy. *See Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 348 S.E.2d 524 (1986).

[2] The official status of state officers, standing alone, however, does not immunize them from suit. *Smith*, 289 N.C. at 331, 222 S.E.2d at 430; *Lewis v. White*, 287 N.C. 625, 643, 216 S.E.2d 134, 146 (1975). A public official, engaged in the performance of governmental duties involving the exercise of discretion, may be held personally liable if it is alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his authority. *Smith*, 289 N.C. at 331, 222 S.E.2d at 430; *see also Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). "As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability." *Smith*, 289 N.C. at 331, 222 S.E.2d at 430. Golden Rule contends that Commissioner Long did not act within the scope of his authority, and that he acted maliciously, thereby removing him from his official status and making him personally liable. We disagree.

Scope of Authority

Golden Rule alleges that Commissioner Long acted outside the scope of his authority in several ways. First, they contend that Commissioner Long acted outside his scope of authority by conditioning approval of Golden Rule's requested 73.6% rate increase by imposing a one-year guarantee of rates and anniversary date implementation restrictions. Golden Rule insists that these conditions were not requirements enacted by the Legislature, nor were they properly promulgated as a rule, and, therefore, Commissioner Long exceeded his authority.

The relevant statute governing the authority of the Commissioner of Insurance at the time of this controversy was N.C. Gen. Stat. § 58-251.2(a), which provided in part:

> The insurer upon a showing of inadequacy of the rates chargeable on such policies upon which notice of nonrenewal has been given, and a finding as to the same by the Commis-

> sioner of Insurance, may increase such rates *with the approval of the Commissioner.*

(Emphasis added.) Golden Rule argues that the statutory language quoted above does not give the Commissioner the authority to demand a delay in implementation or a guarantee of rates for one year.

"An issue as to the existence of power or authority in a particular administrative agency is one primarily of statutory construction." *State ex rel. Comm'r of Ins. v. Rate Bureau,* 300 N.C. 381, 399, 269 S.E.2d 547, 561, *reh'g denied,* 301 N.C. 107, 273 S.E.2d 300 (1980). In construing laws regarding statutory authority of an administrative agency, the court's function is to ensure that the purpose of the Legislature in enacting the law is accomplished. *Id.* The court can look to the language of the statute, the spirit of the act and what the act seeks to accomplish. *Id.* Here, the purpose of the statute conferring upon the Commissioner the authority to approve requested rate increases was best stated by the Attorney General in the following 1969 opinion:

> The Act was designed to curb the abuse, at that time, of A & H companies collecting premiums, then mass cancelling of policies. In order to prevent companies from being locked in on inadequate rates, however, the General Assembly provided a method whereby the company, after giving the proper notice of non-renewal, could seek a rate increase.

40 Op. Att'y. Gen. 340, 341 (1969); *see also, American Nat'l Ins. Co. v. Ingram,* 63 N.C. App. 38, 303 S.E.2d 649, *cert. denied,* 309 N.C. 819, 310 S.E.2d 348 (1983). Furthermore, as to plaintiff's argument that had the Legislature intended to give the power to Commissioner Long to approve a full year fixed rate for accident and health insurance policies it would have done so explicitly, the Supreme Court of North Carolina has responded to this argument by stating that:

> The Legislature can obviously not anticipate every problem which will arise before an administrative agency in the administration of an act. The legislative process would be completely frustrated if that body were required to appraise beforehand the myriad situations to which it wished a particular policy to be applied and to formulate specific rules for each situation. Clearly, then, we must . . . leave to executive

> officers the authority to accomplish the legislative purpose . . . . The modern tendency is to be more liberal in permitting grants of discretion to administrative agencies in order to ease the administration of laws as the complexity of economic and governmental conditions increases.

State ex rel. Comm'r of Ins. v. Rate Bureau, 300 N.C. at 402, 269 S.E.2d at 563 (citation omitted). Moreover, then applicable N.C. Gen. Stat. § 58-254.7 (1981) provided that the Commissioner may disapprove any accident and health policy in which the benefits provided therein are unreasonable in relation to the premium, or where the policy contains provisions that are unfair, unjust, or inequitable. We conclude that Commissioner Long's approval of the requested rate increase conditioned upon a delayed implementation date and one-year guarantee was within his statutory scope of authority.

[3] Second, Golden Rule argues that Commissioner Long exceeded his authority by violating provisions of the Unfair Trade Practices Act. Commissioner Long initially asserts that the Wake County Superior Court has no jurisdiction over plaintiff's cause of action because jurisdiction lies in the Office of the Commissioner of Insurance under N.C. Gen. Stat. 58-63-40 (1991), therefore, summary judgment was properly allowed. Although it is true that jurisdiction under the Insurance UPTA lies in the Commissioner's office, defendant fails to recognize that unfair and deceptive acts in the insurance area are not regulated exclusively by Article 63 of Chapter 58, but are also actionable under N.C. Gen. Stat. 75-1.1 (1988). *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980). Plaintiff is therefore correct. Chapter 58 did not create the only means by which an injured party can seek recovery for damages, and a claim for unfair and deceptive acts and practices within the insurance industry may constitute the basis for recovery under G.S. 75-1.1.

Nevertheless, plaintiff's argument is untenable. In *Sperry Corp. v. Patterson*, 73 N.C. App. 123, 325 S.E.2d 642 (1985), this Court held that G.S. § 75-1.1 does not create a cause of action against state officers when they act as representatives of the State. Long was a representative of the State in this matter, and plaintiff, therefore, has no cause of action.

[4] Third, Golden Rule asserts that Commissioner Long exceeded his scope of authority by soliciting business for BCBS, by granting

BCBS extraordinary rate relief as the *quid pro quo* for BCBS's willingness to provide coverage for Golden Rule policyholders, and by arbitrarily favoring BCBS in rate review. Golden Rule sets forth this assignment of error in its main brief separately as evidence that Commissioner Long acted outside the scope of his authority. Golden Rule also sets forth these allegations concerning BCBS as evidence of violations of the UTPA. In either instance, we hold that Golden Rule's claim alleging political favoritism and discrimination against Golden Rule in favor of BCBS is not evidence that Commissioner Long acted outside his scope of authority.

As previously discussed, Long cannot be sued under Chapter 75. Furthermore, Golden Rule's separate allegation that BCBS received favorable treatment that discriminated against Golden Rule does not constitute a recognized cause of action. Golden Rule's mere allegations regarding special treatment of BCBS by the DOI and Commissioner Long are unsupported by law or fact. Golden Rule fails to afford this Court any citations of authority or portions of the record on which it relies to support its argument. This assignment of error is, therefore, deemed abandoned. N.C.R. App. P. 28; *S.J. Groves & Sons & Co. v. State*, 50 N.C. App. 1, 52, 273 S.E.2d 465, 491-92 (1980), *disc. review denied*, 302 N.C. 396, 279 S.E.2d 353 (1981).

Finally, Golden Rule argues that Commissioner Long exceeded his authority by initiating a retaliatory market conduct examination of Golden Rule. These allegations are contained in the second amended complaint, and, as we discuss in detail below, plaintiff's motion to file the second amended complaint was properly denied. This claim, therefore, is not subject to review.

MALICE

[5] Although Commissioner Long did not act outside the scope of his statutory authority, he may still be liable in his individual capacity if plaintiff can establish that he acted with malice. Plaintiff argues that sufficient evidence of malice exists to defeat Long's summary judgment motion. We disagree.

Plaintiff points to Commissioner Long's communications with other insurance commissioners at the NAIC meeting as evidence of malice. At that meeting, Commissioner Long discussed his concerns over plaintiff's behavior in North Carolina, and the evidence shows that many of the commissioners expressed similar concerns

about plaintiff. Plaintiff concedes that discussions between insurance commissioners about common concerns are legitimate but argues that Commissioner Long's discussions are evidence of malice. We fail to see how a legitimate act, carried out in the performance of official duties, that is Commissioner Long's discussions with other insurance commissioners, could be evidence of malice. If that were the case, public officials would be immobilized at every threat of litigation.

As additional evidence of malice plaintiff contends that during the 6 February 1989 meeting between the DOI and plaintiff, Commissioner Long became angry and told plaintiff's CEO that he would get plaintiff in the press if plaintiff continued to take the dispute between the DOI and plaintiff to the public. Commissioner Long, according to plaintiff, also threatened to leave the meeting and stated that "if that's all we have to talk about . . . this meeting is over." In his deposition Commissioner Long also remarked several times that Golden Rule was holding the citizens of North Carolina hostage.

Although acts of hostility and anger may be used as evidence to prove malice we must reject plaintiff's characterization of such in this case. Given the antagonistic relationship that had developed between the parties we cannot imagine how Commissioner Long's reaction at the 6 February 1989 meeting could have been more predictable. We see no probative value in evidence that Commissioner Long threatened to leave the meeting or use the press against plaintiff. It is irrational to assume that Commissioner Long would not use the press since Golden Rule already had issued public statements against Commissioner Long and the DOI.

42 U.S.C. § 1983 CLAIMS

[6] Plaintiff conceded that summary judgment was properly granted on the § 1983 claim against Commissioner Long in his official capacity, so there is no need to address that portion of the trial court's order.

Plaintiff has abandoned the § 1983 claim against Commissioner Long individually by failing to include any discussion of that claim in its initial brief. N.C.R. App. P. 28(b)(5) dictates that the appellant's brief must contain an argument setting forth the contentions of the appellant and citations of authority upon which the appellant relies. Failure to do so abandons the argument. *S.J.*

Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980), *disc. review denied*, 302 N.C. 396, 279 S.E.2d 353 (1981).

We are aware that plaintiff argued the merits of the § 1983 claim against Commissioner Long individually in plaintiff's reply brief to Commissioner Long's official capacity brief. That argument however did not mend the defect in plaintiff's initial brief. Plaintiff could not address new questions in its brief unless they were raised in defendant's brief, N.C.R. App. P. 28(h), and defendant's individual capacity brief contained no discussion of § 1983. Accordingly, plaintiff's reply brief could not resurrect the abandoned claim. *See Animal Protection Society v. State*, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

Plaintiff suggests that an argument on the merits of the § 1983 claim was unnecessary because summary judgment was granted on all claims on the basis of Commissioner Long's qualified immunity. Even if that is true, plaintiff's claim is still deemed abandoned. Plaintiff did not present any argument as to why Commissioner Long's qualified immunity defense should fail. In order to defeat the qualified immunity, plaintiff had to show that defendant violated some clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396 (1982). This standard determines if further proceedings are barred by qualified immunity by examining the law in existence at the time of the offense to determine if it contained "clearly established . . . rights of which a reasonable person would have known." *Id.* at 818, 73 L.Ed.2d at 410. Plaintiff pled violations of the due process clause, the equal protection clause, and the contract clause, but we are in the dark as to which particular rights plaintiff contends were violated, how they were violated, if they are well established, or even if plaintiff is alleging substantive or procedural due process violations. Because of these deficiencies, plaintiff's claim is deemed abandoned.

SECOND AMENDED COMPLAINT

[7] Golden Rule's second assignment of error is that the trial court erred in denying its motion to file a second amended complaint. Plaintiff sought leave to file the second amended complaint on 13 December 1991 "in order to conform the complaint to the evidence obtained in discovery, to clarify ambiguities, clarify the limitation of the § 1983 claim to Jim Long, individually, and to facilitate presentation of the merits of this action at trial." The

second amended complaint sought to amend Count III of the original amended complaint in order to hold Commissioner Long, individually, liable for alleged violations of 42 U.S.C. § 1983 and to allege specific facts regarding violations that had not yet been pled. Judge Stephens denied the motion based on plaintiff's failure to exercise due diligence in filing the motion before the eve of trial. Furthermore, Judge Stephens concluded that to allow the motion would create a likelihood of further delay and possibility of undue prejudice to defendant, individually.

Leave to amend pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(a) should be "freely given except where the party objecting can show material prejudice by the granting of a motion to amend." *Brown v. Lyons*, 93 N.C. App. 453, 456, 378 S.E.2d 243, 245 (1989) (quoting *Martin v. Hare*, 78 N.C. App. 358, 360, 337 S.E.2d 632, 634 (1985)). The trial court may deny a motion to amend a complaint based on "a) undue delay, b) bad faith, c) undue prejudice, d) futility of amendment, and e) repeated failure to cure defects by previous amendments." *Martin*, 78 N.C. App. at 361, 337 S.E.2d at 634. A ruling on a motion to amend is addressed to the sound discretion of the trial court and is not reviewable absent an abuse of discretion. *Id.* In this case, we find no abuse of discretion on behalf of the trial judge.

Plaintiff did not file its motion to amend until almost two years and six months after the first amended complaint was filed. Both parties had engaged in extensive discovery and various matters had been brought before the court. Golden Rule filed the motion only thirty-nine days prior to the date set for trial. Moreover, the evidence also indicates that Golden Rule's delay was undue and would likely prejudice defendant. Factual allegations raised for the first time in the proposed second amended complaint were found by the trial court to be known by plaintiff, at the latest, in May 1991 when the matter was peremptorily set for trial. The trial judge, therefore, properly exercised his discretion in denying plaintiff's motion to file a second amended complaint.

Affirmed.

Judges ORR and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 21 DECEMBER 1993

Case	County	Disposition
ATKINSON v. ATKINSON No. 935DC436	New Hanover (90CVD1708)	Dismissed
BIOLOGICAL AND CHEMICAL LABS v. N.C. Dept. of E.H.N.R. No. 9210SC1100	Wake (91CVS11256)	Affirmed
BRONDYKE v. JONAS No. 9228SC726	Buncombe (84SP002)	Affirmed
BRYANT v. N.C. CODE OFFICIALS QUALIFICATION BD. No. 9310SC393	Wake (92CVS09523)	Affirmed
BULLARD v. BULLARD No. 925DC919	New Hanover (90CVD2237)	Affirmed
CAROLINA DAY SCHOOL v. DRUMMOND No. 9328DC615	Buncombe (92CVD2719)	Appeal Dismissed
COUNTY OF WILKES ex rel. WOOD v. CHURCH No. 9323DC761	Wilkes (92CVD1180)	Affirmed
FOY v. FOY No. 914DC307	Onslow (86CVD1572)	Affirmed in part, reversed in part & remanded
GARRISON v. ALLSTATE INS. CO. No. 9326SC10	Mecklenburg (91CVS2889)	Affirmed
GILLEY v. FOSTER No. 9222SC1208	Iredell (91CVS99)	Affirmed
GLEN v. CHAPIN No. 9229SC793	Transylvania (90CVS121)	Affirmed
GLEN v. CHAPIN No. 9229SC901	Transylvania (90CVS121)	Affirmed
GRIFFIN v. LAMBRIGHT No. 9210SC961	Wake (90CVS13106)	Reversed & Remanded
HITCHCOCK v. HOSKINS FARMS, INC. No. 9218SC743	Guilford (91CVS06050)	Affirmed

IN RE OGLE No. 9224DC546	Mitchell (91J20) (91J21) (91J22)	Affirmed
IN RE WILL OF MINK No. 9223SC945	Wilkes (91SP126)	Appeal Dismissed
MARLEY v. WILKES COUNTY No. 9210IC520	Ind. Comm. (022383)	Affirmed in part, reversed in part.
O'DONNELL v. JOHNSTON No. 9220SC1182	Moore (91CVS322)	No Error
PENA v. DANNY POUNCEY & CO. No. 9210IC1206	Ind. Comm. (837878)	Affirmed
POINT SOUTH INVESTMENT CO. v. HENSLEY No. 9328SC107	Buncombe (92CVS745)	Affirmed
POPE v. POPE No. 9311SC674	Harnett (92CVS1391)	Affirmed
RICE v. PARKS No. 9218SC1054	Guilford (90CVS5300)	Affirmed
STATE v. ALEXANDER No. 939SC737	Warren (92CRS1579) (92CRS2262)	No Error
STATE v. ANDERSON No. 9312SC641	Cumberland (90CRS36844) (91CRS10152) (91CRS32908) (91CRS32909) (91CRS32910) (90CRS33720)	Affirmed
STATE v. BOOKER No. 934SC693	Onslow (92CRS5985)	No Error
STATE v. BROWN No. 9326SC702	Mecklenburg (92CRS45055) (92CRS45057)	No Error
STATE v. BURNS No. 938SC390	Wayne (91CRS12111)	New Trial

STATE v. CHEEK No. 9218SC157	Guilford (91CRS20545) (91CRS45757)	As to 91CRS20545—judgment is arrested. As to 91CRS45757—remanded.
STATE v. COOK No. 9310SC144	Wake (92CRS85)	Affirmed
STATE v. DAVIS No. 9316SC756	Robeson (92CRS5565)	No error in the trial. Remanded for correction of judgment.
STATE v. HAWKINS No. 9217SC404	Stokes (90CRS2603) (90CRS2606)	No Error
STATE v. McCALL No. 925SC887	New Hanover (91CRS16581)	No Error
STATE v. McNEIL No. 9314SC828	Durham (91CRS24343) (91CRS24935)	No Error
STATE v. MOJICA No. 9310SC71	Wake (91CRS39978) (91CRS40106)	New Trial
STATE v. RAGLER No. 9312SC696	Cumberland (90CRS46801) (90CRS46802) (90CRS47429) (90CRS47430) (90CRS47431) (90CRS46799) (90CRS46800) (90CRS47442) (90CRS47443) (90CRS47444) (90CRS47583) (90CRS47584) (90CRS47585) (90CRS47488) (90CRS47612)	As to def. Timothy K. Ragler—no error. As to def. Curtis J. Smith—dismiss. As to def. Stephen P. Ragler—no error.
STATE v. RASHAD No. 9313SC425	Brunswick (91CRS6620)	No Error
STATE v. ROGERS No. 938SC482	Lenoir (92CRS5495) (92CRS7574)	No Error

STATE v. TESTA No. 9210SC924	Wake (91CRS50569) (91CRS50570)	No Error
STATE v. TURNER No. 9312SC1	Cumberland (91CRS5461)	No Error
STEWARD v. HENRY No. 9319SC225	Rowan (90CVS1895)	Reversed & Remanded
TYNDALL v. CITY OF ASHEVILLE No. 9228SC586	Buncombe (91CVS165)	Affirmed
WHITEHURST v. J. H. CUTHRELL CO. No. 9310IC538	Ind. Comm. (873431)	Affirmed
WOODALL v. WOODALL No. 9311DC53	Johnston (88CVD0462)	Affirmed

THE UNIVERSITY OF NORTH CAROLINA; THE UNIVERSITY OF NORTH CAROLINA, D/B/A THE UNIVERSITY OF NORTH CAROLINA HOSPITALS AT CHAPEL HILL; AND THE UNIVERSITY OF NORTH CAROLINA D/B/A THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, PLAINTIFF v. LEE HENSLEY SHOEMATE AND RUBY C. STATON, DEFENDANTS

No. 9210SC251

(Filed 4 January 1994)

1. Insurance § 889 (NCI4th)— self-insurance program—imposter psychiatrist—medical malpractice coverage—validity of employment contract irrelevant

The trial court erred as a matter of law in ruling that the UNC Liability Insurance Trust Fund did not provide medical malpractice insurance for defendant Shoemate when UNC accepted Shoemate as a resident in psychiatry, failed to check his credentials as required by statute, and then allowed him to work as a psychiatric resident for fourteen months, caring for and treating patients, including defendant Staton, since pursuant to the Supplemental Rules and Regulations of the Trust Fund, the statute governing the creation of a self-insurance program for health care liability, N.C.G.S. § 116-219, and the Rules and Regulations for the Board of Governors for the Liability Trust Fund Council, the Trust Fund provided coverage against personal tort liability for any person or individual, whether an employee, agent or officer of UNC, working within the course and scope of his health care functions. Therefore, the validity of Shoemate's employment contract was totally irrelevant to the issue of whether there was malpractice coverage for Shoemate's conduct against patient Staton.

Am Jur 2d, Insurance § 726.

2. Insurance § 889 (NCI4th)— self-insurance program—coverage of defendant posing as psychiatrist—conduct within scope and coverage of health care functions—defendant as agent of UNC—genuine issue of fact

Defendant Staton presented a genuine issue of fact as to whether defendant Shoemate was an individual health care practitioner covered under the UNC Liability Insurance Trust Fund where she offered evidence that Shoemate was appointed to the position of resident in psychiatry and to house staff as a house staff physician by UNC although he actually had

no medical degree; Shoemate examined Staton, diagnosed depression, and had her admitted to the psychiatric ward; Shoemate testified at a hearing which resulted in a 30-day involuntary commitment of Staton; Staton was ultimately diagnosed as having Crohn's disease and surgery was performed to remove part of her small intestines; Shoemate's conduct was within the course and scope of health care functions; and UNC permitted Shoemate to be represented as its agent.

Am Jur 2d, Insurance § 726.

Appeal by defendant from judgment entered 18 November 1991 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 4 March 1993.

Yates, McLamb & Weyher, by Dan J. McLamb, and Barbara B. Weyher, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Charles Waldrup, for plaintiff-appellee.

Becton, Slifkin & Fuller, P. A., by Charles L. Becton, for defendant-appellant.

Donald B. Hunt for defendant-appellant.

Reckford, Gray & VanDerWeert, by Glenn E. Gray, for defendant-appellant.

JOHNSON, Judge.

I.

On 5 January 1989, Shoemate applied for appointment as a resident in psychiatry at UNC-Chapel Hill (UNC). On his application, Shoemate represented that he had received his undergraduate degree from the University of Texas and that he was an M.D./Ph.D. student at Harvard Medical School with an anticipated graduation date of August 1989.

On 10 January 1989, Shoemate was interviewed by four members of the Department of Psychiatry and one resident in the Department of Psychiatry at UNC at which time he held himself out as a medical student at Harvard Medical School. He received an outstanding rating by all four interviewers. In addition, Dr. Preston

of the Department of Psychiatry received two letters of recommendation purporting to be from Alvin F. Poussaint, M.D., Associate Dean, Harvard Medical School and Daniel Perschonok, Ph.D., Lecturer on Psychology, Harvard Medical School.

On 20 February 1989, UNC offered Shoemate a position as a resident in psychiatry. Shoemate accepted the position the same day, and on 15 May 1989, Shoemate signed a contract, the Appointment to the House Staff Agreement.

Shoemate began his psychiatry residency on 18 July 1989. On 18 July 1989, Ruby C. Staton, then seventeen years old, came to UNC Hospital with symptoms of vomiting, bloody diarrhea, gastric pain and anemia. She was examined by Shoemate. He diagnosed depression and she was admitted to the psychiatric ward of UNC Hospitals.

Shoemate testified as a physician at a 4 August 1989 commitment hearing which resulted in the 30-day involuntary commitment of Ruby Staton. Staton was ultimately diagnosed as having Crohn's disease, an intestinal disease, and surgery was performed on 7 November 1989 to remove part of her small intestines. Meanwhile, Shoemate continued his residency at UNC for approximately fourteen months until 20 September 1990. During this time Shoemate examined, diagnosed, treated, involuntarily committed, and provided other health care services to numerous other patients in addition to Ruby Staton.

During the second year of his residency, Shoemate made application to the Board of Medical Examiners for a full medical license. As a part of its procedure in granting a license, the Board of Medical Examiners contacted the American Medical Association to verify Shoemate's credentials. On 19 September 1990, the American Medical Association reported to UNC that it had no file on Shoemate, and that Harvard Medical School had no record of Shoemate attending that institution. UNC then suspended Shoemate without pay from his positions as resident in psychiatry and house staff physician. His current whereabouts are unknown.

On 19 December 1990, Ruby C. Staton filed a civil action in Wake County Superior Court against Shoemate essentially for medical negligence. On 25 April 1991, UNC filed this suit against Shoemate and Staton in Wake County Superior Court seeking three things:

(1) a declaratory judgment against Shoemate and Staton that (a) Shoemate's employment agreement was void *ab initio* and (b) that UNC has no obligation to provide medical malpractice coverage to Shoemate including no obligation to cover Staton's claims (Second Claim for Relief—Declaratory Judgment);

(2) a judgment against Shoemate that (a) Shoemate's misrepresentations induced UNC to appoint Shoemate as resident in psychiatry and as house staff physician and to pay Shoemate an annual salary and (b) that UNC has been damaged in the amount of $27,452.91, the amount of Shoemate's salary (First Claim for Relief—Fraud); and

(3) a judgment against Shoemate finding the employment contract was void, or alternatively, should be rescinded and declared to be of no further force and effect (Third Alternative Claim for Relief—Rescission).

Ruby C. Staton accepted service, and Shoemate was served by publication. Staton's answer included a counterclaim for declaratory judgment that the UNC Liability Insurance Trust Fund (Trust Fund), UNC's equivalent of a malpractice insurance policy, provide coverage for the claims made by Staton against Shoemate.

UNC obtained an entry of default judgment against Shoemate and subsequently made three motions which were heard on 1 October 1991 and resulted in a judgment which is the subject of this appeal. The trial court entered judgment as follows:

1. Allowed UNC's motion for default judgment against Shoemate for $27,452.91 and entered a declaratory judgment that Shoemate's employment agreement and House Staff Agreement were void and that UNC provided no medical malpractice coverage to Shoemate whatsoever, including coverage for the claims made against Shoemate in *Staton v. Shoemate*;

2. Allowed UNC's summary judgment motion granting a declaratory judgment against Staton on UNC's declaratory judgment claim; and

3. Allowed UNC's motion for a summary judgment on Staton's first counterclaim for a declaratory judgment.

The trial judge amended the judgment to include a finding that there was no just reason for delaying the appeal. Ruby C. Staton filed timely notice of appeal with this Court.

II.

[1] By defendant's first assignment of error, defendant contends that the trial court erred as a matter of law in ruling that the Trust Fund does not provide medical malpractice insurance for defendant Shoemate when UNC accepted Shoemate as a resident in psychiatry, failed to check his credentials as required by statute, and then allowed him to work as a psychiatric resident for fourteen months, caring for and treating patients, including defendant. We agree with defendant.

Appellate review of summary judgment focuses on whether the trial court properly concluded that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. North Carolina General Statutes § 1A-1, Rule 56(c) (Cum. Supp. 1992).

In the instant case, the trial court ruled that the contract between UNC and Shoemate was void *ab initio*. UNC contends that because the employment contract between UNC and Shoemate is void *ab initio* the UNC Trust Fund did not provide coverage for Shoemate because he was not an employee of UNC. In addition, UNC contends that Staton, as a patient at UNC, is not a third-party beneficiary of Shoemate's employment agreement with UNC and has no standing to seek its enforcement.

Defendant argues, however, that the validity of Shoemate's employment contract is totally irrelevant to the issue of whether there is malpractice coverage for Shoemate's conduct against Staton where the malpractice insurance is not connected with an individual's employment contract with UNC. Rather, it is dependent upon an individual's conduct as a health-care practitioner working in UNC's hospitals, whether as an agent or employee of UNC.

In considering the parties' contentions, we must first determine whether Shoemate's right to the medical malpractice insurance was connected with the terms of his employment or whether Shoemate's right to the medical malpractice insurance was dependent on his conduct as a health-care practitioner working in UNC's hospital.

In the instant case, Shoemate signed an agreement entitled "The University of North Carolina Hospitals Appointment to House Staff Agreement." The agreement states in pertinent part:

> Lee Shoemate is hereby appointed to the House Staff of The University of North Carolina Hospitals in the capacity of Second Year Postgraduate in the Department of Psychiatry at an annual stipend of $23,500 to be paid biweekly by the Department from August 1, 1990 to July 31, 1991 based on the following conditions.
>
> The University of North Carolina Hospitals:
>
> . . .
>
> 2. Agrees to provide professional medical malpractice insurance coverage. Members of the House Staff will be eligible to enroll in a group-rated health and hospitalization insurance plan[.]
>
> . . .
>
> The House Staff Physician/Dentist:
>
> 1. Agrees to abide by all applicable rules, regulations and policies of The University of North Carolina and its Clinical Departments, the University of North Carolina Schools of Medicine and Dentistry, the Board of Medical Examiners/ Dental Examiners of the State of North Carolina and other appropriate governmental agencies and departments which may be in force.
>
> . . .
>
> 3. Agrees to obtain a resident training license or full license from the North Carolina Board of Medical Examiners/Dental Examiners and submit a copy (unless a current copy is on file) to the House Staff Office of The University of North Carolina Hospitals prior to the effective date of this appointment. House Staff Physicians/Dentists will be reimbursed for the resident training license fee charged by the Board of Medical Examiners/Dental Examiners by their clinical department. . . .

Under the terms of the House Staff Agreement, UNC would provide the professional medical malpractice insurance pursuant to the agreement entered into by the parties. However, at the time Shoemate entered into the agreement with UNC, Shoemate had not attended medical school and was incapable of fulfilling his promise — namely, performing the services of a physician and undertaking the practice of medicine.

Under North Carolina law, where a contract is impossible to perform at the time it is made, consideration between the parties is lacking, and the contract is void *ab initio*. *Manhattan Life Ins. Co. v. Miller Machine Co.*, 60 N.C. App. 155, 298 S.E.2d 190 (1982). Therefore, if we look only at the House Staff Agreement, Shoemate would not be entitled to professional medical malpractice insurance as the contract between UNC and Shoemate was void *ab initio*.

However, examining the terms of the Trust Fund, we find the wording of the Supplemental Rules and Regulations governing the Trust Fund states that it "covers any person who may be charged with personal tort liability in the provision of health care services, if the charge is based upon conduct within the course and scope of health-care services undertaken by the person, with or without compensation, as a member of the governing board of, an officer or director of, an employee of, or an agent of a covered agent entity, or any person who is a duly enrolled student of the School of Medicine of the University of North Carolina." Covered entities are program participants identified as: "The School of Medicine of the University of North Carolina at Chapel Hill and The Medical Faculty Practice Plan of the School of Medicine of the University of North Carolina at Chapel Hill." The Trust Fund does not appear to provide coverage based solely on whether the person is an employee of UNC.

In addition, North Carolina General Statutes § 116-219 (1987), the statute which authorizes the establishment of a self-insurance program for health-care liability claims, states:

> The Board of Governors of The University of North Carolina . . . is authorized through the purchase of contracts of insurance or the creation of self-insurance trusts . . . to provide individual health-care practitioners with coverage against claims of personal tort liability based on conduct within the course and scope of health-care functions undertaken by such individuals as employees, agents, or officers of . . . (iii) North Carolina Memorial Hospital [now UNC Hospitals at Chapel Hill] . . . The types of health-care practitioners to which the provisions of this Article may apply include, but are not limited to, medical doctors . . . nurses, residents, interns, medical technologists, nurses' aides, and orderlies. . . .

Furthermore, the Rules and Regulations of the Board of Governors for the Liability Insurance Trust Fund Council provide:

> Self-insurance provided pursuant to this Program shall be limited to expenses arising from:
>
> (a) claims against individual health-care practitioners made upon alleged personal tort liability based on conduct, whether compensated, uncompensated, or volunteer, within the course and scope of health-care functions undertaken by such individuals as employees, agents, or officers, but not as independent contractors, of program participants. . . .

From a summary of the Supplemental Rules and Regulations of the Trust Fund, the statute governing the creation of self-insurance program for health-care liability, and the Rules and Regulations for the Board of Governors for the Liability Trust Fund Council, we find the Trust Fund provides coverage against personal tort liability for any person or individual whether an employee, agent or officer of UNC, working within the course and scope of their health-care functions.

[2] Therefore, if Staton showed through her pleadings, affidavits and supporting materials that Shoemate was an individual health-care practitioner, that the claim against Shoemate was a personal tort claim, that the work Shoemate performed on Staton arose out of the course and scope of his employment, and that Shoemate was an employee or agent of UNC at the time Shoemate provided medical services to Staton, there would appear to be a genuine issue of fact as to whether Shoemate is covered under the Trust Fund.

The Rules and Regulations of the Trust Fund define "individual health-care practitioners" in definition (j) as:

> those who render health care to patients by direct ministrations or by indirect ministration upon orders of one who renders health care to patients by direct ministration; for example, medical doctors, medical residents, medical interns, nurses, nurses aides, orderlies, medical technologists, x-ray technicians, physical therapists, dieticians, dentists, dental hygienists, dental assistants, psychiatrists, psychologists, professional counselors, and chaplains.

In the instant case, defendant's pleadings and supporting materials showed that Shoemate was appointed to the position

of resident in psychiatry and to house staff as a house staff physician in 1989. In July 1989, Ms. Staton came to UNC Hospitals with certain symptoms. She was examined by Shoemate who diagnosed depression and she was admitted to the psychiatric ward. Shoemate, as one of her treating physicians, testified at a commitment hearing which resulted in a 30-day involuntary commitment of Staton. Staton ultimately was diagnosed as having Crohn's disease and surgery was performed to remove part of her small intestine. Shoemate, as a resident, met the definition of health-care practitioner as provided in UNC's health insurance because he rendered health-care to Staton and other patients by direct ministration or by indirect ministration upon orders of one who renders health care by direct ministration.

The Rules and Regulations of the Trust Fund further require that the claim against the individual health-care practitioners be made upon an alleged personal tort liability. The Rules and Regulations define tort as "a civil wrong to person or property independent of contract."

An examination of Staton's complaint against Shoemate shows that Staton alleged claims of wrongful commitment, fraud, lack of informed consent, reckless infliction of emotional distress, unfair and deceptive trade practices arising out of her hospitalization, medical negligence and falsifying medical records. All of these claims are civil wrongs to persons or property independent of contract and thus come within the definition of a tort.

Next, the Rules and Regulations require that the conduct must be "within the course and scope of health-care functions." "Health-care functions" are defined as:

> (1) The ministration to the physical or mental well-being of patients, through clinical practice, (including preventative measures, consultation, counseling, analysis, diagnosis, or treatment), or
>
> (2) Other general patient care support services for which expertise as a health-care practitioner is required.

Defendant presented the deposition of Dr. Pedersen to establish that Shoemate's conduct was within the course and scope of health-care functions. Dr. Pedersen testified that Shoemate interviewed Staton, and had a number of sessions to review the patient's history, and the patient's symptoms. Shoemate ordered lab tests and ordered

consultation from other specialists. He performed a physical examination and a mental status examination on Staton.

Dr. Pedersen further testified that he and Shoemate discussed treatment options with Staton in her hospitalization, discussed medication approaches, behavioral approaches to her eating disorder, and discussed short term and long term psychotherapy. From the testimony of Dr. Pedersen, we conclude Shoemate did provide services to Staton within the scope of health-care functions.

The Rules and Regulations apply only to conduct "within the course and scope of health-care functions undertaken by such individuals as employees, agents, or officers, but not as independent contractors, of Program participants." The Liability Trust Fund Council adopted Supplemental Rules and Regulations, including Article IV, which states in pertinent part that: "The program participants . . . are the University of North Carolina at Chapel Hill and the North Carolina Memorial Hospital [now the North Carolina Hospitals at Chapel Hill]." In addition, Article VI, Sec. B (2) of the Supplemental Rules defines "Covered Individuals" as follows:

> A covered individual is any person who may be charged with personal tort liability in the provision of health care services, if the charge is based upon conduct within the course and scope of health care services undertaken by the person, with or without compensation, as a member of the governing board of, an officer or director of, an employee of, or an agent of a covered entity.

Contrary to UNC's argument, we find the Trust Fund does not require that the individual's conduct only be covered if he has a valid employment contract with UNC. Instead, the Rules and Regulations governing the Trust Fund allow coverage of claims against individual health-care practitioners made upon alleged tort liability based upon conduct whether it is compensated, uncompensated, or volunteer as long as it is within the course and scope of health-care functions undertaken by individuals as employees or agents. An agent of UNC is not synonymous with an employee of UNC.

An agent is "a person who is authorized by another to act for him, one intrusted with another's business." *Black's Law Dictionary* p. 59. The evidence established that Shoemate wore a name tag "MD", performed examinations, ordered lab tests, ordered con-

sultations with specialists and interacted with other doctors and patients as if he were a medical doctor. From the evidence presented, we find Shoemate acted as an agent of UNC.

We have acknowledged UNC's argument that the contract between UNC and Shoemate was void *ab initio* and that UNC has no contractual obligation to Shoemate. However, we cannot ignore the relationship between UNC and Shoemate which gave him access to treat, diagnose and involuntarily commit patients such as Staton.

"Where a person, by words or conduct, represents or permits it to be represented that another is his agent, he will be estopped to deny the agency as against third persons, who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency exists in fact." *Barrow v. Barrow*, 220 N.C. 70, 72, 16 S.E.2d 460, 461 (1941). We find UNC did permit Shoemate to be represented as its agent.

We have determined from the evidence that there is a genuine issue of fact as to whether Shoemate was an individual health-care practitioner covered under the Trust Fund.

UNC also argues that Staton is not a third-party beneficiary and therefore not entitled to any contractual benefits between UNC and Shoemate. However, North Carolina law states that "anyone for whose benefit an insurance policy is issued, covering the legal liability of the insured (as distinguished from a mere indemnity insurance contract) may maintain an action directly against the insurer." *Ingram v. Nationwide Mut. Ins. Co.*, 258 N.C. 632, 638, 129 S.E.2d 222, 227 (1963).

From the record, we find Staton asked the court to determine whether the Trust Fund provides coverage against Shoemate in the action for *Staton v. Shoemate*. Since the evidence establishes that the Trust Fund does provide medical malpractice coverage, we hold the trial court erred when it granted: a declaratory judgment against Staton holding that plaintiff provides no medical malpractice coverage to Shoemate whatsoever; a summary judgment against Staton on UNC's declaratory judgment claim (second claim for relief); and UNC's summary judgment against Staton on Staton's first counterclaim for declaratory judgment.

III.

By defendant's second and third assignments of error, defendant contends the trial court erred in granting summary judgment against Shoemate on UNC's fraud claim and UNC's rescission claim. We disagree.

Defendant attacks the trial court's order granting summary judgment against Shoemate on the issue of contract fraud and rescission. As against Shoemate, however, these issues have been conclusively resolved by virtue of the default judgment. Since Shoemate failed to answer the complaint in this matter, all of UNC's allegations are deemed admitted.

At the trial court level, defendant did not bring a motion to set aside the default judgment pursuant to Rule 55(d) of the North Carolina Rules of Civil Procedure or otherwise challenge the default judgment. Counsel for defendant at no time made an appearance on behalf of Shoemate or indicated an intent to represent him. Failure to attack the judgment at the trial court level precludes such an attack on appeal. *Collin v. Highway Commission*, 237 N.C. 277, 74 S.E.2d 709 (1953). As such, defendant is now precluded from challenging the default judgment against Shoemate.

We reverse the decision of the trial court as to issue one and affirm the decision of the trial court as to issues two and three.

Judges LEWIS and JOHN concur.

STATE OF NORTH CAROLINA v. NORMAN RAY PARKER

No. 9222SC1143

(Filed 4 January 1994)

1. Homicide § 284 (NCI4th)— second-degree murder—sufficiency of evidence

Evidence was sufficient to support defendant's conviction of second-degree murder where it tended to show that defendant constantly maintained surveillance of the victim; defendant possessed two firearms; he engaged in target practice with

the guns shortly before the murder; defendant threatened suicide because the victim had ended her relationship with him; defendant had threatened to kill the victim; defendant was seen by several witnesses in the area of the crime on the morning it was committed; and defendant's brand of cigarette package was found on the opposite side of the road from where the victim's vehicle came to rest.

Am Jur 2d, Homicide §§ 425 et seq.

2. Evidence and Witnesses § 351 (NCI4th)— prior incident involving defendant—admissibility to prove motive and identity

In a second-degree murder prosecution where defendant contended that the State's circumstantial evidence was insufficient to connect him to the scene of the crime charged and therefore insufficient to identify him as the assailant who killed the victim, the trial court did not err in admitting evidence of an incident involving defendant five years earlier which was substantially similar to the events occurring in this case, since such evidence was admissible as proof of motive and identity. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 305 et seq.

Appeal by defendant from judgment entered 7 July 1992 by Judge L. P. Martin, Jr. in Iredell County Superior Court. Heard in the Court of Appeals 14 September 1993.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Isham B. Hudson, Jr., for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant-appellant.

JOHNSON, Judge.

On 4 November 1991, the Iredell County Grand Jury indicted defendant Norman Ray Parker for the second degree murder of Ms. Wanda Kay Welborn. State's evidence showed the following: The victim, Ms. Welborn, was twenty-eight years old and lived with her two children. Ms. Welborn's regular job was at Hunt Manufacturing and Distributing Company but on weekends she also worked as a waitress at Shirin's Restaurant.

Defendant had been married three times prior to a relationship with Ms. Welborn. At the time of the murder, defendant lived with his parents next to Davis Oil Company on Buffalo Shoals Road in Statesville. Defendant was sometimes an employee of Davis Oil Company but at the time of the murder, he was not working because he was recovering from a hernia operation.

The couple first started dating in February 1991 after Ms. Welborn broke off a relationship with Mr. Jack Kitchens. Prior to the weekend of 30 March, defendant and Ms. Welborn seemed to have a good relationship evidenced by the giving of gifts. On Easter weekend, the couple traveled to Tennessee. Defendant asked Ms. Welborn to marry him, but she refused. When she refused, defendant refused to drive her home unless she married him. Ms. Welborn was eventually able to convince him to return home. Shortly after that incident, defendant moved into Ms. Welborn's mobile home with Ms. Welborn and her two children.

After defendant moved in the home, he became very jealous. He accompanied Ms. Welborn everywhere she went. Defendant watched Ms. Welborn during her entire shift at Shirin's Restaurant. When the owner asked him not to remain in the restaurant, he watched Ms. Welborn through the window. When Ms. Welborn became ill and went into the hospital, defendant monitored Ms. Welborn's telephone calls and her visitors.

Prior to the week she was murdered, Ms. Welborn asked defendant to move out of the mobile home several times but on 22 May 1991, she insisted that he move out. Defendant pulled out a gun and threatened Ms. Welborn telling her "that if he couldn't have her no one would." He refused to relinquish the house keys. After defendant moved out, he continued to call and follow Ms. Welborn in his pickup truck on her way to work.

The week before she was murdered, Ms. Welborn asked her ex-boyfriend to borrow his gun, but Mr. Kitchens never gave her an answer. On Thursday, 23 May 1991, defendant attempted to talk to Ms. Welborn while she ate her lunch but Ms. Welborn would not talk to him.

On the same Thursday, the Iredell Sheriff's Department responded to a call that someone was going to commit suicide and wanted to talk to an officer. Lieutenant R. M. Lambert and Chief Deputy Cook responded to the call and drove out to Homer's

Truckstop. Defendant drove up and told the officers that he was depressed and was going to kill himself because he and his girlfriend had broken up and life was not worth living. Defendant had a weapon but would not turn it over. After talking to Deputy Cook, defendant calmed down and left.

Defendant talked about committing suicide to several people. In particular, he talked to Mr. Charles Gregg about committing suicide because he had broken up with Ms. Welborn. Mr. Gregg told him to go home and think about it, and defendant said, "Who says I'm the one that's going to get it anyway?"

At various times prior to the murder, defendant had been seen with two pistols: a silver-barreled, dark-handled .380 automatic which he admitted owning, and a silver-barreled, brown-handled larger weapon, said to resemble a black-barreled .357 Taurus magnum revolver. On the Monday before Ms. Welborn's death, defendant had been seen practicing with the .380 automatic and a revolver.

On Friday night, 24 May 1991, defendant left his parents' home, leaving his .380 automatic in his father's possession. He then went to visit a friend, Ms. Jackie Sexton. Ms. Sexton resided at the home of an elderly man as his care giver. She and defendant talked until approximately 10:30 p.m. that night. Ms. Sexton told defendant that he could sleep on the couch in the living room. When Ms. Sexton's daughter, Ms. Sharon Striker, came in at 2:00 a.m., 25 May 1991, defendant was asleep on the couch.

Mr. Keith Wishtichin saw defendant at Shirin's Restaurant around 1:30 a.m. or 2:00 a.m., 25 May 1991. Mr. Wishtichin told defendant he looked like "hell" and that he needed to go home and get some sleep. Mr. Wishtichin later saw defendant around 4:30 a.m. at the truckstop fuel desk.

Between 7:45 a.m. and 8:00 a.m., defendant talked to Ms. Robin Prevette at the fuel desk at Homer's Truckstop. Defendant stated at that time that he had been out all night and had a lot on his mind. The truckstop is 4.9 miles from the scene of the crime.

At 8:00 a.m., Ms. Striker left Ms. Sexton's house for the farmer's market and noticed defendant sitting in the driveway in his pickup truck looking straight ahead. It takes approximately five minutes to travel from Ms. Sexton's house to the truckstop and it is 11 miles from the scene of the crime.

Between 8:30 a.m. and 9:00 a.m., defendant went into Shirin's Restaurant to inquire about Ms. Welborn's whereabouts asking Ms. Donna Shoaf to call him if she came in. Defendant's inquiry seemed to be rehearsed. At 10:00 a.m., defendant told Mr. Archie Cox at the Lake Norman Fuel Stop that Ms. Welborn was dead.

The same morning at approximately 6:28 a.m., Ms. Welborn had stopped at Lake Norman Fuel Stop intersection on Arey Road for coffee. She said she was in a hurry because she was late for work. That was the last time witnesses saw her alive.

At about 6:40 a.m., witnesses in the vicinity of Arey Road heard three shots ring out. One of the witnesses heard squalling tires near the gunfire.

Around 8:30 a.m., Ms. Welborn's car was discovered by Mr. Christopher Beam some 1000 feet off of Arey Road; the gear was in neutral and the car still running. Ms. Welborn was slumped over the wheel of the car and there was blood on the floorboard. There was a cigarette on Ms. Welborn's chest which appeared to have been put out by the blood. Ms. Welborn appeared to have been dead for two hours. There was a wad of money on top of a pocketbook on top of an apron in the passenger's seat.

Further investigation of the scene revealed tire impressions on the pull-off area of the road four hundred feet away from where Ms. Welborn's car came to rest. On the opposite side of the road from the pull-off area, there was a cigarette package and cellophane wrapper. The wrapper came from a pack of Winston Lights. Defendant smoked Winston Lights.

The body was removed from the car for an autopsy and the car was stored. The coroner determined that the cause of death was multiple gunshot wounds.

Defendant was interviewed about 7:40 p.m. on 25 May 1991 by Lieutenant R. M. Lambert. During the interview, defendant stated that it had been months since he had fired a weapon; that he had not killed Ms. Welborn; that he did not know who killed Ms. Welborn; that he had last seen Ms. Welborn on 22 May 1991; and that he had not changed clothes that day.

Contrary evidence introduced showed that defendant had target practice days before the murder, and that he had changed clothing before attending the interview. Witnesses Ms. Robin Prevette and

Ms. Donna Shoaf testified that he had on blue jeans and a red flannel plaid button shirt when they saw him between the hours of 7:30 a.m. and 9:00 a.m. At the time of the interview, defendant had on a pair of blue jeans, a pullover knit shirt and white tennis shoes.

Other evidence for the State showed that Special Agent Joyce Petska, an expert tire track examiner, examined the photographs of tire impressions taken from the scene and compared them to defendant's truck tires. She determined that the pull-off area could not be used for comparison because there appeared to be overlapping impressions, and that the other tire impressions definitely did not match the tread design of defendant's tires. Expert forensic examination of paint samples from areas of minor damage on the right and left front fenders of defendant's truck and left rear of Ms. Welborn's car showed no transfer of paint between the vehicles.

A residue sample was taken from defendant's hands but it was taken too late to be of any value. Special Agent Ronald Marrs, a firearms and tool mark examiner, examined the two guns obtained from defendant's father and compared them to the four bullets recovered from the victim and the victim's car. The bullets had entirely different class characteristics from the State's exhibit 11, the .380, and could not have been fired from that weapon. The bullets exhibited similar characteristics of State's exhibit 10, .357, but the bullets were too deformed for a determination of whether they were fired from that weapon.

On 17 June 1991, defendant talked with Deputy Cook who signed an additional statement basically repeating his innocence and stated that he would submit to a polygraph test. Defendant received a polygraph test.

After a jury trial, defendant was found guilty of second degree murder as charged. From judgment entered 7 July 1992 imposing a sentence of life imprisonment, defendant appealed to this Court.

By defendant's first assignment of error, defendant contends that the trial court erred by denying defendant's motion to dismiss at the close of all of the evidence because the evidence was insufficient as a matter of law to support defendant's conviction for second degree murder. We disagree.

Second degree murder is defined as the unlawful killing of a human being with malice. *State v. Young*, 324 N.C. 489, 380

S.E.2d 94 (1989). The question before us is whether there was sufficient evidence of the unlawful killing of Ms. Welborn by defendant to support a conviction. In *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990), our Supreme Court summarized the law applicable to the question before this Court as follows:

> The question is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. (Citation omitted.)
>
> Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," (citation omitted). . . .
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed. This is true even though the suspicion so aroused by the evidence is strong.

Id. at 215, 393 S.E.2d at 814. In determining the sufficiency of the evidence on a motion to dismiss, the evidence must be viewed in the light most favorable to the State.

> The State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Id. at 216, 393 S.E.2d at 814.

We note:

> While circumstantial evidence is a "recognized and accepted instrument in the ascertainment of truth," (citation omitted) when the State relies upon such evidence for a conviction of a felony, as in the present case, "the rule is, that the facts established or advanced on the hearing must be of such a nature and so connected or related as to point unerringly to the defendant's guilt, and to exclude any other reasonable hypothesis" (citation omitted)[.]

State v. Jarrell, 233 N.C. 741, 746, 65 S.E.2d 304, 307 (1951).

[1] We find the circumstantial evidence presented by the State was sufficient to support a conviction of second degree murder. The State produced the following evidence which tended to connect defendant with the crime scene and the offense charged to commit the crime: defendant's constant surveillance of Ms. Welborn; defendant's possession of two firearms; defendant's target practice with his guns; defendant's threatened suicide because Ms. Welborn had ended the relationship; defendant's threats to kill Ms. Welborn; defendant's appearance around the area on the morning of Ms. Welborn's death; and defendant's brand of cigarette package found on the opposite side of the road where Ms. Welborn's vehicle came to rest.

The State's evidence, when taken in the light most favorable to the State, tends to show defendant had a motive, connects defendant to the execution of his threats, and shows sufficient facts to connect defendant to the crime charged. Based on these findings, the evidence was sufficient to take the case to the jury. *Jarrell*, 233 N.C. 741, 65 S.E.2d 304. The trial court correctly denied defendant's motion to dismiss.

[2] By defendant's second assignment of error, defendant contends that he was denied a fair trial by the trial court's admission of irrelevant and inflammatory evidence of defendant's character and unrelated conduct for which he was not on trial and which was not a proper matter for the jury's consideration. We disagree.

After a voir dire examination, the trial court ruled, over defendant's objections, that the testimony of Ms. Tonya Thomas was relevant to show motive, intent, purpose and design, and did not violate Rule 404(b) or Rule 403 of the North Carolina Rules of Evidence. The trial court's ruling was correct.

Rule 404(b) provides:

> (b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

North Carolina General Statutes § 8C-1, Rule 404(b) (1992).

The preliminary issue to be addressed by the trial court when determining the admissibility of evidence under Rule 404(b) is whether the evidence is in fact being offered pursuant to that rule. *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). In the instant case, the State clearly informed the court that it was offering the testimony of Ms. Thomas pursuant to Rule 404(b). The State offered, during the direct examination of Ms. Thomas, extrinsic evidence of prior conduct to prove *modus operandi* and identity of Ms. Welborn's assailant. Therefore, the trial court properly concluded the admissibility of the evidence was to be analyzed initially under Rule 404(b).

Upon a finding the evidence is offered pursuant to Rule 404(b), the court must then determine whether the evidence is relevant. *Morgan*, 315 N.C. at 637, 340 S.E.2d at 91. Extrinsic evidence of conduct is admissible under Rule 404(b) as long as it is relevant for a purpose other than to show defendant has the propensity to engage in the type of conduct charged. *Id.* "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." North Carolina General Statutes § 8C-1, Rule 401 (1992).

Ms. Thomas' testimony was admitted into evidence as proof of motive and identity. When evidence reasonably tends to prove a material fact at issue in the crime charged, it will not be rejected merely because it also proves defendant guilty of another crime. *State v. Jeter*, 326 N.C. 457, 389 S.E.2d 805 (1990). The existence of motive is a circumstance tending to make it more probable that the person in question did the act, hence evidence of motive is always admissible where the doing of the act is in dispute. *State v. Church*, 231 N.C. 39, 55 S.E.2d 792 (1949). Ms. Thomas' testimony helped to establish defendant's motive in killing the victim as it tended to show how defendant acted after he had been rejected and what he was motivated to do in attempting to effect a satisfactory resolution.

"In a criminal case, the identity of the perpetrator of the crime charged is always a material fact." *Jeter*, 326 N.C. at 458, 389 S.E.2d at 806. However, identity is not always at issue. Therefore, before identity is admissible pursuant to Rule 404(b), there must be a determination of whether the identity of the perpetrator is at issue. *State v. Thomas*, 310 N.C. 369, 312 S.E.2d 458 (1984).

Here, the root of defendant's case is his contention that the State's circumstantial evidence is insufficient to connect him to the scene of the crime charged and therefore, insufficient to identify defendant as the assailant that killed Ms. Welborn. As the identity of the perpetrator is at the heart of this case, Ms. Thomas' testimony as to the motive and identity of the perpetrator is relevant and qualifies under Rule 404(b).

After establishing identity is at issue, and therefore, relevant under Rule 404(b), we must next determine whether the evidence meets the mandate of Rule 403. *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990), *dimissal allowed and disc. review denied*, 328 N.C. 574, 403 S.E.2d 516 (1991). Rule 403 states in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" North Carolina General Statutes § 8C-1, Rule 403 (1992). Defendant argues that the prejudicial value of the evidence outweighed its probative value.

Whether evidence is to be excluded under Rule 403 is left to the sound discretion of the trial court. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990). "When the incidents are offered for a proper purpose, the ultimate test of admissibility is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. White*, 101 N.C. App. 593, 602, 401 S.E.2d 106, 111, *disc. review denied and appeal dismissed*, 329 N.C. 275, 407 S.E.2d 852 (1991).

Here, after Ms. Thomas and Ms. Welborn had rejected defendant in a relationship, defendant kept both women under constant surveillance; threatened to kill both women; threatened to commit suicide over both women; ran both women off of the road with his vehicle; pulled weapons on both women; and in Ms. Thomas' case, stabbed Ms. Thomas with grass shears requiring hospitalization.

Finally, although Ms. Thomas' incident occurred in 1986 and the incident involving Ms. Welborn occurred in 1991, we do not find the incident involving Ms. Thomas to be too remote in time to be more prejudicial than probative. "Remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991).

Under the applicable rules of law, the trial judge correctly admitted the testimony of Ms. Thomas. We find that defendant received a trial free from error.

We find no error.

Judges COZORT and McCRODDEN concur.

LIB WANDA WILLIAMS v. DONALD LEON WILLIAMS

No. 9318SC790

(Filed 4 January 1994)

1. Process and Service § 30 (NCI4th)— service of process— definition of neglect

Neglect, as used in N.C.G.S. § 1A-1, Rule 4(h), means more than a mere failure to serve papers, and a clerk is not required or authorized to appoint a private process server as long as the sheriff is not careless in executing process.

Am Jur 2d, Process §§ 105 et seq., 317 et seq.

2. Process and Service § 30 (NCI4th)— service of process by sheriff's deputies—action of average private process server not required—no neglect

Neglect should not be found where a sheriff does not take all the action to serve the papers that an average private process server would take based on the information in the summons. In this case, the sheriff did not neglect to serve process, as required by N.C.G.S. § 1A-1, Rule 4, where the sheriff, through his deputies, attempted to serve process on two occasions at the address provided by plaintiff; deputies were told by defendant's grandmother, who lived at the address, that defendant did not live there and she did not know his whereabouts; and further information was not provided by the grandmother or by plaintiff which would require more diligence than that exhibited by the deputies.

Am Jur 2d, Process §§ 105 et seq., 317 et seq.

Judge WYNN dissenting.

Upon writ of certiorari from order entered 2 July 1993 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 28 December 1993.

On 29 March 1993, plaintiff filed a complaint in Guilford County District Court seeking child support from defendant. On 30 March 1993, the complaint and a summons were delivered to the Guilford County Sheriff's Department and returned unserved on 5 April 1993.

On 24 May 1993, plaintiff filed an "Affidavit and Order on Appointment of Process Server" requesting that the Clerk of Superior Court appoint a private process server pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(h) (1990). The Clerk entered an order denying plaintiff's request. Pursuant to N.C. Gen. Stat. § 1-272 (1983), plaintiff appealed the Clerk's order to the Superior Court.

Following a hearing, the trial court made several findings of fact. It found that plaintiff's counsel had met with both Sheriff Burch and the Sheriff's attorney, Susan Lewis, in July 1992 to discuss a grant proposal that would pay for private process servers in child support actions involving parents who are difficult to locate. At the meeting, they discussed the fact that a finding of neglect on the part of the Sheriff, where no such finding is justified, would be required under Rule 4(h) before a substitute process server could be appointed. Plaintiff's counsel did not agree with this analysis. Both Sheriff Burch and Mrs. Lewis stated that the Sheriff would not agree to be found to have neglected any duties simply to enable plaintiff's counsel to implement the grant.

The trial court also found that the Sheriff tried twice, through his deputy, to serve the defendant in this action at the address provided by the plaintiff but was unable to do so. The address provided by the plaintiff was that of the defendant's grandmother. Defendant's grandmother told the Sheriff that the defendant did not live there and that his whereabouts were unknown. After the summons was returned unserved, plaintiff filed an affidavit stating that she believed the defendant did live at that address because her eleven year old daughter had spoken with him on the telephone there.

Finally, the trial court found that the Sheriff had neither refused nor neglected to attempt service of process and, in fact, made a diligent effort to serve process on the defendant. The trial court also stated that any failure to serve the defendant resulted

from insufficient information given by the plaintiff concerning defendant's whereabouts. The trial court then concluded that the Sheriff of Guilford County had not neglected or refused to execute process and that the Clerk of Superior Court was not required to appoint a private process server pursuant to Rule 4(h). From this order, the plaintiff appeals.

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

No brief for defendant appellee.

ARNOLD, Chief Judge.

[1] At the outset, we note that this appeal would normally be dismissed as interlocutory. *See Updike v. Day*, 71 N.C. App. 636, 322 S.E.2d 622 (1984). Due to the importance of this issue, however, we have granted certiorari. In her first assignment of error, the plaintiff contends the trial court erred in determining that neglect, as used in Rule 4(h), means more than a mere failure to serve papers. The plaintiff argues that neglect can be found even where no sheriff misconduct is present. We disagree.

G.S. 1A-1, Rule 4(h) provides as follows:

> *Summons—When proper officer not available.*—If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.

Neglect, as used in Rule 4(h), has no clear meaning and the word neglect has been defined in various ways. Neglect "[m]ay mean to omit, fail or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention in the doing or omission of a given act. And it may mean a designed refusal or unwillingness to perform one's duty."

Black's Law Dictionary 930 (5th ed. 1979). Neglect has also been defined as "to give little or no attention or respect to . . . to fail to attend to sufficiently or properly . . . to carelessly omit doing (something that should be done) either altogether or almost altogether . . . leave undone or unattended to through carelessness or by intention." Webster's Third New International Dictionary of the English Language 1513 (1966). Thus, neglect may mean (1) to fail to do a thing that can be done, (2) to leave undone through carelessness, or (3) to leave undone by intention.

Plaintiff contends that cases interpreting North Carolina's amercement statutes should guide this Court in defining neglect as used in Rule 4(h). Amercement is "[a] money penalty in the nature of a fine imposed upon an officer for some misconduct or neglect of duty." Black's Law Dictionary 75 (5th ed. 1979). Statutes *in pari materia*, or upon the same matter or subject, "must be read in context with each other." *Cedar Creek Enter., Inc. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976). Our amercement statute, prior to its amendment in 1989, provided as follows:

> If any sheriff, constable or other officer . . . refuse or neglect to return any precept, notice or process . . . which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to anyone who will sue for the same one hundred dollars ($100.00), and shall moreover be guilty of a misdemeanor.

N.C. Gen. Stat. § 14-242 (1986). This statute was later amended and "refuse or neglect" was replaced with "willfully refuses." N.C. Gen. Stat. § 14-242 (Cum. Supp. 1992).

We agree with the plaintiff that the two statutes are *in pari materia*. We disagree, however, with plaintiff's contention that neglect, as used in the amercement statute, means mere failure to do what is required. Instead, we believe neglect in that context means to leave undone through carelessness. In *Swain v. Phelps*, the court stated that amercement was "given for the neglect to serve process *when no sufficient cause is shown.*" *Swain v. Phelps*, 125 N.C. 43, 44, 34 S.E. 110, 111 (1899) (emphasis added). This indicates something more than mere failure to act is needed. Applying the definition of neglect used in the amercement statutes to Rule 4(h), we hold that a Clerk is not required or authorized to appoint a private process server as long as the sheriff is not careless

in executing process. Had the legislature intended a more lax standard for the appointment of private process servers, it would not have used the terms "refuse or neglect." Also, our Rule 4(h) represents a departure from the federal rules of civil procedure, which have become increasingly flexible regarding service. This provides further indication that our legislature intended something more than mere failure to serve process when it used the words "refuse or neglect" in Rule 4(h).

[2] In her second assignment of error, plaintiff contends that even if neglect means something other than mere failure to serve process it should be found where a sheriff does not "take all the action to serve the papers that an average private process server would take based on the information in the summons." We disagree.

In serving process, a sheriff must conduct a "due search" for the person to be served. *Tomlinson v. Long*, 53 N.C. (8 Jones) 469 (1862). Where the person to be served has an established residence well known to the sheriff and has been available for service, failure to serve process amounts to negligence. *Id.; see also Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977). This is so even if the sheriff is given misinformation as to the person's whereabouts, *Tomlinson*, 53 N.C. 469, has an understaffed office, or carries the process to the person's residence as many as three times. *See Rollins*, 293 N.C. 73, 235 S.E.2d 159. Furthermore, the sheriff is negligent even if the person to be served is absent from his residence during daytime, working hours. *Id.* The sheriff is not negligent in his failure to serve process when he is not informed by the plaintiff where the person to be served can be found and when he makes a diligent search to locate the person but is unable to do so. *See Brogden Produce Co. v. Stanley*, 267 N.C. 608, 148 S.E.2d 689 (1966).

From an examination of the cases interpreting the amercement statutes, it is clear that when negligence is alleged on the part of the sheriff, facts must be closely examined to determine whether under the circumstances the sheriff conducted a "due search." If, under the circumstances, the sheriff should have done more in order to find the defendant, then the Clerk must find under Rule 4(h) that the sheriff neglected to serve process and then appoint a suitable person to serve that process.

In this case, the sheriff, through his deputies, attempted to serve process on two occasions at the address provided by the

plaintiff. The deputies were told by the defendant's grandmother, who lived at that address, that the defendant did not live there and that she did not know his whereabouts. If the sheriff had been given more information concerning the location of the defendant, the basis upon which the plaintiff believed he was located at the address provided, or the time at which the defendant normally came and went, a "due search" would have required more diligence than that exhibited by the deputies. These things were not given, however, and plaintiff did little to assist the sheriff in locating the defendant. We hold that the sheriff did not neglect to serve process, as required by Rule 4(h).

Surely we have great sympathy for the plight of mothers who face difficulties in getting support from former husbands. We also realize that no sheriff wants to be found negligent when he has not been. This opinion may be of some guidance for clerks who may wish to allow for private process servers more often, but perhaps this entire matter should be examined by our General Assembly to make it easier to use private process servers in the future.

Affirmed.

Judge MARTIN concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I respectfully dissent from the majority's conclusion that the sheriff in this case did not neglect to serve process as required by N.C. Gen. Stat. § 1A-1, Rule 4(h). In view of the legislature's command in N.C. Gen. Stat. § 50-13.4(b) that the "father and mother shall be primarily liable for the support of a minor child," I conclude that the General Assembly did not intend Rule 4(h) to be a bar to mothers who are attempting to serve fathers who fail to pay child support.

I agree with the majority that the correct definition for "neglect" as it is used in Rule 4(h) is "to fail to do a thing that can be done." This definition is consistent with the other appearances of "neglect" in the Rules of Civil Procedure. *See* Rule 6(b) (A party is entitled to an extended time period when "the failure to act

was the result of excusable *neglect*."); Rule 13(f) ("When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable *neglect*, or when justice requires, he may by leave of court set up the counterclaim by amendment."); Rule 60(b)(1) (A party may obtain relief from a final judgment for "[m]istake, inadvertence, surprise, or excusable *neglect*.") (Emphasis added). This definition is also in harmony with the use of "neglect" in other statutes. *See e.g.* N.C. Gen. Stat. §§ 14-69, 14-230, and 14-231.

By meaning "to fail to do a thing that can be done," "neglect" is not the same as "negligence." "Negligence" has been defined as "conduct 'which falls below the standard established by law for the protection of others against unreasonable risk of harm.' " W. Page Keeton, ed., *Prosser and Keeton on The Law of Torts*, 5th ed. § 31 (1984) (quoting Second Restatement of Torts § 282). Therefore, the sheriff can neglect to serve process and not be negligent. By neglecting to serve process, the sheriff has simply failed to serve process on a person that can be served. It is undisputed that the defendant in this case lives in Guilford County. Thus, by attempting to serve process on a Guilford County resident and failing to do so, the sheriff has neglected to execute such process under Rule 4(h) and the Clerk should have appointed a private process server.

The majority's holding, therefore, that a clerk is not authorized to appoint a private process server "as long as the sheriff is not careless in executing process" is contrary to what the General Assembly intended by Rule 4(h). The majority notes that our Rule 4(h) is a departure from the federal rules of civil procedure which are more liberal with regard to service. The majority then concludes that based upon this departure, our legislature meant something more than mere failure to serve process when it used the words "refuse or neglect" in Rule 4(h). I agree. The legislature did mean something more than just mere failure by using the word "neglect;" it meant the failure to do something which could be done. Since the sheriff did not dispute the fact that the defendant could be served, his failure to serve the defendant constitutes "neglect" as it is used in Rule 4(h).

My conclusion that a mother seeking child support from a delinquent father should be allowed to hire a private process server is bolstered by the strong public policy in North Carolina that parents must support their minor children. *See Pace v. Pace*, 244

N.C. 698, 94 S.E.2d 819 (1956) (It is the "public policy of this State that a father shall provide necessary support for his minor children, a 'duty he may not shirk, contract away, or transfer to another.' " *Pace*, 244 N.C. at 699, 93 S.E.2d at 821 (quoting *Ritchie v. White*, 225 N.C. 450, 452-53, 35 S.E.2d 414, 415 (1945)). *See also Alamance County Hospital, Inc. v. Price Neighbors*, 315 N.C. 362, 338 S.E.2d 87 (1986); *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982); *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956); *Nisbet v. Nisbet*, 102 N.C. App. 232, 402 S.E.2d 151, *disc. rev. denied*, 329 N.C. 499, 407 S.E.2d 538 (1991); *In re Botsford*, 75 N.C. App. 72, 330 S.E.2d 23 (1985); *In re Biggers*, 50 N.C. App. 332, 274 S.E.2d 236 (1981). In spite of this policy, which is shared by all the states, noncustodial fathers fail to pay $4 billion in child support each year and more than half of the mothers who are due child support receive nothing. B. Renee Sanderlin, Alamance County Hospital v. Neighbors: *North Carolina Rejects Child Support Provisions as a Limit on the Doctrine of Necessaries*, 65 N.C. L. Rev. 1308, n.75 (1987). *See also* Lorraine A. Schmall, *Women and Children First, But Only if the Men are Union Members: Hiring Halls and Delinquent Child-Supporters*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 449 (1992).

By concluding "neglect" means "to fail to do a thing that can be done," I avoid holding a sheriff negligent when he is not and I permit a mother to hire a private process server in order to obtain the child support her child is owed. My definition of "neglect" reassures a sheriff that he has done his duty. No sheriff in our state has the available resources to locate all delinquent fathers who do not want to be found. A private process server with his more flexible resources, could greatly aid our sheriffs. A mother seeking support for her children should be allowed to use these alternative resources to locate "deadbeat fathers." In my view, Rule 4(h) permits the mother in this case to hire a private process server. I respectfully dissent.

JOHNNY BRANTLEY, PETITIONER v. DARRELL CROCKET WATSON, CO-EXECUTOR OF THE ESTATE OF RACHEL A. BRANTLEY AND WILLIAM WOODWARD WEBB, RESPONDENTS AND IN THE MATTER OF THE ESTATE OF RACHEL A. BRANTLEY, DECEASED

No. 9210SC1008

(Filed 4 January 1994)

1. **Husband and Wife § 28 (NCI4th)— postnuptial agreement—no privy examination of wife—agreement not set aside**

A postnuptial agreement executed between a husband and wife could not be set aside due to any alleged noncompliance with N.C.G.S. §§ 52-6 or 52-10 because the principle of equal protection under the law makes gender based discrimination presumptively unconstitutional.

Am Jur 2d, Husband and Wife §§ 264, 265.

2. **Executors and Administrators § 108 (NCI4th)— year's allowance—inapplicability of postnuptial agreement**

A postnuptial agreement in which the husband renounced his N.C.G.S. § 30-1 right to dissent from the wife's will did not include forfeiture of the spousal right to a year's allowance pursuant to N.C.G.S. § 30-15.

Am Jur 2d, Descent and Distribution §§ 115 et seq.

Appeal by petitioner from order entered 17 August 1992 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 16 September 1993.

Sink, Powers, Sink & Potter, by Charles F. Powers III and Henry H. Sink, Jr., for petitioner-appellant.

Broughton, Wilkins, Webb & Jernigan, by Charles P. Wilkins and Roy J. Baroff, for respondents-appellees.

JOHNSON, Judge.

This action centers around the validity of a postnuptial agreement between Rachel A. Brantley (decedent) and Johnny Brantley (husband-petitioner). The postnuptial agreement was signed 1 February 1977, and Rachel A. Brantley died testate on 21 November 1991. On 3 February 1992, petitioner filed his dissent from the will of Rachel A. Brantley and his petition for a year's allowance.

On 25 February 1992, respondents filed responses which contained Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted. Both responses contained the defense of the postnuptial agreement as a bar to petitioner's dissent and application for a year's allowance. Respondents also filed a motion for judgment on the pleadings.

The clerk of superior court consolidated these cases and entered an order on 18 May 1992 denying each of respondents' motions. The clerk ruled that the postnuptial agreement was void as a matter of law because it did not meet the provisions of North Carolina General Statutes § 52-10 (1976) and North Carolina General Statutes § 52-6 (1976) (repealed 1977) in effect at the time of the signing of the agreement. Respondents appealed to superior court.

The trial court's findings of fact were as follows:

> (1) On September 6, 1973 Rachel A. Brantley and Johnny Brantley were married.
>
> (2) On February 1, 1977 Rachel A. Brantley and Johnny Brantley entered into a postnuptial agreement whereby each released, renounced and quitclaimed any and all rights accorded to each of them under Article 1 of Chapter 30 of the N.C. General Statutes, to dissent from the will of the other if surviving. Both signed the agreement before a Notary Public and no privy examination was given to the wife.
>
> (3) On November 21, 1991 Rachel A. Brantley died testate survived by her husband, Johnny Brantley.
>
> (4) On February 3, 1992 Johnny Brantley filed a dissent from the will of Rachel A. Brantley . . . and his application for a year's allowance[.] . . .
>
> (5) On May 18, 1992 the Clerk of Superior Court entered an order denying motions to dismiss the dissent and application for a year's allowance on the grounds that the agreement dated February 1, 1977 was void because of its failure to comply with the provisions of G.S. 52-6 and G.S. 52-10 as they existed at the time of the execution of the agreement.
>
> (6) Neither Rachel A. Brantley or Johnny Brantley questioned the validity of the agreement nor attempted to revoke it prior to the death of Rachel A. Brantley.

The trial court found the following conclusions of law:

> Since neither Rachel A. Brantley or Johnny Brantley revoked the agreement during the wife's life, the agreement should be binding on the husband, Johnny Brantley, after her death. An agreement between a husband and wife dealing with the testamentary disposition of their properties is not binding upon the wife during her lifetime unless the procedure prescribed by G.S. 52-6 was followed. During the wife's life, such agreement, not properly acknowledged pursuant [sic] G.S. 52-6, is not binding on the husband either since, as to him, there is a failure of consideration. However, when the wife dies leaving unchanged the agreement dealing with the testamentary disposition of the properties, the agreement should be binding upon the husband. Their minds met on a particular testamentary disposition of their properties to accomplish a particular purpose and they both intended the agreement and their wills, made pursuant thereto, to remain unrevoked at their deaths. The agreement may be revocable during their joint lives so far as it relates to the testamentary disposition of their property but it should be irrevocable after the death of one of them. The wife complied with and never revoked or breached the terms of the agreement during her lifetime and thus the husband should also be bound by the terms of the agreement dealing with the testamentary disposition of property. Equity should enforce the agreement.

From the trial court's order, petitioner gave notice of appeal to our Court.

Petitioner first argues the trial court committed reversible error in reversing the ruling of the clerk of superior court and allowing respondents' motions to dismiss because no evidence was introduced to support the trial court's findings of fact and conclusions of law.

A Rule 12(b)(6) motion is based on a party's failure to state a claim upon which relief can be granted. North Carolina General Statutes § 1A-1, 12(b)(6) (1990). A complaint must be dismissed when it is clear from the face of the complaint that the plaintiff cannot recover, that some essential fact is missing in regard to plaintiff's case, or a fact is revealed in the plaintiff's case which defeats the action. *Piedmont Ford Truck Sale v. City of Greensboro*,

90 N.C. App. 692, 370 S.E.2d 262, *disc. review allowed*, 323 N.C. 477, 373 S.E.2d 866 (1988).

We note that in the case *sub judice*, the clerk of superior court denied respondents' motions to dismiss upon finding that the postnuptial agreement was void as a matter of law. Respondents then appealed to the judge of the superior court, who reviewed the appeal, with findings of fact and conclusions of law. Because the trial judge heard evidence in the form of oral arguments and undisputed facts from counsel, this Rule 12(b)(6) motion was converted into a Rule 56 motion for summary judgment. *Privette v. University of North Carolina*, 96 N.C. App. 124, 385 S.E.2d 185 (1989). North Carolina General Statutes § 1A-1, Rule 12(b) (1990) provides in pertinent part:

> If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

This assignment of error is overruled.

Petitioner next argues the trial court committed reversible error in reversing the ruling of the clerk of superior court and allowing respondents' motions to dismiss because the trial court treated the 1 February 1977 agreement between decedent and petitioner as a contract to make a joint will. We find the reference to *Olive v. Biggs*, 276 N.C. 445, 173 S.E.2d 301 (1970) and *Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970) in the trial court's order was not an indication that the trial court treated the contract as a joint will.

Petitioner further argues the trial court committed reversible error in reversing the ruling of the clerk of superior court and allowing respondents' motions to dismiss because the agreement dated 1 February 1977 between decedent and petitioner was absolutely void as a matter of law.

The law as it existed on 1 February 1977 relative to "contracts between husband and wife generally" was found in North Carolina General Statutes § 52-10:

> Contracts between husband and wife not forbidden by G.S. 52-6 and not inconsistent with public policy are valid, and any persons of full age about to be married, and, subject to G.S. 52-6, any married persons, may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released.

North Carolina General Statutes § 52-6 reads:

> (a) No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, nor shall any separation agreement between husband and wife be valid for any purpose, unless such contract or separation agreement is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land.
>
> (b) The certifying officer examining the wife shall incorporate in his [/her] certificate a statement of his [/her] conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife. The certificate of the officer shall be conclusive of the facts therein stated but may be impeached for fraud as other judgments may be.
>
> (c) Such certifying officer must be a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment and examination are made and such officer must not be a party to the contract.

This form of acknowledgement which was required in North Carolina General Statutes § 52-6 was set out in North Carolina General Statutes § 47-39 (1976) (repealed 1977).

North Carolina General Statutes § 52-8 (1991) is a curative statute which has been amended through the years. This statute seeks to validate contracts which fail to comply with the provisions

of North Carolina General Statutes § 52-6. North Carolina General Statutes § 52-8 reads:

> Any contract between husband and wife coming within the provisions of G.S. 52-6 executed between January 1, 1930 and January 1, 1978, which does not comply with the requirement of a private examination of the wife or with the requirements that there be findings that such a contract between a husband and wife is not unreasonable or injurious to the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. This section shall not affect pending litigation.

The particular question herein is whether the contract signed 1 February 1977 by the decedent and the petitioner is void, considering that this contract does not comply with the requirements of a private examination of the wife, that it does not contain findings that the contract is not unreasonable or injurious to the wife, and that it may not have been acknowledged by a proper party.

[1] We need not address this question because of our Supreme Court's recent decision in *Dunn v. Pate*, 334 N.C. 115, 431 S.E.2d 178 (1993). The Court held in *Dunn* that noncompliance with North Carolina General Statutes § 52-6 may not set aside a deed executed in 1962 because "the principle of equal protection under the law . . . makes gender-based discrimination presumptively unconstitutional." *Dunn*, 334 N.C. at 116, 431 S.E.2d at 179. Therefore, we find that this agreement, executed 1 February 1977 between Rachel A. Brantley and Johnny Brantley, may not be set aside due to any alleged noncompliance with North Carolina General Statutes §§ 52-6 or 52-10.

We find the agreement dated 1 February 1977 between decedent and petitioner is not void as a matter of law and that the trial court was correct in reversing this ruling of the clerk of superior court. The trial court properly allowed respondents' motions to dismiss as to petitioner's dissent from the will of Rachel A. Brantley.

[2] Petitioner's final argument is that the trial court committed reversible error in reversing the ruling of the clerk of superior court and allowing respondents' motion to dismiss as to petitioner's application for a year's allowance because the 1 February 1977

agreement between decedent and petitioner had no application whatsoever to petitioner's right to a year's allowance. We agree with petitioner.

The wording in the contract at issue in this case reads "[the] party of the second part hereby releases, renounces and quitclaims any and all rights accorded to him under Article 1 of Chapter 30 of the North Carolina General Statutes, to dissent from the will of party of the first part should he survive her, both as to property now owned by party of the first part and property hereafter acquired." North Carolina General Statutes § 30-1 (1984) deals specifically with the statutory right to dissent.

North Carolina General Statutes § 30-15 (1984) reads "[e]very surviving spouse of an intestate or of a testator, whether or not he has dissented from the will, shall, unless he has forfeited his right thereto as provided by law, be entitled . . . to an allowance of the value of five thousand dollars[.]" We find that the express language in the agreement, referring only to North Carolina General Statutes § 30-1, should not be interpreted to include forfeiture also of the spousal right to a year's allowance found in North Carolina General Statutes § 30-15. Therefore, the trial court erred in reversing the ruling of the clerk of superior court allowing respondents' motion to dismiss as to petitioner's application for a year's allowance.

The decision of the trial judge is affirmed in part and reversed in part.

Judges COZORT and McCRODDEN concur.

STATE OF NORTH CAROLINA v. WILLIAM ABDULLAH MUSTAFA

No. 9215SC980

(Filed 4 January 1994)

1. Criminal Law § 813 (NCI4th)— character for truthfulness— request for pattern instruction—no supporting evidence

The trial court did not err by denying defendant's request to give the pattern instruction on consideration of a witness's

character for truthfulness as it related to defendant's pretrial exculpatory statement to the police since the pattern instruction applied only to testimony at trial and not to pretrial exculpatory statements.

Am Jur 2d, Trial §§ 1338-1352.

2. **Rape and Allied Offenses § 190 (NCI4th)— first-degree rape— use of weapon—submission of lesser offense not required**

The trial court properly instructed on first-degree rape and did not err in failing to instruct on second-degree rape where both defendant and the victim agreed that a knife and a gun were displayed during the commission of the crime.

Am Jur 2d, Rape § 110.

3. **Evidence and Witnesses § 84 (NCI4th)— defendant's military service record—inadmissibility in rape case**

Evidence of defendant's good military record or military service was not relevant to his guilt or innocence in this rape case, and the trial court therefore properly excluded it.

Am Jur 2d, Evidence §§ 251 et seq.

4. **Evidence and Witnesses § 120 (NCI4th)— victim's prior sexual conduct—inadmissibility**

A rape victim's prior consensual relationship with her boyfriend which was ongoing since the 1970's did not amount to a pattern of sexual behavior closely resembling the events that took place in this case, and the trial court therefore did not err in excluding evidence of the victim's prior sexual conduct. N.C.G.S. § 8C-1, Rule 412(b)(3).

Am Jur 2d, Rape §§ 55 et seq.

Appeal by defendant from judgments entered 13 February 1992 by Judge Henry V. Barnette, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 31 August 1993.

Attorney General Lacy H. Thornburg, by Associate Attorney General John J. Aldridge, III, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

JOHNSON, Judge.

Defendant, William Abdullah Mustafa, was indicted on 16 September 1991 for the criminal offenses of first degree sexual offense, first degree rape, kidnapping, and robbery with a dangerous weapon. Defendant was convicted of first degree rape, first degree sexual offense and misdemeanor larceny. The trial court dismissed the charge of kidnapping at the close of the evidence. Defendant received a sentence of life in prison. Defendant gave timely notice of appeal to this Court.

The evidence presented by the State showed the following: During the night of 30 August 1991 and the early morning hours of 1 September 1991, the victim, Ms. Sheena Gladden Cheek, was at the Rock Creek Lounge. As Ms. Cheek proceeded to leave the club, she was approached by a friend, Mr. Danny Ray Timmins, and began conversation with him. While conversing, Ms. Cheek was approached by defendant. Ms. Cheek has known defendant for fourteen years by the name of Butch Garner.

After this conversation, Mr. Timmins asked Ms. Cheek for a ride home. While Ms. Cheek drove to Mr. Timmins' home, defendant followed and parked across the street. Defendant asked Mr. Timmins if he could park in Mr. Timmins' driveway; Mr. Timmins denied this request. Ms. Cheek then left Mr. Timmins' home, and defendant followed, blowing the horn and flashing his headlights. After overtaking Ms. Cheek twice, defendant persuaded Ms. Cheek to pull over to the side of the road. Defendant indicated that he was having car trouble and asked for a ride back to the lounge. Defendant said that he wanted to return to the lounge because somebody had taken something from his car. Before returning to the lounge, Mr. Joe Patterson drove up on his motorcycle and asked defendant and Ms. Cheek if they needed help. Defendant responded no and Mr. Patterson drove off.

Once defendant and Ms. Cheek arrived at the lounge, Ms. Cheek stayed in the van while defendant went to look for a friend. After defendant failed to find this friend, defendant told Ms. Cheek to take him back to his car located at the Shady Oak Service Station.

After returning to the service station, defendant shoved his knee in Ms. Cheek's chest and drew a knife placing the point of the knife under Ms. Cheek's throat. While holding the knife to Ms. Cheek's throat, defendant patted Ms. Cheek down and retrieved

a gun. Holding the gun on Ms. Cheek, defendant told Ms. Cheek to take her clothes off. When Ms. Cheek did not take her top off, defendant told her that "You could do it this way or you can die."

Defendant forced Ms. Cheek to perform oral sex on him. Defendant then penetrated Ms. Cheek's rectum with his penis. After the anal sex, defendant had forced vaginal intercourse with Ms. Cheek. During all acts, defendant held the gun to Ms. Cheek's head.

Defendant had Ms. Cheek get into the passenger's side of the van while continuing to hold the gun to Ms. Cheek's head. He told Ms. Cheek that she was going to get him some drugs. Ms. Cheek then directed defendant to the location of her son in Ramseur. After arriving at the Ramseur location, Ms. Cheek attempted to get out of the van with her purse, but defendant grabbed the purse back from Ms. Cheek. At this point, Ms. Cheek ran from the van screaming. Defendant sped off, and Ms. Cheek and other relatives attempted to follow him.

Ms. Cheek then reported the incident to a Liberty police officer, Lieutenant Smith. Because the incident took place out of his jurisdiction, Lieutenant Smith requested that the Alamance County Sheriff's Department take over the case.

Deputy Roger Lloyd of the Alamance County Sheriff's Department went to the Shady Oak Service Station later that day with Ms. Cheek and found defendant's car stripped of license plates and the window broken out with a bullet hole in it. At about 6:00 a.m. that morning, Deputy Lloyd took Ms. Cheek to the hospital and turned the case over to Detective Phil Ayers.

The next night Deputy Lloyd planned to serve arrest warrants on defendant charging him with kidnapping, a sexual offense, rape and robbery. Defendant, however, turned himself in and gave a statement to Deputy Lloyd. Defendant said that on the night in question, Ms. Cheek asked him to follow her to Mr. Timmins' house. After leaving Mr. Timmins' house, defendant said that he and Ms. Cheek stopped at Shady Oak Service Station to smoke. The two then got into an argument over drugs and Ms. Cheek pulled a gun on him. Defendant then pulled out one of the four knives he possessed and proceeded to disarm Ms. Cheek. After he took her gun, he put away his knife and defendant and Ms. Cheek had consensual sex. Defendant then stated that they left the service station and went to Ms. Cheek's son's house to get drugs. However,

when defendant saw Ms. Cheek's relatives come out of the house, he left with Ms. Cheek's purse and papers in the van. He returned to the service station and switched the license plates on the van with those on the car.

Others that testified at trial included: Ms. Diana Roark, an emergency room nurse, and Dr. James Strickland, an emergency room physician. Both testified that Ms. Cheek was visibly upset and crying when she came to the emergency room. Dr. Strickland testified that his examination revealed ten linear tears in the bottom of Ms. Cheek's rectum consistent with forced penetration.

[1] By defendant's first assignment of error, defendant contends that the trial court erred in instructing the jury about defendant's reputation for truthfulness in evaluating his statement to the police. We disagree.

The trial court has wide discretion in presenting the issues of a case to the jury so long as the law is adequately explained. *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985). The purpose of a charge is to give a clear instruction which applies the law to the evidence in such a manner as to assist the jury in understanding the case and in reaching a correct verdict. *State v. Harris*, 306 N.C. 724, 295 S.E.2d 391 (1982). Where a requested instruction is a correct statement of the law and supported by the evidence, the trial court is required to give the instruction; however, the instruction is not required to be given verbatim. It is sufficient if the instruction is given in substance. *State v. Corn*, 307 N.C. 79, 296 S.E.2d 261 (1982).

In the case *sub judice*, counsel for defendant requested the trial judge give North Carolina Pattern Jury Instruction 105.30, which provides that a jury may consider evidence of a witness' character for truthfulness in deciding whether to believe or disbelieve his testimony at trial. The trial judge pointed out to defense counsel that there had been no testimony at trial by defendant which would give rise to such an instruction. Defense counsel then modified his request that the same instruction be given to relate to defendant's exculpatory pre-trial statement. The judge denied the request.

The trial judge correctly denied defendant's request because the patterned instruction applies to testimony at trial and not exculpatory statements. A trial judge is only required to give instructions that are an accurate statement of the law and evidence.

[2] By defendant's second assignment of error, defendant contends that the trial court erred in not instructing the jury on second degree rape and second degree sexual offense. More specifically, defendant alleges that there was an element of first degree rape that was in factual dispute, thereby requiring a charge of a lesser-included offense. We disagree.

As a general rule, the trial judge must charge upon a lesser-included offense whenever there is some evidence "which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). "A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." *Sansone v. United States*, 380 U.S. 343, 350, 13 L.Ed.2d 882, 888 (1965).

The crime of first degree rape and second degree rape contain essentially the same elements. The sole distinction between first degree rape and second degree rape is the element of the use or display of a dangerous weapon. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981). To sustain a conviction for first degree rape, the evidence need only show that a weapon was "displayed or employed in the course of the rape." *State v. Blackstock*, 314 N.C. 232, 241, 333 S.E.2d 245, 251 (1985).

In the instant case, both defendant and the victim agree that weapons were displayed during the altercation in the van. Ms. Cheek alleges that defendant took her gun and displayed a knife to coerce her into sexual intercourse. Defendant alleges an argument broke out over drugs and Ms. Cheek displayed a gun. Defendant alleges he then displayed his knife and disarmed Ms. Cheek and that thereafter, they had consensual sex.

All of the elements for first degree rape were present in the evidence; the only fact in dispute was whether the sex was consensual. The jury was properly instructed on this issue, and as such, we find that the trial court correctly denied the instruction to charge on a lesser-included offense.

[3] By defendant's third assignment of error, defendant contends that the trial court erred in not allowing defendant to present evidence that he was honorably discharged from the marines. We disagree.

North Carolina General Statutes § 8C-1, Rule 404(a)(1) (1992) provides, in pertinent part, that evidence of a pertinent trait of the accused's character may be admissible. Pursuant to this rule, an accused may only introduce character evidence of "pertinent" traits of his character and not evidence of overall "good character." *State v. Squire*, 321 N.C. 541, 364 S.E.2d 354 (1988). In criminal cases, in order to be admissible, a pertinent character trait must bear a special relationship to or be involved in the crime charged. *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989). In determining whether a general "law-abidingness" character trait was admissible in a criminal case, the trait must be pertinent or relevant to the crime charged. *Squire*, 321 N.C. at 548, 364 S.E.2d at 358.

Defendant asserts that the omitted military information is relevant to show whether defendant was the type of person to break civilian laws and commit forcible unlawful sex acts. We disagree. We believe that a good military record or military service is not relevant to defendant's guilt or innocence in this rape case. The trial court properly excluded this evidence.

[4] By defendant's last assignment of error, defendant contends that the trial court erred in overruling defendant's motion to introduce evidence of prior sexual conduct of the prosecuting witness. Defendant's argument is meritless.

Except when found to fall within one of the stated exceptions to our Rape Shield Act, the sexual history of rape victims is irrelevant. *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982). The North Carolina Rape Shield Act provides in pertinent part:

> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> . . .
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented[.]

North Carolina General Statutes § 8C-1, Rule 412(b)(3) (1992).

Contrary to the assertions by defendant, Ms. Cheek's previous sexual encounter with a boyfriend does not amount to a pattern of sexual behavior closely resembling defendant's version of the incident. During an *in-camera* examination of Ms. Cheek and her previous boyfriend, Mr. David Patterson, the evidence revealed an on-going relationship since the 1970's. We find that Ms. Cheek's prior consensual relationship with Mr. Patterson does not amount to a pattern of sexual behavior closely resembling the events that took place in the case *sub judice*. The trial court properly excluded this evidence.

The decision of the trial court is affirmed.

Judges WYNN and JOHN concur.

CLARK ROBINSON WESTNEAT, PLAINTIFF-APPELLEE v. HEIDI MELISSA WESTNEAT, DEFENDANT-APPELLANT

No. 9226DC943

(Filed 4 January 1994)

1. **Divorce and Separation § 353 (NCI4th)— child custody—findings supported by competent evidence**

   In a child custody proceeding in which primary custody was awarded to the father, the trial court's findings of fact were supported by competent evidence and should not be upset on appeal.

   Am Jur 2d, Divorce and Separation §§ 974 et seq.

2. **Divorce and Separation § 336 (NCI4th)— child custody—"tender years" doctrine no longer law**

   The "tender years" doctrine is no longer the law in North Carolina. N.C.G.S. § 50-13.2(a).

   Am Jur 2d, Divorce and Separation § 976.

3. Divorce and Separation § 499 (NCI4th)— child custody— appropriate and convenient forum—order supported by proper findings and conclusion

The trial court's order that the State of North Carolina was the most appropriate and convenient forum for the trial of this child custody case was supported by proper findings of fact and conclusions of law and was appropriate.

Am Jur 2d, Divorce and Separation §§ 963 et seq.

Appeal by defendant from order entered 3 April 1992 by Judge Jane V. Harper in Mecklenburg County District Court. Heard in the Court of Appeals 9 July 1993.

Casstevens, Hanner, Gunter & Gordon, P. A., by Robert P. Hanner II, and Elizabeth J. Caldwell, for plaintiff-appellee.

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

JOHNSON, Judge.

Pertinent facts to this appeal are as follows: Plaintiff father and defendant mother met in 1983 and were married in 1986; Brian Graham Westneat (the child herein) was born on 27 August 1987. The family lived in Florida before moving to North Carolina in June of 1989. During the child's early years, plaintiff father stayed home and cared for the child, while defendant mother worked full time. In February of 1990, the child started attending day care, and plaintiff began working in a position as an insurance agent.

In 1990, defendant mother went to New Hampshire to interview for a job with G. H. Bass Company. The child went with her on this trip. Defendant was offered a position with the company and accepted it, informing plaintiff father that she did not want plaintiff to move with her to New Hampshire. After much discussion, plaintiff agreed that defendant could take the child with her. Plaintiff and defendant separated on 1 August 1990, and defendant and the child moved to New Hampshire. In August of 1990, defendant mother re-established a personal relationship with an old boyfriend, David Kukla, who was in New Hampshire.

On 13 August 1990, plaintiff father removed the child from New Hampshire and returned the child to North Carolina. The

child stayed with plaintiff until November of 1990, when the parties agreed to have the child return to defendant's home in New Hampshire, subject to certain conditions.

The weekend of 4 April 1991, plaintiff picked up the child from his day care in New Hampshire and brought him back to North Carolina. On 5 April 1991, plaintiff father filed a complaint for custody of the child in Mecklenburg County District Court. On 8 May 1991, defendant mother filed an action for child custody in New Hampshire and obtained an *ex parte* order allowing defendant temporary custody of the child. On 15 May 1991, defendant filed an answer and counterclaim for custody in Mecklenburg County District Court in addition to a motion that the North Carolina court decline jurisdiction.

By order entered on 25 June 1991, the Mecklenburg County District Court determined that the North Carolina court had jurisdiction and indicated that the North Carolina court would contact the New Hampshire court to determine if there was concurrent jurisdiction. On 5 August 1991, a further order was entered which provided that the New Hampshire court had been contacted and that the New Hampshire proceeding had been stayed pending resolution of the North Carolina action. In the order, the court noted that it would consider affidavits to determine the issue of convenient forum. On 23 August 1991, an order was entered, concluding that North Carolina was the most appropriate and convenient forum and denying defendant mother's motion to decline jurisdiction.

On 8 January 1992, plaintiff father filed a motion requesting that defendant mother allow him temporary visitation privileges pending a final disposition of the custody case. On 13 January 1992, order was entered granting plaintiff father's motion and awarding temporary visitation. A hearing was held on the custody issue from 11 February 1992 until 13 February 1992. On 23 April 1992, an order was entered awarding plaintiff primary care, custody and control of the child. From that order, defendant appeals to this Court.

[1] The first issue defendant raises on appeal is that the trial court erred in failing to find facts and to reach appropriate conclusions of law regarding the best interest of the child when it entered and signed the child custody order awarding the father primary care, custody and control of the minor child born of the marriage. Defendant further argues that a child custody decree which is

not supported by proper findings and conclusions of law which awards primary care, custody and control of a minor child to one of the parties but is not supported by competent evidence should be reversed.

We note:

> It is clear beyond the need for multiple citation that the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence. *E.g., Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980). The findings of fact made by the trial court are regarded as conclusive on appeal if they are supported by competent evidence. *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E.2d 324 (1967). In child custody cases, the paramount consideration of the court is the welfare of the child. *Williams v. Williams*, 18 N.C. App. 635, 197 S.E.2d 629 (1973). The welfare of the child is the "polar star" that guides the court in the exercise of its discretion. *In re Moore*, 8 N.C. App. 251, 174 S.E.2d 135 (1970). The trial court's judge's discretion with regard to the weight and credibility of the evidence is bolstered by its responsibility for the welfare of the child. In child custody cases, where the trial judge has the opportunity to see and hear the parties and witnesses, the trial court has broad discretion and its findings of fact are accorded considerable deference on appeal. *Id. Blackley v. Blackley*, 285 N.C. 358, 204 S.E.2d 678 (1974). So long as the trial judge's findings of fact are supported by competent evidence, they should not be upset on appeal. *In re Moore, supra.*

Smithwick v. Frame, 62 N.C. App. 387, 392, 303 S.E.2d 217, 221 (1983). Defendant argues that several findings were conclusory in nature. We have reviewed defendant's contentions and find them to be without merit. Based on our review of the record, we find the trial judge's findings of fact are supported by competent evidence and should not be upset on appeal.

Our Supreme Court in *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982) stated:

> [Requiring the trial court, when sitting without a jury, to make findings of fact] does not, of course, require the trial court to recite in its order all evidentiary facts presented at hearing. The facts required to be found specially are those material

> and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached.

The Court defined "ultimate facts" as set out in *Woodward v. Mordecai*, 234 N.C. 463, 67 S.E.2d 639 (1951):

> Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. (Citations omitted.)

Woodward, 234 N.C. at 472, 67 S.E.2d at 645. We find that in the testimony presented, there were sufficient evidentiary facts from which to infer the ultimate facts found.

Defendant further argues that "the effect of the decree is to invoke a penalty upon the parent who had previously been the primary caretaker, the nurturing parent, and the person from whom custody should not be taken, absent some compelling evidence demonstrating sufficient reasons capsuled in the court's findings of ultimate fact and conclusions of law." We note once again that under North Carolina law, "the trial judge is entrusted with the delicate and difficult task of choosing an environment which will, in [the judge's] judgment, best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties." *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). We find that the trial judge has properly performed this task.

[2] We make reference to defendant's cite to *In re Kowalzek*, 37 N.C. App. 364, 367, 246 S.E.2d 45, 47, *disc. review denied and appeal dismissed by* 295 N.C. 734, 248 S.E.2d 863 (1978) ("It is universally recognized that the mother is the natural custodian of her young . . . If she is a fit and proper person to have the custody of the children, other things being equal, the mother should be given their custody[.]") This "tender years" doctrine is no longer the law in North Carolina. *See* North Carolina General Statutes § 50-13.2(a) (1987) ("Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child.")

[3] Defendant next argues the trial court erred when it failed to determine that New Hampshire was the more appropriate forum and therefore denied defendant's motion requesting the North Carolina court to decline jurisdiction. We are unpersuaded by defendant's argument.

The trial court, in determining which state was the most appropriate forum, made the following pertinent findings of fact:

> 1. On June 25, 1991, the Court entered an Order in this action after the presentation of evidence and argument of counsel which provided in pertinent part:
>
> > a. North Carolina had jurisdiction for purposes of a custody determination pursuant to North Carolina General Statutes § 50A-3(a)(1)(i)(ii) and that this State is the home state of the minor child at the time . . . of the commencement of the North Carolina action.
>
> . . .
>
> 5. The Court finds that Plaintiff, Defendant and the minor child resided in Mecklenburg County, North Carolina, from on or about June 1, 1989, until on or about June 24, 1990, when the parties separated and the Defendant moved to the State of New Hampshire.
>
> 6. As between the States of North Carolina and New Hampshire, North Carolina is the only state where the parties and the minor child have lived as a family unit.
>
> 7. Although there are a number of witnesses Defendant may call that reside in New Hampshire that can testify about the present care, supervision and control of the minor child, there are numerous other witnesses who reside in the State of North Carolina who are in a position to testify about the qualifications of the parties and the care, custody and control of the minor child while all concerned lived as a family unit in the State of North Carolina.
>
> 8. The Court therefore finds that North Carolina is the more convenient forum for the determination of the custody issues raised in this case.

We find the district court's order that the state of North Carolina was the most appropriate and convenient forum for the

trial of this case was supported by proper findings of fact and conclusions of law and was appropriate. Defendant's motion was properly denied.

Defendant's final argument is that "the grandfather of a child, subject to a child custody proceeding, may testify, as a physician to the child's hearsay statement, as to child abuse, where the grandfather-physician recommended that the child be examined by another doctor[.]"

We direct defendant's attention to N.C.R. App. P. 10(c), which reads in pertinent part:

> An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

We observe the assignments of error as to this argument do not direct our Court "to the particular error about which the question is made." Further, we cannot discern from the argument or from the body of the argument exactly what is being argued. For failure to comply with N.C.R. App. P. 10(c), we dismiss this argument.

The decision of the trial court is affirmed.

Judges WYNN and JOHN concur.

THELMA L. BEAVERS, EXECUTRIX OF THE ESTATE OF ALAN B. BEAVERS, DECEASED, PLAINTIFF v. FEDERAL INSURANCE COMPANY, DEFENDANT

No. 9210SC879

(Filed 4 January 1994)

Insurance § 377 (NCI4th)— coverage for injuries while passenger on common carrier—drowning while white water rafting—excursion company not common carrier—summary judgment improperly entered

Where a policy of insurance issued by defendant provided coverage for accidental death sustained by insured while a passenger in a conveyance operated by a common carrier, the trial court erred in granting summary judgment for plaintiff and should have entered it for defendant where insured drowned while white water rafting, since the company which provided white water excursions did so for recreational purposes; any transportation was merely incidental to this primary purpose; and the excursion company was therefore not a common carrier. N.C.G.S. § 62-3(6).

Am Jur 2d, Insurance §§ 559 et seq.

Appeal by defendant from order entered 6 April 1992 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 31 August 1993.

Young, Moore, Henderson & Alvis, P.A., by R. Michael Strickland and David M. Duke, for plaintiff-appellee.

LeBoeuf, Lamb, Leiby & MacRae, by George R. Ragsdale and Stephanie H. Autry, for defendant-appellant.

JOHN, Judge.

Defendant contends the trial court erred (1) by granting plaintiff's motion for summary judgment and (2) by denying defendant's motion for summary judgment. We agree, reverse the decision of the trial court, and remand with direction to enter summary judgment for defendant.

Evidence before the court indicated the following: on 2 November 1987, Federal Insurance Company (defendant) issued an "Accident" policy to Wachovia Bank and Trust Company (Wachovia).

The policy insured all persons maintaining a Wachovia Crown account; at all relevant times, Alan B. Beavers (decedent) was an insured. The policy, which allowed for recovery of benefits in the event of accidental death, provided in pertinent part:

> Section III—HAZARDS INSURED AGAINST
>
> * * * *
>
> Subject to the terms of the policy, the hazards insured against are all those to which the Insured may be exposed while: riding as a passenger (not as the operator, pilot or crew member) in or on, or boarding or alighting from:
>
> a) any conveyance operated by a common carrier licensed for the transportation of passengers for hire; or
>
> b) any transport type aircraft operated by a military air transport service.

On 6 May 1989, decedent took part in a white-water rafting excursion offered by Adventures, Inc., d/b/a Rivers (RIVERS) on the Bluestone River in West Virginia. During the expedition, decedent fell overboard and drowned.

Plaintiff, decedent's widow and executrix, timely submitted a proof of claim to defendant which denied the claim. Thereafter, plaintiff filed suit and ultimately both parties moved for summary judgment. On 6 April 1992, the trial court entered summary judgment in favor of plaintiff.

Defendant argues its insurance policy provided decedent no coverage under the circumstances of his death, and consequently it was under no obligation to honor plaintiff's claim. Based upon this argument, defendant urges us to reverse the trial court and direct summary judgment to be entered in its favor. We find defendant's contentions persuasive.

Under N.C.R. Civ. P. 56(c), summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The party moving for summary judgment must establish the lack of any triable issue, and may meet this burden by showing (1) an essential element

of the opposing party's claim is nonexistent; (2) discovery indicates the opposing party cannot produce evidence to support an essential element; or (3) the opposing party cannot surmount an affirmative defense. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

Section III of the "accident policy" at issue specifies the "Hazards Insured Against." In pertinent part, coverage is afforded only if the insured is injured while a passenger in either (1) a "conveyance operated by a common carrier" or (2) a transport-type aircraft operated by the military. As decedent's death was unrelated to military air travel, summary judgment for plaintiff was proper only if decedent was killed *while a passenger in a conveyance operated by a common carrier.*

We note initially decedent's policy was "made" in North Carolina, *see Suitt Construction Co. v. Seaman's Bank for Savings*, 30 N.C. App. 155, 159, 226 S.E.2d 408, 410 (1976), and insured decedent who resided in this state. Under these circumstances, North Carolina substantive law governs construction of the policy and any terms contained therein. N.C.G.S. § 58-3-1 (1991); *Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*, 335 N.C. 91, 436 S.E.2d 243 (1993).

Under North Carolina law, what constitutes a common carrier is a question of law, but whether one is acting as a common carrier is ordinarily a question of fact. *Jackson v. Stancil*, 253 N.C. 291, 300, 116 S.E.2d 817, 824 (1960). However, if the facts are undisputed, it is a question of law whether the evidence is sufficient to show one is a common carrier. *Id.* at 301, 116 S.E.2d at 824.

The term "common carrier" is not defined in the insurance contract and thus we turn to other sources for explication. Under N.C.G.S. § 62-3(6) (1989), a common carrier:

> means any person which holds itself out to the general public to engage in transportation of persons or property for compensation, including transportation by train, bus, truck, boat or other conveyance . . . .

Our common law provides a similar definition:

> "A common carrier is one who holds himself out to the public as engaged in the public business of transporting persons . . . for compensation from place to place, offering his

> services to such of the public generally as choose to employ him and pay his charges. The distinctive characteristic of a common carrier is that he undertakes as a business to carry for all people indifferently . . . ."

Jackson v. Stancil, 253 N.C. at 300, 116 S.E.2d at 824 (quoting *Utilities Comm'n v. Gulf-Atlantic Towing Corp.*, 251 N.C. 105, 109, 110 S.E.2d 886, 889 (1959)); *see also Utilities Comm'n v. Bird Oil Co.*, 302 N.C. 14, 26, 273 S.E.2d 232, 239 (1981). In *Jackson v. Stancil*, the question was whether the carrier "held out" its transportation service to the public. *Id.* at 302, 116 S.E.2d at 825. In the case *sub judice*, however, the issue is even more basic: whether the services being provided by RIVERS to decedent at the time of his death, qualify RIVERS as a common carrier.

Under both statutory and common law, the fundamental service which a common carrier renders is *transportation. See* G.S. § 62-3(6) (wherein the legislature used the term "transportation" twice in defining who is a common carrier); *Utilities Commission v. J.D. McCotter, Inc.*, 16 N.C. App. 475, 479, 192 S.E.2d 629, 631 (1972) ("A common carrier . . . may be defined as a person . . . who holds himself out to the general public to engage in transportation . . . ."), *aff'd*, 283 N.C. 104, 194 S.E.2d 859 (1973); *Woolsey v. National Transp. Safety Board*, 993 F.2d 516, 523 ("[T]he crucial determination . . . is whether the carrier has held itself out to the public . . . as being willing to transport . . . ."), *reh'g denied*, 3 F.3d 441 (5th Cir. 1993). The vital import of "transportation" may also be discerned by examining those entities which have been held to be common carriers: (1) petroleum carriers, *Utilities Commission v. Bird Oil Co.*, 302 N.C. at 27, 273 S.E.2d at 239; (2) an aircraft transporter of musicians, *Woolsey*, 993 F.2d at 525; (3) a company which hauls boats and lumber, *Utilities Comm'n v. McCotter*, 16 N.C. App. at 480, 192 S.E.2d at 632; and (4) an operator of passenger elevators, *Bullard v. Rolader*, 152 Ga. 369, 110 S.E. 16 (1921). Considering these entities judicially determined to be common carriers, it is evident the basic function of a common carrier is the provision of safe and secure transportation of persons or property. *See Harlan v. Six Flags Over Georgia, Inc.*, 250 Ga. 352, 297 S.E.2d 468 (1982).

Since every division of a business need not involve the provision of transportation services, an entity may be a common carrier as to only a portion of its operations. *See* 13 C.J.S. *Carriers*

§ 2 (1990); *see also Grauer v. State of New York*, 15 Misc.2d 471, 476, 181 N.Y.S.2d 994, 999 (Ct. Cl.) (The State of New York "was a common carrier in the operation of [a] chair lift."), *aff'd*, 9 A.D.2d 829, 192 N.Y.S.2d 647 (1959). Because decedent died while white-water rafting, we need only determine whether RIVERS was providing the requisite transportation services at this time. The facts necessary to resolve this question are undisputed; thus it is a question of law whether the evidence is sufficient to show RIVERS was acting as a common carrier. *See Jackson v. Stancil*, 253 N.C. at 301, 116 S.E.2d at 824.

According to RIVERS' president, it was "in the outdoor recreation business, primarily a whitewater rafting outfitter" and offered "all kinds of adventure sports activities"; "the nature of our business [is] to promote come and have a good time, let us enjoy some camaraderie on the river, enjoy nature, run a wild river . . . ." Advertising brochures contained colorful, full action photographs of white-water rafting and announced RIVERS' equipment was designed for "running wild rivers" and "having wild fun." RIVERS' president further described its business as "selling fun [and] camaraderie."

Focusing more specifically upon the white-water rafting services being provided at the time of decedent's death, the uncontroverted evidence shows RIVERS offered "runs" on several different rivers; however, RIVERS' advertizing brochure proclaimed it took "every available opportunity to raft the Gauley [river] when river conditions allow." The Gauley river contains over 75 rapids which are Class III or above. A Class III rapid, according to international standards, is one which is difficult to navigate because of numerous waves. Moreover, decedent died while rafting the Bluestone river which contained a number of Class III rapids. The fatal section of the river was known as "Mile Long Rapid." A video tape of the trip in question, introduced as an exhibit at the summary judgment hearing, portrayed rafts plunging down nearly vertical drops, with everyone drenched with water and paddling furiously. The narrator described participants as "white-water animals" and "white-water assassins." Finally, RIVERS' rafting customers were required to wear life jackets and safety helmets during white-water rafting trips.

In a case involving analogous factual circumstances, the Georgia Supreme Court distinguished between an amusement park ride

known as the "Wheelie" and common carriers such as railroads and bus-lines. *Harlan v. Six Flags Over Georgia, Inc.*, 250 Ga. 352, 297 S.E.2d 468 (1982). The court reasoned persons using the transportation services of a common carrier "expect to be carried safely, securely, and without incident to their destination." *Id.* at 353, 297 S.E.2d at 469. The "Wheelie," on the other hand, did not involve transportation, rather "[i]ts riders seek a sensation of speed and movement for the sake of entertainment and thrills." *Id.* at 353-54, 297 S.E.2d at 469; *see also Grauer v. State of New York*, 15 Misc.2d 471, 181 N.Y.S.2d 994 (operator of a ski lift was a common carrier because, *unlike a roller coaster*, passengers used the lift primarily for transportation to the top of a mountain, and not to be amused or thrilled in the ascent thereto).

We find the logic underlying *Harlan* applicable to the case *sub judice*. The undisputed facts show RIVERS' white-water rafting excursions (including decedent's fatal rafting trip), were offered to provide participants with outdoor adventure, camaraderie, excitement and thrills. Any "transportation" was merely incidental to this primary purpose. Accordingly, as a matter of law, RIVERS was not operating as a common carrier at the time of decedent's death.

Because RIVERS was not operating as a common carrier, decedent's fatal accident was not covered under the terms of the insurance policy and plaintiff is not entitled to any proceeds thereunder. We therefore reverse the entry of summary judgment in favor of plaintiff and remand with instruction that summary judgment be entered for defendant.

Reversed and remanded.

Judges JOHNSON and GREENE concur.

BRENT T. COCHRAN v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 9324SC126

(Filed 4 January 1994)

1. Insurance § 527 (NCI4th)— state-owned vehicle included in definition of underinsured vehicle

An underinsured highway vehicle as defined in N.C.G.S. § 20-279.21(b)(4) can include a state-owned vehicle, and there was no merit to defendant's contention that, for a vehicle to qualify as an underinsured highway vehicle, it must first meet the definition of an uninsured motor vehicle in N.C.G.S. § 20-279.21(b)(3) which excluded state-owned vehicles.

Am Jur 2d, Insurance §§ 22, 30, 59, 828 et seq.

2. Insurance § 690 (NCI4th)— no prejudgment interest in excess of policy limits

Plaintiff was not entitled to prejudgment interest in excess of defendant's underinsured motorist policy limits.

Am Jur 2d, Automobile Insurance § 428.

Appeal by defendant from judgment entered 2 December 1992 in Watauga County Superior Court by Judge Charles C. Lamm, Jr. Heard in the Court of Appeals 2 December 1993.

Di Santi, Watson & McGee, by Anthony S. di Santi, for plaintiff-appellee.

Willardson & Lipscomb, by John S. Willardson and William F. Lipscomb, for defendant-appellant.

GREENE, Judge.

North Carolina Farm Bureau Mutual Insurance Company (Mutual) appeals from an order entered 2 December 1992 concluding that a state-owned vehicle operated by Robert Lee Hunt, III (Hunt) was an underinsured highway vehicle under N.C. Gen. Stat. § 20-279.21(b)(4) thereby entitling Brent T. Cochran (Cochran) to $100,000 of underinsured motorist (UIM) coverage from Mutual, and awarding interest to Cochran at the legal rate from 8 January 1992, the date Cochran filed this declaratory judgment action.

Mutual and Cochran stipulated to the facts as follows: On 15 November 1990, Cochran was driving his motorcycle in Boone, North Carolina, when it collided with a Jeep registered to and owned by an agency of the State of North Carolina and operated by Hunt, an employee of the state agency, in the course and scope of his employment. The accident, which was caused by Hunt's negligence, resulted in serious injuries to Cochran.

On behalf of the State and Hunt, Travelers Insurance Company (Travelers) paid $100,000 in primary liability insurance limits to Cochran pursuant to a structured settlement agreement, $651.54 for property damage and $99,348.46 for personal injuries, leaving open Cochran's right to proceed against Mutual for $100,000 in UIM coverage. At the time of the accident, Mutual provided liability insurance coverage to Cochran under policy number AP 3795639 for the motorcycle involved in the accident and a 1985 Nissan pickup truck. This policy also provided a total of $200,000 UIM coverage, $100,000 on each vehicle for which Cochran paid separate premiums.

The issues presented are whether (I) an underinsured highway vehicle as defined in Section 20-279.21(b)(4) can include a state-owned vehicle; and (II) Cochran is entitled to prejudgment interest in excess of Mutual's UIM policy limits.

I

[1] Under N.C. Gen. Stat. § 20-279.21(b)(4), an underinsured highway vehicle is defined as

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C.G.S. § 20-279.21(b)(4) (1993). Section 20-279.21(b)(4) contains the additional language that "[a]n 'uninsured motor vehicle,' as described in subdivision (3) of this subsection, includes an 'underinsured highway vehicle' . . . ." *Id.* Defendant argues that due to this additional language, for a vehicle to qualify as an underinsured highway vehicle, it must meet the definition of an uninsured motor vehicle; therefore, because an uninsured motor vehicle is defined in Section

20-279.21(b)(3) to exclude "[a] motor vehicle that is owned by . . . a state," an underinsured highway vehicle cannot include a state-owned vehicle. We disagree.

Where statutory language is clear and unambiguous, there is no room for judicial construction, and we must give the language its plain meaning; however, where the statutory language is ambiguous, we must resort to judicial construction to determine legislative intent. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990). The language in Section 20-279.21(b)(4) that an uninsured motor vehicle includes an underinsured highway vehicle is far from being clear and unambiguous as to whether to qualify as an underinsured highway vehicle, a vehicle must first meet the definition of uninsured motor vehicle set out in Section 20-279.21(b)(3). Furthermore, an underinsured highway vehicle has its own specific definition in Section 20-279.21(b)(4) which is different from the definition of an uninsured motor vehicle and which makes no mention of an exclusion for state-owned vehicles. Because of this ambiguity, we resort to tenets of statutory construction to ascertain legislative intent.

The intent of the legislature is controlling when we construe a statute, and we must look to the language of the act, its legislative history, and the circumstances surrounding the enactment of the act with an eye towards the evil sought to be remedied when determining the legislative intent. *North Carolina Bd. of Examiners for Speech v. State Bd. of Educ.*, 77 N.C. App. 159, 161, 334 S.E.2d 503, 505 (1985). Furthermore, when construing a statute, we must avoid a construction which will defeat or impair the object of a statute and should construct the statute in a way that, in practical application, will suppress the evil sought to be avoided. *Id.*

Although it is possible for a vehicle to be an underinsured vehicle and an uninsured vehicle simultaneously where the vehicle is insured with liability limits less than those required by Section 20-279.5 or where the vehicle is self-insured, to attempt to define **every** underinsured highway vehicle as an uninsured motor vehicle under all circumstances is, by the definitions contained in Sections 20-279.21(b)(3) and (b)(4), an impossible task. Not every vehicle that qualifies as an underinsured highway vehicle under Section 20-279.21(b)(4) can also meet the definition of an uninsured motor vehicle under Section 20-279.21(b)(3). A vehicle can qualify as an underinsured vehicle, which by definition has insurance, without

falling in any category of the definition of an uninsured motor vehicle, defined as a vehicle where (1) there is no insurance in at least the amounts specified in Section 20-279.5; (2) there is insurance but the insurance company denies coverage or becomes bankrupt; (3) there is no bond or deposit of money instead of liability insurance; (4) the owner of the vehicle has not qualified as a self-insurer under Section 20-279.33; or (5) a vehicle is not subject to the Motor Vehicle Safety and Financial Responsibility Act. N.C.G.S. § 20-279.21(b)(3). Due to the impossibility of every underinsured highway vehicle meeting the definition of an uninsured motor vehicle as defined in Section 20-279.21(b)(3) and because state-owned vehicles are specifically excluded in the circumstance where an uninsured motor vehicle is involved, but are not specifically excluded in the definition of an underinsured highway vehicle in Section 20-279.21(b)(4), we do not believe the legislature intended to fully incorporate the definition of an uninsured motor vehicle into the definition of an underinsured highway vehicle.

Furthermore, an opposite construction of the language contained in Section 20-279.21(b)(4) would conflict with the underlying policy of the statute recognized by this Court and our Supreme Court. N.C. Gen. Stat. § 20-279.21(b) is a part of the Motor Vehicle Safety and Financial Responsibility Act (the Act) which is a "remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). The concept of UIM coverage "allows the insured to recover when the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate the injured party for his full damages." *Harris v. Nationwide Mutual Ins. Co.*, 332 N.C. 184, 189, 420 S.E.2d 124, 127 (1992) (quoting J. Snyder, Jr. *North Carolina Automobile Insurance Law* § 30-1 (1988)). This purpose of the Act indicates that to construe the statute to deny UIM coverage to an individual who has attempted to protect himself by purchasing UIM coverage simply because he had the misfortune of being involved in an accident with a state-owned vehicle which otherwise meets the definition of an underinsured highway vehicle, would defeat the beneficial object of the statute, contrary to legislative intent. For these reasons, we hold that an underinsured highway vehicle as defined in Section 20-279.21(b)(4) can include a state-owned vehicle.

II

[2] Mutual also contends that Cochran is not entitled to prejudgment interest in excess of its UIM policy limits. We agree.

Part C of Cochran's Mutual policy which deals with uninsured motorist coverage and incorporates Part D dealing with uninsured and underinsured motorist coverage provides that Mutual:

> will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:
>
> 1. Bodily injury sustained by an insured and caused by an accident, and
>
> 2. Property damage caused by an accident.

Our Supreme Court recently interpreted an almost identical insurance policy provision in *Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993). The Court concluded that the term "damages" in the UIM portion of the insurance policy includes prejudgment interest on a jury verdict in the underlying tort action; however, the Court held that the insurance company must "pay plaintiff's resulting damages . . . up to, but not in excess of, its UIM policy limits." *Id.* at 11, 430 S.E.2d at 901.

Based on *Baxley*, Mutual has promised to pay Cochran's resulting damages, which includes prejudgment interest; however, the amount of damages owed by Mutual is "up to, but not in excess of, its UIM policy limits." For these reasons, the trial court erred in awarding Cochran prejudgment interest which exceeded the $100,000 available to Cochran under Mutual's UIM policy limits.

In sum, we affirm the trial court's judgment that the state-owned vehicle in this case qualified as an "underinsured highway vehicle" and was not excluded by language in Section 20-279.21(b)(3), but we reverse that portion of the judgment awarding Cochran prejudgment interest.

Affirmed in part, reversed in part.

Judges COZORT and WYNN concur.

C. M. EASTERWOOD AND WIFE, MARTHA M. EASTERWOOD; JAMES C. HICKS AND WIFE, HILDA L. HICKS; TERRY A. WARD AND WIFE, DOROTHY S. WARD; JOHN R. HOOVER AND WIFE, REBECCA M. HOOVER; ALBERT LOY, JR. AND WIFE, CAROLYN LOY; G. G. LOTHIAN AND WIFE, LINDA M. LOTHIAN; CHESLEY OVERBY AND WIFE, BETTY OVERBY; BARBARA B. JONES AND HUSBAND, RONNIE JONES; DAVID M. VAUGHN AND WIFE, XANDRA W. VAUGHN; DALE A. FARRAR; IRA TROLLINGER AND WIFE, NANCY F. TROLLINGER; TOMMY SCHOOLFIELD AND WIFE, HAZEL SCHOOLFIELD, PLAINTIFFS v. GARY D. BURGE AND WIFE, BETTY J. BURGE, DEFENDANTS

No. 9217SC628

(Filed 4 January 1994)

Deeds § 72 (NCI4th)— restrictive covenants in subdivision— construction of right of way as violation—new facts—violation not corrected—prior appeal as res judicata

The prior appeal in this action, 103 N.C.App. 507, operated as *res judicata*, barring defendants' arguments in the present appeal, since defendants' use of their subdivision lot as a gravel right of way to a parcel outside the subdivision would be a violation of the subdivision restrictions, and restrictions as to the outside parcel which were recorded subsequent to the prior appeal would not correct the violation.

Am Jur 2d, Covenants, Conditions, and Restrictions § 232.

Appeal by defendants from judgment entered 19 March 1992 by Judge Melzer A. Morgan, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 13 May 1993.

Gwyn, Gwyn & Farver, by Julius J. Gwyn, for plaintiffs-appellees.

Walker, Melvin & Berger, by Philip E. Berger, for defendants-appellants.

JOHNSON, Judge.

This case has been to our Court previously. We restate the preliminary facts underlying this action as found in *Easterwood v. Burge*, 103 N.C. App. 507, 405 S.E.2d 787 (1991):

Defendants acquired a 1.313 acre lot in the Easterwood Subdivision (hereafter, the Easterwood lot) subject to a restrictive

> covenant [one of which are hereafter, the Easterwood restrictions] which confined use of the lot to "residential purposes only" for the construction of "one detached single family dwelling." After having acquired this property, the defendants purchased approximately 13.902 acres bordering the nearby Reidsville City Lake (hereafter, the outside tract) which is not subject to restrictive covenants. The defendants have constructed a gravel way over and across the Easterwood lot as a means of access to and from the outside tract and U.S. Highway 158 by way of the private road of the Easterwood subdivision. The defendants do not contemplate construction of a single family residence on the Easterwood lot and intend to use it strictly as an access. The plaintiffs filed a complaint praying that the defendants be permanently enjoined from using the lot for the purpose of access. Defendants answered denying breach of restrictive covenants and asserting estoppel, laches, and waiver in defense. Both parties moved for summary judgment. The plaintiffs' motion was denied and defendants' motion was granted. The trial court retained jurisdiction.

Easterwood, 103 N.C. App. at 508, 405 S.E.2d at 788. Our Court held in *Easterwood* that defendants' use of the Easterwood lot violated the restrictive covenant, and that the case should be remanded to the trial court "for determination of whether each of the plaintiffs is estopped from asserting or has waived the right to assert the covenant." *Id.* at 510, 405 S.E.2d at 789.

On remand, plaintiffs served interrogatories on defendants which dealt with these defenses of waiver, laches and estoppel, revolving around specifics as to the identification of plaintiffs who had knowledge of defendants' plans for the Easterwood lot at the time defendants acquired the inside tract. Plaintiffs then requested defendants to make admissions as to the answers to these interrogatories; defendants filed an answer to this request for admissions containing denials to many of the statements and filed a motion for leave to amend answer. This motion stated that "[t]he Court of Appeals Opinion was, in part, based upon the fact that the Defendants' property outside of the subdivision was 'not subject to restrictive covenants.' . . . On the 6th day of March, 1992, the Defendants filed in the Office of the Registrar of Deeds of Rockingham County, a Notice of Restrictive and Protective Covenants [hereafter, the Burge restrictions] on their previously unrestricted property located outside of the Subdivision[.]"

Plaintiffs moved for summary judgment, alleging:

> The defendants' response to the plaintiffs' interrogatories reveal that they have no evidence upon which to assert that "each of the plaintiffs' [sic] is estopped from asserting or has waived the right to assert the covenant".
>
> In fact, the defendants' response to interrogatories reveals that they had contact with fewer than one-half of the plaintiffs before acting in breach of their covenant.
>
> . . .
>
> The defendants have asserted a counterclaim for which there is no support in law or in fact. In essence, the defendants seek to recover damages from these plaintiffs for seeking the relief to which plaintiffs are entitled and for the expensive consequences resulting from the defendants' efforts to do that which they were not legally entitled to do.

Defendants further alleged "that there is no genuine issue as to any material fact as shown by the pleadings and discovery together with the Affidavits attached hereto and Movants are entitled to Judgment as a matter of law."

The trial court ordered that plaintiffs' motion for summary judgment be allowed, that defendants' motion to amend their answer be denied, that defendants' counterclaim be dismissed, and that defendants be taxed with the cost of the action. From this order, defendants appealed to our Court.

Defendants argue that the trial court should have allowed defendants to amend their answer "to reflect changes in the relevant facts which occurred up to the time of the hearing and should have then granted Defendants [sic] motion for summary judgment." Defendants assert that the prior ruling from our Court is "instructive but not controlling," because the instant appeal should be based on the facts existing on 16 March 1992, the date of the hearing on remand. Defendants note that defendants' property has now been combined into one parcel, and the entire parcel is now subject to restrictive covenants, either the Easterwood restrictions or the Burge restrictions.

Defendants point out that in *Easterwood* defendants first acquired property "subject to a restrictive covenant which confined use of the lot to 'residential purposes only' then acquired property

'not subject to restrictive covenants' and constructed a gravel drive over the restricted property to the unrestricted property." Defendants argue that as of 6 March 1992, because the Easterwood lot was subject to the Easterwood restrictions and the outside parcel was subject to the recently recorded Burge restrictions, the "Defendants' entire property was subject to restrictions, the property could not be further subdivided and only one (1) single family dwelling could be constructed thereon."

Plaintiffs argue that our previous decision in *Easterwood* is the law in this case and the trial court's subsequent granting of summary judgment should control.

We first address whether our *Easterwood* decision operates as *res judicata*, barring defendants' arguments in the instant appeal:

> A final adjudication of an action, on its merits, by a court of competent jurisdiction is conclusive, as to the parties, of the issues raised therein and the doctrine of *res judicata* bars subsequent actions involving the same issues and parties and those in privity with them. Strict identity of issues is not required; the doctrine of *res judicata* also applies to issues which could have been, but were not, raised in the prior action. However, where subsequent to the rendition of judgment in the prior action, new facts have occurred which may alter the legal rights of the parties, the former judgment will not operate as a bar to the later action.

Trustees of Garden of Prayer Baptist Church v. Geraldco Builders, 78 N.C. App. 108, 112, 336 S.E.2d 694, 697 (1985) (citations omitted). For reasons which follow, we find that *res judicata* acts as a bar to defendants' arguments because there has been a final adjudication of this action on its merits. We further find defendants' assertion that new facts have occurred which alter defendants' legal rights without merit.

Defendants assert as new facts that defendants' property has now been combined by deed into one parcel and the entire parcel is now subject to restrictive covenants, either the Easterwood restrictions or the Burge restrictions.

As in our earlier *Easterwood* opinion, we quote with approval from *Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967). We note initially that "[i]n construing restrictive covenants, the fun-

damental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Long*, 271 N.C. at 268, 156 S.E.2d at 238. Concerning a "[g]rant of right of way over restricted property as a violation of restriction," our Supreme Court has said:

> In general, it may be said that if the granting of the right of way seems to be inconsistent with the intention of the parties in creating or agreeing to the restriction and with the result sought to be accomplished thereby, the courts incline to hold such a grant to be a violation of the restriction, while if the granting of the right of way does not interfere with the carrying out of intention of the parties and the purpose of the restrictions, it will not be held to be a violation.

Id. at 269, 156 S.E.2d at 239. The dispositive question on this appeal is whether the granting of the right of way will interfere with the carrying out of the intention of the Easterwood subdivision owners and the purpose of the Easterwood restrictions.

We note that although the Easterwood restrictions and Burge restrictions are nearly similar, there is one fatal difference: the covenants as to the Easterwood subdivision lots can only be amended "prior to the expiration of thirty (30) years by instrument signed by the owners of not less than seventy five (75%) per cent of the described property and thereafter by an instrument signed by the owners of a majority of the property." "[T]he owners . . . of the described property" refers to all of the property owners in the Easterwood subdivision. The Burge restrictions can be amended in a similar fashion. However, "the owners . . . of the described property" as to the Burge restrictions refers only to property owned by the following parties: defendants, Dale A. Farrar and wife, Kimberly P. Farrar; and Joseph T. Smith and wife, Deborah S. Smith. The Farrars and Smiths are Easterwood subdivision owners whose lands are adjacent to defendants' outside parcel.

The amendment language in the Easterwood restrictions indicates that by agreeing to the Easterwood restrictions, the Easterwood subdivision owners clearly intended to maintain control over the amendment of those restrictions. Because we find that the Easterwood subdivision owners would not retain such control over the outside parcel in this appeal, we find that to grant the right of way would be a violation of the Easterwood restrictions.

Therefore, we find that the trial court properly ordered that plaintiffs' motion for summary judgment be allowed, that defendants' motion to amend their answer be denied, that defendants' counterclaim be dismissed, and that defendants be taxed with the cost of the prior action.

The decision of the trial court is affirmed.

Judges GREENE and WYNN concur.

FLORENCE CONCRETE PRODUCTS, INC., PETITIONER v. NORTH CAROLINA LICENSING BOARD FOR GENERAL CONTRACTORS, RESPONDENT

No. 9210SC462

(Filed 4 January 1994)

Contractors § 4 (NCI4th)— manufacturer of prestressed concrete bridge components—general contractor's license required

Plaintiff was required to possess a general contractor's license when performing DOT bridge construction projects if the cost of the undertaking exceeded the statutory minimum, since the work performed by plaintiff, manufacturing and installing prestressed concrete components for highway bridges, constituted an improvement to a highway which was the type of work referred to in N.C.G.S. § 87-1 requiring a general contractor's license.

Am Jur 2d, Building and Construction Contracts § 131.

Appeal by respondent from judgment entered 2 January 1992 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 April 1993.

Jordan, Price, Wall, Gray & Jones, by Henry W. Jones, Jr. and Jeffrey S. Whicker, for petitioner-appellee.

Bailey & Dixon, by Carson Carmichael, III, for respondent-appellant.

JOHN, Judge.

Respondent (the Licensing Board) appeals from the trial court's order holding petitioner (Florence Concrete) did not meet the definition of "general contractor" under N.C.G.S. § 87-1 (1989) (amended 1992) and therefore was not required to obtain a North Carolina general contractor's license in order to bid and perform bridge construction projects. The Licensing Board contends the trial court erred because Florence Concrete qualifies as a general contractor within the purview of the statute. We find this argument persuasive and reverse the trial court.

Florence Concrete, a South Carolina corporation engaged in the manufacture and installation of prestressed concrete components for highway bridges, bids on North Carolina Department of Transportation (DOT) construction projects. If successful in its bid, it thereafter manufactures the necessary components and then transports and installs the finished components. More than 200 North Carolina bridges have been built using Florence Concrete's prestressed components.

The bidding procedure begins when DOT issues invitations for bids on a particular project. Upon receipt of proposals from Florence Concrete and other competitors, DOT awards the contract to the lowest responsible bidder. The Department of Administration (DOA) administers all purchase orders concerning these matters. Florence Concrete's method of performing these contracts has not changed over the years and is not anticipated to differ in the future. Upon receiving the requisite purchase order from DOA, Florence Concrete begins fabrication; a DOT inspector supervises the manufacturing process. After final DOT inspection and approval, the completed components are stored in South Carolina until the North Carolina Division of Bridge Maintenance (DOM) requests delivery. Prior to delivery, DOM installs all the necessary bridge pilings and otherwise prepares the location for the prestressed concrete components. Upon reaching the project site, Florence Concrete installs the components under DOM's supervision. DOM labor crews thereafter complete bridge construction. An entire project will customarily require from 7 to 10 days for completion; Florence Concrete's portion of the project generally consists of approximately 6 to 8 hours.

In February 1991, the DOA made inquiry to the Licensing Board, questioning whether Florence Concrete must be a licensed

general contractor in order to perform the bridge construction activities described above. Mark Selph, Secretary of the Board, replied licensure would be required under N.C.G.S. § 87-1 for projects costing $45,000 or more. On this basis, several of petitioner's bids for contracts were disqualified. In order to continue to bid on bridge projects, Florence Concrete obtained the requisite general contractor's license; however, this action was taken "under protest" because of the increased liability and insurance costs involved with being a general contractor.

On 9 April 1991, Florence Concrete filed a petition with respondent Licensing Board requesting a declaratory ruling. Florence Concrete sought a decision stating it is not required to maintain a general contractor's license for bidding on and performing DOT projects. Respondent Licensing Board failed to issue a ruling within 60 days; under then-existing N.C.G.S. § 150B-17 (1987) (recodified at G.S. § 150B-4 (1991)), this was tantamount to a denial of the request on its merits. Florence Concrete appealed to Wake County superior court which, after making detailed findings of fact and conclusions of law, reversed the "decision" of the Licensing Board.

Initially, we observe this case involves the appeal of an agency decision to the trial court and subsequent appeal to this Court. Our Administrative Procedure Act (APA), N.C.G.S. §§ 150B-1 to -52 (1991), details the appropriate procedures which must be followed in such instances. The requisite review standards which must be applied by: (1) the superior court in considering an initial appeal, and (2) this Court upon a subsequent appeal, have been fully explored in our decisional law. *See In re Appeal by McCrary*, 112 N.C. App. 161, 164-165, 435 S.E.2d 359, 362-63 (1993); *Sherrod v. N.C. Dep't of Human Resources*, 105 N.C. App. 526, 530, 414 S.E.2d 50, 53 (1992). In the interest of judicial economy, we decline to elaborate further upon these standards.

In the case *sub judice*, the controversy centers upon interpretation and application of the term "general contractor" as used in N.C.G.S. § 87-1. Florence Concrete argues it does not operate as a general contractor in fulfilling bridge building contracts with DOT, and therefore it should not be obliged to be licensed as such.

Misinterpretation of a statutory term by an agency constitutes an error of law necessitating *de novo* review by the court. *McCrary*, 112 N.C. App. at 166, 435 S.E.2d at 363. In conducting such review,

the court may freely substitute its own judgment for that of the agency. *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). Furthermore, where, as in the case *sub judice*, the trial court was required to utilize *de novo* review, this Court will directly review the agency's decision under a *de novo* review standard. *Id.* at 464, 372 S.E.2d at 345.

While the trial court decided this case by application of then-existing N.C.G.S. § 87-1 (1989) (amended 1992), we observe Florence Concrete has sought a prospective ruling regarding license requirements for future contracts. Under these circumstances we shall apply present N.C.G.S. § 87-1 (Supp. 1992) in formulating our decision. However, for purposes of this appeal there is little difference in the relevant portion of the two versions of G.S. § 87-1; only the cost of the undertaking was changed.

In pertinent part, G.S. § 87-1 currently defines a general contractor as:

> [A]ny person or firm or corporation who . . . undertakes to bid upon or to construct or who undertakes to superintend or manage . . . the construction of any building, highway, public utilities, grading, or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more . . . .

Licensure is required for any entity meeting this statutory definition. *See Baker Construction Co. v. Phillips*, 333 N.C. 441, 448, 426 S.E.2d 679, 683 (1993). Accordingly, the common law definition of "general contractor" is irrelevant in deciding the question of whether a license is required; our ruling must turn on the meaning of the specific words contained in the statute. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 131, 177 S.E.2d 273, 281 (1970). Licensing is required in order to guarantee skill and to protect the public from incompetent builders. *Baker Construction*, 333 N.C. at 446-47, 426 S.E.2d at 683. It is undeniable that the risk to the public from improper construction of highway bridges is high.

In its judgment pronouncing a license not required, the trial court reasoned Florence Concrete did not exercise control over the bridge construction project and therefore was not a general contractor, but rather a *subcontractor* or a *parallel prime contractor*. This analysis finds support in cases such as *Mill-Power Supply Co. v. CVM Assocs.*, 85 N.C. App. 455, 355 S.E.2d 245 (1987) and

Duke University v. American Arbitration Ass'n, 64 N.C. App. 75, 306 S.E.2d 584, *disc. review denied*, 309 N.C. 819, 310 S.E.2d 349 (1983).

However, since the trial court rendered its judgment, our Supreme Court issued its opinion in *Baker Construction Co. v. Phillips*, 333 N.C. 441, 426 S.E.2d 679 (1993). Under *Baker Construction*, even a subcontractor must be licensed if its contracted work is "the type of work referred to in section 87-1." *Id.* at 448, 426 S.E.2d at 683; *see also Spivey and Self, Inc. v. Highview Farms, Inc.*, 110 N.C. App. 719, 431 S.E.2d 535, *disc. review denied*, 334 N.C. 623, 435 S.E.2d 342 (1993). The statute refers to the "construction of any building, highway, public utilities, grading, or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more . . . ."

In the case *sub judice*, the work performed by Florence Concrete involved the manufacture of prestressed concrete components for highway bridges. This constitutes an *improvement* to a *highway* and is thus the type of work referred to in G.S. § 87-1. Furthermore, all Florence Concrete's contracted work appears to exceed the statutory $30,000 limit. Under these circumstances, we hold Florence Concrete is required to possess a general contractor's license when performing DOT bridge construction projects if the cost of the undertaking exceeds the statutory minimum. *See Baker Construction*, 333 N.C. at 447-48, 426 S.E.2d at 683; *Spivey and Self*, 110 N.C. App. at 725-26, 431 S.E.2d at 538-39.

Reversed.

Judges EAGLES and MARTIN concur.

R. ERNEST COHN, D.C., AND THE NORTH CAROLINA CHIROPRACTIC ASSOCIATION, PLAINTIFFS-APPELLANTS v. WILKES REGIONAL MEDICAL CENTER AND NEIL G. CASHION, JR., FRANK W. DOOLEY, CHARLES M. DRUM, JR., GEORGE FORESTER, JR., PAUL C. HOLBROOK, GAITHER M. KEENER, JR., GERALD LANKFORD, BLAKE LOVETTE, JOHN Q. MYERS AND REX REEVES, AS TRUSTEES OF WILKES REGIONAL MEDICAL CENTER, DEFENDANTS-APPELLEES

No. 9223SC1072

(Filed 4 January 1994)

1. **Hospitals and Medical Facilities or Institutions § 39 (NCI4th)— hospitals not required to give privileges to chiropractors**

The legislature's use of the word "may" instead of "shall" in N.C.G.S. § 90-153 indicates that it is not a requirement that a licensed chiropractor have access to and practice chiropractic in any hospital, and the statute does not confer the absolute right on chiropractors practicing within the state to be given hospital privileges in publicly funded institutions.

Am Jur 2d, Hospitals and Asylums § 9.

2. **Hospitals and Medical Facilities or Institutions § 39 (NCI4th)— patient's freedom of choice—no requirement that chiropractors be on qualified providers list**

The freedom of choice protection afforded hospital patients by N.C.G.S. § 90-157.2 is for patients to have the freedom to choose a qualified provider of care or service, and the statute does not require all North Carolina public hospitals to admit upon request at least one chiropractor to their staffs.

Am Jur 2d, Hospitals and Asylums § 9.

3. **Hospitals and Medical Facilities or Institutions § 39 (NCI4th)— hospital privileges—discretion in hospital boards—discretion not affected by statute**

In enacting N.C.G.S. § 131E-85, which sets out specific criteria a governing board of a hospital is to consider when granting or denying privileges to practice in its hospital to physicians, dentists, and podiatrists, the legislature did not intend to take away the discretion afforded hospital boards to make decisions regarding other health care providers, such as chiropractors.

Am Jur 2d, Hospitals and Asylums § 9.

Appeal by plaintiffs from order entered 11 August 1992 by Judge Julius A. Rousseau in Wilkes County Superior Court. Heard in the Court of Appeals 30 September 1993.

Moore and Brown, by B. Ervin Brown, II, and R. J. Lingle, of counsel, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., and M. Elizabeth Gee, of counsel, and E. James Moore, for defendants-appellees.

JOHNSON, Judge.

The facts of this appeal are as follows: Plaintiff chiropractor is licensed by the State of North Carolina. Plaintiff maintains his office in Wilkesboro, North Carolina, and provides chiropractic service to patients in Wilkes County. Plaintiff North Carolina Chiropractic Association (Association) is a professional association, incorporated and authorized to transact business in North Carolina. All members of the Association are chiropractors licensed under the laws of North Carolina to provide to patients care and services which are within the scope of practice of the profession of chiropractic as defined by North Carolina General Statutes § 90-143 (1990). In the years 1984, 1985 and 1987, plaintiff chiropractor made application for certain medical privileges at defendant hospital; plaintiff applied for both in-patient and out-patient privileges. Each of plaintiff's applications has been denied by defendant Board of Trustees.

Plaintiffs allege the various reasons given for the denials of plaintiff chiropractor's applications were "mere pretext," and that defendants had essentially "instituted and maintained a blanket prohibition denying access to all resources, facilities, and co-admitting and/or admitting privileges available at Wilkes Regional Medical Center to any and all chiropractors, including Plaintiff Cohn."

Plaintiffs filed this action on 20 December 1991 asserting violations of North Carolina General Statutes § 90-153 (1990) and North Carolina General Statutes § 90-157.1 (1990). Plaintiffs sought declaratory and injunctive relief to declare and enforce their rights to administer chiropractic care to their patients in the manner and form permitted under these statutes. Defendants responded by moving for the following: (1) to hold the matter in abeyance pending certain federal litigation; (2) to dismiss the action pursuant to North Carolina General Statutes § 1A-1, Rule 12(b)(6) (1990)

for failure to state a claim upon which relief can be granted, claiming the statutes in question do not prohibit hospitals from denying chiropractors the right to hospital privileges; and (3) to dismiss the Association as a party plaintiff for lack of standing.

This matter was held in abeyance pending the final disposition of the federal litigation relating to this matter. Once *Cohn v. Bond, et al.*, 953 F.2d 154 (4th Cir. 1991), *cert. denied*, 120 L.Ed.2d 922 (1992) was concluded, defendants renewed these motions for dismissal, adding the assertion that there is no private right of action available to enforce the statutes under which plaintiffs seek relief. On 31 July 1992, the trial court dismissed the complaint, concluding "the Complaint is not barred by the statute of limitations but . . . it fails to state a claim upon which relief can be granted." Plaintiffs filed timely notice of appeal to this Court.

Plaintiffs argue the trial court erred in granting defendants' motions to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted.

[1] North Carolina General Statutes § 90-153 states in its entirety:

> **§ 90-153. Licensed chiropractors may practice in public hospitals.**
>
> A licensed chiropractor in this State *may* have access to and practice chiropractic in any hospital or sanitarium in this State that receives aid or support from the public, and *shall* have access to diagnostic X-ray records and laboratory records relating to the chiropractor's patient. (Emphasis added.)

"Words in a statute generally must be construed in accordance with their common and ordinary meaning, unless a different meaning is apparent or clearly indicated by the context." *State v. Raines*, 319 N.C. 258, 262, 354 S.E.2d 486, 489 (1987) (citation omitted). We believe the Legislature's use of the word "may" contrasted with the use of the word "shall" in North Carolina General Statutes § 90-153 set out above indicates it is not a requirement that a licensed chiropractor have access to and practice chiropractic in any hospital. We believe the straightforward meaning of these words as they are set out in North Carolina General Statutes § 90-153 does not "confer[ ] the absolute right on chiropractors practicing within the state to be given hospital privileges in publicly funded institutions," as plaintiffs assert in their brief.

[2] North Carolina General Statutes § 90-157.1, set out in its entirety, reads:

> **§ 90-157.1. Free choice by patient guaranteed.**
>
> No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose a duly licensed chiropractor as the provider of care or services which are within the scope of practice of the profession of chiropractic as defined in this Chapter.

Plaintiffs argue that reading North Carolina General Statutes § 90-157.1 in tandem with North Carolina General Statutes § 90-153 leads to the "inescapable" conclusion "that *all* North Carolina public hospitals must, upon request, admit at least *one* chiropractor to its staff." (Emphasis retained.) We find no merit to this argument.

We call attention to *Cameron v. New Hanover Memorial Hospital, Inc.*, 58 N.C. App. 414, 293 S.E.2d 901, *disc. review denied*, 307 N.C. 127, 297 S.E.2d 399 (1982). *Cameron* was an action wherein two podiatrists brought suit against a public hospital alleging a wrongful denial of hospital staff privileges. One theory expounded by the plaintiffs in *Cameron* was that they were entitled to practice podiatry at the hospital under the terms of North Carolina General Statutes § 90-202.12 (1990), which states:

> No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose the provider or care or service which are within the scope of practice of a duly licensed podiatrist or duly licensed physician as defined in this Chapter.

Our Court held "we do not read G.S. 90-202.12 to *require* [the hospital] to grant staff privileges regardless of the standards set by its Board of Trustees which are reasonably related to the operation of the hospital. Generally, the protection offered by the statute is for patients to have the freedom to choose a qualified 'provider of care or service.'" (Emphasis retained.) *Cameron*, 58 N.C. App. at 453, 293 S.E.2d at 924.

North Carolina General Statutes § 90-202.12 is worded similarly to North Carolina General Statutes § 90-157.1, save the profession involved. We agree with the reasoning in *Cameron*, and find that the protection afforded by North Carolina General Statutes § 90-157.1, similarly, is for patients to have the freedom to choose a qualified provider of care or service.

[3] Finally, plaintiff makes reference to North Carolina General Statutes § 131E-85 (1988), which sets out specific criteria a governing board of a hospital is to consider when granting or denying privileges to practice in their hospital to physicians, dentists and podiatrists. Plaintiff argues that by not including chiropractors within this statute, or without enacting a similarly worded statute, the legislature articulated a different state policy concerning the profession of chiropractic, rather than one which would have allowed the denial of hospital privileges to chiropractors. We disagree.

North Carolina General Statutes § 131E-85(a) concludes by noting "[n]othing in this Part shall be deemed to mandate hospitals to grant or deny to any such individuals or others privileges to practice in hospitals." We do not believe the Legislature, when enacting North Carolina General Statutes § 131E-85, meant to take away the discretion afforded hospital boards to make decisions regarding other health care providers, such as chiropractors. North Carolina General Statutes § 131E-85(a) allows governing boards of hospitals to consider "the reasonable objectives and regulations of the hospital, including, but not limited to appropriate utilization of hospital facilities" when granting or denying privileges to practice in their hospital. Defendant hospital could properly consider factors such as these in the case *sub judice*, evidenced in the resolution adopted by the Board of Trustees.

Because we find the complaint was deficient in failing to set forth a claim upon which relief could be granted, we need not address plaintiffs' argument that the Association has standing to bring this suit, or defendants' argument that the statute of limitations had expired in this matter.

The decision of the trial court is affirmed.

Judges COZORT and McCRODDEN concur.

ROY H. GREEN, PLAINTIFF v. BAIN HARBOUR, INDIVIDUALLY AND BAIN HARBOUR, INC., DEFENDANTS

No. 9317SC537

(Filed 4 January 1994)

Frauds, Statute of § 32 (NCI4th)— affirmative defense—specific pleading required

Defendants could not take advantage of the provisions of the statute of frauds by a motion to dismiss for failure to state a claim upon which relief could be granted, since the statute of frauds is an affirmative defense which must be pleaded.

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

Appeal by plaintiff from order entered 26 February 1993 by Judge Peter M. McHugh in Rockingham County Superior Court. Heard in the Court of Appeals 28 December 1993.

Plaintiff filed a complaint against defendants regarding an oral contract for real property. In the complaint plaintiff sought recovery of all sums paid defendants plus interest at the legal rate, ad valorem taxes paid, and the costs of all improvements made to the real property. He also sought to treble these damages pursuant to N.C. Gen. Stat. § 75-16 (1988) and to recover attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1 (1988). In an alternative cause of action plaintiff sought specific performance of the contract.

On 25 January 1993 defendants filed a motion to dismiss plaintiff's alternative cause of action pursuant to N.C.R. Civ. P. 12(b) for failure of the complaint to state a claim upon which relief could be granted. This motion stated that plaintiff's complaint on its face showed that the alleged contract was an oral contract for the conveyance of real property and was therefore barred by the Statute of Frauds. The trial court allowed defendants' motion to dismiss in an order signed 24 February 1993 and filed 26 February 1993. From this order plaintiff appeals.

Pfaff, Elmore & Hayes, by Susan Hayes, for plaintiff-appellant.

Harrington & Stultz, by Thomas S. Harrington, for defendant-appellees.

ARNOLD, Chief Judge.

The issue before this Court is whether the trial court erred in allowing defendants' motion to dismiss one of plaintiff's alternative causes of action pursuant to N.C.R. Civ. P. 12(b) for failure to state a claim upon which relief could be granted. We conclude, as defendants concede, that the trial court erred in allowing defendants' motion to dismiss.

Defendants' motion to dismiss asserted the statute of frauds, an affirmative defense which must be pleaded. *Yeager v. Dobbins*, 252 N.C. 824, 114 S.E.2d 820 (1960); N.C. Gen. Stat. § 1A-1, Rule 8(c) (1990). "It is settled in this jurisdiction that the provisions of the statute of frauds cannot be taken advantage of by demurrer." *Weant v. McCanless*, 235 N.C. 384, 386, 70 S.E.2d 196, 197 (1952). Defendants' motion to dismiss for failure to state a claim upon which relief could be granted tests the legal sufficiency of the complaint and performs the same function as the old common law demurrer. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). Therefore, defendants may not take advantage of the provisions of the statute of frauds by a motion to dismiss for failure to state a claim upon which relief could be granted. For the reasons stated, the trial court's order must be reversed.

Reversed.

Judges WYNN and MARTIN concur.

KENNETH J. FOREMAN, JR. AND WIFE, MARY FRANCES O. FOREMAN, TRUSTEES UNDER DECLARATION OF TRUST DATED AUGUST 6, 1981 v. S. H. SHOLL, M.D., EDWARD HENRY SHOLL, ELEANOR B. DEEX, GEORGE A. McELVEEN, JR., B. G. NORTH, B. G. WORTH, MRS. BERNARD GERMANN, B. O. TOWNSEND, MRS. IKE C. LOWE, MRS. PAUL MOONEY, W. T. DENMAN, III, MARGARET G. DENMAN, JANIE C. WILLIAMSON, EL DORA WILLIAMSON, OEHLESE WILLIAMSON, JAMES WILLIAMSON, JAMES L. WILLIAMSON, JR., JOHN GATLING, MRS. W. J. JOHNSON, MRS. ETHEL HIGHSMITH, MRS. ANNIE BROOKS, GARNETT T. BROOKS, MRS. A. H. McCORMICK, JAMES A. McCORMICK, DOROTHY HARLAN McMILLAN, EUGENE MAXTON HARLAN, WILLIAM WADE HARLAN, JOHN BURKE HARLAN, VIRGINIA AUTEN DIXON, F. I. STONE, ANNE STONE BARNETTE, T. R. SAMPSON, ISABEL H. SAMPSON, J. M. DAVIS, LEO W. HEARTT, JOSEPH BROWN, TICER BROWN, RICHARD B. BRIGGS, MRS. ELLA R. SAMPSON, JAMES A. BLUE, MRS. BONNIE BLUE COVELL, E. B. McNEIL, J. L. McNEILL TRUST, J. J. McNEILL, JR., GEO. S. CROMARTIN, ARTHU[R] S. HARRIS, ANN TURNER CROMARTIE, R. H. COHN, MARY N. HOWERTON, J. R. HOWERTON, PHILIP T. HOWERTON, M.D., J. A. McLAUGHLIN, WAYNE M. CLEGHERN, DONALD W. WILSON, CHAS. A. DIXON, C. H. MORROW (OR MARROW), R. B. SLAVIN, J. DAVID WINGER, MRS. ROSA H. GREER, MRS. EVA M. HUMPHREYS, J. F. ROBERTSON, BILLY SHAW HOWELL, JR., MRS. E. G. HUTCHINSON, DR. CHARLES E. WALKER, CLARA H. CARSWELL HEIRS, J. H. HOWELL, E. Y. WEBB, R. G. VAUGHN, CYNTHIA VAUGHN PRICE, JOHN TRIMBLE, MATTIE C. SPENCER, MRS. LYNWOOD G. CRAIG, C. C. SPRINKLE, REV. J. C. SIMS, H. J. WATRONS, JIM WATRONS, J. E. GROVES, F. J. GOWDEY (OR GOWDY), HODGES C. GOWDEY, SLOCUM G. KENDALL (OR FRANCES SLOCUM GOWDEY), G. D. CLIFFORD, MARY E. LAZENBY, THOS. H. SOMERVILLE, JAMES DENWIDDIE (OR DENEVIDDIE) ESTATE, MISS LINDA (OR SUIDA) H. CHANEY, A. S. DE VLANING, MRS. THOMAS C. JOHNSON, R. E. CABELL, T. L. TRAWICK, C. B. MAHAN, ELIZABETH CHAFFIN, MISS FANNIE R. WILLIAMS, WM. C. BUCHANAN, ADAIR H. SANDERS, KATHLEEN ADAIR BROWN, MONTREAT CONCRETE AND BUILDING COMPANY, INC., C. H. ROBINSON & COMPANY, MONTREAT-ANDERSON COLLEGE, INC., AND MOUNTAIN RETREAT ASSOCIATION, INC.: TO EACH OF THE ABOVE, IF LIVING; IF DECEASED, TO THEIR HEIRS, DEVISEES, SUCCESSORS, TRANSFEREES, LEGAL REPRESENTATIVES OR ASSIGNS; AND TO THE SPOUSE OF EACH, IF ANY; AND TO THE BENEFICIARIES OR TRUSTEES OF EACH, IF ANY; AND TO ALL OTHER PERSONS, FIRMS, CORPORATIONS, ESTATES OR TRUSTS WHO NOW HAVE OR CLAIM, OR MAY HEREAFTER CLAIM, ANY RIGHT, TITLE OR INTEREST OR ESTATE IN AND TO THE PROPERTY DESCRIBED HEREIN, WHETHER SANE OR INSANE, ADULT OR MINOR, IN ESSE OR NOT IN ESSE OR EN VENTRE SA MERE, RESIDENT OR NONRESIDENT OF THE STATE OF NORTH CAROLINA, LIVE CORPORATION OR DISSOLVED CORPORATION

No. 9228SC1040

(Filed 18 January 1994)

1. Adverse Possession § 12 (NCI4th)— color of title—inadequate description of land—summary judgment for defendants proper

The trial court in an action to quiet title properly entered summary judgment for defendants where plaintiffs could not show that the deed upon which they relied for possession under color of title contained an adequate description of the property; the description in the deed was incapable of being reduced to certainty by use of something extrinsic to which the deed referred; the "drawing" to which the deed referred did not have any ascertainable monuments, did not indicate the size of the tracts of land shown, did not indicate any courses and very few distances, had no ascertainable beginning point, and therefore was not sufficient to describe the land conveyed; and testimony by four surveyors that they could, by reference solely to the "drawing," identify the property on the ground added to and enlarged the description given in the "drawing" and thus was not competent.

Am Jur 2d, Adverse Possession § 147.

2. Quieting Title § 9 (NCI4th)— action prematurely commenced—summary judgment proper

Because an action to quiet title was commenced more than three months before plaintiffs could have acquired an interest in the property by virtue of adverse possession, the trial court properly entered summary judgment for all defendants on this basis.

Am Jur 2d, Quieting Title and Determination of Adverse Claims §§ 36 et seq.

3. Appeal and Error § 209 (NCI4th)— inadequate notice of appeal—intent to appeal not fairly inferred

Plaintiffs' intent to appeal from the denial of their motion to file a supplemental pleading could not be fairly inferred from plaintiffs' notice of appeal which stated that plaintiffs appealed from "the 28 May 1992 ORDER FOR PARTIAL SUMMARY JUDGMENT"; therefore, because plaintiffs failed to give proper notice of their intent to appeal the denial of their motion to file a supplemental pleading, under Rule 3 of the N.C.

Rules of Appellate Procedure, the Court of Appeals was without jurisdiction to review the trial court's denial of this motion.

Am Jur 2d, Appeal and Error §§ 316 et seq.

Judge ORR dissenting.

Appeal by plaintiffs from order entered 28 May 1992 in Buncombe County Superior Court by Judge Robert D. Lewis. Heard in the Court of Appeals 29 September 1993.

Shuford, Best, Kelly, Cagle, Rowe, Brondyke & Wolcott, by E. Glenn Kelly, for plaintiff-appellants.

McGuire, Wood & Bissette, P.A., by Grant B. Osborne, for defendant-appellees.

GREENE, Judge.

Kenneth J. Foreman, Jr., (Mr. Foreman) and Mary Frances O. Foreman (Mrs. Foreman) appeal from an order for summary judgment entered against them in their action to quiet title, pursuant to N.C. Gen. Stat. § 41-10 (1984), to 59 tracts of property located in or near the town of Montreat. Each of the deeds described below purport to convey the 59 tracts in controversy.

In February 1979, Mr. Foreman had a telephone conversation with Jeseppo Perrone (Mr. Perrone) in which Mr. Foreman told Mr. Perrone that he [Mr. Foreman] was interested in locating the heirs of "people who bought property in Buncombe County, North Carolina, from the Mountain Retreat Association in 1907 or shortly afterwards" for the purpose of buying the property from them. Mr. Foreman and Mr. Perrone did not speak with each other again until a few days before 17 June 1981, when Mr. Perrone called Mr. Foreman and told him that he [Mr. Perrone] had located the heirs and was willing to convey to Mr. Foreman the interest he [Mr. Perrone] had obtained if Mr. Foreman was ready to proceed. Mr. Foreman told Mr. Perrone that he was ready and that he wanted Mr. Perrone to execute the deed to "Kenneth J. Foreman, Jr., Trustee" on 17 June 1981. Mr. Perrone informed Mr. Foreman that he would be going on a trip, but that he would execute the deed on 17 June 1981 and see that Mr. Foreman received the deed. Mr. Foreman and Mr. Perrone, who had yet to meet in person, did not communicate with each other again until a few days before

15 September 1983 when Mr. Perrone telephoned Mr. Foreman to tell Mr. Foreman that he was ready to deliver the deed. Mr. Perrone and Mr. Foreman agreed to meet on 15 September 1983 at the entrance to the Radisson Hotel in Charlotte at three p.m. to deliver the deed. On 15 September, Mr. Foreman met Mr. Perrone on the sidewalk outside the Radisson Hotel in Charlotte where Mr. Perrone handed Mr. Foreman an envelope containing a quit-claim deed, which Mr. Foreman examined, before paying Mr. Perrone $2,400. This deed (hereinafter referred to as "the Perrone deed") dated 17 June 1981, listed 75 different tracts of land as the property conveyed, indicated that "Kenneth J. Foreman, Jr., Trustee" was the named grantee, and was recorded in the Buncombe County Register of Deeds on 19 September 1983 at 3:53 p.m. The 59 tracts of property, the subject of this lawsuit, constitute a portion of the 75 tracts described in the Perrone deed. Of the 59 tracts, 41 are described by reference to a 1906 drawing recorded in the Buncombe County Register of Deeds at Plat Book 154 at Pages 1, 2, and 3 (the Drawing) and by reference to a 1935 map recorded in Plat Book 16 at Pages 92-97. It is not disputed that the 1935 map does not include the 41 tracts. The 1906 Drawing reveals: a legend entitled "Map of Montreat . . . And Situated In Buncombe County, N.C. 1906"; a North Arrow aligned with the magnetic meridian; a statement of scale of "300 feet to an inch"; over 1000 platted and numbered lots; distances shown on many, but not all, lot lines; numerous buildings shown on various lots; numerous streets; the absence of any physical evidence of a fixed point on the ground, such as a concrete or pipe marker; with very few exceptions, the bearings of the lines are not depicted; the radius or arc distance or chord length, chord bearing and tangent distance of any arc are not shown; and nothing in the drawing refers to anything which can be located or identified with certainty.

On 19 September 1983 at 3:54 p.m., Mr. Foreman recorded a "Declaration of Trust" dated 17 June 1981 wherein he declared that he would hold the property described in the Perrone deed "IN TRUST . . . [f]or the use and benefit of [his] Wife Mary Frances Ogden Foreman." On 11 October 1983 at 4:45 p.m., a quit-claim deed dated 21 July 1981 was recorded wherein Mr. Foreman, as trustee, conveyed the 75 tracts of land to himself in his individual capacity. On 11 October 1983 at 4:47 p.m., a "Declaration of Trust" dated 6 August 1981 was recorded wherein Mr. and Mrs. Foreman placed the 75 tracts of land "IN TRUST . . . [f]or the use and benefit

of [their] [s]ons." On 11 October 1983 at 4:51 p.m., a quit-claim deed dated 6 August 1981 was recorded wherein Mr. Foreman conveyed the same 75 tracts of land to himself and his wife "as Joint Trustees under the terms of" the 6 August 1981 declaration of trust.

Mr. and Mrs. Foreman (plaintiffs), as trustees under the August 1981 declaration of trust, filed suit in the Buncombe County Superior Court on 25 May 1990 seeking to quiet title to 59 of the tracts of land conveyed to them in the quit-claim deed dated 6 August 1981. Plaintiffs claim, pursuant to N.C. Gen. Stat. § 1-38 (1983), that they "under known and visible lines and boundaries" have "for more than seven (7) years" "asserted continuous, open, notorious and hostile adverse possession of [the premises in question] under color of title since [the] 17th day of June, 1981," and should thus be declared the owners in fee simple of the land in question.

A group of defendants (hereinafter referred to as the Exhibit A defendants) moved for summary judgment on 21 February 1992, on the ground that plaintiffs had not exercised adverse possession under color of title because the deed upon which plaintiffs relied to establish color of title did not sufficiently describe the property purportedly conveyed. The Exhibit A defendants claim to own the 41 tracts of land described by reference to the Drawing. There is no dispute that the property claimed by the remaining defendants (hereinafter described as Exhibit B defendants) is sufficiently described by the Perrone deed.

The Exhibit A defendants, as well as the Exhibit B defendants, also moved for summary judgment on the ground that, as to all 59 lots, the plaintiffs failed to possess the lots under color of title for seven years prior to the commencement of plaintiffs' action to quiet title. In response to this motion, plaintiffs, on 4 March 1992, moved to supplement their complaint pursuant to Rule 15(d) of the North Carolina Rules of Civil Procedure to allege transactions and occurrences or events which had happened after the complaint was filed. Specifically, plaintiffs' supplemented complaint would have alleged that plaintiffs had remained in adverse possession of the 59 lots after the original complaint was filed.

At the summary judgment hearing, Exhibit A defendants offered the affidavits of three surveyors who stated that it was impossible, using the Drawing, "to fit with certainty any intended description in any of the Drawings to any particular parcel of

land by correlating (a) any such lot corner with (b) physical evidence of any apparent corner or point that may now appear on the ground." Plaintiffs offered counter-affidavits of four surveyors who stated that the information contained in the 1906 Drawing "is sufficient for all Lots shown therein to be located on the ground with certainty by a competent surveyor following generally accepted practices for locating Buncombe County mountain land."

On 28 May 1992, a hearing was held and on 23 July 1992, Judge Robert D. Lewis granted Exhibit A defendants' motions for summary judgment on the ground that the deed upon which plaintiffs relied contained an insufficient description of 41 of the 59 lots. The order also granted both Exhibit A and Exhibit B defendants' motions for summary judgment on the ground that seven years had not run from the time plaintiffs claimed to have obtained color of title until the time they commenced this action, and denied plaintiffs' motion to file supplemental pleadings. The court then entered a final judgment against plaintiffs on all of plaintiffs' claims. On 25 June 1992, plaintiffs filed a notice of appeal from "the 28 May 1992 ORDER FOR PARTIAL SUMMARY JUDGMENT."

The issues presented are whether: (I) the description of the 41 tracts of land is adequate to create color of title; (II) the seven-year statutory period under N.C. Gen. Stat. § 1-38 had run at the time this action was instituted; and (III) plaintiffs' notice of appeal confers jurisdiction upon this Court to determine whether the trial court erred by denying plaintiffs' motion to supplement their pleadings to allege facts and events which occurred after the action was instituted.

I

[1] An essential element of plaintiffs' claims is "possession of . . . real property . . . under color of title." N.C.G.S. § 1-38(a) (1983). Thus, Exhibit A defendants are entitled to summary judgment if they can show that plaintiffs are unable to prove the existence of this essential element of their claim. *See Best v. Perry*, 41 N.C. App. 107, 109-10, 254 S.E.2d 281, 283 (1979).

All conveyances purporting to be color of title, including deeds, must contain, as an essential element of the conveyance, "a description identifying the land." *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 300, 144 S.E.2d 59, 61 (1965); *Carrow v. Davis*, 248 N.C.

740, 741, 105 S.E.2d 60, 61 (1958) (the instrument purporting to be color of title must adequately describe the land). If the conveyance does not contain such a description, it is void. *Overton v. Boyce*, 289 N.C. 291, 293, 221 S.E.2d 347, 349 (1976). The description must be "either certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which the deed refers." *Duckett v. Lyda*, 223 N.C. 356, 358, 26 S.E.2d 918, 919 (1943). "It is the deed that must speak . . . [and] oral evidence must only interpret what has been said therein." *Id.* at 359, 26 S.E.2d at 920. In other words, a "description, although indefinite, is sufficient if the court can, with the aid of extrinsic evidence which does not add to, enlarge, or in any way change the description, fit it to the property conveyed by the deed." 2 C.J.S. *Adverse Possession* § 108, at 802 (1972).

In speaking on the subject of insufficient descriptions of property contained in deeds, our Supreme Court in *Overton* stated:

> When it is apparent upon the face of the deed, itself, that there is uncertainty as to the land intended to be conveyed and the deed, itself, refers to nothing extrinsic by which such uncertainty can be resolved, the description is said to be patently ambiguous. As Justice Barnhill, later Chief Justice, speaking for the Court, said in *Thompson v. Umberger*, 221 N.C. 178, 19 S.E.2d 484, "[A] patent ambiguity is such an uncertainty appearing on the face of the instrument that the Court, reading the language in the light of all the facts and circumstances *referred to in the instrument*, is unable to derive *therefrom* the intention of the parties as to what land was to be conveyed." Parol evidence may not be introduced to remove a patent ambiguity since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument.

Overton, 289 N.C. at 294, 221 S.E.2d at 349 (emphases and brackets in original) (citations omitted). "Whether a description is patently ambiguous is a question of law." *Kidd v. Early*, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976).

In this case, the deed upon which plaintiffs rely to establish color of title describes the property with reference to a drawing recorded in the Buncombe County Register of Deeds and known as the Drawing. Thus the Drawing " 'becomes a part of the deed

as if it were written therein.' " *Kelly v. King*, 225 N.C. 709, 716, 36 S.E.2d 220, 224 (1945) (quoting *Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach*, 216 N.C. 778, 786, 7 S.E.2d 13 (1940)). The question, therefore, is whether the Drawing provides a "description having the same degree of certainty as [is] required of a description appearing only in the deed itself." 6 George W. Thompson, *Thompson on Real Property* § 3052, at 608 (1962). The Drawing without question is not sufficient in itself to describe the land conveyed. The Drawing does not have any ascertainable monuments, does not indicate the size of the tracts of land shown, does not indicate any courses and very few distances, and has no ascertainable beginning point. *See* James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 184, at 226-27 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 3d ed. 1988) [hereinafter *Webster*] (valid metes and bounds description must contain a certain starting point and the direction and length of each boundary line). The only issue is whether the description in the deed is capable of being reduced to certainty by use of something extrinsic to which the deed refers. We do not believe it is. The Drawing simply does not refer to anything extrinsic that would be of aid in identifying the property with certainty. The four surveyors, offered by plaintiffs, testified that they could, by reference solely to the Drawing, identify the property on the ground. This testimony, however, added to and enlarged the description given in the Drawing and was thus not competent. *See Overton*, 289 N.C. at 294, 221 S.E.2d at 349.

Accordingly, because the Exhibit A defendants have shown that plaintiffs cannot prove an essential element of their claim— that the deed upon which plaintiffs rely contains an adequate description of the property—the trial court did not err in granting summary judgment for the Exhibit A defendants.

II

[2] Another essential element of a claim of adverse possession is that the claimant possess the property under color of title "for seven years," before the action is filed. N.C.G.S. § 1-38(a) (1983); *Heath v. Turner*, 309 N.C. 483, 489, 308 S.E.2d 244, 246 (1983). Where the adverse claimant and the opposing party derive their title from the same source, the seven-year period does not begin to run until the instrument purporting to convey title is recorded. *Anderson v. Walker*, 190 N.C. 826, 829, 130 S.E. 840, 841 (1925).

Where, however, the adverse claimant and the opposing party derive their title from independent sources, as is the case here, recordation is irrelevant, *see* Webster § 294, at 361 n.78, and the seven-year period begins to run when the adverse claimant obtains color of title and that does not occur until the conveyance, if a deed, is delivered. *Avent v. Arrington*, 105 N.C. 377, 388-89, 10 S.E. 991, 995 (1890); *Chastien v. Philips*, 33 N.C. 255, 257-58 (1850); *see* 2 C.J.S. *Adverse Possession* § 109, at 804 (1972). Other procedural defects

> such as the omission of a seal, the lack of a privy exam, the unconstitutionality of a statute, and the failure to make all owners of the property parties to a suit in which a judgment affecting the title is rendered have all been held no obstacle to the instrument's ability to serve as color of title.

Monica K. Kalo, *The Doctrine of Color of Title in North Carolina*, 13 N.C. Cent. L.J. 123, 145 (1982).

In this case, the Perrone deed, which is the source of title to all the subsequent deeds executed by Mr. Foreman, was not delivered until 15 September 1983, and thus the seven-year period could not begin to run until that date. In so holding we reject the argument of plaintiffs that the seven years began to run on 6 August 1981 when Mr. Foreman conveyed the property to himself and Mrs. Foreman as trustees. A person cannot create color of title in himself while at the same time contending that the source of his title is another person from whom he has not yet received a deed. *See* 2 C.J.S. *Adverse Possession* § 112, at 808 (1972) (grantee cannot rely on deed as color of title where grantee knew that grantor did not have title to the land). Because this cause of action was commenced on 25 May 1990, more than three months before the plaintiffs could have acquired an interest in the property by virtue of adverse possession, the trial court correctly entered summary judgment for all defendants on this basis.

III

[3] Rule 3(d) of the North Carolina Rules of Appellate Procedure provides:

> The notice of appeal required to be filed and served by subdivision (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and

> shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C. R. App. P. 3(d) (1993).

Rule 3 is jurisdictional, and if the requirements of the rule are not complied with, the appeal must be dismissed. *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, *appeal dismissed and disc. rev. denied*, 327 N.C. 633, 399 S.E.2d 326 (1990); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). Furthermore, an appellant "must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider." *Smith v. Independent Life Ins. Co.*, 43 N.C. App. 269, 272, 258 S.E.2d 864, 866 (1979).

> Despite these principles, we may liberally construe a notice of appeal in one of two ways to determine whether it provides jurisdiction over an apparently unspecified portion of a judgment. First, "a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake" [citing *Smith*]. Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine that the party complied with the rule if the party accomplishes the "*functional equivalent*" of the requirement.

Von Ramm, 99 N.C. App. at 156-57, 392 S.E.2d at 424 (emphases in original) (citations omitted). The second exception stated above is inapplicable to this case because plaintiffs did not "technically fail[ ] to comply with procedural requirements in filing papers with the court."

The question then is whether plaintiffs' intent to appeal from the denial of their motion to file supplemental pleading can be "fairly inferred" from plaintiffs' notice of appeal, which states that plaintiffs appeal from "the 28 May 1992 ORDER FOR PARTIAL SUMMARY JUDGMENT." We cannot fairly infer from plaintiffs' notice of appeal an intent to appeal the denial of their motion to file supplemental pleading.

The present case is unlike *Smith*, wherein a trial court granted summary judgment to defendants and sustained defendants' defense that plaintiff had failed to state a claim. The appellant in *Smith* gave notice of appeal only from the entry of summary judgment, but this Court held that the appellant's intent to appeal from the portion of the order sustaining the failure to state a claim defense could be fairly inferred because "[p]laintiff's obvious intent could not have been to challenge only part of [the] order where the portion not challenged was sufficient to dismiss her entire claim." *Smith*, 43 N.C. App. at 274, 258 S.E.2d at 867.

In this case, the portion of the order not specified in plaintiffs' notice of appeal was not sufficient to dismiss plaintiffs' entire claim. Plaintiffs in this case had three apparently viable grounds for appeal, first, that the description contained in their deed was adequate, second, that the seven-year period required for adverse possession under color of title begins to run from the time the document creating color of title is executed, and third, that the trial court erred in denying their motion to file supplemental pleading. Plaintiffs' notice of appeal unambiguously states plaintiffs' intent to pursue the first two grounds, but there is nothing in the notice of appeal from which defendants, or this Court, could fairly infer that plaintiffs intended to pursue the third ground on appeal.

Accordingly, plaintiffs failed to properly give notice of their intent to appeal the denial of their motion to file supplemental pleading and, under Rule 3 of the North Carolina Rules of Appellate Procedure, this Court is without jurisdiction to review the trial court's denial of this motion.

Affirmed.

Judge EAGLES concurs.

Judge ORR dissents with separate opinion.

Judge ORR dissenting.

Here we have two groups of surveyors disagreeing in their respective affidavits as to whether the description of the land in question was adequate and could be located with certainty on the ground. With this conflict in the evidence, summary judgment would not be appropriate to determine this issue. In addition, the trial

court should have allowed plaintiffs' motion to amend so as to satisfy the seven-year requirement for color of title. For these reasons, I respectfully dissent.

BENNY BENTON, PLAINTIFF v. HUGH CLIFTON THOMERSON, JR., DEFENDANT AND THIRD-PARTY PLAINTIFF v. CLAUDE E. McCLAIN, THIRD-PARTY DEFENDANT

No. 9212SC1069

(Filed 18 January 1994)

1. Costs § 35 (NCI4th)— attorney's fees under N.C.G.S. § 6-21.1—settlement not bar

A settlement in and of itself does not bar a claim for attorney's fees under N.C.G.S. § 6-21.1.

Am Jur 2d, Costs §§ 72-86.

2. Costs § 35 (NCI4th); Compromise and Settlement § 7 (NCI4th)— timely and reasonable settlement by insurance company— finding of unwarranted refusal to settle error—award of attorney's fees improper

Where the record revealed that plaintiff's insurance company settled with defendant within four months of the accident in question and for a reasonable amount, as evidenced by the similarity between the jury verdict and the settlement amount, and defendant's counsel admitted that he was aware of the settlement and brought the counterclaim in order to get plaintiff to plead the prior settlement as a defense, thereby ratifying the conduct of his insurance company and causing his claim for contribution to be barred, the trial court abused its discretion in concluding that there had been an unwarranted refusal to settle and in awarding attorney's fees pursuant to N.C.G.S. § 6-21.1.

Am Jur 2d, Costs §§ 72-86.

3. Pleadings § 61 (NCI4th)— third-party complaint filed two weeks before trial—improper purposes—sanctions proper

It could reasonably be inferred from plaintiff's filing of a third-party complaint two weeks before trial that the com-

plaint was filed for an improper purpose such as to delay trial or to increase the costs of litigation, since plaintiff had ample opportunity to file his third-party complaint at an earlier date, if he had chosen to do so; therefore, the trial court did not err in awarding Rule 11 sanctions against plaintiff's attorney.

Am Jur 2d, Pleading § 339.

Judge MARTIN concurring in part and dissenting in part.

Appeal by defendant and third-party plaintiff from order entered 22 April 1992 and judgment entered 18 May 1992 by Judge Coy E. Brewer in Cumberland County Superior Court. Heard in the Court of Appeals 30 September 1993.

Hedrick, Eatman, Gardner & Kincheloe, by R. Gregory Lewis, for defendant and third-party plaintiff.

Rose, Ray, Winfrey & O'Connor, P.A., by Ronald E. Winfrey, for third-party defendant.

LEWIS, Judge.

The facts giving rise to this appeal reveal that on 31 December 1988, a pick-up truck driven by Hugh Clifton Thomerson, Jr. ("plaintiff") collided with another pick-up truck driven by Claude E. McClain ("defendant"). At the time of the accident, Benny Benton ("Benton") was a passenger in defendant's vehicle and suffered injuries as a result of the accident. On 6 April 1990, Benton initiated an action against plaintiff, claiming that plaintiff had operated his vehicle in a negligent manner by crossing the center line of an unpaved road and striking the vehicle in which he was a passenger. In his answer of 11 May 1990, plaintiff denied the allegations of negligence and sought to have the complaint dismissed. Discovery followed and the case was set for trial on 4 March 1991. On 15 February 1991, approximately two weeks prior to trial, plaintiff filed a third-party complaint alleging that if he was liable, which he denied, then he should be entitled to contribution because defendant was also negligent. In asserting his right to contribution, plaintiff claimed that he was parked on the side of the road and that it was defendant who was negligent in crossing the center line and striking his vehicle. Upon receipt of the third-party com-

plaint, defendant counterclaimed for the property damage caused to his truck as the result of plaintiff's negligence.

This matter came on for trial during the 24 February 1992, civil session of Superior Court for Cumberland County. Although the issues presented by this appeal arise out of a third-party complaint, the original plaintiff, Benny Benton, is not a party to this appeal. Thus, for the sake of simplicity, Hugh Clifton Thomerson, Jr., the defendant and third-party plaintiff, will be referred to throughout as "plaintiff" and Claude E. McClain, the third-party defendant, will be referred to as "defendant." Upon hearing all the evidence, the jury found plaintiff negligent and returned verdicts in favor of Benton for $15,000.00 and in favor of defendant for $1,000.00. As part of the entry of judgment, the trial court, in its discretion, awarded attorney's fees against plaintiff pursuant to N.C.G.S. § 6-21.1 because of his insurance company's unwarranted refusal to settle defendant's counterclaim. The trial court found $8,810.00 to be a reasonable attorney's fee and ordered plaintiff to pay that amount to defendant.

Thereafter, plaintiff filed a motion for relief from judgment pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. As part of his motion plaintiff alleged that his insurance company had in fact made a property settlement with defendant in the amount of $1,160.00, and, therefore, there had been no unwarranted refusal to settle. Plaintiff further argued that counsel for the defendant had been aware of the settlement and had tried to convince plaintiff to plead the settlement, which would have barred plaintiff's claim. Plaintiff argued that this constituted a fraud upon the court and misconduct on the part of defendant's counsel entitling him to relief from judgment. A hearing was held on plaintiff's Rule 60(b) motion on 18 May 1992, at which time the trial court amended its previous order and reduced the amount of attorney's fees from $8,810.00 to $1,000.00.

In addition, defendant also moved for Rule 11 sanctions against plaintiff's counsel, Philip R. Hedrick ("Hedrick"), on the basis that the claim for contribution was not well-grounded in law or fact and that it was filed for an improper purpose. The trial court agreed and awarded sanctions against Hedrick in the amount of $8,810.00, which represented the reasonable attorney's fees incurred by defendant as a result of the third-party complaint. Both plaintiff and Hedrick have given timely notice of appeal to this Court.

[1] The first issue we address is whether or not the trial court erred in awarding attorney's fees pursuant to N.C.G.S. § 6-21.1. This statute provides in pertinent part that:

> In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

N.C.G.S. § 6-21.1 (1986). The purpose of this statute is to enable an individual to bring suit when that individual has been damaged in an amount so small that it otherwise would not be feasible to bring suit because of the restrictive attorney's fees involved. *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973). Attorney's fees awarded under N.C.G.S. § 6-21.1 are awarded in the discretion of the trial judge and will be reversed only upon a showing of abuse of discretion. *Hillman v. United States Liab. Ins. Co.*, 59 N.C. App. 145, 296 S.E.2d 302 (1982), *disc. review denied*, 307 N.C. 468, 299 S.E.2d 221 (1983). Despite plaintiff's contention to the contrary, attorney's fees may even be awarded when damages are recovered by settlement prior to trial. *Epps v. Ewers*, 90 N.C. App. 597, 369 S.E.2d 104 (1988). As stated by the Supreme Court in *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973), to hold that the term "presiding judge" indicates an intention on the part of the legislature that no attorney's fees are allowed in a case settled prior to trial would be too strict a construction. Otherwise, a party claiming attorney's fees would be required to insist that the case proceed to trial, thereby increasing the amount of attorney's fees. Thus, it is clear that a settlement in and of itself does not bar a claim for attorney's fees under N.C.G.S. § 6-21.1.

[2] The critical language in N.C.G.S. § 6-21.1 is that there must have been an "unwarranted refusal" to settle. In deciding whether there was an unwarranted refusal to settle it is important to consider the context in which the dispute arose. The record reveals

that on 13 April 1989, plaintiff's insurance company paid defendant $1,160.00 in full payment for his property damages arising out of the 31 December 1988 accident. Thus, the settlement took place prior to plaintiff's filing his third-party complaint against defendant and prior to defendant's counterclaim for the same property damages. Counsel for defendant was aware of the settlement and admitted that it was his goal in bringing the counterclaim for plaintiff to plead the prior settlement as a defense. By doing so, plaintiff would have ratified the conduct of his insurance company and his claim for contribution would have been barred. *See McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E.2d 585, *cert. denied*, 283 N.C. 665, 197 S.E.2d 874 (1973). However, plaintiff was aware of defendant's ploy and did not plead the settlement as a defense. Defendant's counsel then took the position that since plaintiff had not pled the settlement, that affirmative defense was waived and defendant was entitled to maintain his counterclaim for property damages despite the prior settlement. Once he obtained a jury verdict on his counterclaim, defendant also sought a recovery of attorney's fees.

On the facts of this case, we find that there has been no unwarranted refusal to settle as that term is used in N.C.G.S. § 6-21.1. Although zealous in his representation of defendant, to allow defendant's counsel an award of attorney's fees on these facts would amount to manifest injustice. The record reveals that plaintiff's insurance company settled with defendant within four months of the accident and for a reasonable amount, as evidenced by the similarity between the jury verdict and the settlement amount. It is only the unusual circumstances of this case which make its resolution difficult. Regardless of whether there has been a settlement, there may be counsel who will nevertheless counterclaim for damages that have already been recovered.

This Court has previously recognized the risks and pitfalls involved in deciding whether to raise a prior settlement as a defense. In *McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E.2d 585, *cert. denied*, 283 N.C. 665, 197 S.E.2d 874 (1973), the plaintiff sued for injuries arising out of an automobile accident. When the defendant counterclaimed for his own injuries, the plaintiff raised the prior settlement as a bar to defendant's counterclaim. The defendant then amended his answer to allege that the plaintiff had ratified the settlement, barring plaintiff's claim. On appeal, this Court agreed and set forth the options which a plaintiff has in deciding whether or not to plead a prior settlement. If the plaintiff pleads the prior

settlement or moves to strike the defendant's counterclaim then he has ratified the actions of his insurance company. *Id.* at 284, 196 S.E.2d at 587. The reason for this is that when an insurance company makes a settlement, it is binding on the insured if the insured consents or ratifies the settlement. *Id.* In the event the plaintiff does not plead the prior settlement, he preserves his claim, but at the same time he assumes the risk of having to pay a judgment without the benefit of liability insurance. *Id.* The only benefit afforded the plaintiff is the fact that the amount of any judgment must be diminished by the amount of the settlement already paid. *Id.*

Although the plaintiff may have to pay more money on a claim that has already been settled, we do not think that he should be penalized a third time in having to pay attorney's fees. Just because strategic reasons prevented plaintiff from raising the settlement as a bar to defendant's counterclaim, we do not think that this should prevent his raising the settlement in response to defendant's motion for attorney's fees. The rationale which prevented plaintiff from raising the settlement as a defense to defendant's counterclaim simply does not apply in the context of a motion for attorney's fees under N.C.G.S. § 6-21.1. Plaintiff did settle the property damages with defendant and we find that this settlement was made in a reasonable time. We hold that the trial court abused its discretion in concluding that there had been an unwarranted refusal to settle and we vacate the trial court's award of attorney's fees. We also take note that there is nothing in the record to indicate that the judgment against plaintiff was diminished by the amount of the settlement. Since the jury verdict in favor of defendant was less than the amount of the settlement, defendant should not have been entitled to any recovery on the judgment.

[3] The next issue we address is whether the trial court erred in awarding Rule 11 sanctions against Hedrick. After the jury ruled against plaintiff, defendant brought a motion for Rule 11 sanctions. The trial court agreed and awarded sanctions in the amount of $8,810.00. In its order awarding sanctions, the trial court concluded that to the best of Hedrick's knowledge, the third-party complaint was not well-grounded in law, was not well-grounded in fact, and was filed for an improper purpose. Having reviewed the record, we agree with the trial court and affirm its award of sanctions.

In reviewing a trial court's decision to either grant or deny sanctions, this Court applies a *de novo* standard. *Turner v. Duke Univ.*, 325 N.C. 152, 381 S.E.2d 706 (1989). As part of its *de novo* review, this Court must determine "(1) whether the trial court's conclusions of law support its judgment . . . , (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 evidence." *Id.* If these three questions are answered in the affirmative then this Court must uphold the decision of the trial court. *Id.* It is now well established that there are three separate and distinct issues to Rule 11: 1) legal sufficiency; 2) factual sufficiency; and 3) improper purpose. *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992). A violation of any one of these three is sufficient to support sanctions under Rule 11. *Id.*

An improper purpose has been defined as one other than to vindicate rights or to put claims to a proper test. *See Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992). The duty under the improper purpose prong of Rule 11 is a continuing one, *Bryson* at 658, 412 S.E.2d at 334, and the burden is on the moving party to prove that an improper purpose exists. *Mack* at 93, 418 S.E.2d at 689. In deciding whether an improper purpose is present this Court must look to the objective behavior of the offender to determine if an improper purpose can be inferred. *Id.* The subjective beliefs of the aggrieved party are irrelevant. *Taylor v. Taylor Prods. Inc.*, 105 N.C. App. 620, 414 S.E.2d 568 (1992), *overruled on other grounds by Brooks v. Giesey*, 334 N.C. 303 (1993). By way of illustration this Court has stated that an improper purpose can be inferred from the service of excessive, successive or repetitive papers, by filing excessive lawsuits which would otherwise be barred by res judicata, by filing numerous dispositive motions when trial is imminent, by filing meritless papers by an attorney with extensive experience, or by filing suit when no basis exists other than a fishing expedition. *Mack* at 93, 418 S.E.2d at 689. Thus, this Court will look to see whether the purpose of the offender's conduct was intended to harass, persecute, or otherwise to vex his opponent or to cause unnecessary cost or delay. *Bryson* at 663, 412 S.E.2d at 337. Whether or not the offender's conduct achieves these results is immaterial. *Mack* at 93, 418 S.E.2d at 689.

In this case the trial court concluded that plaintiff's third-party complaint was filed for an improper purpose because it was intended to harass and cause unnecessary delay and costs. In support

of this conclusion the trial court found as fact that the original trial date was set for 4 March 1991, and that plaintiff filed his third-party complaint on 18 February 1991, approximately two weeks prior to trial. In addition, the trial court found that before plaintiff filed his third-party complaint he was on notice that all discovery was to be completed by 15 January 1991 and that no further continuances would be granted except for unforeseen circumstances. Plaintiff argues, and the trial court found, that plaintiff filed his third-party complaint after having reviewed the deposition of Benton. However, the record reveals that Benton was deposed on 28 September 1990, almost five months prior to when plaintiff filed his third-party complaint.

Given these facts we find that it can reasonably be inferred from plaintiff's objective conduct that the third-party complaint was filed for an improper purpose such as to delay trial or to increase the costs of litigation. In reaching this decision we are guided by *Turner v. Duke Univ.*, 325 N.C. 152, 381 S.E.2d 706 (1989). There, the Supreme Court held that an improper purpose could be inferred from the noticing of depositions six days prior to trial when the depositions would require extensive travel. We find that the same rationale applies here because the addition of a new party so close to trial by necessity will require further discovery and prolong the litigation. This is not to take away plaintiff's right to implead additional parties, but plaintiff had ample opportunity to review Benton's deposition and to file his third-party complaint at an earlier date if he chose to do so. The fact that he waited until the eve of trial to bring his third-party complaint leads to the inescapable conclusion that it was filed for an improper purpose.

In his defense, plaintiff asserts that it was actually Benton that sought to continue the trial. Although this is true, we are not persuaded by this argument. Benton was the party who sought the continuance, but his action was necessitated by plaintiff and was a reasonably foreseeable consequence of plaintiff's third-party complaint. If Benton had not been the one to seek a continuance, then defendant would have done so because it would have been unreasonable for him to have to prepare for trial in two weeks. Either way, plaintiff achieved his objective of delaying the trial. Therefore, we find that plaintiff filed his third-party complaint for an improper purpose and we affirm the trial court's conclusion of law to that effect. Having found that plaintiff violated the im-

proper purpose prong of Rule 11, we find that this is sufficient to affirm the trial court's award of sanctions and we see no reason to examine the other two prongs of Rule 11. Accordingly, the order of the trial court awarding sanctions against Hedrick is affirmed.

Reversed in part and affirmed in part.

Judge WELLS concurs.

Judge MARTIN concurs in part and dissents in part.

Judge MARTIN concurring in part and dissenting in part.

I concur in the decision of the majority to vacate the trial court's award of attorney's fees in favor of third-party defendant. However, I must respectfully dissent from the majority's decision to uphold the award of Rule 11 sanctions against Philip R. Hedrick, counsel for defendant and third party plaintiff.

The trial court concluded that the third-party complaint was not well grounded in law or in fact, that Hedrick's conduct in researching and filing the pleading was not objectively reasonable, and that the pleading was filed for an improper purpose. In my view, neither the trial court's findings of fact nor a sufficiency of the evidence support these conclusions. *See Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989), (*de novo* review of decision with respect to the imposition of sanctions requires determination of whether trial court's conclusions of law support its decision, whether the conclusions of law are supported by the findings of fact, and whether the findings of fact are supported by sufficient evidence).

The third party complaint denied negligence on the part of defendant, alleged the third party defendant's sole negligence as a bar to plaintiff's recovery from defendant, and, alternatively, alleged that if defendant was negligent, the third party defendant was also negligent. Construed liberally as required by G.S. § 1A-1, Rule 8; *Gore v. Ball, Inc.*, 279 N.C. 192, 182 S.E.2d 389 (1971), the third-party complaint was sufficient to allege sole negligence on the part of the third party defendant so as to support a claim for indemnity as well as an alternative claim for contribution based on concurring negligence. Thus, the third party complaint was warranted by the existing law as set forth in *Clemmons v. King*,

265 N.C. 199, 143 S.E.2d 83 (1965). The factual information which had been previously developed through discovery was at least sufficient to provide a basis for the allegations. Thus, I am unable to say that Hedrick's conduct in researching and filing this pleading was objectively unreasonable.

Nor can I agree with the majority that the evidence leads to the "inescapable conclusion" that the filing of the third-party complaint was for an improper purpose. The totality of the circumstances in this case does not infer the objectively strong level of improper conduct on Hedrick's part intended to be punished by Rule 11 sanctions. *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992). The third party complaint was filed within the time by which the trial court ordered the pleadings to be closed. While the filing of the pleading may have contributed to a delay in the trial, it was not the only reason for the delay. Plaintiff requested the continuance partly because of the filing of the third party complaint and partly because he was continuing to receive treatment for injuries sustained in the accident and was to obtain an additional medical examination which could not be completed before the scheduled trial date. It is significant that plaintiff has never objected to the filing of the third party complaint nor has he alleged that he was delayed, harassed, or occasioned any additional expense of litigation by reason thereof.

Because I believe that Rule 11 sanctions were improperly awarded against Philip R. Hedrick, I dissent from that portion of the majority opinion upholding the award.

JANA L. CAMALIER, ADMINISTRATRIX C.T.A. OF THE ESTATE OF CALEB WILLARD CAMALIER, CORRIE R. CAMALIER BY AND THROUGH HER DULY APPOINTED GUARDIAN AD LITEM, G. BRYAN COLLINS, JR., LOUISE H. CAMALIER, BY AND THROUGH HER DULY APPOINTED GUARDIAN AD LITEM, G. BRYAN COLLINS, JR., AND JANA L. CAMALIER, INDIVIDUALLY, PLAINTIFFS v. CHARLES J. JEFFRIES, FRANK A. DANIELS, JR., AND THE NEWS AND OBSERVER PUBLISHING CO., DEFENDANTS

No. 9210SC1152

(Filed 18 January 1994)

1. **Intoxicating Liquor § 59 (NCI4th)— social host liability—retroactive liability**

Social host liability as announced in Hart v. Ivey, 332 N.C. 299, applied retroactively to this case.

Am Jur 2d, Intoxicating Liquors §§ 35, 36.

Intoxicating liquors: employer's liability for furnishing or permitting liquor on social occasion. 51 ALR4th 1048.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence. 62 ALR4th 16.

2. **Intoxicating Liquor § 59 (NCI4th)— social host liability issue—no knowledge that guest was intoxicated**

In an action to recover for the wrongful death of plaintiff's intestate who was killed when his vehicle was struck by defendant newspaper employee who consumed alcoholic beverages at a retirement party sponsored by defendant newspaper and defendant editor, summary judgment was properly entered for defendants where plaintiffs claimed social host liability but there was no evidence that either the newspaper or the editor knew, or reasonably should have known, that defendant employee was intoxicated at any time while he was at the retirement party.

Am Jur 2d, Intoxicating Liquors §§ 35, 36.

Intoxicating liquors: employer's liability for furnishing or permitting liquor on social occasion. 51 ALR4th 1048.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence. 62 ALR4th 16.

3. Intoxicating Liquor § 59 (NCI4th) — editor's retirement party — newspaper as social and not business host

Defendant newspaper was purely a social host and not a business host at a retirement party for its editor.

Am Jur 2d, Intoxicating Liquors §§ 35, 36.

Intoxicating liquors: employer's liability for furnishing or permitting liquor on social occasion. 51 ALR4th 1048.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence. 62 ALR4th 16.

4. Death § 49 (NCI4th) — wrongful death — intoxicated defendant — prior guilty plea in criminal prosecution — summary judgment on liability issue proper

In a wrongful death action where plaintiff alleged that defendant negligently drove his automobile away from a company retirement party while intoxicated, ran a red light, and struck plaintiff's intestate's automobile, the trial court properly granted partial summary judgment on the issue of defendant driver's liability, since plaintiffs offered defendant's guilty plea to driving under the influence and running a red light; defendant came forward with no evidence to show that a genuine issue of fact did exist; and defendant's affidavit that he didn't feel intoxicated and recollected the light being green was insufficient to justify reversal.

Am Jur 2d, Death § 529.

Appeal by plaintiffs from orders entered 22 July 1992 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 18 October 1993.

Appeal by defendant, Charles J. Jeffries, from order entered 22 July 1992, and amended 29 July 1992, by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 18 October 1993.

Appeal by unnamed defendant, Michigan Mutual Insurance Company, from orders entered 22 July 1992 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 18 October 1993.

On 27 October 1990 The News and Observer Publishing Company (hereinafter The News and Observer) sponsored a retirement party for its editor, Claude Sitton, at the home of Frank A. Daniels, Jr., publisher and president of The News and Observer. Daniels hired Paul D. Broughton d/b/a Broughton Special Events Catering as an events coordinator. Broughton's duties included serving alcoholic beverages to guests. Although Broughton required Daniels to actually purchase the alcohol that was to be served at the party, Broughton hired four bartenders to assist him in serving the alcohol. Broughton also hired Savory Fare, Inc. to assist in the preparation and service of the food and alcohol. Savory Fare provided two bartenders to assist in the serving of the alcohol.

Defendant Jeffries, a News and Observer reporter, arrived at the retirement party at approximately 7:30 p.m. and stayed until approximately 10:15 p.m. During the time he was at the party Jeffries consumed three or four gin and tonic drinks or approximately ten to twelve ounces of gin. When Jeffries left the party he was transported to his car parked across the street by a van supplied by the defendants. Jeffries left the parking lot and drove west along Highway 70 towards his home in Durham. At approximately 10:40 p.m., Jeffries' vehicle collided with a vehicle driven by Caleb Camalier at an intersection located along Highway 70. Camalier was seriously injured in the collision. After living in a comatose state for approximately nine months, Camalier died.

Jeffries was transported to Durham County General Hospital where a sample of his blood was drawn shortly after midnight. A SBI analysis revealed a blood alcohol concentration level of 0.191. Although no one witnessed the collision, at least two witnesses stated that Jeffries appeared intoxicated at the scene of the accident. Jeffries was not seriously injured in the collision.

Jeffries was charged with driving while impaired and with failing to stop for a red light. Pursuant to a plea bargain agreement with the State, Jeffries entered pleas of guilty to both charges on 15 February 1991.

On 18 March 1991, plaintiffs filed a complaint against Charles J. Jeffries, Frank A. Daniels, Jr. and The News and Observer, alleging negligence on behalf of all parties named. The complaint alleged that Jeffries negligently drove his automobile away from a company retirement party while intoxicated, ran a red light, and struck an automobile operated by Caleb Willard Camalier,

III. The complaint further alleged that The News and Observer and Daniels negligently served to Jeffries alcoholic beverages from which he became intoxicated. Camalier lived in a coma until 27 July 1991 at which time he died. Plaintiffs subsequently amended their complaint to allege a claim for wrongful death against all defendants.

Defendant Jeffries moved for partial summary judgment; defendants Daniels and The News and Observer filed individual motions for summary judgment; plaintiffs moved for partial summary judgment as to Jeffries' liability; and the unnamed party Michigan Mutual moved for summary judgment. On 22 July 1992 the trial court granted summary judgment in favor of The News and Observer and Daniels. The trial court also allowed plaintiffs' motion for partial summary judgment as to Jeffries' liability. Plaintiffs and defendants and the unnamed defendant appeal from the orders as entered.

Young, Moore, Henderson & Alvis, P.A., by R. Michael Strickland and Jerry S. Alvis; White & Gaskins, by Johnny S. Gaskins, for plaintiff-appellants.

Bailey & Dixon, by Gary S. Parsons, Patricia P. Kerner and Kenyann G. Brown, for defendant-appellant Charles J. Jeffries.

Yates, McLamb & Weyher, by Dan J. McLamb, for defendant-appellee Frank A. Daniels, Jr.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson and John D. Madden, for defendant-appellee The News and Observer Publishing Company.

Carruthers & Roth, P.A., by Richard L. Vanore and Michael J. Allen, for unnamed defendant-appellant Michigan Mutual Insurance Company.

ARNOLD, Chief Judge.

Plaintiffs' first assignment of error is that the trial court erred in granting summary judgment in favor of defendants Daniels and The News and Observer. In granting The News and Observer's motion, the trial court ruled that the common law at the time of this judgment (22 July 1992) did not recognize "social host liability for persons giving a party for social entertainment purposes even if the party provides excessive alcohol to an adult

who thereafter leaves impaired and injures another." The trial court noted that three exceptions to the common law rule of nonliability existed, but that the conduct of The News and Observer did not fall within any of these exceptions. The trial court therefore ruled as a matter of law that The News and Observer was a purely social host and was not liable under the laws of North Carolina for any act of negligence committed by Jeffries. In granting summary judgment in favor of defendant Daniels, the trial court concluded that no legal basis existed for the claims made by plaintiffs against Daniels individually, therefore he was entitled to judgment as a matter of law.

Plaintiffs' appeal addresses a claim that until recently had not been recognized by our courts: liability of a social host who serves alcohol to a guest when the host has knowledge, or should have knowledge, that the guest is intoxicated and is likely to drive on the streets or highways and negligently injure a third party. Plaintiffs contend that in light of the recent Supreme Court decision in *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174 (1992), North Carolina now appears to recognize social host liability, and that defendants can no longer rely on the defense that the alcohol was served at a social event rather than a business function.

[1] At the outset we consider whether our Supreme Court's decision in *Hart v. Ivey*, which was filed 4 September 1992, applies to our decision in this case. In *Hart* the plaintiffs, husband and wife, brought an action alleging that four defendants were negligent in giving a party at which beer was served to John Dennis Little, Jr., an eighteen year old minor. The plaintiffs alleged that these defendants knew or should have known that Little was intoxicated at the time they served him the beer, and that Little would be driving a motor vehicle from the party thereby making it likely that he would injure someone. The plaintiffs further alleged that as a result of the defendants' negligent acts, Little's vehicle collided with a motor vehicle driven by the plaintiff wife, causing her serious injury. The defendants argued that the complaint did not state a claim against them. The plaintiffs contended that they stated a claim for negligence on two separate grounds: negligence *per se* for serving alcohol to a minor, which is not at issue in this case, and common law negligence for serving alcohol to a person when they knew or should have known that person was under the influence of alcohol and would drive an automobile shortly after consuming the alcoholic beverage. As to the latter cause

of action, the Supreme Court held that the plaintiffs "stated a cognizable claim." *Id.* at 304, 420 S.E.2d at 177. The Court admitted that no precedent in this State dealt with social host liability, but it maintained that the principles of negligence at least required a holding that the plaintiffs in that case stated a claim. *Hart*, 332 N.C. 299, 420 S.E.2d 174. The Court stated that it was not recognizing a new claim; rather, it was merely applying already established negligence principles under which the plaintiffs have stated claims. *Id.*

There is a presumption of retroactive application of decisions by our Supreme Court that change the existing law. *Fowler v. N.C. Dept. of Crime Control & Public Safety*, 92 N.C. App. 733, 376 S.E.2d 11, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 773 (1989). The Supreme Court decision will be applied retroactively unless compelling reasons exist for limiting its retroactive effect. *Id.* "In balancing the countervailing interests this Court must consider whether the [defendant] was unfairly prejudiced by his reliance on prior law, whether the purposes of the intervening decision could be achieved solely by prospective application, and the impact of retroactive application on the administration of justice." *Id.* at 735, 376 S.E.2d at 12-13 (citing *Cox v. Haworth*, 304 N.C. 571, 284 S.E.2d 322 (1981)).

Defendants do not claim any reliance on prior law. Their reliance, if any, on the absence of social host liability in the common law cannot be held to prevent retroactive application. Certainly defendants did not commit the alleged tort with this in mind. Furthermore, a retroactive application of *Hart* would serve North Carolina's public policy against drunken driving. Ironically, defendants, through News and Observer editorials and articles, have called to the public's attention the inherent dangers posed by the drinking driver. Moreover, we do not believe that a retroactive application of *Hart* would significantly impair the administration of justice. In fact, defendants practically concede that *Hart* applies to the facts in this case, although they argue that even under *Hart* the record supports summary judgment in their favor. We hold that social host liability announced in *Hart* applies to the case at bar.

[2] For summary judgment to be appropriate for defendants, their forecast of evidence must clearly indicate that plaintiffs would not be able to prove an essential element of their claim, and that defendants are entitled to judgments as a matter of law. To succeed

under social host liability as set forth in *Hart*, plaintiffs must present sufficient evidence showing the following elements: 1) defendants served an alcoholic beverage, 2) to a person they knew or should have known was under the influence of alcohol, and 3) defendants knew that the person who was under the influence of alcohol would shortly thereafter drive an automobile. *Hart*, 332 N.C. 299, 420 S.E.2d 174. Based on the forecast of evidence in the record, we conclude that no material issue of fact exists concerning defendants' knowledge of defendant Jeffries' alleged intoxicated or impaired condition, and that such element could not be proved by plaintiffs through the presentation of substantial evidence.

Under the second element of social host liability, plaintiffs must forecast evidence sufficient to raise a genuine issue as to whether defendants served the alcohol to Jeffries knowing that he was under the influence. The knowledge required of this element is that the social host knew or should have known that his guest was intoxicated. "The crucial consideration has been the condition of the guest . . . at the time the social host . . . served him or her an alcoholic drink." *McGuiggan v. New England Telephone and Telegraph Company*, 398 Mass. 152, 161, 496 N.E.2d 141, 146 (1986); *see also Harshbarger v. Murphy*, 90 N.C. App. 393, 368 S.E.2d 450 (1988) (requiring plaintiff to show intoxicated driver displayed manifestations of intoxication or impairment during the time when he was served alcoholic beverages at the premises of the establishment which plaintiff attempts to hold liable). Thus, we must look to the evidence relevant to the time Jeffries was served the alcoholic beverages and any outward manifestations which would reasonably lead defendants to know that Jeffries was under the influence.

The record is devoid of any evidence showing actual or constructive knowledge by defendants of Jeffries' alleged intoxication when alcoholic beverages were served to him at the party. Plaintiff offered no showing that at the time of the party, defendant Jeffries exhibited behavior or manifestations of intoxication or impairment to lead defendants to reasonably know that Jeffries was indeed intoxicated or impaired. The record includes dozens of depositions and affidavits in which individuals who knew Jeffries prior to the party testified that, through their observation of and interaction with Jeffries at the party, they noticed nothing indicating that he was intoxicated or impaired by the consumption of alcohol. In

fact, they testified to the contrary by stating that Jeffries appeared perfectly normal.

No evidence was presented suggesting Jeffries was obviously intoxicated so that defendants knew or even should have known that he was too impaired to drive. Furthermore, any evidence regarding Jeffries' condition or appearance after he got into his car and drove out of the parking lot is immaterial and irrelevant. We agree with the court in *McGuiggan v. New England Telephone and Telegraph Company*, 398 Mass. 152, 496 N.E.2d 141, that evidence of the driver's blood alcohol content does not raise a dispute on a material fact issue because only the time at which the defendant took his last drink is relevant to the question of whether the hosts knew or should have known about a guest's intoxication.

Although we acknowledge that granting summary judgment is generally not appropriate in negligence cases, *see Wilson Brothers v. Mobil Oil*, 63 N.C. App. 334, 305 S.E.2d 40, *disc. review denied*, 309 N.C. 634, 308 S.E.2d 719 (1983), this is one of those exceptional cases where an essential element of a plaintiff's claim creates no genuine issue of material fact, and reasonable men could only concede defendants were not negligent. *See Boza v. Schiebel*, 65 N.C. App. 151, 308 S.E.2d 510 (1983), *disc. review denied*, 310 N.C. 475, 312 S.E.2d 882 (1984).

With the recent recognition of social host liability, cases of this nature must be decided one by one, applying the principles announced in *Hart*. The facts here do not present a case for social host liability. There is no evidence that either The News and Observer or Frank Daniels knew, or reasonably should have known, that Jeffries was intoxicated at any time while he was at the retirement party. Having failed to provide sufficient evidence on an essential element of their claim, plaintiffs' argument therefore fails.

[3] Plaintiffs alternatively contend that their evidence is sufficient for a jury to conclude that alcohol was negligently served to Jeffries at an employment related function of The News and Observer. Before *Hart*, the only other applicable exception to the common law rule of nonliability of a person serving alcoholic beverages to an intoxicated individual was a situation in which alcohol was furnished at a business function. Both plaintiffs and defendant newspaper rely on *Chastain v. Litton Systems, Inc.*, 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 462 U.S. 1106, 77 L. Ed. 2d 1334 (1983), in which the Fourth Circuit held that a business that was not

acting as a social host at the time it held a company Christmas party could be held liable for furnishing alcoholic beverages to an employee knowing that the employee had become intoxicated at the party. Inherent in our discussion above regarding social host liability is the conclusion that defendant, The News and Observer, was a purely social host, as determined by the trial court. Furthermore, as we have determined above, there is no genuine issue of material fact as to whether The News and Observer knew Jeffries was intoxicated. For this reason, as well as for the reason that North Carolina appellate courts have not squarely addressed the issue of business host liability, it is not necessary to do so in this case. Business or employer liability is not an issue now before us.

[4] Next we address defendant Jeffries' cross appeal regarding the trial court's grant of plaintiffs' motion for partial summary judgment on the issue of Jeffries' liability. Defendant Jeffries contends that genuine issues of material fact exist as to whether he was negligent, and as to whether such negligence, if any, proximately caused the accident. Defendant relies on his amended answer and affidavit in which he denies driving under the influence and running a red light, and in which he alleges Camalier's contributory negligence.

Prior to this civil action, defendant Jeffries appeared in Wake County District Court and pleaded guilty to impaired driving in violation of N.C. Gen. Stat. § 20-138.1 (1993) and to running a red light in violation of N.C. Gen. Stat. § 20-158(b)(2) (1993). During the hearing, Jeffries responded to the following questions posed by the court:

> [COURT]: Do you understand that you are pleading guilty to the misdemeanors of, Number 1, driving while subject to an impairing substance; that is, alcoholic beverages, in violation of G.S. 20-138.1; and 2, by entering an intersection while a stop light was emitting a steady red light for traffic in your direction of travel in violation of G.S. 20-158(b)(2)?
>
> [JEFFRIES]: Yes.
>
> [COURT]: Have the charges been explained to you by your lawyer and do you understand the nature of the charges, and do you understand every element of each charge?

[JEFFRIES]: Yes.

. . . .

[COURT]: Do you now personally plead guilty to these charges?

[JEFFRIES]: Yes, sir.

[COURT]: Are you in fact guilty of these charges?

[JEFFRIES]: Yes.

Jeffries subsequently signed the transcript of plea under oath. Counsel representing Jeffries, upon asking the court to accept the plea arrangement, stated that "[b]y virtue of this plea [Jeffries] subjects himself to a very serious civil liability." Thereafter, plaintiffs filed a civil action against Jeffries based on his alleged negligence. In his answer defendant Jeffries specifically denied that he was driving while intoxicated at the time of the accident and that he ran a red light or failed to yield to Camalier's oncoming vehicle. In his amended answer Jeffries made the same denial and further alleged that Caleb Camalier was contributorily negligent, thereby barring plaintiffs from recovery. Plaintiffs filed a motion for partial summary judgment as to Jeffries' liability, and defendant filed a motion for summary judgment. The trial court granted plaintiffs' motion for partial summary judgment.

Our Supreme Court has held that evidence of a guilty plea to a criminal charge arising out of an automobile collision is generally admissible, yet not conclusive, and may be explained. *Grant v. Shadrick*, 260 N.C. 674, 133 S.E.2d 457 (1963) (per curiam). In a comparable case this Court recognized that a plea of guilty made by a defendant was an evidentiary admission by him. *Boone v. Fuller*, 30 N.C. App. 107, 226 S.E.2d 191 (1976). In *Boone*, the plaintiff sought damages from the defendant resulting from an assault by the defendant causing serious injury and eventual death to plaintiff's intestate. The plaintiff filed a motion for summary judgment on the issue of proximate cause offering a copy of the defendant's guilty plea to second degree murder of plaintiff's intestate in support of the motion. The defendant filed an affidavit explaining, *inter alia*, that the guilty plea was entered as a result of plea bargaining, and that the defendant believed the ultimate cause of death was actually pneumonia. The trial court granted plaintiff's motion for partial summary judgment and the defendant appealed. This Court held that the evidence of the defendant's guilty plea

supported plaintiff's motion and further that "the defendant offered no *competent* evidence to contradict plaintiff's evidence as to the cause of death." *Id.* at 109, 226 S.E.2d at 193 (emphasis added).

We likewise hold that plaintiffs' motion for partial summary judgment as to defendant's liability was properly granted. "It is well settled in North Carolina that, upon a motion for summary judgment, the moving party has the burden of offering evidence to show that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law." *Id.* Once plaintiffs offered defendant's guilty plea to driving under the influence and running a red light, the burden shifted to defendant to come forward with evidence in contradiction to plaintiffs' evidence to show that a genuine issue of fact did exist. *Id.* Defendant failed to meet his burden. In his guilty plea he unequivocally responded that he was in fact guilty of the crimes charged. As evidence to contradict plaintiffs' evidence of the guilty pleas, defendant relies on his affidavit which states that "[he] did not feel that [he] was intoxicated or that [his] ability to drive had been impaired by the alcohol that [he] had consumed," and further that it was his "recollection that . . . the light from [his] direction of travel was green." Defendant fails to set forth specific facts showing that genuine issues remain for trial. His mere allegations that he did not *feel* intoxicated or that he *recollected* the light being green without more are not competent evidence to justify a reversal. (By way of dictum it should be noted that issues of judicial estoppel, perjury and sanctions may be present here, but we decline in this opinion to entertain such questions.)

The trial court also properly granted summary judgment against defendant on the issue of contributory negligence. Defendant bears the burden of proving contributory negligence. When an essential element of a defendant's claim is nonexistent or when the defendant cannot produce evidence to support an essential element of his claim, summary judgment is appropriate. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974). Defendant has not presented any evidence or testimony to indicate that Caleb Camalier acted negligently. No genuine issue of fact exists, therefore, as to the issue of the decedent's contributory negligence.

In summary, the trial court's grant of defendants News and Observer and Frank Daniels' motions for summary judgment, and

the trial court's grant of plaintiffs' motion for summary judgment as to defendant Jeffries' liability are

Affirmed.

Judges WELLS and JOHNSON concur.

RUBY SMITH BUMGARDNER v. WADE J. BUMGARDNER

No. 9225DC427
No. 9225DC712
No. 9225DC1228

(Filed 18 January 1994)

1. Appearance § 6 (NCI4th)— general appearance—waiver of lack of service of process

When defendant and his counsel appeared in court and proceeded with the action for absolute divorce without contesting the court's jurisdiction for lack of service of process, defendant submitted himself to the jurisdiction of the court and thus effectively waived any defect in service of process.

Am Jur 2d, Appearance § 7.

2. Divorce and Separation § 181 (NCI4th)— failure to make entry of divorce judgment—subsequent motion to dismiss complaint granted—granting of motion overruled by another district court judge

The trial court committed reversible error in setting aside another judge's order dismissing the complaint for absolute divorce since the trial court's original pronouncement of the divorce judgment on 6 December 1989 was not entered within the explicit meaning of N.C.G.S. § 1A-1, Rule 58; finality and fair notice require entry of judgment after the requisite findings of fact have been adopted; entry of judgment therefore did not occur until 29 January 1992, the day plaintiff's counsel submitted the judgment to the court and the day the court signed the judgment; the other judge dismissed plaintiff's complaint on 11 October 1990 based on lack of service of process; plaintiff chose not to appeal or file a Rule 60 motion for relief;

at the time of the trial court's order of 29 January 1992 there did not exist any pleading on which to base a judgment; the trial court's judgment of 29 January 1992 was therefore null and void; and the other judge's order of dismissal entered on 11 October 1990 should be given its full force and effect.

Am Jur 2d, Courts §§ 87 et seq.; Divorce and Separation §§ 950 et seq.

3. Pleadings § 63 (NCI4th)— pleading not warranted by existing law—pleading not well grounded in fact—Rule 11 sanctions properly imposed on defendant

The trial court did not err in imposing Rule 11 sanctions on defendant where defendant, at the time of the filing of a motion to dismiss based on lack of service, knew that the pleading was not facially plausible because he had knowledge that he had made a general appearance in court where he had acknowledged, through counsel, that he had received a copy of the summons and complaint, thereby waiving any defect in service of process, and defendant therefore knew that the pleading was not warranted by existing law; furthermore, defendant knew that the pleading was not well grounded in fact where he acquired new legal representation and failed to disclose all of the relevant facts of the first divorce proceeding to his new counsel.

Am Jur 2d, Pleading § 339.

Appeal by defendant from judgment entered 29 January 1992 by Judge Timothy S. Kincaid in Catawba County District Court, order entered 15 April 1992 and signed 4 May 1992 by Judge Jonathan L. Jones in Catawba County District Court, and order entered 10 August 1992 by Judge L. Oliver Noble, Jr. in Catawba County District Court. Heard in the Court of Appeals 27 May 1993.

Steve B. Potter, P. A., by Steve B. Potter, for plaintiff-appellee.

Rudisill & Brackett, P. A., by H. Kent Crowe and J. Richardson Rudisill, Jr., for defendant-appellant.

JOHNSON, Judge.

Defendant Wade J. Bumgardner in these consolidated cases, *see* N.C.R. App. P. 40 (Court on its own initiative may consolidate

cases which involve common questions of law), appeals from a judgment in no. 9225DC427 granting absolute divorce; an order in no. 9225DC712 denying relief pursuant to N.C.R. Civ. P. 60(b) and imposing sanctions pursuant to N.C.R. Civ. P. 11; and an order in no. 9225DC1228 setting out an award of sanctions pursuant to N.C.R. Civ. P. 11. We will dispose of these cases in one opinion.

The pertinent facts are as follows: On 25 August 1988, plaintiff Ruby Smith Bumgardner filed a complaint against defendant seeking absolute divorce and equitable distribution of marital property. A summons was issued by the clerk of court in Catawba County on 25 August 1988. The summons was returned to the clerk's office marked "not served." An alias and pluries summons was subsequently issued by the court.

At the time the matter was filed, defendant was represented by Mr. John W. Crone, III. Defendant did not file an answer or response to plaintiff's complaint. On 6 October 1988, an amendment to the complaint was filed by plaintiff.

On 6 December 1989, the parties appeared before Judge Timothy S. Kincaid at the regularly scheduled session of domestic court for hearing in this matter. At that time, the parties had just finished a proceeding on other matters related to their marriage. At the time the divorce in this file was called for hearing, defendant was personally present in the courtroom with attorney Crone. When the matter was called on for hearing, the court inquired whether there were any objections to the court proceeding with the hearing of an absolute divorce between these parties and through counsel. Defendant did not raise any objections. Defendant, through counsel, agreed that he had been served with said complaint. After hearing evidence on the matter, the court rendered a judgment in open court and the clerk made a notation of said divorce in the clerk's minutes.

In January 1990, the law firm of Rudisill & Brackett, P.A. assumed representation of defendant in this matter. Upon examination of the court file of the case, attorney Rudisill of the Rudisill & Brackett, P.A. law firm filed, *inter alia*, a motion to dismiss, based on lack of subject matter or personal jurisdiction, pursuant to N.C.R. Civ. P. 12(b)(1), (2) on 19 January 1990. Although Judge Kincaid's judgment of 6 December 1989 was noted in the clerk's minutes, no document reciting Judge Kincaid's judgment had been placed into the court file at that time. The motions were served

by mail on plaintiff's counsel on the same date. No responsive pleadings were filed by plaintiff.

During the 24 September 1990 term, the matter came on for hearing before Judge Ronald E. Bogle in Catawba County District Court *ex parte*. After examining the contents of the file, which at that time consisted of a complaint, a summons marked "not served," an amended complaint, and motions to dismiss, the court, on 11 October 1990, entered an order dismissing plaintiff's action because plaintiff's summons and complaint had not been sufficiently served within the time and in the manner prescribed by law, and further ordered that plaintiff bear the costs. This order was served upon counsel for plaintiff on 12 October 1990. No appeal was taken from this order. At the time the order was entered by Judge Bogle, the written divorce judgment reciting the decree entered by Judge Kincaid on 6 December 1989 had not yet been filed.

Once plaintiff's counsel learned that the divorce judgment entered by Judge Kincaid had not been filed, he examined the court record and his notes and prepared a divorce judgment per the instructions of Judge Kincaid. On 29 January 1992, counsel for plaintiff, *ex parte*, submitted a detailed judgment to Judge Kincaid for his signature. This purported judgment set aside Judge Bogle's order entered 11 October 1990. The judgment was not served upon defendant; however, defendant's counsel did receive a copy of this judgment on 24 February 1992 by way of supplemental response to a request for production of documents in a third lawsuit between the parties. Defendant filed timely notice of appeal as to Judge Kincaid's judgment and filed a motion pursuant to N.C.R. Civ. P. 60 to set aside the judgment of divorce in February 1992.

On 15 and 16 April 1992, Judge Jonathan L. Jones presided over the hearing concerning defendant's Rule 60 motion to set aside the judgment. Judge Jones denied defendant's Rule 60 motion and, pursuant to N.C.R. Civ. P. 11, imposed sanctions on defendant for filing a frivolous action. Judge Jones found, *inter alia*, that defendant had caused his attorney, Mr. Rudisill, to file a Rule 12(b)(1), (2) motion to dismiss in this case, after being personally present in open court with counsel when the divorce matter was heard, acknowledging that he had received a copy of the summons and complaint, stating he had no objection to the court hearing the case, and hearing the court render a judgment of absolute

divorce. The written order reciting these findings was filed on 4 May 1992. The court left the amount of sanctions open for determination at a later date along with the question as to whether counsel for defendant also violated N.C.R. Civ. P. 11. Defendant filed timely notice of appeal as to Judge Jones' order.

The amount of sanctions was determined on 10 August 1992 by Judge L. Oliver Noble, Jr., who held that defendant should be ordered to pay plaintiff's attorney's fees in the amount of $750.00. Defendant filed timely notice of appeal as to Judge Noble's order.

Case No. 9225DC427

[1] By defendant's first, second and third assignments of error, defendant contends the trial court erred by granting plaintiff an absolute divorce when the court lacked personal jurisdiction, when there was insufficiency of process. We find the court did have personal jurisdiction over defendant as defendant made a general appearance in court giving the court jurisdiction over his person.

In *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 247, 243 S.E.2d 412, 413 (1978) the Court stated:

> G.S. 1-75.7 provides that "[a] court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action. . . ." G.S. 7A-193 provides that "the civil procedure provided in chapters 1 and 1A of the General Statutes applies in the district court division of the General Court of Justice." Thus, if defendant made a "general appearance", the court has jurisdiction over his person even if service of process was defective. (Citation omitted.)

"[A] general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person." *In Re Blalock*, 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951). "A general appearance waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof." *Youngblood v. Bright*, 243 N.C. 599, 602, 91 S.E.2d 559, 561 (1956) (citation omitted).

On 6 December 1989, the parties in this matter appeared before Judge Kincaid in Catawba County District Court. At the time the

divorce was called for hearing, the parties had just finished a proceeding in the same court before Judge Kincaid on other matters relating to the marriage. Defendant was personally present as was his attorney, Crone. When the matter was called for hearing, the court inquired personally of defendant and his counsel if there were any objections to the court proceeding with the hearing of an absolute divorce between the parties and through counsel. Defendant raised no objections. Judge Kincaid proceeded with the hearing on this basis.

We are of the opinion that when defendant and his counsel appeared in court and proceeded with the matter without contesting the court's jurisdiction for lack of service of process, defendant submitted himself to the jurisdiction of the court and thus, effectively waived any defect in service of process and service thereof. Accordingly, defendant's first, second and third assignments of error are overruled.

[2] By defendant's fourth assignment of error, defendant contends that Judge Kincaid committed reversible error in setting aside Judge Bogle's order. We agree.

The record in this case reveals that on 6 December 1990, Judge Kincaid rendered a judgment for absolute divorce in open court and the clerk noted the judgment in the minutes. Judge Kincaid also directed plaintiff's counsel to draft the judgment for his signature. Plaintiff's counsel, however, mistakenly believed it was defense counsel's obligation to draft the judgment. As such, the judgment was not drafted until 29 January 1992. Meanwhile, defendant had acquired new legal representation who examined the court files in the case and determined that the court lacked personal jurisdiction over defendant because defendant had not been properly served the summons and complaint. Nothing in the file indicated that the matter had been heard and that a judgment had been rendered by Judge Kincaid. As a result, defendant's counsel filed a motion to dismiss. The motion was heard by Judge Bogle *ex parte*. On 11 October 1990, Judge Bogle entered an order dismissing plaintiff's action on the ground that the summons and complaint had not been served within the time and in the manner prescribed by law. The order was served upon counsel for plaintiff 12 October 1990.

Once plaintiff's counsel received a copy of Judge Bogle's order and learned that the divorce judgment had not been filed, plaintiff's

counsel prepared a divorce judgment for Judge Kincaid's signature. Judge Kincaid signed and filed the judgment on 29 January 1992. The judgment contained language indicating Judge Bogle's order was erroneous. Defendant contends Judge Kincaid's judgment granting the absolute divorce, and setting aside Judge Bogle's order, was error.

In order to determine whether the trial court erred, we must first determine the effect of the divorce judgment rendered by Judge Kincaid on 6 December 1989 and then whether Judge Kincaid properly set aside Judge Bogle's order. We note that entry of judgment is governed by N.C.R. Civ. P. 58, which states:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his [/her] minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> In other cases where judgment is rendered in open court, the clerk shall make a notation in his [/her] minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

North Carolina General Statutes § 1A-1, Rule 58 (1990).

In the instant case, the explicit language of Rule 58 does not establish the point of entry of judgment. Paragraphs one and two of Rule 58 apply to cases in which judgment is rendered in open court. Paragraph one is inapplicable because the judgment is not for a sum certain or denying all relief. Paragraph two is inapplicable

because the Caldwell County Clerk of Court made a notation in the minutes, but "the record fails to indicate that such entry was made upon the judge's direction." *Cobb v. Rocky Mount Board of Educ.*, 102 N.C. App. 681, 683, 403 S.E.2d 538, 540 (1991), *aff'd per curiam*, 331 N.C. 280, 415 S.E.2d 554 (1992). Paragraph three is inapplicable because the judgment was rendered in open court.

"In cases when entry of judgment cannot be determined from the express language of Rule 58, fair notice concerns indicate that 'entry' occurs only after draft orders or judgments are submitted to and adopted by the court." *Stachlowski v. Stach*, 328 N.C. 276, 283, 401 S.E.2d 638, 644 (1991).

Here, Judge Kincaid directed plaintiff's counsel to draft a judgment reflecting the court's decision. This judgment required findings of fact supporting the court's conclusion that an absolute divorce be granted. "The material facts in every complaint asking for divorce . . . shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge[.]" North Carolina General Statutes § 50-10 (1987). "[C]onsiderations of finality and fair notice to the parties militate against finding entry of judgment prior to adoption of the requisite findings." *Stachlowski*, 328 N.C. at 286, 401 S.E.2d at 642.

Therefore, because the pronouncement of the divorce judgment on 6 December 1989 was not entered within the explicit meaning of Rule 58 and because finality and fair notice require *entry* of judgment after the requisite findings of fact have been adopted, we find *entry* of judgment did not occur until 29 January 1992, the day plaintiff's counsel submitted the judgment to the court and the day the court signed the judgment. The rendition of judgment by Judge Kincaid on 6 December 1989 was of no effect absent an *entry* of judgment. Consequently, when Judge Bogle dismissed plaintiff's complaint on 11 October 1990, based on lack of service and service of process, and when plaintiff chose not to appeal or file a Rule 60 motion for relief, there did not exist on 29 January 1992 any pleading on which to base a judgment. Therefore, we find Judge Kincaid's judgment of 29 January 1992 was null and void, and Judge Bogle's order should be given its full force and effect.

Case No. 9225DC712

By defendant's first assignment of error, defendant contends that the trial court erred in denying defendant's motion for relief from judgment pursuant to N.C.R. Civ. P. 60. Since we have determined Judge Bogle's order to be valid and Judge Kincaid's judgment of 29 January 1992 to be null and void, it therefore follows that Judge Jones' order of 15 April 1992 denying defendant's Rule 60 motion for relief from judgment should be vacated.

[3] By defendant's second assignment of error, defendant contends that the trial court erred when it imposed sanctions pursuant to N.C.R. Civ. P. 11 on defendant. We disagree.

We note that although we have determined that Judge Kincaid's judgment is null and void due to procedural errors, we are not precluded from reviewing and affirming Judge Jones' order imposing sanctions pursuant to Rule 11 if the facts support such an award.

Under Rule 11, the signer certifies that the pleading or paper is well grounded in fact and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. North Carolina General Statutes § 1A-1, Rule 11(a) (1990). In addition, under Rule 11, the signer certifies that three distinct things are true: the pleading is (1) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); (2) well grounded in fact; and (3) not interposed for any improper purpose. A breach of the certification as to any one of these three prongs is a violation of the Rule. *See Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992). At issue here are the "warranted by existing law" and "well grounded in fact" prongs.

In determining whether the "warranted by existing law" prong has been met, the court must first determine the facial plausibility of the paper. *Id.* It is the client's responsibility to make a reasonable inquiry to determine the legal sufficiency of the document. *Id.*

In the instant case, when the divorce matter was called on 6 December 1989, the parties were present in court with their respective counsel. The court inquired whether there were any objections to the court proceeding with the hearing of an absolute divorce between the parties and through counsel. Neither party raised any objections. Defendant, through counsel, acknowledged in open court that he had been served with a copy of said sum-

mons and complaint. Based on the parties' consent, Judge Kincaid proceeded with the hearing on the absolute divorce between the parties. After hearing evidence, Judge Kincaid announced the rendering of an absolute divorce in open court. From the record, we can therefore conclude that when the motion to dismiss based on lack of service was filed, defendant knew that the pleading was not facially plausible because he had knowledge that he had made a general appearance in court where he had acknowledged, through counsel, that he had received a copy of the summons and complaint thereby waiving any defect in service of process. As such, we find that defendant violated the "warranted by existing law" prong.

In addition, the pleading was not "well grounded in fact." When defendant acquired new legal representation, he failed to disclose all of the relevant facts of the 6 December 1989 proceeding to his new legal counsel. Where a party misleads an attorney as to facts or the purpose of a motion, sanctions on the party are appropriate. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), *modified on other grounds*, 330 N.C. 644, 412 S.E.2d 327 (1992). The pleading was based on erroneous facts and therefore, defendant has violated the "well grounded in fact" prong of Rule 11. We find the trial court's imposition of sanctions were proper.

Case No. 9225DC1228

We note that in case no. 9225DC1228 defendant again assigned as error the imposition of attorney's fees. As we have already addressed this assignment of error, we do not deem it necessary to address this assignment of error again.

* * *

Case no. 9225DC427 is remanded to the trial court with directions to vacate the judgment of divorce entered on 29 January 1992; case no. 9225DC712 is remanded with direction to vacate the part of the order denying defendant's Rule 60 motion and to affirm the imposition of sanctions; and case no. 9225DC1228 is affirmed.

Affirmed in part, reversed in part and remanded.

Judges GREENE and WYNN concur.

VALLEREE L. OWENS, PLAINTIFF v. W. K. DEAL PRINTING, INC., DEFENDANT

No. 9227SC845

(Filed 18 January 1994)

Master and Servant § 87 (NCI3d)— workers' compensation—compensable accident—employer's showing of accidental injury—burden on injured employee to show tortious conduct

If defendant uses its pleadings and supporting materials to negate an essential element of a *Woodson* claim, *i.e.*, to show that the injury was solely accidental, then the burden shifts to plaintiff and plaintiff will be required to produce a forecast of evidence to show that the injury is also due to the tortious conduct of the employer. In this case, plaintiff failed to produce supporting affidavits or any supporting materials as evidence to support her claim that her injury resulted from tortious conduct by defendant employer, and summary judgment was therefore properly entered for defendant.

Am Jur 2d, Workers' Compensation §§ 566, 569, 593, 709.

Judge WYNN dissenting.

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-appellant.

Alala, Mullen, Holland & Cooper, P. A., by H. Randolph Sumner and Jesse V. Bone, Jr., for defendant-appellee.

JOHNSON, Judge.

This court filed its decision in *Owens v. W. K. Deal Printing, Inc.*, 111 N.C. App. 900, 433 S.E.2d 793 (1993) on 7 September 1993. Plaintiff timely petitioned for rehearing on the matter and we granted this petition.

We now revisit the pertinent facts: On 15 December 1988, plaintiff Valleree L. Owens, suffered an 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 Commission) 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 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 motion for 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, *disc. review 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).

Here, the trial judge made findings of fact in this case and concluded as a matter of law that the release agreement signed by plaintiff barred an additional monetary recovery from defendant. "A trial judge is not required to make findings of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal." *Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147, *disc. review denied*, 295 N.C. 467, 246 S.E.2d 9 (1979). Therefore, upon review of this case, we will consider only the pleadings, affidavits

and supporting materials of the parties in our determination of whether a genuine issue of fact has been presented by plaintiff.

Plaintiff in this action filed a complaint alleging rights as set out in *Woodson*, 329 N.C. 330, 407 S.E.2d 222. In order to fully understand plaintiff's allegations, we consider the *Woodson* holding.

Woodson, 329 N.C. 330, 407 S.E.2d 222, involved a wrongful death action arising from a work-related cave-in which killed Thomas Alfred Sprouse. The plaintiff in the 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 appeal, the Court of Appeals affirmed the decision of the trial court. Upon review of the matter, the Supreme Court opined that:

> [i]f Sprouse's death can only be considered accidental, defendants' summary judgment motions were properly allowed because Sprouse's death would fall within the Act's exclusive coverage, and no other remedies than those provided in the Act are available to plaintiff either against his employer or a co-worker. On the other hand, if the forecast of evidence is sufficient to show that Sprouse's death was the result of an intentional tort committed by his employer, then summary judgment was improperly allowed on the ground stated, because the employer's intentional tort will support a civil action. (Citations omitted.)

Woodson, 329 N.C. at 337, 407 S.E.2d at 226.

From the outset we note that plaintiff's injury occurred before *Woodson* was filed; however, *Woodson* is to be applied retroactively. *Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, 416 S.E.2d 193, *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992). Therefore, we will consider this case according to the standard as set out in *Woodson*.

The Court in *Woodson* reasoned that:

> [f]rom the standpoint of the injured party, . . . an injury caused by the same conduct . . . [may be] both the result of an accident, giving rise to the remedies provided by the [Workers' Compensation] Act, and an intentional tort, making the exclusivity

> provision of the Act unavailable to bar a civil action. (Citations omitted.)

Woodson, 329 N.C. at 349, 407 S.E.2d at 233.

In the instant case, defendant, through his pleadings and supporting materials, showed that the injury to plaintiff was solely accidental. On 21 January 1992, defendant moved for dismissal of the case and supported his motion with his answer and a release agreement. Defendant stated in his answer that "plaintiff was operating the machine [sic] that she was not operating the machine pursuant to the instructions that were given her, or that she was not operating the machine in a safe and prudent manner; . . . and that plaintiff was operating the machine under the influence of prescription medication, and that these acts constitute a bar to recovery." In addition, the agreement stated that plaintiff suffered an injury by accident when she accidently applied a hydraulic weight before removing her hand. Based on defendant's answer and the clincher agreement which stated that the injury was accidental, the burden then shifted to plaintiff to present a forecast of evidence to support her claim that the injury was also the result of an intentional tort committed by defendant employer. Plaintiff failed to produce supporting affidavits or any supporting materials as evidence to support her claim that her injury resulted from tortious conduct by defendant employer. If the defendant moving for summary judgment successfully carries his/her burden of proof, the plaintiff may not rely upon the bare allegations of his/her complaint to establish a triable issue of fact. *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E.2d 865 (1971). Considering the materials submitted to the court, we find that plaintiff has failed to present a genuine issue of fact sufficient to support a civil action against the employer for an intentional tort.

We note at this point that this case does not stand for the proposition that once a plaintiff signs a release agreement to settle a workers' compensation claim that plaintiff is automatically precluded from recovering pursuant to *Woodson* or that plaintiff is automatically admitting the injury was solely accidental to the exclusion of a claim against an employer for tortious conduct. Instead, we hold that if defendant uses his/her pleadings and supporting materials to negate an essential element of a *Woodson* claim, i.e., that the injury was solely accidental, *Id.*, 329 N.C. at 337, 407 S.E.2d at 226, then the burden shifts to plaintiff and plaintiff

will be required to produce a forecast of evidence to show that the injury is also due to the tortious conduct of the employer. *Dunleavy v. Yates*, 106 N.C. App. 146, 416 S.E.2d 193. These principles are basic principles of law pursuant to North Carolina General Statutes § 1A-1, Rule 56 (1991).

Since plaintiff's injury, based upon defendant's pleadings and supporting materials, can only be considered accidental, defendant's summary judgment motion was properly allowed and no other remedies other than those provided in the Act are available to plaintiff against her employer. *Woodson*, 329 N.C. at 337, 407 S.E.2d at 226. Consequently, plaintiff is limited to the amount received pursuant to the release agreement.

Accordingly, the decision of the trial court is affirmed.

Judge JOHN concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I respectfully dissent from the majority's holding that the trial court properly granted defendant's motion for summary judgment. I instead conclude that the release signed by plaintiff, by its own terms, does not bar her from pursuing her *Woodson* claim and that the trial court erred by entering summary judgment against plaintiff.

In her complaint, plaintiff alleged that in the course of her employment with defendant she was injured by defendant's hydraulic drill press and that defendant knew the machine was unsafe and dangerous but still ordered plaintiff to operate it. Defendant moved for summary judgment pleading the "Agreement for Final Compromise Settlement and Release," which plaintiff signed, as a bar to plaintiff's action.

In order to prevail on a summary judgment motion, the moving party must meet the burden of establishing the lack of a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party meets this burden by (1) proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party (2) cannot produce evidence to support an essen-

tial element of his or her claim, or (3) cannot surmount an affirmative defense which would bar the claim. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982). If the moving party fails to carry this burden, the opposing party does not have to respond and summary judgment should be denied. *Brown v. Fulford*, 311 N.C. 205, 316 S.E.2d 220 (1984); *Steel Creek Development Corp. v. James*, 300 N.C. 631, 268 S.E.2d 205 (1980).

A release executed by an injured party based on valuable consideration is generally a complete defense to an action for damages for such injuries. *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (1993). What a release means depends upon the executing parties' intent which is determined from the language used, the parties' situation and the objectives they sought to accomplish. *McGladrey, Hendrickson & Pullen v. Syntek Finance Corp.*, 92 N.C. App. 708, 375 S.E.2d 689, *disc. rev. denied*, 324 N.C. 433, 379 S.E.2d 243 (1989). When the circumstances surrounding the execution of the release are not in dispute and its terms are free from ambiguity, its meaning is for the court to determine. *Miller*, 112 N.C. App. at 301, 435 S.E.2d at 542. "Where a written agreement is explicit, the court must so declare, irrespective of what either party thought the effect of the contract to be." *McNair v. Goodwin*, 262 N.C. 1, 8, 136 S.E.2d 218, 223 (1964).

In the instant case, the release states in pertinent part:

> NOW, THEREFORE, Loretta Owens, for and in consideration of the compensation payment herein recited and the medical benefits which shall be paid upon approval of the North Carolina Industrial Commission, the receipt of which is hereby acknowledged, does hereby remise, release and forever discharge the said W. K. Deal Printing, Inc. and Liberty Mutual Insurance Company of and from any and all and every manner of action and actions, cause or causes of action, suits, debts, dues and sums of money, judgments, demands and claims whatsoever, which against W. K. Deal Printing, Inc. and Liberty Mutual Insurance Company she ever had or may now have, or which her heirs, next of kin or personal representatives, or any other person whomsoever, hereafter can, shall or may have by reason *of or growing out of the terms and provisions of the North Carolina Workers' Compensation Act* on account of the alleged injury, which gives rise to this claim for compen-

> sation, and for any other disability or medical expenses sustained by her.

(Emphasis added).

By its own terms, the release only bars plaintiff from pursuing any action under the terms of the Workers' Compensation Act, N.C. Gen. Stat. § 97. The release does not bar plaintiff from pursuing a tort action. *Woodson v. Rowland* held that when an employer intentionally engages in conduct which the employer knew was substantially certain to cause injury, the employee may pursue a civil action against the employer. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). This conduct must be so egregious as to be tantamount to an intentional tort. *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993). The employee may also pursue any workers' compensation claims which arise from the same accident but is only entitled to one recovery. *Woodson*, 329 N.C. at 341, 407 S.E.2d at 228.

The release signed by plaintiff only addresses her claims under the Workers' Compensation Act and does not bar her from pursuing a *Woodson* tort action. Defendant thus failed to establish that it is entitled to judgment as a matter of law. Therefore the trial court erred in granting defendant's motion for summary judgment and this case must be reversed.

The majority's analysis is contrary to the Supreme Court's holding in *Woodson*. The majority reasons that because the release agreement states that plaintiff's injury was accidental, defendant has met its burden of proof and is entitled to summary judgment unless the plaintiff produces evidence her injury resulted from defendant's tortious conduct. In *Woodson*, however, the Supreme Court held that "accident" under the Workers' Compensation Act means " '(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause.' " *Woodson*, 329 N.C. at 348, 407 S.E.2d at 233 (quoting *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962)). The Court in *Woodson* then reasoned:

> From the standpoint of the injured party, an injury intentionally inflicted by another can nonetheless at the same time be an "unlooked for and untoward event . . . not expected or designed by the injured employee." *Harding*, 256 N.C. at

> 428, 124 S.E.2d at 110. It is, therefore, not inherently inconsistent to assert that an injury caused by the same conduct was both the result of an accident, giving rise to the remedies provided by the [Workers' Compensation] Act, and an intentional tort, making the exclusivity provision of the Act unavailable to bar a civil action.

Woodson, 329 N.C. at 349, 407 S.E.2d at 233.

Woodson clearly holds that a plaintiff's injury can be both an accident for the purposes of workers' compensation and the result of an intentional tort committed by the defendant employer. In the instant case, in order for defendant to prevail on its motion for summary judgment, it must negate plaintiff's allegation that its conduct was substantially certain to cause injury. *See Dunleavy v. Yates Construction Co., Inc.*, 106 N.C. App. 146, 416 S.E.2d 193, *disc. rev. denied*, 332 N.C. 343, 421 S.E.2d 146 (1992) (Summary judgment properly entered for the defendant when his forecast of evidence revealed his conduct did not manifest reckless disregard for the safety of the plaintiff nor did it amount to the intentional failure to carry out a duty of care owed to the plaintiff). Merely pleading the release signed by plaintiff is insufficient, since the release does not bar plaintiff from pursuing a tort action.

The majority concludes, however, that based upon the release and defendant's answer which alleged that plaintiff did not operate the hydraulic press properly, defendant had shifted the burden to plaintiff to produce evidence that her injury was the result of an intentional tort. Defendant's allegation stated:

> [A]t the time the Plaintiff was operating the machine that she was not operating the machine pursuant to the instructions that were given to her, or that she was not operating the machine in a safe and prudent manner; that in addition thereto, it is alleged upon information and belief that the Plaintiff was operating the machine under the influence of prescription medication, and that these acts constitute a bar to any recovery.

The nonmoving party does not bear the burden of coming forward with evidence in support of his claim, however, until the moving party has offered evidence which negates that claim. *Mace v. Bryant Constr. Corp.*, 48 N.C. App. 297, 269 S.E.2d 191 (1980); *Butler v. Berkeley*, 25 N.C. App. 325, 213 S.E.2d 571 (1975); *Whitely v. Cubberly*, 24 N.C. App. 204, 210 S.E.2d 289 (1974). Defendant's

unverified allegation, upon which the majority relies, is an allegation of contributory negligence. Contributory negligence is not a defense to an intentional tort. *Jenkins v. North Carolina Dept. of Motor Vehicles*, 244 N.C. 560, 94 S.E.2d 577 (1956). Therefore, I conclude that defendant did not shift the burden over to plaintiff to supply evidence in support of her claim and that the trial court's entry of summary judgment against plaintiff should be reversed. I respectfully dissent.

STATE OF NORTH CAROLINA v. DENNIS LEE OAKES

No. 9218SC1096

(Filed 18 January 1994)

1. Evidence and Witnesses § 1850 (NCI4th)— field test on counterfeit controlled substance—officer's testimony admissible

The trial court did not err in admitting testimony by an officer concerning the results of a field test which he conducted on the substance purchased from defendant, since the officer was qualified by training and experience to perform that test.

Am Jur 2d, Evidence § 826.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance. 76 ALR2d 354.

2. Criminal Law § 1054 (NCI4th)— sentencing hearing—continuance to obtain new habitual felon indictment—no error

The trial court did not err in continuing defendant's sentencing hearing after his conviction of sale and delivery of a counterfeit controlled substance in order to allow the State to obtain a new indictment alleging that he was an habitual felon.

Am Jur 2d, Criminal Law §§ 527 et seq.

3. Criminal Law § 1284 (NCI4th)— habitual felon indictment—judgment not entered on underlying felony—pending prosecution to which habitual felon indictment attaches

For the purpose of the habitual felon laws, until judgment was entered upon defendant's conviction of sale and delivery

of a counterfeit controlled substance, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could attach.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

4. **Criminal Law § 1280 (NCI4th)— habitual felon indictment quashed—new habitual felon indictment subsequent to trial on underlying felony—adequate notice to defendant**

There was no merit to defendant's contention that, to allow the State to obtain a new indictment alleging habitual felon status after he had been convicted of the underlying substantive felony but before he had been sentenced, violated the notice provisions of the Habitual Felon Statute, since the defective habitual felon indictment was nevertheless adequate to put defendant on notice that the State was seeking to prosecute defendant on the principal charge as a recidivist.

Am Jur 2d, Habitual Criminals and Subsequent Offenders § 18.

5. **Criminal Law § 1283 (NCI4th)— habitual felon indictment quashed—subsequent indictment prior to judgment on underlying felony—no double jeopardy**

Defendant's plea of former jeopardy was properly denied where an habitual felon indictment was quashed before defendant was placed on trial upon the charge that he was an habitual felon, and the subsequent indictment alleging defendant's status as an habitual felon was still part of, and ancillary to, the prosecution of defendant for the underlying felony, for which no judgment had been entered.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

Appeal by defendant from judgment entered 3 June 1992 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 14 September 1993.

On 14 October 1991 defendant was charged in a proper bill of indictment with the felony of sale and delivery of a counterfeit controlled substance. On 12 November 1991 defendant was indicted as an habitual felon. At trial before Judge Freeman and a jury,

the State offered evidence which tended to show that on 9 September 1991 the Greensboro police were conducting an undercover drug operation in Greensboro. Pursuant to this investigation, Officers W. J. Graves and Cindy Stachowski were patrolling southeast Greensboro in plain clothes and an unmarked car when they were approached by defendant and another individual asking "what we [the officers] wanted." Officer Graves asked defendant if he could buy some cocaine and defendant offered the officers a substance he represented to be crack cocaine. Officer Graves gave defendant a twenty dollar bill, the serial number of which had been previously recorded by the officers. After the purchase, the officers left the area and called for assistance in arresting the two men. At the time of defendant's arrest, he had in his possession the twenty dollar bill with the corresponding recorded serial number. Officer Graves conducted a "field test" of the substance defendant sold him and found that it tested negative as being cocaine based.

Defendant did not offer any evidence. On 1 April 1992, the jury found him guilty of the sale and delivery of a counterfeit controlled substance. After the verdict, and before the State presented evidence with respect to the habitual felon indictment, defendant moved to dismiss the indictment on the grounds that the indictment failed to allege the underlying felony with particularity. Judge Freeman granted the motion but deferred sentencing, at the State's request, on the sale and delivery conviction "until such time as the State prays judgment."

On 6 April 1992, the State obtained a new indictment charging defendant with being an habitual felon. Defendant moved to dismiss the new habitual felon indictment on the grounds that it failed to allege a pending, cognizable offense and that his prosecution as an habitual felon was barred by the prohibition against double jeopardy. The motion was denied; defendant pled guilty to being an habitual felon. The State prayed judgment and defendant was sentenced to imprisonment for a term of fifteen years as an habitual felon based on the underlying conviction for sale and delivery of a counterfeit controlled substance. Defendant's motion for appropriate relief on the same grounds as his earlier motion to dismiss was denied by Judge Thomas Ross without hearing. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jeffrey P. Gray, for the State.

Assistant Public Defender Mark E. Hayes for defendant-appellant.

MARTIN, Judge.

Defendant assigns error to rulings of the trial court admitting and excluding evidence at the trial of the underlying felony of sale and delivery of a counterfeit controlled substance. He also contends that the trial court erred when it continued the sentencing hearing in order that the State might obtain a new habitual felon indictment, and when it denied his motion to dismiss the second habitual felon indictment. We find no prejudicial error.

[1] By his first assignment of error defendant contends that the trial court erred when it admitted testimony by Officer Graves concerning the results of the field test which he conducted on the substance purchased from defendant. At trial, defendant did not specify the grounds for his objection to the testimony; his argument in this Court appears to be that the State did not establish a sufficient foundation for the test and did not offer evidence as to what substance defendant actually sold the officers. We overrule the assignment of error.

Before he was permitted to testify concerning the use of the field test kit, Officer Graves testified that he had previous training and experience in the use of the kit in the field. He placed part of the substance which he purchased from defendant inside the kit and determined that it did not contain the controlled substance cocaine. We conclude that Officer Graves was qualified by training and experience to perform that simple test and it was not error to admit his testimony. *See State v. Crowder*, 285 N.C. 42, 203 S.E.2d 38 (1974); *State v. Essick*, 67 N.C. App. 697, 314 S.E.2d 268 (1984). Since defendant represented that the substance was cocaine, the State was required to prove only that the substance which defendant sold the officers was not cocaine in order to establish a violation of G.S. § 90-95(a). *See* N.C. Gen. Stat. § 90-87(6)(b) (counterfeit controlled substance is any substance intentionally misrepresented as a controlled substance).

In his second assignment of error defendant contends that the trial court erred by excluding evidence during his counsel's

cross-examination of Officer W. T. Fox, one of the officers who arrested defendant. Specifically, defendant directs us to the following exchange:

> Q. And you—Dennis Oakes told you and Officer Williams that he didn't have anything to do with it, didn't he?
>
> A. I don't remember him making any statements.
>
> Q. Well, he told you that you had the wrong man, didn't he?
>
> MR. CARROLL: I object to that.
>
> THE COURT: Well, overruled—Well, no. You're talking about the defendant?
>
> MR. CARROLL: Yes, sir.
>
> THE COURT: Sustained.

Defendant argues that the trial court should have allowed this testimony into evidence as a present sense impression or excited utterance exception to the hearsay rule in accordance with G.S. § 8C-803(1) and (2). However, the record does not reveal what Officer Fox's answer would have been had he been permitted to answer. The burden is on defendant to show prejudicial error, *State v. Little*, 286 N.C. 185, 209 S.E.2d 749 (1974), and by failing to show how the witness would have answered, defendant has failed to show that he was prejudiced by the trial court's ruling. *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986). Moreover, the record does reflect that both Officer Williams and Officer Fox testified at other times in the trial that they did not remember defendant making any statement to them at the time of his arrest. Accordingly, this assignment of error is overruled.

[2] Defendant's third and fourth assignments of error are related. By his third assignment of error, defendant contends that the trial court erred in continuing the sentencing hearing after his conviction of sale and delivery of a counterfeit controlled substance in order to allow the State to obtain a new indictment alleging that he is an habitual felon. G.S. § 15A-1334(a) provides that "[e]ither the defendant or the State may, upon a showing which the judge determines to be good cause, obtain a continuance of the sentencing hearing." Thus, whether to allow a continuance of the sentencing hearing is addressed to the trial court's discretion. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986); *State v. Blandford*, 66

N.C. App. 348, 311 S.E.2d 338 (1984). " 'A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.' " *State v. Lane*, 39 N.C. App. 33, 38, 249 S.E.2d 449, 453 (1978), *quoting State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962).

G.S. § 14-7.1 *et seq.*, the Habitual Felons Act ("the Act"), declares that one who has been convicted of three felony offenses is an habitual felon. The Act requires that an indictment charging one as an habitual felon "be separate from the indictment charging him with the principal felony," G.S. § 14-7.3, and requires that the defendant be tried first for the principal felony. N.C. Gen. Stat. § 14-7.5. The habitual felon indictment may not be revealed to the jury until the jury finds that the defendant is guilty of the principal felony with which he is presently charged. *Id.* Because being an habitual felon is a status rather than a crime, the only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he allegedly committed while in that status. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977). Thus, whether defendant should be sentenced as an habitual felon was relevant to the sentencing proceeding for the offense of sale and delivery of a counterfeit controlled substance. Accordingly, if we conclude, upon consideration of defendant's final assignment of error, that the State could properly obtain a new indictment charging defendant with being an habitual felon, after the original habitual felon indictment had been quashed as defective, there was no abuse of the trial court's discretion in continuing the sentencing proceeding to allow the State an opportunity to do so.

By his final assignment of error, defendant alleges that the trial court erred in failing to dismiss the second habitual felon indictment. He argues first that the indictment was defective because it was not ancillary to a pending cognizable offense, since he had been found guilty of sale and delivery of a counterfeit controlled substance before the State obtained the second habitual felon indictment. Second, he argues that the prohibition against double jeopardy barred his prosecution under the second habitual felon indictment. We are not persuaded by either argument.

[3] We first address defendant's contention that the second indictment was improper because there was no cognizable offense pending against him when the indictment was returned by the grand jury. Our Supreme Court has held that:

> [T]he proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the 'principal,' or substantive, felony. The act does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon.

Allen, 292 N.C. at 433-34, 233 S.E.2d at 587. The importance of indicting defendant as an habitual felon prior to entry of a plea or conviction on the present, substantive crime is so that defendant has notice that he is to be charged as a recidivist before pleading to the substantive felony, thereby eliminating the possibility that he will enter a guilty plea without a full understanding of the possible consequences of conviction. *Id.; State v. Winstead*, 78 N.C. App. 180, 336 S.E.2d 721 (1985).

The Habitual Felons Act contemplates the following procedure generally described in 40 N.Y.U. L. Rev. at 334 and cited with approval by the *Allen* Court:

> Before the trial and in the absence of the jury, both parts of the indictment are read to the defendant, at which time he must plead to the charge of the present crime. If he pleads not guilty to the present offense and proceeds to trial, at the trial there can be no mention to the jury of the prior convictions. If and when the jury returns a verdict of guilty, the second part of the indictment is again read to the defendant, at which time he must plead to the recidivist allegation. If he admits the prior convictions, he is sentenced in accordance with the recidivist statute. If he denies them, he is entitled to a jury trial on the issue of prior convictions.

Allen, 292 N.C. at 434, 233 S.E.2d at 587-88. Accordingly, the *Allen* Court held that the Act did not authorize an habitual felon proceeding when the habitual felon indictment was returned after "all the proceedings by which he [defendant] had been found guilty of the underlying substantive felonies had been concluded," because "there was no pending felony prosecution to which the habitual felon proceeding could attach as an ancillary proceeding." *Id.* at

432, 436, 233 S.E.2d at 586, 589. However, in *Allen*, the defendant had entered his plea to the underlying felony, had been convicted, and had been *sentenced* before the State obtained the indictment charging habitual felon status. Thus, the underlying felony had been "prosecuted to completion," before the habitual felon indictment was returned, leaving no pending felony prosecution to which the habitual felon charge could attach. In the present case, there had been no entry of judgment or sentence as to the substantive underlying felony, sale and delivery of a counterfeit controlled substance. The sentencing phase of a criminal prosecution constitutes a significant component of the prosecutorial process. Thus, we hold that for the purpose of our habitual felon laws, until judgment was entered upon defendant's conviction of sale and delivery of a counterfeit controlled substance, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could attach.

[4] Defendant contends, however, that to allow the State to obtain a new indictment alleging habitual felon status, after he had been convicted of the underlying substantive felony, violates the purpose of the provisions of the Act requiring two indictments, i.e., "to provide notice to defendant that he is being prosecuted *as a recidivist.*" *Allen*, 292 N.C. at 436, 233 S.E.2d at 588. We disagree. At the time defendant entered his plea to the underlying substantive felony and proceeded to trial, there was pending against him an habitual felon indictment presumed valid by virtue of its "return by the grand jury as a true bill." *State v. Mitchell*, 260 N.C. 235, 238, 132 S.E.2d 481, 482 (1963). This indictment sufficiently notified defendant that the State was seeking to prosecute him as a recidivist. It is of no consequence that the trial court subsequently determined that the habitual felon indictment was defective. It is well established that where an indictment is quashed as fatally defective, the defendant is subject to prosecution on a new indictment. *State v. Miller*, 231 N.C. 419, 57 S.E.2d 392 (1950); *State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492 (1984), *cert. denied*, 311 N.C. 767, 319 S.E.2d 284, *appeal dismissed*, 469 U.S. 1101, 83 L.Ed.2d 766 (1985). As *Allen* makes clear, the critical issue is whether defendant had notice of the allegation of habitual felon status at the time of his plea to the underlying substantive felony charge. Here, the defect in the initial habitual felon indictment was technical and was not such as to deprive defendant, when entering his plea to

the substantive charge, of notice and understanding that the State was seeking to prosecute him on that charge as a recidivist.

[5] Defendant's second argument under his final assignment of error is that the trial court should have dismissed the second habitual felon indictment because he was protected from prosecution by constitutional prohibitions against being twice put in jeopardy for the same offense. "Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been impanelled and sworn." *State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977). A defendant is not subjected to double jeopardy when an insufficient indictment is quashed, and he is subsequently put to trial on a second, sufficient indictment. *State v. Coleman*, 253 N.C. 799, 117 S.E.2d 742 (1961).

G.S. § 14-7.5 provides that after a defendant has been tried and convicted of the underlying substantive felony, the habitual felon indictment may be presented to the same jury. There is no requirement, however, that the same jury hear both issues. In fact, the habitual felon indictment may not be revealed to the jury unless the jury finds defendant guilty of the principal felony. *State v. Keyes*, 56 N.C. App. 75, 286 S.E.2d 861 (1982); *Allen, supra*. Although the habitual felon indictment in the present case was joined for trial with the underlying charge of sale and delivery of a counterfeit controlled substance, the indictment was quashed before defendant was placed on trial upon the charge that he was an habitual felon. The subsequent indictment alleging defendant's status as an habitual felon was still part of, and ancillary to, the prosecution of defendant for the underlying felony, for which no judgment had been entered. Accordingly, defendant's plea of former jeopardy was properly denied.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges WELLS and LEWIS concur.

NESBIT A. KING, JR., AS ADMINISTRATOR OF THE ESTATE OF HIS DECEASED WIFE, SHERRI SPARROW KING, PLAINTIFF v. DURHAM COUNTY MENTAL HEALTH DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE AUTHORITY, LUTHERAN FAMILY SERVICES IN THE CAROLINAS, MOHAMMED THOMPSON, CARLOS NICHOLS, AND DURHAM COMMUNITY GUIDANCE CLINIC FOR CHILDREN AND YOUTH, INC., DEFENDANTS

No. 9214SC1337

(Filed 18 January 1994)

Negligence § 95 (NCI4th)— murder by Willie M. class member— no liability of service providers

In an action to recover for the wrongful death of plaintiff's intestate who was shot to death during a robbery by a seventeen year old who had been certified as a "Willie M." class member, defendants, who evaluated and provided services including residential treatment for Willie M. class members, were entitled to judgment as a matter of law where there was no dispute that defendants were aware of the killer's propensity for violence, but there was no evidence of a court order requiring his participation in the Willie M. program and his participation was thus voluntary, and none of the defendants therefore had custody of the killer or the ability or right to control him, and, accordingly, they could not be held liable for his conduct when he killed plaintiff's intestate.

Am Jur 2d, Negligence §§ 21, 458 et seq.

Appeal by plaintiff from orders entered 14 May 1992, 14 July 1992, and 22 July 1992 in Durham County Superior Court by Judge A. Leon Stanback, Jr. Heard in the Court of Appeals 16 November 1993.

Patton, Boggs & Blow, by Kenneth J. Gumbiner and Julie A. Davis, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Timothy P. Lehan, for defendant-appellee Durham County Mental Health Developmental Disabilities and Substance Abuse Authority.

Cranfill, Sumner & Hartzog, by H. Lee Evans, Jr. and Kari Lynn Russwurm, for defendant-appellee Lutheran Family Services.

Faison & Fletcher, by O. William Faison and Selina S. Nomeir, for defendant-appellee Durham Community Guidance Clinic for Children and Youth, Inc.

GREENE, Judge.

Nesbit A. King, Jr. (plaintiff), as Administrator of the Estate of his deceased wife, Sherri Sparrow King, appeals from the dismissal of his complaint filed in the superior court against Durham County Mental Health Developmental Disabilities and Substance Abuse Authority (Durham Mental Health), Lutheran Family Services in the Carolinas (Lutheran Services), and Durham Community Guidance Clinic for Children and Youth, Inc. (Guidance Clinic). The plaintiff's action against Mohammed Thompson (Thompson) and Carlos Nichols (Nichols) has not been dismissed.

The complaint alleged that on 27 February 1990, Sherri Sparrow King was shot to death by Thompson and Nichols in the course of a robbery of a convenience store located in Person County. Thompson, who was seventeen years old at the time of the murder, had a history of drug abuse and violent crime and, after his certification as a Willie M. class member in the spring of 1988, had been transferred from a state training school to Triangle House in Durham County. Triangle House, operated by Lutheran Services under contract with Durham Mental Health, was a "high management facility" which provided residential treatment to Willie M. class members. A Willie M. class member is a minor "having serious emotional, mental or neurological handicaps accompanied by violent or assaultive behavior." Durham Mental Health, which had waived its governmental immunity by purchasing liability insurance, coordinated the administration of services to Willie M. class members in Durham County and was responsible for providing secure facilities. Lutheran Services was responsible for providing evaluation and treatment to the residents of Triangle House and providing facilities "equipped to prevent residents from escaping and posing a threat to the community." Guidance Clinic contracted with Durham Mental Health to provide psychological testing, evaluation, and treatment to the residents of Triangle House. In January 1990, Thompson was transferred from Triangle House to a drug rehabilitation center.

"Before completing treatment . . . he returned to Triangle House, still with a drug dependence problem. Upon his return, Thompson was required to stay at the facility at all times in order to prevent his continued abuse of drugs. The possibility of his escape posed a clear and present danger to the general public." After his return to Triangle House, neither Durham Mental Health, Guidance Clinic, nor Lutheran Services initiated any evaluations of Thompson to determine the risk to the community. In mid-January 1990, Thompson left Triangle House through a door left unlocked "in violation of the facility's rules." In violation of regulations, Lutheran Services, Durham Mental Health, and Guidance Clinic failed to inform the police that Thompson had left Triangle House and failed to return Thompson to the facility.

The complaint also alleges that the defendants' failure to evaluate Thompson, the failure to provide a secure facility, and the failure to seek his return after he left Triangle House was "gross negligence" and that because of Thompson's history of drug abuse, violence, and other unlawful activity, it was reasonably foreseeable that his escape could lead to armed robbery and murder.

Durham Mental Health and Lutheran Services moved to dismiss the complaint on the bases of Rules 12(b)(1) and 12(b)(6). Guidance Clinic moved to dismiss on the basis of Rule 12(b)(6). At the hearing on the motions various documents were presented to the trial court including the following: (1) a performance audit report, dated March 1991, from the Office of the State Auditor which reveals that the State of North Carolina entered into a federal court consent decree in 1980 agreeing that the Department of Human Resources and the Department of Public Instruction would provide Willie M. class members with "the medical treatment, education, training and care which was suited to each child's individual needs." "In lieu of developing a new system of services throughout the State, the [State of North Carolina] chose to use local independent area mental health programs and educational agencies to provide the needed services to class members." A complete system of services was mandated, "ranging from a highly restrictive treatment environment (such as a locked residential facility or a high management group home) to the least restrictive setting (such as independent apartment living and outpatient treatment services)"; (2) a report, dated October 1990, and titled "The Willie M. Program" prepared by the North Carolina Department of Human Resources and the North Carolina Department of Public Instruction which reveals that

although the Willie M. Program operation must "conform to state regulations, state supervision, and must meet the standards defined by the state," its operation is the ultimate responsibility of the local mental health boards; (3) a Mental Health Study Commission report, dated 28 February 1991, which states that the "[u]ltimate responsibility for serving Willie M. class members has been fixed at the state level. The State has designated the local mental health program as the lead agency for ensuring that its obligations to class members are met"; (4) a document entitled "Criteria for Certification as a Class Member" which states that to meet the behavioral criteria for certification as a Willie M. child, there must be evidence of one of the following:

> [a] physical attacks against other persons, with or without weapons
>
> [b] physical attacks against property, including burning
>
> [c] physical attacks against animals
>
> [d] self abusive or injurious behavior, including suicide attempts
>
> [e] threatened attack with a deadly weapon
>
> [f] forcible sexual attacks;

(5) a section from the Willie M. Manual which describes a high management home as one providing "treatment in a highly structured community residential setting to children with moderate to severe behavior problems, mental retardation, or other handicaps." "These group homes are not locked, but they do have 24-hour awake staff, and security precautions are taken"; (6) a portion of the second set of stipulations entered into in the federal Willie M. case, which in relevant part states that each Willie M. child is to be provided with the least restrictive living condition appropriate for that child. "Among the factors to be considered in determining the least restrictive living conditions . . . are the need to minimize the possibility of harm to the individual and society"; and (7) a document entitled "The Willie M. Lawsuit," prepared by the North Carolina Department of Human Resources and dated "Fall, 1988." This document states in part that the plan of treatment for each Willie M. certified child "should . . . respond to the [federal] court's mandate to ensure the safety of the community." This document further states that although the State is "obligated to provide appropriate services to all members of the [Willie M.] class[,]

. . . [it is] accepted that there may be times when the [State] will be unable to fulfill [its] obligations to some class members." For example, when the "parent or non-agency guardian, or the child himself, refuses for the certified Willie M. class member to receive services or participate in services called for in the child's Individual Habilitation Plan."

The trial court determined that the complaint against Guidance Clinic presented an "insurmountable bar to recovery" and dismissed this complaint pursuant to Rule 12(b)(6). The trial court determined that it "lacked subject matter jurisdiction over the dispute" and dismissed, pursuant to Rule 12(b)(1), the complaint against Durham Mental Health and Lutheran Services. In the alternative, the trial court dismissed the complaint pursuant to Rule 12(b)(6).

The dispositive issue is whether, on this record, any of the defendants had a duty to Sherri Sparrow King.

We note initially that "matters outside the pleadings [were] presented to and not excluded by the [trial] court," thereby converting defendants' motions to dismiss pursuant to Rule 12(b)(6) into Rule 56 motions for summary judgment, and we review the motions accordingly. *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979). Thus, the question is whether there are genuine issues of material fact and if not, whether defendants are entitled to judgment as a matter of law. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 650, 407 S.E.2d 178, 181 (1991).

The general rule is that there "is no duty to protect others against harm from third persons." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 56, at 385 (5th ed. 1984) [hereinafter *Prosser and Keeton*]; Restatement (Second) of Torts § 315 (1965); *see Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991). An exception to this general rule is recognized when a special relationship exists between parties. *Prosser and Keeton* § 56, at 383-85; Restatement (Second) of Torts § 315; 3 Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray, *The Law of Torts* § 18.7, at 734 (1986) [hereinafter *Harper, James, and Gray*]; *Dudley v. Offender Aid and Restoration of Richmond, Inc.*, 401 S.E.2d 878, 881 (Va. 1991); *see Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 902; Note, *Torts—Duty to Control Others*, 19 La. L. Rev. 228, 229 (1958). In such event, there is a duty "upon the actor to control the third person's conduct," Restatement (Second)

of Torts § 315(a), and "to guard other persons against his dangerous propensities." *Prosser and Keeton* § 56, at 383. Some examples of such recognized special relationships include: (1) parent-child, Restatement (Second) of Torts § 316; *Prosser and Keeton* § 56, at 384; *Moore v. Crumpton*, 55 N.C. App. 398, 403-04, 285 S.E.2d 842, 845, *modified*, 306 N.C. 618, 295 S.E.2d 436 (1982); (2) master-servant, Restatement (Second) of Torts § 317; *Prosser and Keeton* § 56, at 384; *Harper, James, and Gray* § 18.7, at 738-39; *Vaughn v. Department of Human Resources*, 296 N.C. 683, 686, 252 S.E.2d 792, 795 (1979); (3) landowner-licensee, Restatement (Second) of Torts § 318; (4) custodian-prisoner, Restatement (Second) of Torts § 319; *Hull v. Oldham*, 104 N.C. App. 29, 38, 407 S.E.2d 611, 616, *disc. rev. denied*, 330 N.C. 441, 412 S.E.2d 72 (1991); *see Dudley*, 401 S.E.2d at 881-82; and (5) institution-involuntarily committed mental patient, Restatement (Second) of Torts § 319; *Prosser and Keeton* § 56, at 384; *Pangburn v. Saad*, 73 N.C. App. 336, 347-48, 326 S.E.2d 365, 372-73 (1985), *see Semler v. Psychiatric Institute*, 538 F.2d 121, 125 (4th Cir.), *cert. denied*, 429 U.S. 827, 50 L. Ed. 2d 90 (1976); *Currie v. United States*, 836 F.2d 209, 212 (4th Cir. 1987). In each example, "the chief factors justifying imposition of liability are 1) the ability to control the person and 2) knowledge of the person's propensity for violence." *Abernathy v. United States*, 773 F.2d 184, 189 (8th Cir. 1985); *see O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 186, 352 S.E.2d 267, 272-73 (1987) (summary judgment for defendant-employer affirmed where employer had no "custodial" duty to control prison work release employee outside the scope of the employment); *Prosser and Keeton* § 56, at 383 (duty arises if relationship is "custodial").

In this case, there is no dispute that the defendants were aware of Thompson's propensity for violence. A Willie M. certified class member is by definition a violent person, and the defendants were charged with the responsibility of providing treatment especially designed for Willie M. children. The more difficult question is whether any of the defendants had custody of Thompson or the ability or right to control him.

Materials in this record establish that the State of North Carolina is obligated to provide appropriate services to every Willie M. certified class member in this state. The participation by the class member is voluntary, however, and, in the absence of a court order, cannot be mandated. Thus, although the defendants had an obligation to ensure the safety of the community, may have

had an obligation to report Thompson's absence from Triangle House to the police and an obligation to seek his return, because there is no evidence of a court order requiring his participation in the Willie M. program, they had no legal right to mandate his return to the facility. It cannot therefore be said that any of the defendants had custody of Thompson or that they had the ability or right to control him. *See Cantrell v. United States*, 735 F. Supp. 670, 673 (E.D.N.C. 1988) (voluntary commitment to mental institution did not confer control over patient). Accordingly, the defendants cannot be held liable for the conduct of Thompson on 27 February 1990 and are entitled to judgment as a matter of law. We need not therefore decide whether dismissal was also correct pursuant to Rule 12(b)(1).

Affirmed.

Judges MARTIN and JOHN concur.

STATE OF NORTH CAROLINA v. STONIE MAYNOR EASTMAN, DEFENDANT

No. 9210SC1210

(Filed 18 January 1994)

1. Public Officers and Employees § 39 (NCI4th)— Director of Cottage Life at Governor Morehead School—State employee—no officer of State—no conviction of failure to discharge duties

The Director of Cottage Life at the Governor Morehead School for the Blind was merely a State employee and not an official of the State and thus could not be convicted of the crime of failure to discharge duties under N.C.G.S. § 14-230 based on his failure to report alleged sexual abuse of a student where there was no evidence that he could exercise sovereign power at any time in the course of his employment, and there was no evidence that his position was created by statute, constitution, or delegation of state authority.

Am Jur 2d, Public Officers and Employees §§ 416 et seq.

2. Obstructing Justice § 15 (NCI4th)— investigation at Governor Morehead School—failure to show intentional concealment or destruction of evidence

In a prosecution of defendant for obstruction of justice, there was insufficient evidence of specific intent of the crime charged for the jury to conclude that defendant, Director of Cottage Life at the Governor Morehead School for the Blind, in fact intended to conceal or destroy evidence of an investigation of alleged sexual misconduct at the school; furthermore, the evidence presented by the State tended to show that defendant's failure to report to the Department of Social Services was merely compliance with the published policy of the school rather than an intentional election on defendant's part.

Am Jur 2d, Obstructing Justice §§ 108-110.

Appeal by defendant from judgment entered 5 June 1992 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 15 September 1993.

This case arises out of an incident involving Hannah Goodman, a thirteen-year-old student at the Governor Morehead School for the Blind. Hannah reported to one of her houseparents, Glenda McKeithan, that she was receiving coded love letters from a volunteer at the school, Jerry Hewlett. She gave Ms. McKeithan four pages of her diary and two letters to review. Ms. McKeithan determined that there had been some sort of sexual encounter between Hewlett and Hannah on trips between the student's home in Hickory and the school, and she reported the incident to the defendant, who at the time was the Director of Cottage Life at the Morehead School. Both Hannah and Ms. McKeithan met with the defendant and possession of the documents was turned over to him. He assured Ms. McKeithan that he would take care of the situation. Shortly thereafter, the defendant confronted Hewlett with the documents and banned him from the campus.

The defendant's supervisor, Cheryl Goodwin, was not notified of the incident until sometime in July 1991. She in turn reported it to Vernon Malone, the Superintendent of the Morehead School. At trial, Mr. Malone testified that it was the policy of the school for employees to report incidents of possible abuse or neglect to their immediate supervisor. He further testified that the decision to contact outside agencies required his approval.

Prior to the defendant's report to his supervisor, a State Bureau of Investigation inquiry was initiated looking into allegations involving another student at the school. During that investigation, agent Melanie Thomas was told of the incident involving Hannah Goodman. Agent Thomas subsequently interviewed the defendant on two occasions. The defendant told Agent Thomas that he believed an incident took place, and that the incident resulted in the confrontation with Mr. Hewlett. Agent Thomas requested that the defendant turn over the diary pages and the letters. He could not provide the diaries or letters to the agent and stated that they must have been lost in some way. The defendant also told Agent Thomas that he did not feel a crime had been committed, even though he also told her that he had told Hewlett that Goodman's parents might bring charges. The defendant further told Agent Thomas that he felt his responses to the incident were a "judgmental call."

On 15 October 1991, the defendant was charged with felonious obstruction of justice and of misdemeanor failure to discharge duties. Indictments were returned by the grand jury on 7 January 1992. Trial commenced on 1 June 1992. At the close of all the evidence, the jury returned verdicts of guilty on the charge of misdemeanor obstruction of justice and guilty of failure to discharge duties. From this verdict, the defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Grayson G. Kelley, for the State.

John T. Hall and L. Michael Dodd for defendant-appellant.

ORR, Judge.

The defendant in the instant case argues three issues on appeal. In his second and third assignments of error, he asserts that the trial court erred in denying the defendant's motions for appropriate relief to set aside the jury's verdict on the convictions of failure to discharge duties and obstruction of justice. We agree with these contentions and accordingly reverse the decision of the trial court and vacate the judgment against the defendant.

I.

Defendant argues that the trial court erred in denying his motion for appropriate relief, pursuant to N.C. Gen. Stat. § 15A-1411(a). A motion for appropriate relief allows "[r]elief from

errors committed in the trial division, or other post-trial relief." G.S. § 15A-1411(a) (1988). Such a motion must be made in writing unless it is made in open court, before the judge who presided at trial, before the end of the session if made in superior court and within ten days after entry of judgment. N.C. Gen. Stat. § 15A-1420(a)(1) (1988).

[1] The defendant's basic argument is that the State did not and could not show that he was an official of one of the State institutions within the meaning of the statute, since he was only an employee of the State. The argument continues that if he is not within the group of officials included in G.S. § 14-230, he cannot be convicted of that offense. We agree and therefore reverse the decision of the trial court.

N.C. Gen. Stat. § 14-230 states in pertinent part that:

> If any clerk of any court of record, sheriff, magistrate, county commissioner, county surveyor, coroner, treasurer, or *official of any of the State institutions*, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer . . . willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office . . . such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court.

(Emphasis added.) The essential elements of the crime are that 1) the defendant is an official of a state institution, rather than a state employee, and that 2) he willfully omitted, neglected or refused to discharge the duties of his office.

As a threshold question, we must define whether the position held by the defendant is an office within the meaning of the statute. The North Carolina Supreme Court distinguished state officers from employees in *State v. Hord*, 264 N.C. 149, 141 S.E.2d 241 (1965). In deciding that a police officer was an official within the meaning of the statute, the Court stated: "To constitute an office, as distinguished from employment, it is essential that the position

must have been created by the constitution or statutes of the sovereignty, or that the sovereign power shall have delegated to an inferior body the right to create the position in question." *Id.* at 155, 141 S.E.2d at 245. "An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power." *Id.* Thus, in the case at bar, the prosecution was required to offer proof that the defendant's employment was created by the constitution, statutory authority, or some delegation of sovereign power, and that the defendant exercised some portion of that sovereign power in the course of his duties.

The testimony at trial indicated that the defendant was the Director of Cottage Life, and was one of the three senior administrators at the school, supervising a number of paid staff and volunteers. Vernon Malone, Superintendent of the Morehead School at the time of the incidents, stated that the defendant was a state employee whose role in "caring for the students in the afternoons and in the evenings and getting them out in the morning was—a vital piece. There's no question about that. Very vital." He further testified that "[i]f it's something that happened in Cottage Life, then Mr. Eastman would have the responsibility."

However, Mr. Malone also testified that the defendant had no policy making position, although he had been an employee of the State for twenty-five years. His testimony indicated that the defendant was required to go through channels within the school in order to report alleged instances of abuse. Additionally, the school's 1988 policy statement required that "[t]he supervisor *shall* investigate any incident of alleged or suspected abuse and file a preliminary report with the superintendent within twenty-four (24) hours." (Emphasis in original.) Mr. Malone testified that, "I don't think that he [the defendant] would make the decision as to whether or not it [any alleged abuse] ought to be reported, no. Actually, the reporting or the soliciting of outside investigation would not take place or should not have taken place if the superintendent was not aware of that."

The State failed to show any instance where the defendant could exercise sovereign power at any time in the course of his employment. The State additionally failed to produce any evidence that the defendant's position was created by statute, constitution, or delegation of state authority. The evidence presented showed

that the defendant made decisions and "judgment calls" normally made by a senior staff member and that they were subject to review and approval by other personnel and by the superintendent of the school.

"On a defendant's motion for dismissal, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. . . . What constitutes substantial evidence is a question of law for the court." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citations omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* "To be 'substantial,' evidence must be existing and real, not just 'seeming or imaginary.' " *Id.* at 564, 411 S.E.2d at 595, quoting *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982).

We agree with the defendant that his motion for appropriate relief, pursuant to N.C. Gen. Stat. § 15A-1411, was improperly denied by the trial court. Our review of the record indicates that there was no substantial evidence presented to prove that the defendant was an officer of the state, and thus no evidence of one of the essential elements of the crime charged. The defendant, as a matter of law, could not be convicted of the crime of failure to discharge duties under G.S. § 14-230. Accordingly, we reverse the decision of the trial court and vacate the judgment on the conviction for failure to discharge duties.

II.

[2] The defendant also argues that the trial court erred in denying his motion for appropriate relief with respect to the charge of obstruction of justice. We find that, as a matter of law, there was insufficient evidence of specific intent of the crime charged for the jury to conclude that the defendant in fact intended to conceal or destroy evidence of the investigation at the Morehead School. We therefore vacate the judgment as to the charge of obstruction of justice.

Defendant was charged with common law obstruction of justice. The indictment read:

> [T]he defendant . . . did unlawfully, willfully and feloniously did with deceit and intent to defraud, and for a corrupt purpose commit the infamous offense of obstruction of justice by failing

> to report to the Director of the Department of Social Services of Wake County or any law enforcement agency that he had cause to believe that Hannah F. Goodman, . . . a juvenile under his supervision had been sexually abused and that the crime of taking indecent liberties with a minor had been committed against said juvenile, and furthermore after failing to report the matter he concealed and destroyed evidence, including paper writings, letters, and documents, that had been entrusted to him and were in his possession, and that he knew or should have known would have concerned this matter and would have assisted governmental authorities in the investigation of this matter.

At common law, it is an obstruction of justice to suppress, fabricate, or destroy physical evidence. *Wharton's Criminal Law* § 588 (14th ed. 1981). *Wharton* illustrates the elements of the crime by citing various states' statutory definitions. All these statutes reflect the common law principal that when a person, "believing that an official proceeding is pending or about to be instituted and acting without legal right or authority . . . alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its verity or availability in such proceeding", he is guilty of obstruction of justice. *Wharton, supra,* quoting Colo. Rev. Stat. § 18-8-610(1) and Conn. Gen. Stat. Ann. § 53a-155(a).

North Carolina's codified obstruction of justice offenses are found at N.C. Gen. Stat. § 14-221 through § 14-227. All of these offenses are specific intent crimes, requiring that the State present evidence that the defendant acted willfully or with purpose in committing the offense. Likewise, the common law offense charged in the case *sub judice* required that the State prove that the defendant willfully and with an intent to defraud destroyed the notes relating to Hannah Goodman, and that he willfully failed to report the incident to the Department of Social Services.

Our review of the record indicates that there was insufficient evidence presented for the jury to conclude that the documents had been intentionally destroyed by the defendant, or that they had been destroyed in order to obstruct a criminal investigation of the Morehead School. Further, the evidence presented by the State tended to show that the defendant's failure to report to the Department of Social Services was merely compliance with the published policy of the school rather than an intentional election

on the defendant's part. There was no evidence whatsoever that the defendant knew that an investigation was pending until he was interviewed by Officer Thomas.

In applying the rules regarding review of a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1411 as outlined in part I of this opinion, we find that even in reviewing the evidence in the light most favorable to the State, there was no substantial evidence presented which would enable the jury to conclude that the defendant *intended* to commit the crime of common law obstruction of justice. We therefore reverse the decision of the trial court and vacate the judgment as to the charge of obstruction of justice as well.

In light of the above disposition of the defendant's convictions, it is unnecessary to review defendant's first assignment of error regarding the trial court's denial of defendant's motion *in limine*.

The decision of the trial court is reversed and judgment against defendant vacated.

Judges EAGLES and GREENE concur.

BILLY DEAN BUCKNER, EMPLOYEE, PLAINTIFF/APPELLEE v. CITY OF ASHEVILLE, EMPLOYER, DEFENDANT/APPELLANT

BILLY DEAN BUCKNER, PLAINTIFF v. WAYNE FORTUNE HENSLEY AND DOES A THROUGH D AND CORPORATIONS ONE THROUGH FIVE, DEFENDANTS

CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, PLAINTIFF v. WAYNE FORTUNE HENSLEY, DEFENDANT

No. 9210IC1167

(Filed 18 January 1994)

1. **Master and Servant § 89.4 (NCI3d)— employer-employee settlement with tortfeasor—distribution of proceeds—jurisdiction in Industrial Commission—no jurisdiction of trial court**

Pursuant to N.C.G.S. § 97-10.2, the trial court did not have jurisdiction to distribute the proceeds of an employer-

employee settlement with a tortfeasor where the record did not reveal that, at the time the parties settled their claim with the tortfeasor, the case was pending on a trial calendar and a pretrial conference had been had, but the record did reveal that the settlement was sufficient to fully compensate the employer for monies paid to the employee pursuant to the Workers' Compensation Act.

Am Jur 2d, Workers' Compensation §§ 453, 454.

2. **Master and Servant § 89.4 (NCI3d)— employer-employee settlement with tortfeasor—distribution of proceeds—governing statute**

In distributing proceeds of an employer-employee settlement with a tortfeasor, the Industrial Commission was governed by N.C.G.S. § 97-10.2(f) and not (j), since the Commission did not "stand in the shoes of" the trial judge and have authority to make a distribution pursuant to subsection (j); the authority to distribute pursuant to that subsection is reserved for the trial court alone, and even if the trial court here had jurisdiction, it could not confer the authority of subsection (j) on the Commission; and the Commission's authority to allocate third party proceeds was limited to that stated in subsection (f), and estoppel was not given as a factor to be considered.

Am Jur 2d, Workers' Compensation §§ 453, 454.

3. **Insurance § 530 (NCI4th)— workers' compensation benefits paid—payment from employer's underinsured motorist carrier—employer's right to funds**

An employer who has paid workers' compensation benefits to its employee is entitled to a lien on the employer's underinsured motorist benefits received by the employee in an action by the employee against the tortfeasor.

Am Jur 2d, Automobile Insurance § 322.

4. **Master and Servant § 94.1 (NCI3d)— workers' compensation—employee's rehabilitation costs—employer's right to subrogation—insufficient findings**

The Industrial Commission erred in concluding that an employer was not entitled to monies paid for the employee's rehabilitation on the ground that there was no evidence that the particular services in question constituted medical treat-

ment or supplies as defined by N.C.G.S. § 97-25, since the Commission did not make the necessary findings to support its conclusion.

Am Jur 2d, Workers' Compensation §§ 453, 454.

Appeal by employer-defendant City of Asheville from Order for the Full Commission filed 4 August 1992. Heard in the Court of Appeals 19 October 1993.

James H. Toms & Associates, P.A., by James H. Toms and Christopher A. Bomba, for plaintiff/employee-appellee.

Nesbitt & Slawter, by William F. Slawter, and Assistant City Attorney Sarah Patterson Brison, for defendant/employer-appellant.

GREENE, Judge.

City of Asheville (the employer) timely appeals from an order of the Industrial Commission (the Commission) directing that $170,000 received from a settlement with Wayne Fortune Hensley (the tortfeasor) be distributed to Billy Dean Buckner (the employee).

The material facts underlying this appeal are that the employee, while working within the course and scope of his employment as a plumbing inspector for the employer, was injured in an automobile collision with the tortfeasor. The employee sustained substantial injuries as a consequence of the collision. On 24 April 1989, the employee and the employer executed an "Agreement of Final Compromise Settlement and Release" wherein the parties agreed that the employer would pay to the employee the lump sum of $44,000 in addition to $39,823.17 in medical bills previously paid by the employer on behalf of the employee and in addition to $29,358 in temporary total disability previously paid by the employer to the employee. The Commission approved the settlement in an order filed 28 June 1989.

On 11 August 1989, the employer filed a civil action against the tortfeasor and on 11 September 1989 the employee filed a civil action against the tortfeasor. These actions were consolidated on 29 November 1989. On 15 February 1990, the tortfeasor's liability insurance carrier, pursuant to N.C. Gen. Stat. § 20-279.21, paid into the Clerk of Superior Court its policy limit of $100,000. On 11 June 1990, both plaintiffs and the tortfeasor executed a consent

judgment, compromising all claims for the total sum of $170,000. The employer's underinsured motorist insurance carrier subsequently paid the sum of $70,000 into the Clerk of Superior Court. In the consent decree it was ordered that the "settlement funds be held by the Clerk pending further Order of this Court or receipt of an Order of Distribution from the North Carolina Industrial Commission." On 13 June 1990, the trial court conducted a hearing regarding the distribution of the $170,000 and entered an order which "referred [the matter] to the NC Industrial Commission for such action as they deem appropriate under the facts as they find them to be."

Subsequently, the Commission ordered that the employer "recover none of the . . . funds on deposit with the Buncombe County Clerk of Superior Court." In support of the order barring the employer from recovery, the Commission entered two separate conclusions of law: (1) that "the employer is estopped from asserting a claim of subrogation to third party funds due to its intentional deception of the Industrial Commission"; and (2) that "the . . . Commission may, standing in the shoes of the Superior Court Judge, . . . distribute the proceeds under N.C. Gen. Stat. Section 97-10.2(j), which allows the presiding judge to exercise complete discretion as to the division of the third party funds between the employee and the employer." The Commission further concluded that even if the employer were entitled to subrogation, it was not entitled to a claim to the $70,000 paid by the employer's underinsurance carrier. Finally, the Commission concluded that the employer was in no event entitled to subrogation "in regard to the $9,061.93 paid to International Rehabilitation Associates (IRA) since the employer failed to carry its burden of proving that services provided by IRA constituted medical treatment or supplies as defined in N.C. Gen. Stat. Section 97-25."

The issues are whether (I) the trial judge, who was requested pursuant to N.C. Gen. Stat. § 97-10.2(j) to distribute proceeds of a third party recovery between the employer and the employee, has jurisdiction to enter an order transferring the matter to the Commission; (II) the Commission is governed by N.C. Gen. Stat. § 97-10.2(j) or N.C. Gen. Stat. § 97-10.2(f); (III) the employer is entitled to subrogation for the $70,000 paid by its underinsurance carrier; and (IV) the employer is entitled to subrogation for the $9,061.93 paid for the employee's rehabilitation.

I

[1] The payor of benefits under the Workers' Compensation Act is generally entitled to reimbursement from the proceeds received from the third party tortfeasor. 2A Arthur Larson, *The Law of Workmen's Compensation* § 74.31(a), at 14-481 (1993). The amount of reimbursement, if any, and the method for seeking that reimbursement is determined by statute. In North Carolina, N.C. Gen. Stat. § 97-10.2 is the relevant statute, and on 13 June 1990, the date the trial court heard the motion for distribution, that statute read in pertinent part:

> (f) (1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> a. First to the payment of actual court costs taxed by judgment.
>
> b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of § 90 of this Chapter but shall not exceed one third of the amount obtained or recovered of the third party.
>
> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission.
>
> d. Fourth to the payment of any amount remaining to the employee or his personal representative.
>
> (2) The attorney fee paid under (f)(1) shall be paid by the employee and the employer in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof

and shall be deducted from such payments when distribution is made.

. . .

(j) In the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party when said action is pending on a trial calendar and the pretrial conference with the judge has been held, either party may apply to the resident superior court judge of the county in which the cause of action arose or the presiding judge before whom the cause of action is pending, for determination as to the amount to be paid to each by such third party tort-feasor. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division.

N.C.G.S. § 97-10.2 (1985).

Thus under the statute, the distribution issue can be decided in some instances by either the Commission or the trial court, with "a different standard for disbursement when the case is before the Superior Court than that for cases before the Industrial Commission." *Pollard v. Smith*, 90 N.C. App. 585, 588, 369 S.E.2d 84, 86 (1988), *rev'd on other grounds*, 324 N.C. 424, 378 S.E.2d 771 (1989). Under subsection (j), as it existed on 13 June 1990, the trial court had jurisdiction if: (1) the proceeds from the third party tortfeasor were "insufficient to compensate" the employer for compensation paid; or (2) if the employee and the third party tortfeasor had settled the employee's claim against the tortfeasor at a time when the action was "pending on a trial calendar and the pretrial conference with the judge [had] been held."[1] Otherwise, the Commission had exclusive jurisdiction to determine the distribution issue.

In this case the record does not reveal that, at the time the parties settled their claim with the tortfeasor on 11 June 1990, the case was pending on a trial calendar and that a pretrial con-

1. A 1991 amendment to subsection (j), effective 1 October 1991, removed the requirement that the settlement occur at a time when the case was calendared and after the pretrial conference.

ference had been held. The record does reveal that the settlement of $170,000 was sufficient to fully compensate the employer for monies paid to the employee pursuant to the Workers' Compensation Act. Thus on this record, the trial court did not have jurisdiction, on 13 June 1990, under the provisions of subsection (j) to distribute the $170,000. Exclusive jurisdiction was therefore in the Commission.

II

[2] Once the employee's request for an order of distribution was before the Commission, as it was in June of 1990, the authority of the Commission to distribute the proceeds of the employer-employee settlement with the tortfeasor was governed by subsection (f) as it then existed.[2] The Commission did not, as it suggests, stand "in the shoes" of the trial judge and have the authority to make a distribution pursuant to subsection (j). The authority to distribute pursuant to subsection (j) is reserved for the trial court alone, and even if the trial court had jurisdiction under this subsection, the trial court could not confer the authority of subsection (j) on the Commission.

Furthermore, we reject estoppel as a basis for denying an employer its statutory right to the distribution of third party proceeds. The Commission is not a court of general jurisdiction; its only jurisdiction being that "conferred upon it by statute." *Bryant v. Dougherty*, 267 N.C. 545, 548, 148 S.E.2d 548, 551 (1966). The Commission's authority to allocate third party proceeds is limited to that stated by the legislature in subsection (f) and estoppel is not given as a factor to be considered. If in fact the employer has committed some fraud or made some misrepresentation in the procurement of its settlement with the employee, the employee's remedy was to seek to have the agreement set aside under the provisions of N.C. Gen. Stat. § 97-17 (1985).

III

[3] This Court recently held that an employer who has paid workers' compensation benefits to its employee is entitled to a lien on the employee's underinsured motorist benefits received by the employee

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2. Subsection (f) was also amended in 1991, but the amendments were not significant, and even if the amended version applied to this case, the result would be no different.

in an action by the employee against the tortfeasor. *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 136, 392 S.E.2d 647, 650, *disc. rev. denied*, 327 N.C. 484, 396 S.E.2d 614 (1990). The Commission in this case concluded that *Ohio Casualty* was not applicable to the facts of this case because "we are faced with the proceeds of an *employer's* underinsured motorist policy." This distinction is unimportant. The employer in this case argues that if the employee's underinsured benefits are subject to distribution pursuant to N.C. Gen. Stat. § 97-10.2, it necessarily follows that the employer's underinsured benefits are subject to a subrogation claim by the employer. We agree.

The Commission further noted "in passing that the *Ohio Casualty* case fails to follow the clear majority result of courts in other states." Whether our opinion in *Ohio Casualty* is the majority view in this country is immaterial. It is the law of this state and until overruled by our Supreme Court or abrogated by the legislature, it is binding on the Commission.

IV

[4] N.C. Gen. Stat. § 97-10.2(f)(1)c provides that reimbursement may be had by the employer "for all benefits by way of compensation or medical compensation expense[s] paid" for the employee. A party claiming a right to reimbursement under this statute must show

> pursuant to N.C.G.S. 97-25, (1) that the treatment provided was in the form of medical treatment, surgical treatment, hospital treatment, nursing services, medicines, sick travel, rehabilitation services, or other treatment including medical and surgical supplies *and* (2) that the treatment provided was reasonably required for at least one of three purposes, namely, to effect a cure, give relief, or lessen the period of the plaintiff's disability.

Roberts v. ABR Associates, Inc., 101 N.C. App. 135, 142, 398 S.E.2d 917, 920 (1990) (emphasis in original). The Commission must make findings of fact regarding these matters. *Id.* In this case, as in *Roberts*, the Commission did not make the necessary findings and on remand the Commission will be required to make the necessary findings and enter a conclusion supported by the findings.

The order of the Commission is accordingly reversed and remanded to the Commission for entry of an order of distribution consistent with this opinion and N.C. Gen. Stat. § 97-10.2(f).

Reversed and remanded.

Judges MARTIN and JOHN concur.

ROBERT G. CRANE, PLAINTIFF v. MELVIN W. CALDWELL, DEFENDANT

No. 9225SC1312

(Filed 18 January 1994)

1. **Negligence § 51 (NCI4th)— plaintiff helping defendant with chores on defendant's property—plaintiff as invitee**

Evidence was sufficient to support a finding that plaintiff was an invitee upon defendant's premises where plaintiff was on defendant's property at the request of defendant; his purpose in entering upon defendant's property was to complete a series of tasks which were undertaken at defendant's request and were beneficial to defendant; plaintiff was injured while attempting to comply with these requests; plaintiff received no benefit from any of the services he performed for defendant; his gratuitous services were neither merely those of a social guest rendered as favors incidental to his social presence on defendant's property, nor those which one neighbor customarily performs for another in the ordinary course of friendly relations; and there was no indication from the evidence that plaintiff performed the services as a means of repaying some debt.

Am Jur 2d, Premises Liability §§ 87 et seq.

2. **Negligence § 147 (NCI4th)— slip and fall on steps—plaintiff not contributorily negligent as matter of law**

In an action to recover for injuries sustained by plaintiff invitee who slipped and fell on steps leading to defendant's boat dock, plaintiff was not contributorily negligent as a matter of law where there was no evidence that plaintiff considered the steps dangerous but took them instead of a safer

path; plaintiff testified that he did not know that the steps were wet and slippery; the steps were unlit where plaintiff slipped; and there was no evidence that plaintiff had ever used the steps at night or when they were wet.

Am Jur 2d, Premises Liability §§ 786, 790.

Premises liability: proceeding in the dark on outside steps or stairs as contributory negligence. 23 ALR3d 365.

Appeal by plaintiff from judgment entered 16 September 1992 by Judge Robert M. Burroughs in Catawba County Superior Court. Heard in the Court of Appeals 28 October 1993.

Plaintiff commenced this action to recover damages for injuries which he allegedly sustained when he slipped and fell on premises owned by defendant. At trial, plaintiff's evidence tended to show that he and defendant were neighbors in a lake front community. Defendant owned a boat which he kept at a dock in front of his home. Defendant did not own a boat trailer, so when he decided to remove his boat from the water, he sought plaintiff's assistance. Plaintiff owned a pickup truck and boat trailer which were suitable for removing defendant's boat from the water. Plaintiff agreed to assist defendant and thereafter removed defendant's boat from the water and towed it to plaintiff's house where defendant changed the oil in the boat's motor. Plaintiff then towed the boat to defendant's home where the boat remained throughout the following week while defendant performed additional maintenance on the boat.

When defendant decided to return the boat to the water, he again sought plaintiff's assistance. Plaintiff drove his pickup truck to defendant's home and connected it to the boat trailer. At defendant's request, plaintiff towed the boat to a service station so that defendant could refuel the boat, and then towed the boat to an access ramp and unloaded it into the water. Defendant then requested that plaintiff go to defendant's dock and move another boat from the boat slip so as to make room for defendant's boat.

Plaintiff testified that nightfall was approaching as he returned to defendant's home to move the other boat. Plaintiff walked to the end of defendant's driveway and began walking down a stairway leading to the dock. The stairway, constructed of railroad ties and brick, turned 60 degrees to the right as it approached the lake. A landing was positioned where the stairway turned to

the right. Although there were small lights placed at intervals along the entire length of the stairway, the light located closest to the landing was not functioning.

Plaintiff proceeded down the steps to the place where it turned to the right. As he stepped onto the landing, he slipped and fell backwards, breaking his leg in two places. Plaintiff testified that the place on the steps where he slipped was poorly lit, wet, and covered with slippery moss. Plaintiff was unaware that the steps were wet. Prior to slipping, plaintiff had no difficulty with his footing. He acknowledged on cross-examination that he had previously used defendant's stairway during daylight hours. Plaintiff considered the steps to be difficult to negotiate and that one needed to use caution when walking down the steps because of their irregularity. Plaintiff was aware that the steps were poorly lit. Plaintiff testified that immediately after he fell, defendant stated, "I know the steps are dangerous, they're poorly lit, and the moss is slippery when it's wet." On a later occasion, defendant told plaintiff that he "needed to do something about the steps because several people had fallen before[,]" and that he noticed it was dark where plaintiff fell.

Defendant, who was called as a witness by plaintiff, testified that plaintiff came to his home for the purpose of helping him and that plaintiff's assistance had been beneficial to him. Earlier in the day in question, defendant had watered his lawn with a sprinkler and water from the sprinkler may have fallen on the steps. Defendant knew that the steps were slippery when wet. Defendant had slipped on the steps on previous occasions as had defendant's girlfriend.

At the close of plaintiff's evidence, defendant moved for a directed verdict on the grounds that plaintiff had failed to present sufficient evidence of any breach of the applicable standard of care by defendant and, alternatively, that plaintiff was contributorily negligent as a matter of law. The trial court granted defendant's motion and plaintiff appealed.

Womble Carlyle Sandridge & Rice, by Jimmy H. Barnhill, for plaintiff-appellant.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by James F. Wood, III, for defendant-appellee.

MARTIN, Judge.

The sole question presented by this appeal is whether the trial court erred in granting defendant's motion for a directed verdict. Issues arising in negligence cases are ordinarily not susceptible to summary adjudication because it is generally for the jury to apply the apposite standard of care. *Taylor v. Walker*, 320 N.C. 729, 360 S.E.2d 796 (1987); *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979). A motion by the defendant for a directed verdict pursuant to G.S. § 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977). For the purpose of such a motion, the plaintiff's evidence must be taken as true and considered in the light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference which can be drawn therefrom. *Id.* The motion must be denied unless it appears as a matter of law that the plaintiff is not entitled to a recovery upon any view of the facts which the evidence reasonably tends to establish. *Id.*

Defendant based his motion for a directed verdict upon the alternative grounds that plaintiff was a licensee and that plaintiff was contributorily negligent as a matter of law. In reviewing the trial court's decision to grant a directed verdict, this Court's scope of review is limited to those grounds asserted by the moving party at the trial level. *Freese v. Smith*, 110 N.C. App. 28, 428 S.E.2d 841 (1993); *Southern Bell Telephone & Telegraph Co. v. West*, 100 N.C. App. 668, 397 S.E.2d 765 (1990), *affirmed*, 328 N.C. 566, 402 S.E.2d 409 (1991).

The standard of care which defendant owed to plaintiff depends upon whether plaintiff was on defendant's property as an invitee or a licensee. Where the plaintiff is an invitee, the property owner owes the plaintiff the duty to exercise ordinary care to keep his premises in a reasonably safe condition so as not to unnecessarily expose the plaintiff to danger, and to give warning of hidden conditions and dangers of which the owner has express or implied notice. *Mazzacco v. Purcell*, 303 N.C. 493, 279 S.E.2d 583 (1981); *Southern Railway Co. v. ADM Milling Co.*, 58 N.C. App. 667, 294 S.E.2d 750, *disc. review denied*, 307 N.C. 270, 299 S.E.2d 215 (1982). If the plaintiff is a licensee, the owner owes him a duty to refrain from doing the plaintiff willful injury and from wantonly and reckless-

ly exposing him to danger. *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E.2d 408 (1940); *DeHaven v. Hoskins*, 95 N.C. App. 397, 382 S.E.2d 856, *disc. review denied*, 325 N.C. 705, 388 S.E.2d 452 (1989). Our Supreme Court has described the difference between an invitee and a licensee as follows:

> The distinction between an invitee and a licensee is determined by the nature of the business bringing a person to the premises. A licensee is one who enters on the premises with the possessor's permission, express or implied, solely for his own purposes rather than the possessor's benefit. An invitee is a person who goes upon the premises in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself.

Mazzacco, 303 N.C. at 497, 279 S.E.2d at 586-87. A social guest in a person's home is a licensee. *Murrell v. Handley*, 245 N.C. 559, 96 S.E.2d 717 (1957). One's status does not change simply because he renders some minor incidental service for his host. *Id.* This Court, for example, has held that a social guest's status was not changed to that of an invitee merely because he was injured while unloading groceries into the defendant's house. *Beaver v. Lefler*, 8 N.C. App. 574, 174 S.E.2d 806 (1970). However, in *Mazzacco*, *supra*, the Supreme Court held that the plaintiff, who traveled from New Jersey to North Carolina to help his sister and her husband remove trees from their property was an invitee because the plaintiff's service was of direct and substantial benefit to the defendants in maintaining and improving their property.

[1] Plaintiff argues that the evidence in the present case, when viewed in the light most favorable to plaintiff, was sufficient to support a finding that he was an invitee upon defendant's premises. We agree. At the time of his injury, plaintiff was on defendant's property at the request of defendant. His purpose in entering upon defendant's property was to complete a series of tasks which were undertaken at defendant's request and were beneficial to defendant. He was injured while attempting to comply with these requests. Plaintiff received no benefit from any of the services he performed for defendant. His gratuitous services were neither merely those of a social guest rendered as favors incidental to his social presence on defendant's property, nor those which one neighbor customarily performs for another in the ordinary course of friendly relations. There was no indication from the evidence that plaintiff performed

the services as a means of repaying some previous debt. We are persuaded that this evidence was sufficient to permit a finding that plaintiff was on defendant's property as an invitee.

[2] We now consider whether plaintiff was contributorily negligent as a matter of law. There is no duty to warn of an obvious condition; when an invitee sees, or should see, an obstacle in his way, which is not hidden or concealed, and proceeds with full knowledge and awareness of the dangers posed thereby, there can be no recovery. *Wyrick v. K-Mart Apparel Fashions*, 93 N.C. App. 508, 378 S.E.2d 435 (1989). The law imposes a duty upon a person to use due care to protect himself from injury, and the degree of care should be commensurate with the danger to be avoided. "If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence." *Dunnevant v. R.R.*, 167 N.C. 232, 233, 83 S.E. 347, 348 (1914).

Defendant contends that plaintiff was contributorily negligent because he knowingly attempted to descend unlit steps which he considered dangerous. We disagree. While it is true that plaintiff testified that the steps were poorly lit, he did not testify that he considered the steps to be dangerous. Rather, he testified that he considered the steps difficult to negotiate because they were of irregular lengths and required a person using them to look where he was placing his feet. Moreover, plaintiff testified that he did not know that the steps were wet and slippery. Although there was evidence that it had rained earlier in the day, there was also evidence that this rainfall had evaporated and that the steps were wet due to defendant's prior use of a lawn sprinkler. Plaintiff was unaware of the stairway's wet condition which, according to his testimony, was not discernable upon visual inspection. Plaintiff testified that he had used the steps on several prior occasions, yet there was no evidence that he had used the steps at night or when they were wet. In addition, there was no evidence that plaintiff chose the more dangerous of two or more routes to defendant's boat dock.

The two cases cited by defendant as support for his contention that plaintiff was contributorily negligent as a matter of law are readily distinguishable from the present case. In *Gordon v. Sprott*, 231 N.C. 472, 57 S.E.2d 785 (1950), the plaintiff was injured when she slipped and fell in a darkened movie theater. The plaintiff

testified that she fell when she attempted to leave her balcony seat. However, the plaintiff further testified that she was fully aware of the flooring condition which caused her to fall and that she proceeded to negotiate the obstacle even though the theater was too dark to walk. Although plaintiff in the present case was aware that the stairway was poorly lit, there was no evidence that it was "too dark to walk." Additionally, plaintiff was not fully aware of the wet, slippery condition of the stairway which caused him to fall. In *Sheets v. Sessions*, 12 N.C. App. 283, 182 S.E.2d 873 (1971), the plaintiff was inspecting an apartment for the purpose of renting it when he fell, at nighttime, from the apartment's porch. The evidence showed that the plaintiff stepped onto the unfamiliar, unlit porch without turning on the readily accessible porch light. Thus, the plaintiff voluntarily chose the more dangerous of two available options. In the present case, there was no evidence that plaintiff possessed any means for improving the lighting condition of defendant's stairway. Thus, he did not choose the more dangerous of two or more options. For the foregoing reasons, we hold that the evidence does not establish plaintiff's contributory negligence as a matter of law and that this issue should have been resolved by the jury.

The directed verdict in favor of defendant is reversed and this case is remanded to the superior court for a new trial.

New trial.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. BILLY WILLIAMS CUMMINGS

No. 9220SC1306

(Filed 18 January 1994)

1. Searches and Seizures § 109 (NCI4th)— search warrant for defendant's residence—sufficiency of affidavit to support issuance of warrant

An affidavit contained sufficient information to establish probable cause for issuance of a warrant to search for drugs and drug paraphernalia, although defendant contended that

the affidavit falsely stated that one informant had given reliable information in the past about drug deals, where the affidavit stated that the officer applying for the search warrant had just arrived from a crime scene to which he had been taken by a confidential informant; the informant had told him exactly where he could find cocaine and had described defendant's procedure for retrieving cocaine when a buyer placed an order; the officer had instructed the informant to go and place an order from defendant, and as a result defendant's associate went down to a creek next to defendant's house to retrieve some cocaine from the hiding place; and a second informant from whom the officer had previously received information leading to arrests told the officer he had observed cocaine on defendant's premises within ninety-six hours and told the officer that additional quantities of cocaine were buried in the creek near defendant's residence.

Am Jur 2d, Searches and Seizures § 124.

2. Searches and Seizures § 58 (NCI4th)— search for drugs and drug paraphernalia—seizure of pornographic photos—no error

The trial court did not commit reversible error by denying defendant's motion to suppress photographs of various nude women seized during a search of defendant's residence under a valid search warrant for drugs and drug paraphernalia, since the officers could properly seize the photographs because they thought they could be connected to another crime involving pornography. N.C.G.S. § 15A-253.

Am Jur 2d, Searches and Seizures § 161.

3. Evidence and Witnesses § 1569 (NCI4th)— drug trial—admission of pornographic photos seized from defendant's residence—admission as harmless error

Although the trial court erred in allowing into evidence at defendant's drug trial certain pornographic photos seized from defendant's residence during a lawful search, the court's error was harmless because defendant failed to show that a different result would have likely ensued at trial had the evidence been excluded.

Am Jur 2d, Searches and Seizures § 113.

Appeal by defendant from judgments entered 22 July 1992 by Judge James M. Webb in Richmond County Superior Court. Heard in the Court of Appeals 28 September 1993.

Attorney General Michael F. Easley, by Assistant Attorney General David M. Parker, for the State.

George E. Crump, III, for defendant-appellant.

JOHNSON, Judge.

After a trial by jury in Richmond County Superior Court, defendant Billy Williams Cummings was convicted of trafficking in cocaine by possession, intentionally keeping and maintaining a dwelling house for the use or keeping of a controlled substance, and possession of drug paraphernalia. Judge James M. Webb sentenced defendant to fifteen years incarceration and fined defendant fifty thousand dollars ($50,000.00) on the trafficking conviction. The trial judge consolidated the paraphernalia and maintaining a dwelling house convictions for sentencing, and imposed a sentence of five years incarceration to begin at the end of the trafficking sentence.

Defendant filed a motion to suppress evidence and a *voir dire* hearing was conducted at the beginning of the trial on this matter. The State presented evidence tending to show the following: On 20 June 1991, a confidential informant (hereafter, CSI #1) contacted Captain Phillip E. Sweatt, Jr., of the Richmond County Sheriff's Department. CSI #1 told Sweatt that he had personally observed a quantity of cocaine at the residence of defendant and had also observed defendant conceal cocaine just off his property. CSI #1 offered to show Sweatt where defendant had concealed the cocaine. CSI #1 said that CSI #1 had personal knowledge of defendant's drug activity; defendant had given drugs to him and to other people. CSI #1 also told Sweatt that CSI #1 knew that defendant had gone out of state and obtained cocaine and that he had seen cocaine at defendant's residence within the past twenty-four hours.

Sweatt and another officer went with CSI #1 to defendant's residence. CSI #1 took the officers to the edge of a creek one hundred to one hundred and fifty feet from defendant's house. CSI #1 told Sweatt that the cocaine was on the other side of some bushes. Sweatt walked behind the bushes and found a blue Thermos (registered trademark) bottle. Inside were plastic vials containing what appeared to be cocaine. After finding this bottle,

Sweatt placed it back on the ground. CSI #1 had explained that the procedure for buying drugs from defendant was that CSI #1 or CSI #1's sister would call defendant to order cocaine. Once the call was placed to defendant, defendant would have an associate named Cauthen (also referred to as Fly) go out to the creek bank to retrieve some cocaine from the cache stored there. Sweatt told CSI #1 to go and make a phone call and order some cocaine from defendant. CSI #1 left and shortly thereafter, Cauthen came to the bank to retrieve the bottle. Cauthen crossed the creek, reached the bottle and opened it. Sweatt and the other officer then arrested Cauthen. A few minutes later, defendant came out of his house and called to Cauthen, "Fly, come on up with that sh--" Sweatt and the other officers proceeded to defendant's residence, placed him under arrest and secured the residence. Sweatt then went to obtain a search warrant for the residence.

In his application for a search warrant, Sweatt recounted the information given to him by CSI #1 who led him to the bottle and also recounted information given to him by a second informant (hereafter, CSI #2). CSI #2 told Sweatt that he had personal knowledge of defendant's drug activity. CSI #2 also stated that he had personally seen cocaine at defendant's residence within the past ninety-six hours. CSI #2 stated that the cocaine was bagged in one-fourth gram bags and that additional ounces of cocaine were in the residence and buried in the creek by the residence. Based on the information given to him by the informants, Sweatt obtained a search warrant.

After the trial judge heard evidence from both sides, he determined that the search warrant was issued upon probable cause and concluded that none of defendant's state or federal statutory or constitutional rights were violated in the search of the premises and the seizure of property therefrom. The court denied defendant's motion to suppress the evidence.

[1] On appeal, defendant argues that the trial court erred in failing to grant defendant's motion to suppress evidence seized pursuant to the search warrant in that the search warrant was based on false information contained in the application for the search warrant. Specifically, defendant contends that the application for the search warrant stated falsely that CSI #1 was a reliable informant who had given information in the past about drug deals. We find defendant's argument meritless.

In *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527 (1983), the U.S. Supreme Court refined the standard of review in cases where probable cause in search warrant applications is based upon an informant's tip. The Court opined:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. (Citations omitted.)

Id. at 238-39, 76 L.Ed.2d at 548.

In the instant case, the officer applying for the search warrant had just arrived from a crime scene to which he had been taken by CSI #1. CSI #1 had told him exactly where he could find cocaine and had described defendant's procedure for retrieving cocaine when a buyer placed an order. The officer had instructed CSI #1 to go and place an order from defendant, and as a result, defendant's associate had gone down to the creek to retrieve some cocaine from the hiding place. In addition, CSI #2, from whom the officer had previously received information leading to arrests, told the officer he had observed cocaine on defendant's premises within ninety-six hours, and told the officer that additional quantities of cocaine were buried in the creek near defendant's residence. "It is enough, for purposes of assessing probable cause, that '[c]orroboration through other sources of information reduced the chances of a reckless or prevaricating tale,' thus providing 'a substantial basis for crediting the hearsay.' " (Citation omitted.) *Gates*, 462 U.S. at 244-45, 76 L.Ed.2d at 552.

We find there was sufficient information in the affidavit to establish probable cause that illegal drug activity and drug paraphernalia would be found on the premises to be searched. As such, we find the trial court properly denied defendant's motion to suppress the evidence.

[2] Defendant argues that the trial court committed reversible error by denying defendant's motion to suppress photographs seized

during the search of defendant's residence under a search warrant. We disagree.

The Richmond County Sheriff's Department obtained a search warrant dated 20 June 1991 in order to search the residence of defendant. The search warrant and application for the search warrant described the property to be seized as cocaine, U.S. currency, drug paraphernalia, and drug records. Pursuant to the search warrant, the Richmond County Sheriff's Department conducted a search of the residence of defendant on 20 June 1991. Ninety-four photographs of women in various stages of dress and undress were seized during the search.

North Carolina General Statutes § 15A-253 (1988) provides "[i]f in the course of the search the officer inadvertently discovers items not specified in the warrant which are subject to seizure under G.S. 15A-242, he may also take possession of the items so discovered." Items subject to seizure under North Carolina General Statutes § 15A-242 (1988) are "item[s] . . . that . . . (4) constitute[ ] evidence of an offense[.]"

The United States Supreme Court, in *Horton v. California*, 496 U.S. 128, 110 L.Ed.2d 112 (1990), abolished the inadvertence requirement when the Court stated:

> It is . . . an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view; its incriminating character must also be "immediately apparent." . . . Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself. (Citations omitted.)

Id. at 136-37, 110 L.Ed.2d at 123.

Here, officers were at defendant's residence pursuant to a valid search warrant. While searching for the various items, the officers discovered ninety-four photographs of various nude women. The officers seized the photographs because the officers "understood pornography to be a crime." Because defendant was engaged in illegal activity, it is reasonable that the officers could conclude

that the large quantity of the photographs, showing women in various stages of dress and undress, could have been connected to pornography. As such, we find the photographs were properly seized under the plain view doctrine.

[3] Defendant also argues that the trial court committed reversible error in admitting certain photographs into evidence over defendant's objections. We agree that it was error to admit the photographs into evidence, but we find no prejudicial error.

North Carolina General Statutes § 8C-1, Rule 402 (1988) states that "all relevant evidence is admissible[.] . . . Evidence which is not relevant is not admissible." North Carolina General Statutes § 8C-1, Rule 403 (1988) states "[a]lthough 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." A decision to admit evidence rests in the discretion of the court upon consideration of the facts supporting relevancy. *State v. Wortham*, 80 N.C. App. 54, 341 S.E.2d 76 (1986), *modified on other grounds*, 318 N.C. 669, 351 S.E.2d 294 (1987).

The trial court allowed into evidence thirteen of the photographs seized from defendant's residence during execution of the search warrant. These photographs were pictures of Angie Cook, a witness who testified at trial, and three other women, who did not testify at trial. The State used the photographs of Angie Cook, while she testified, to corroborate her allegations that defendant used the photographs to blackmail her from testifying. The other photographs were admitted into evidence and were not used for any purpose during the trial.

We find that the trial court properly admitted the photographs of Angie Cook as the photographs were relevant to corroborate her testimony. However, we find that the trial court erred in admitting the other photographs as they were not relevant for corroboration or identification purposes. Although we have determined that admission of some of the photographs was erroneous, the error made by the trial court was harmless error because defendant failed to show that a different result would have likely ensued at trial had the evidence been excluded. *State v. Gappins*, 320 N.C. 64, 357 S.E.2d 654 (1987). The State presented overwhelming evidence on defendant's charges of trafficking cocaine by posses-

sion, maintaining a place to keep or sell controlled substances and possession of drug paraphernalia. The State's evidence tended to show that defendant controlled the cocaine found in the creek, that defendant was involved in selling cocaine from his house, and that defendant possessed items of obvious drug paraphernalia, some of which were found to have cocaine residue on them. As such, defendant is not entitled to a reversal on this assignment of error.

We find that defendant received a trial free of prejudicial error.

No error.

Judges COZORT and McCRODDEN concur.

PAULA LOWERY PUGH, PLAINTIFF v. LARRY SCOTT PUGH, FREDDIE GLENN PUGH, THELMA PUGH, PAUL CLIFTON AND SHIRLEY ALLEN, DEFENDANTS IN THE MATTER OF: APPEAL OF B. ERVIN BROWN II FROM DISCOVERY SANCTIONS ORDER

No. 9221SC1341

(Filed 18 January 1994)

1. **Discovery and Depositions § 62 (NCI4th)— evasive responses to discovery—absence of motion to compel—Rule 37(a)(3) sanctions not proper**

Although plaintiff's responses to discovery, through her attorney, were incomplete and evasive and thus constituted failure to answer, sanctions could not be imposed under Rule 37(a)(3) where defendants never filed a motion to compel but instead immediately filed a motion to dismiss. N.C.G.S. § 1A-1, Rule 37(a)(3).

Am Jur 2d, Depositions and Discovery §§ 373 et seq.

2. **Discovery and Depositions § 62 (NCI4th)— requests for production—failure to respond or object—Rule 37(d) sanctions**

Once plaintiff was served with requests for the production of tapes and transcripts of those tapes, she was required to respond or object within the time limits set forth in Rule

34. Where plaintiff, through her attorney, failed to exercise either of these options, defendants were entitled to move for the imposition of sanctions under Rule 37(d) for plaintiff's failure to produce the tapes or transcripts. N.C.G.S. § 1A-1, Rules 34 and 37(d).

Am Jur 2d, Depositions and Discovery §§ 373 et seq.

3. Discovery and Depositions § 62 (NCI4th)— failure to make discovery—tapes and transcripts in possession of attorneys—sanctions against current attorney

Where defendants requested that plaintiff produce tapes she made of her telephone conversations with defendants, plaintiff failed to produce the tapes because she had given them to her former attorney and no longer had them in her possession, and plaintiff's current attorney possessed copies of the transcripts of the tapes, the tapes and transcripts were within plaintiff's control and custody so that the trial court could impose sanctions under Rule 37(d) for plaintiff's failure to produce them. Furthermore, the trial court properly imposed the sanctions against plaintiff's current attorney where notice of plaintiff's deposition was served on plaintiff's attorney, and the attorney never informed plaintiff of the need to bring the tapes and transcripts to the deposition.

Am Jur 2d, Depositions and Discovery §§ 373 et seq.

Appeal by plaintiff's attorney, B. Ervin Brown II, from order entered 18 March 1991 by Judge Melzer A. Morgan, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 17 November 1993.

Moore and Brown, by David B. Puryear, Jr., for B. Ervin Brown, II.

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

LEWIS, Judge.

The facts of this appeal arise out of Paula Lowery Pugh's ("plaintiff") civil suit for abuse of process, malicious prosecution, conversion and assault and battery against her estranged husband, Larry Scott Pugh, and several of his business associates and family

members ("defendants"). Several of the defendants swore out criminal warrants against plaintiff for such things as trespass and communicating threats. To aid in her defense, plaintiff retained the services of High Point attorney Debra Irene Johnson ("Johnson"). On Johnson's advice, plaintiff recorded her telephone conversations with the defendants to document her allegations that they were attempting to force her out of the county. Plaintiff also alleged that these recordings contained evidence of criminal activity on the part of the defendants. Johnson was successful in helping plaintiff obtain a settlement with the defendants by which plaintiff agreed to move out of the county and defendants agreed to withdraw their criminal complaints. However, when plaintiff moved out of the county, the defendants reinstated their criminal warrants. Johnson closed her legal office and moved out of state. Prior to moving, Johnson contacted Attorney B. Ervin Brown, II ("Brown") and asked him if he would represent plaintiff in her dispute with the defendants. Brown agreed and has represented plaintiff at all times relevant to this appeal.

On 16 April 1990, counsel for the defendants served a notice of deposition on plaintiff and requested that she produce "all audio tapes, photographs, documents, letters, papers, charts, writings and other tangible things" which she intended to introduce at trial. At the deposition, plaintiff testified, under oath, that she did not have any copies of the tapes and that she had given all of those to her former attorney, Johnson. At no time during the deposition did counsel for the defendants ask whether or not Brown was in possession of the tapes or transcripts of the tapes.

When defendants were unable to obtain copies of the tapes from plaintiff, they then subpoenaed Johnson and requested that she produce the same items as had been requested from plaintiff. Johnson testified that plaintiff had given her the tapes, that she had made transcripts from the tapes and that she had delivered the transcripts to Brown. Johnson further testified that the tapes were still in her possession, but that she did not have them with her because they were in storage. When defendants' counsel asked if Johnson was going to produce the tapes, Brown interrupted and replied that the transcripts and tapes were prepared in anticipation of litigation and were covered by the work product doctrine.

Frustrated in their attempts to obtain copies of plaintiff's tapes, defendants filed a motion to dismiss, motion for sanctions

and motion for protective order on the day of the trial. At a hearing Judge Morgan concluded that plaintiff and Brown had violated Rule 26(e)(1), Rule 26(e)(2), Rule 37(a)(3) and Rule 37(d) without justification and sanctioned Brown $1,171.50. Brown filed a motion to reconsider and for relief from order, which the trial court denied. Brown has now appealed the sanctions and the denial of his motion to reconsider.

The substantive law governing discovery is contained in N.C.G.S. § 1A-1, Rules 26-36. However, it is Rule 37 which governs discovery sanctions and which puts teeth in the other rules. As this Court stated in *Green v. Maness*, 69 N.C. App. 292, 299, 316 S.E.2d 917, 922, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 922 (1984):

> Our courts and the federal courts have held consistently that the purpose and intent of [Rule 37] is to prevent a party who has discoverable information from making evasive, incomplete, or untimely responses to requests for discovery . . . . In addition to its inherent authority to regulate trial proceedings, the trial court has express authority under G.S. 1A-1, Rule 37, to impose sanctions on a party who balks at discovery requests.

Therefore, although the trial court found that Brown violated several discovery rules, we must first find a basis in Rule 37 to support the trial court's imposition of sanctions. Based on the trial court's order, the only portions of Rule 37 which are applicable are (a)(3) and (d).

[1] After reviewing the provisions of Rule 37(a)(3) we find that this section is insufficient to justify the imposition of sanctions in the present case. Rule 37(a)(3) provides that "[f]or purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer." Although it is clear that plaintiff's responses to discovery, through Brown, were incomplete and evasive, Rule 37(a) requires that a motion to compel be filed before sanctions can be awarded. *See* N.C.G.S. § 1A-1, Rule 37(a); G. Gray Wilson, *North Carolina Civil Procedure*, § 37-1 (1989). In this case, defendants never filed a motion to compel, but instead immediately filed a motion for dismissal. Accordingly, Rule 37(a) is not applicable to this case.

[2] Since subsection (a)(3) is insufficient to justify the imposition of sanctions in this case, we turn to the provisions of subsection

(d). Generally sanctions under Rule 37 are imposed only for the failure to comply with a court order. *Stilley v. Auto. Enters. of High Point, Inc.*, 55 N.C. App. 33, 284 S.E.2d 684 (1981), *disc. review denied*, 305 N.C. 307, 290 S.E.2d 708 (1982). Rule 37(d), however, expressly contemplates a limited number of circumstances where a court order is not required before sanctions can be imposed. *See First Citizens Bank & Trust Co. v. Powell*, 58 N.C. App. 229, 292 S.E.2d 731 (1982), *aff'd*, 307 N.C. 467, 298 S.E.2d 386 (1983) (per curiam) (Court order compelling discovery was not a prerequisite to entry of default judgment). Rule 37(d) provides in pertinent part:

> If a party . . . fails . . . (iii) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The application of Rule 37(d) is justified in this case because of plaintiff's failure to respond to defendants' request for production of documents and other tangible items. We find that plaintiff, through Brown, refused to respond to defendants' request for production of either the tapes or the transcripts of the tapes. There was no justification for this complete failure to respond to the discovery request and, accordingly, we affirm the trial court's award of sanctions against Brown.

Our appellate courts have yet to give a detailed analysis of Rule 37(d), but since the North Carolina version of Rule 37 is virtually identical to its federal counterpart, *see* W. Brian Howell, *Shuford North Carolina Civil Practice and Procedure* § 37-13 (4th ed. 1992), we have considered federal decisions and treatises. As stated previously, the only applicable part of Rule 37(d) is that dealing with whether plaintiff failed to respond to defendants' request for inspection. However, since Rule 37 is merely the enforcement mechanism, we must determine whether plaintiff violated the provisions of Rule 34, governing requests for production. Once

a party is served with requests for production, he must respond or object within the time limits set forth in Rule 34. *See* N.C.G.S. § 1A-1, Rule 34; *see also Badalamenti v. Dunham's, Inc.*, 896 F.2d 1359 (Fed. Cir.), *cert. denied*, 498 U.S. 851, 112 L. Ed. 2d 109 (1990). It is clear that plaintiff, through Brown, failed to exercise either of these options. Thus, defendants were entitled to move for imposition of sanctions under Rule 37(d). *See* 4A James W. Moore et al., *Moore's Federal Practice* ¶ 37.02[4] (2d ed. 1993). Brown's assertion of a work product privilege to the tapes and to the transcripts is insufficient to meet the requirements of Rule 34. If Brown thought that the tapes and the transcripts were privileged, he should have filed a written objection or sought a protective order. Brown's failure to do either of these can only be interpreted as a complete failure to answer the discovery request, entitling defendants to proceed under Rule 37(d).

[3] Having determined that defendants were able to proceed under Rule 37(d) without an order compelling discovery, we consider whether or not plaintiff, through Brown, was justified in failing to produce the requested documents. Brown has asserted, both on appeal and at the hearing below, that plaintiff's failure to respond was because she no longer had the transcripts or the tapes in her possession. During her deposition, plaintiff repeatedly said that she had given the tapes to Johnson and that she no longer had possession of them. Although plaintiff's statement that she no longer had possession of the tapes may have been technically correct, we find that the language of Rule 34 encompasses more than just actual possession.

Rule 34 provides that a party may obtain production of documents or other tangible items which are within the "possession, custody or control" of the other party. "The federal courts have universally held that documents are deemed to be within the possession, custody or control of a party for purposes of Rule 34 if the party has actual possession, custody or control of the materials or has the legal right to obtain the documents on demand." *Resolution Trust Corp. v. Deloitte & Touche*, 145 F.R.D. 108, 110 (D. Colo. 1992). Applying this test to the facts of this case, we find that plaintiff had control of the tapes because she originally made them and then gave them to Johnson for review. We also note that Brown, himself, had copies of the transcripts of the tapes and had reviewed these in preparing plaintiff's complaint in the underlying action. *See Pugh v. Pugh*, 111 N.C. App. 118, 431 S.E.2d

873 (1993). Clearly, the tapes and the transcripts, though not in plaintiff's actual possession, were within her control and custody, such that she could have obtained them from her attorney. *See Biben v. Card*, 119 F.R.D. 421, 425 (W.D. Mo. 1987) ("If the items were originally produced by the party or his agents, and then turned over to the attorney, they are considered under the party's control") (quoting *Hanson v. Gartland Steamship Co.*, 34 F.R.D. 493, 496 (N.D. Ohio (1964)). Any other result would encourage clients to hide otherwise discoverable items with their attorneys in an effort to frustrate discovery. Clearly, this was not contemplated by those drafting the Rules of Civil Procedure.

Sufficient facts exist to support the trial court's imposition of sanctions upon plaintiff. However, the trial court did not impose sanctions on plaintiff, but instead imposed sanctions on attorney Brown. After reviewing all the facts we find that the trial court was justified in so doing. At her deposition, plaintiff testified that she had not received notice that she was to bring anything with her to the deposition. A review of the record shows that the notice of plaintiff's deposition was actually sent to Brown's office and not to plaintiff. We can only assume that plaintiff was unaware that she needed to bring the tapes and any other documents with her because Brown never informed her of such. Brown attempts to divert attention from his conduct by arguing that at plaintiff's deposition he was never directly asked whether the documents would be produced. Brown argues that since all the questions about the production of documents were directed to plaintiff he was not required to answer. This argument is spurious at best and frustrates the very purpose of discovery. The trial court's award of sanctions against Brown was justified.

Having established that sanctions were justified, we now determine whether the sanction imposed was appropriate. We note that the choice of sanctions is within the discretion of the trial court and will not be overturned absent an abuse of discretion. *Routh v. Weaver*, 67 N.C. App. 426, 313 S.E.2d 793 (1984). Given that Rule 37(d) specifically contemplates an award of expenses and attorney's fees in lieu of more serious sanctions, we find no abuse of discretion. We have also reviewed Brown's motion to reconsider and again we find no abuse of discretion.

Accordingly, the order of the trial court is

Affirmed.

Judges WYNN and McCRODDEN concur.

DEBORAH K. DUFFEY, PLAINTIFF APPELLEE v. ROY G. DUFFEY, DEFENDANT APPELLANT

No. 9312DC147

(Filed 18 January 1994)

1. Divorce and Separation § 386 (NCI4th)— support for stepchildren—voluntary extension of in loco parentis status

By signing a separation agreement in which he agreed to pay child support to plaintiff for his stepchildren, defendant voluntarily and in writing extended his status of in loco parentis and gave the court the authority to order that support be paid. N.C.G.S. § 50-13.4.

Am Jur 2d, Divorce and Separation §§ 1018 et seq.

2. Divorce and Separation § 408 (NCI4th)— child support for stepchildren—natural parents primarily responsible for needs—stepfather secondarily responsible for deficiency

Competent evidence existed in the record to justify a reduction in the amount of child support; however, the trial court erred in holding defendant primarily liable for the child support for his stepchildren, since N.C.G.S. § 50-13.4(b) clearly states that even if an individual assumes the status of in loco parentis, he shall still be secondarily liable to the child's natural parents for the support of that child; therefore, this case is remanded for a determination of the stepchildren's needs and the ability of their natural parents to meet these needs. Should the needs exceed the ability of the natural parents to meet the needs, only then should defendant be responsible for the deficiency.

Am Jur 2d, Divorce and Separation §§ 1037, 1038.

Appeal by defendant from order entered 9 December 1992 by Judge James Floyd Ammons, Jr. in Cumberland County District Court. Heard in the Court of Appeals 3 December 1993.

Bruce Allen for defendant.

Hedahl & Radtke, by Debra J. Radtke, for plaintiff.

LEWIS, Judge.

The issue presented by this appeal is the extent, if any, to which defendant is liable for the support of his two stepchildren. The facts show that plaintiff and defendant were married in Vicenza, Italy on 4 September 1980. At the time of the marriage, plaintiff had a child from a previous marriage, Derissa Collins ("Derissa"), and at all times pertinent to this appeal Derissa has resided with the parties. In addition to Derissa, two natural children were born of the marriage, Roy Gene Duffey ("Roy") on 28 November 1980 and Jacqueline Nicole Duffey ("Jacqueline") on 24 November 1982. During the marriage, plaintiff also gave birth to Dominique Duffey ("Dominique") who was conceived while defendant was away on military duty, but born when defendant returned. Although defendant is listed as Dominique's father on her birth certificate, it is undisputed that he is not her natural father.

Though plaintiff and defendant had a turbulent marriage, defendant, in an effort to make his marriage succeed, began adoption and legitimization proceedings for Derissa. However, these proceedings were never completed. While defendant was in Saudi Arabia as part of Operation Desert Storm, another man moved into defendant's home, and the children began calling this interloper "daddy." When defendant returned from Saudi Arabia, he refused to accept this adulterous behavior and separated from plaintiff in February or March of 1991. Unable to afford an attorney, defendant drafted a Separation Agreement with legal assistance from the base Judge Advocate General's Office. Several drafts were exchanged and reviewed prior to the final version which was signed on 23 October 1991. The final version of the Separation Agreement provided that Roy and Jacqueline were born of the marriage and that custody of these two children would be with defendant. In addition, the agreement provided that plaintiff would have custody of the two children not born of the marriage and that defendant would help with their support. Defendant expressly agreed to pay plaintiff child support in the amount of $250.00 per month for each child for the first year following the dissolution of marriage and then $175.00 per child for each month thereafter.

A Judgment of Absolute Divorce was entered on 13 December 1991, incorporating the parties' Separation Agreement. Defendant subsequently moved to set aside a portion of the Judgment of Absolute Divorce on the basis that it was erroneous and void. Defendant also filed a motion in the cause seeking child support from plaintiff and a modification of plaintiff's visitation privileges. A hearing was held on 29 October 1992, before Judge Ammons, who, after hearing the evidence and arguments of counsel, entered an order requiring defendant to pay child support of $302.00 per month for his two stepchildren. The order also required defendant to pay $3,500.00 in back child support to plaintiff at a rate of $100.00 per month. It is this order from which defendant appeals.

[1] In his motion to set aside a portion of the Judgment of Absolute Divorce, defendant relied upon Rule 60(b)(1), (b)(4) and (b)(6). These provisions allow for relief from judgment due to:

> (1) Mistake, inadvertence, surprise, or excusable neglect; . . .
>
> (4) The judgment is void; . . . or
>
> (6) Any other reason justifying relief from the operation of the judgment.

A motion under Rule 60(b) is directed to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Cole v. Cole*, 90 N.C. App. 724, 370 S.E.2d 272, *disc. rev. denied*, 323 N.C. 475, 373 S.E.2d 862 (1988). In this case, defendant claims that he is entitled to relief because the trial court erred in interpreting the provisions of the parties' Separation Agreement and because the trial court's order requiring him to pay support for his stepchildren is void as against public policy. In order to determine if the trial court abused its discretion we must first analyze the underlying issue of whether defendant is required to pay child support for his stepchildren.

In North Carolina, there is no duty for a person to support stepchildren. As stated in *State v. Ray*, 195 N.C. 628, 629, 143 S.E. 216 (1928), "the [law] does not impose upon a husband the burden of supporting another man's offspring." However, one can become liable for the support of stepchildren by placing himself in loco parentis to those children. *In re Dunston*, 18 N.C. App. 647, 197 S.E.2d 560 (1973). The term "in loco parentis" has been defined by this Court as a person in the place of a parent or someone who has assumed the status and obligations of a parent

without a formal adoption. *Shook v. Peavy*, 23 N.C. App. 230, 208 S.E.2d 433 (1974). This status has been officially recognized by statute in N.C.G.S. § 50-13.4, which provides in pertinent part:

> (b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child, and any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. . . . However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing.

Applying the applicable law to the facts of this case, the trial court found that defendant had voluntarily assumed an obligation of support for Derissa and Dominique and that he stood in loco parentis to these two stepchildren at the time of the execution of the Separation Agreement. We agree.

All the evidence shows that defendant voluntarily accepted Derissa and Dominique into his home and that he acted as a father to his stepchildren. Defendant cared and provided for his stepchildren by supplying them with military identification and listing them as his dependents. Thus, there is no doubt that defendant stood in loco parentis to Derissa and Dominique during the term of his marriage to plaintiff.

Typically, the status of in loco parentis terminates upon divorce. *See* Mary E. Wright-Hunt, *Equating A Stepparent's Rights And Liabilities Vis-A-Vis Custody Visitation And Support Upon Dissolution of The Marriage With Those Of The Natural Parent*, 17 N.C. Cent. L.J. 1, 6 (1988). However, in this case we find that defendant has voluntarily extended his status beyond the termination of the marriage. By signing the Separation Agreement in which he agreed to pay child support to plaintiff, defendant voluntarily and in writing extended his status of in loco parentis and gave the court the authority to order that support be paid. This is all that is required by the express terms of N.C.G.S. § 50-13.4(b). Although defendant

claims that this is an erroneous interpretation of the Separation Agreement, we are not persuaded.

Defendant has asserted in his brief that his agreement to pay child support was only in the event that he did not get custody of his two natural children. This assertion is farfetched, and defendant's own actions do not support this interpretation. The record reveals that several drafts of the Separation Agreement were exchanged before the final version was agreed upon. All of the prior drafts referred to the children in a manner as to include both the natural children of the marriage as well as Derissa and Dominique, defendant's stepchildren. As further evidence that this was the construction intended by the parties, we note that defendant paid support for all four children while they were in plaintiff's custody. In addition, the parties' Separation Agreement gave defendant visitation privileges with Derissa and Dominique. Therefore, it is only logical to conclude that defendant voluntarily undertook the obligation to pay child support to plaintiff for Derissa and Dominique and the trial court did not err in so finding. Having determined that defendant stood in loco parentis to his stepchildren and voluntarily extended this obligation, we find no error in the trial court's denying defendant's motion to set aside the Judgment of Absolute Divorce.

Typical of most separation agreements, plaintiff's and defendant's agreement contained a clause seeking to have the agreement incorporated into the divorce decree. The record reveals that the parties' Separation Agreement was in fact incorporated into the Judgment of Absolute Divorce. Because the parties' agreement was incorporated, the trial court was not bound by the amount which defendant agreed to pay but was free to modify the amount of child support in the event of changed circumstances. *See* N.C.G.S. § 50-13.7(a); *In re Register*, 303 N.C. 149, 277 S.E.2d 356 (1981). In determining what constitutes a change of circumstances, courts look to those circumstances relating to child oriented expenses, *see Greer v. Greer*, 101 N.C. App. 351, 399 S.E.2d 399 (1991), as well as to the welfare of the child. *Wehlau v. Witek*, 75 N.C. App. 596, 331 S.E.2d 223 (1985). By incorporating the parties' Separation Agreement into the original Judgment of Absolute Divorce, the court essentially found that the amounts contained in the Agreement were reasonable at that time. *See Allen v. Allen*, 7 N.C. App. 555, 173 S.E.2d 10 (1970). Thus, for defendant to prevail in

his request for a modification in the amount of child support, he must show a substantial change in circumstances. *Id.*

[2] In this case, defendant originally agreed to pay $175.00 per stepchild per month. However, the trial court felt justified in ordering a reduction in the amount of child support because plaintiff had failed to obtain satisfactory employment and was presently unemployed. The trial court thus imputed a minimum wage income to plaintiff for the purpose of determining the extent of her contribution. Given that the trial court is vested with broad discretion in custody and support matters, *see Best v. Best*, 81 N.C. App. 337, 344 S.E.2d 363 (1986), we defer to the judge on the front line and conclude that competent evidence exists in the record to justify a reduction in the amount of child support. However, as to the amount of child support ordered we are unable to give the trial court the same deference.

Typically, the amount of support awarded is directed to the discretion of the trial court and absent an abuse of discretion will not be disturbed on appeal. *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E.2d 581 (1986). However, in this case we find an abuse of discretion. After imputing an income of $731.00 per month to plaintiff, the trial court used the Child Support Guidelines for split custody to determine that defendant was required to pay plaintiff $302.00 per month. This was error. N.C.G.S. § 50-13.4(b) clearly states that even if an individual assumes the status of in loco parentis, he shall still be secondarily liable to the child's natural parents for the support of that child. By using the Child Support Guidelines, the trial court equated the duties and obligations of defendant with those of the natural fathers of Derissa and Dominique. If we are to impose the same obligations and duties on a stepparent, then it is only fair to confer the same rights and privileges, such as visitation and custody, to a stepparent. However, to do so would necessarily interfere with a child's relationship with his or her noncustodial, natural parent. Clearly this is not what the legislature intended.

This is not the first time that the legislature has imposed secondary responsibility on a party for the support of a child. Prior to its amendment in 1981, N.C.G.S. § 50-13.4 imposed secondary liability on a mother, only after the father was unable to meet his primary duty of support. *Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985). Applying this prior law in the case of *In*

re Register, 303 N.C. 149, 277 S.E.2d 356 (1981), the Supreme Court remanded on the issue of support because there were no findings as to the ability of the father to pay support. On remand, the Supreme Court directed that if the child's needs exceeded the ability of the father to pay, then the mother must pay according to her ability. Using this as guidance, we remand the issue of support to the trial court for a determination as to the needs of Derissa and Dominique, and the ability of their respective natural parents to meet these needs. Should the needs of Derissa and Dominique exceed the ability of their natural parents to meet those needs, then and only then is defendant secondarily responsible for the deficiency.

On the issue of the arrearage we find no error. Having construed the Separation Agreement to provide for support for Derissa and Dominique, the trial court was correct in ordering defendant to honor his contractual obligation to pay this support. Our opinion in no way lessens defendant's responsibility for paying this arrearage. The relief granted by this opinion is prospective only from the time of the filing of the motion in the cause.

We have carefully considered defendant's remaining assignments of error and find them to be without merit. Accordingly, the judgment of the trial court is

Affirmed in part and Remanded in part.

Judges ORR and JOHN concur.

IN THE MATTER OF MARK MITCHELL EZZELL, MAGISTRATE

No. 9318SC208

(Filed 18 January 1994)

1. **Judges, Justices, and Magistrates § 49 (NCI4th)— magistrate's removal hearing—case presented by district attorney—legality—no injury to respondent—no standing to raise issue**

Respondent did not have standing to raise the issue of the legality of the district attorney's presence in a magistrate's removal hearing, since respondent could not show that he had

sustained any distinct injury by the involvement of the district attorney or that, had the trial court appointed an independent counsel to present the case against him, a different result would have occurred. N.C.G.S. § 7A-173(c); N.C. Const. art. IV, § 18.

Am Jur 2d, Judges § 2.

2. **Judges, Justices, and Magistrates § 49 (NCI4th)— removal of magistrate—no automatic conflict of interest by judge conducting hearing**

There was no merit to respondent's contention that as a matter of law every Resident Regular Superior Court Judge who appoints a magistrate has a personal bias or prejudice and thus must be disqualified under Canon 3(C)(1)(a) of the Code of Judicial Conduct from conducting a magistrate's removal hearing pursuant to N.C.G.S. § 7A-173(c).

Am Jur 2d, Judges § 2.

Appeal by respondent from order entered 8 October 1992 in Guilford County Superior Court by Judge W. Douglas Albright. Heard in the Court of Appeals 7 December 1993.

Attorney General Michael F. Easley, by Assistant Attorney General Jeffrey P. Gray, for the State.

Wyatt Early Harris Wheeler & Hauser, by John Bryson, for respondent-appellant.

GREENE, Judge.

Mark Mitchell Ezzell (Ezzell) appeals from an order permanently removing him from office as Magistrate in the Eighteenth Judicial District.

Written charges against Ezzell were filed by Melissa K. Halloran (Halloran) on 15 September 1992 in the Office of the Clerk of Superior Court of Guilford County. Halloran alleged that Ezzell "[o]n August 13, 1992, while on duty and in the discharge of his official duties as Magistrate, put his hand upon her bare ankle and pushed her pant leg up . . . [and] put his hand upon and grabbed her breast, all without her permission or consent." Upon examination of the charges, J. Bruce Morton, Chief District Court Judge for the Eighteenth Judicial District, on 21 September 1992, entered an "Order

and Notice of Suspension," pursuant to N.C. Gen. Stat. § 7A-173(b) (1989), finding that "such charges, if true, constitute grounds for [Ezzell's] removal from office" and suspended Ezzell "with pay, from the performance of [his] official duties as magistrate." Judge Morton further ordered that the matter "be set for public hearing before the Honorable W. Douglas Albright, Senior Resident Superior Court Judge of the Eighteenth Judicial District, on the 2nd day of October, 1992 . . . at which time said Superior Court Judge will determine whether grounds for removal . . . exist." On 22 September 1992, Judge Albright wrote a letter to Horace M. Kimel, Jr., the District Attorney for the Eighteenth Judicial District, informing him of the charges against Ezzell and "requesting that [his] office present the case against [Ezzell] at the hearing." The letter goes on to say that "[y]our duties would be to investigate the case and interview the witness(es) in support of the charges[,] . . . question the witnesses in support of the charges and cross examine . . . Ezzell and/or his witnesses. Thereafter, you would present a final argument. I will be most grateful to you if you will accept this responsibility."

The matter, pursuant to N.C. Gen. Stat. § 7A-173(c), came on for hearing before Judge Albright on 2 October 1992. At the hearing, Ezzell was present and represented by counsel. Also appearing was Howard P. Neumann, Assistant District Attorney for the Eighteenth Judicial District. Prior to the taking of any evidence, Ezzell objected "to the state's being represented" in the proceeding. The objection was overruled by Judge Albright. Mr. Neumann then presented evidence in support of the charges and Ezzell presented evidence in opposition to the charges. Ezzell and his witnesses were cross-examined by Mr. Neumann. Mr. Neumann also made a final argument to Judge Albright in support of the charges.

On 8 October 1992 Judge Albright signed an "Order of Removal" decreeing that Ezzell be permanently removed from office and that his salary be terminated. Included in the order were detailed findings of fact and conclusions of law. The court found as a fact that the allegations made by Halloran were true and concluded that such conduct constituted "willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

The issues presented are whether (I) Ezzell had standing to raise the issue of the legality of the district attorney's presence in a magistrate's removal hearing, (II) the findings of fact are supported by evidence in the record; and (III) Ezzell was denied due process of law because the trial judge was not an impartial decision maker.

I

[1] Ezzell argues that "Judge Albright's request that the District Attorney's office of the 18th Judicial District present the case against [him] was erroneous and in violation of the constitutional limits of the office of the District Attorney." In support of this argument Ezzell directs our attention to Article IV, Section 18 of the North Carolina Constitution and N.C. Gen. Stat. § 7A-173(c). Article IV, Section 18 of the North Carolina Constitution provides that the

> District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe.

N.C. Gen. Stat. § 7A-173(c) provides

> (c) If a hearing, with or without suspension, is ordered, the magistrate against whom the charges have been made shall be given immediate written notice of the proceedings and a true copy of the charges, and the matter shall be set by the chief district judge for hearing before the senior regular resident superior court judge or a regular superior court judge holding court in the district or set of districts as defined in G.S. 7A-41.1(a) in which the county is located. The hearing shall be held in a county within the district or set of districts not less than 10 days nor more than 30 days after the magistrate has received a copy of the charges. The hearing shall be open to the public. All testimony offered shall be recorded. At the hearing the superior court judge shall receive evidence, and make findings of fact and conclusions of law. If he finds that grounds for removal exist, he shall enter an order permanently removing the magistrate from office, and terminating his salary.

> If he finds that no such grounds exist, he shall terminate the suspension, if any.

N.C.G.S. § 7A-173(c) (1989).

Ezzell argues that because both the constitution and the statute are silent on the authority of the district attorney to present the case in support of the removal of a magistrate and because there are no other statutes authorizing such action by the district attorney, the district attorney acts unconstitutionally if he does appear in a Section 173(c) proceeding. This alleged unconstitutional conduct, Ezzell contends, requires a new trial.

Although Ezzell's argument may have merit, we do not reach the issue he attempts to raise because he does not have standing to raise the issue. A party has the necessary standing to raise the constitutionality of a law or act only if he "has sustained or is immediately in danger of sustaining a direct injury [in fact] as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." *Watkins v. City of Wilson*, 255 N.C. 510, 512, 121 S.E.2d 861, 862 (1961), *cert. denied*, 370 U.S. 46, 8 L. Ed. 2d 398 (1962) (quoting *Ex Parte Albert Levitt*, 302 U.S. 633, 634, 82 L.Ed. 493 (1937)); *Armstrong v. Armstrong*, 322 N.C. 396, 400, 368 S.E.2d 595, 597 (1988); *Greene v. Town of Valdese*, 306 N.C. 79, 88, 291 S.E.2d 630, 636 (1982); *Murphy v. Davis*, 61 N.C. App. 597, 600, 300 S.E.2d 871, 873 (must have sustained an "injury in fact"), *disc. rev. denied*, 309 N.C. 192, 305 S.E.2d 735 (1983); *In re Jackson*, 60 N.C. App. 581, 584, 299 S.E.2d 677, 679 (1983) ("must be adversely affected"); 16 C.J.S. *Constitutional Law* § 65, at 170-72 (1984). "The keystone for defining injury in fact is the requirement that it be 'distinct and palpable'—and conversely that it not be 'abstract' or 'conjectural' or 'hypothetical.'" Laurence H. Tribe, *American Constitutional Law* § 3-16, at 114 (2d ed. 1988) [hereinafter *Tribe*] (quoting *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 569-70 (1984)). The injury in fact "requirement includes as a corollary a requirement that a litigant show that the challenged government action caused the litigant's injury." *Tribe* § 3-18, at 129. That is, the party who asserts standing must "establish that, in fact, the asserted injury was the consequence of the . . . [alleged unconstitutional] actions, or that prospective relief will remove the harm." *Tribe* § 3-18, at 129-30 (quoting *Warth v. Seldin*, 422 U.S. 490, 505, 45 L. Ed. 2d 343, 358 (1975)).

Ezzell, as the basis for his right to assert the alleged unconstitutional actions of the district attorney, claims that "the District Attorney's involvement brought to bear all of the resources of the State against" him and that as a consequence he was prejudiced. For us to agree with Ezzell we must accept that had the trial court, under its inherent authority, *see In The Matter of The Alamance County Court Facilities*, 329 N.C. 84, 93-94, 405 S.E.2d 125, 129 (1991), appointed an independent counsel to present the case against Ezzell, a different result would have occurred. This would require inferences that we are not prepared to make and amount to nothing more than conjecture. The conclusion that Ezzell draws from the district attorney's involvement in the case, that he was prejudiced, does not necessarily follow.

In any event, were we to hold that Ezzell has standing to raise the constitutional issue and were we to hold that it was error for the district attorney to present the charges in a Section 173(c) proceeding, Ezzell would be entitled to a new trial only if he could show that a different result would have been reached had the district attorney not appeared. N.C. Gen. Stat. § 1A-1, Rule 61 (1990); *Lee v. Keck*, 68 N.C. App. 320, 327, 315 S.E.2d 323, 328, *disc. rev. denied*, 311 N.C. 401, 319 S.E.2d 271 (1984). Ezzell is not entitled to a new trial for the same reasons we have given for holding he does not have standing. He simply cannot show that a different result would probably have occurred had the district attorney not appeared in the case.

II

Ezzell argues that the findings of fact entered by the trial judge were not supported by the evidence. We disagree. Although the evidence was in great dispute, there is competent evidence in the record to support the findings of the trial court and the findings are thus conclusive on appeal. *Little v. Little*, 9 N.C. App. 361, 365, 176 S.E.2d 521, 523-24 (1970).

III

[2] Ezzell finally argues that because the trial judge, as the senior regular resident superior court judge, is also responsible for appointing magistrates, N.C. Gen. Stat. § 7A-171(b), there existed "an automatic conflict of interest," and he was therefore denied an "unbiased, impartial decision maker." We disagree. A trial judge should disqualify himself or herself where he or she "has a personal

bias or prejudice concerning a party." Code of Judicial Conduct, Canon 3(C)(1)(a) (1993). A party claiming bias or prejudice may move for recusal and in such event has the burden of demonstrating "objectively that grounds for disqualification actually exist." *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993). In this case there was no motion in the trial court that Judge Albright recuse himself and thus there is no evidence in this record of any personal bias or prejudice. Furthermore, we do not accept that as a matter of law every Resident Regular Superior Court Judge who appoints a magistrate has a personal bias or prejudice and thus must be disqualified under Canon 3 from conducting a magistrate's removal hearing pursuant to N.C. Gen. Stat. § 7A-173(c).

Affirmed.

Judge WYNN concurs.

Judge COZORT concurs in the result.

EAST CAROLINA FARM CREDIT, ACA v. ELWOOD L. SALTER, JR. AND ANITA S. SALTER

No. 923DC1217

(Filed 18 January 1994)

1. **Courts § 99 (NCI4th)— transfer of case from superior to district court—written motion required**

The trial court did not err in denying defendants' motion to transfer this case from the superior court to the district court division where defendants' original motion was not in writing and therefore did not comply with N.C.G.S. § 7A-258, and their written motion was not filed within 30 days after they were served as required by the statute.

Am Jur 2d, Courts §§ 87 et seq.

2. **Ejectment § 13 (NCI4th)— summary ejectment action—concurrent original jurisdiction in district and superior courts**

There was no merit to defendants' contention that the trial court erred in denying their motion to dismiss because

the district court division had exclusive jurisdiction over a summary ejectment action, since the superior court and the district court had concurrent original jurisdiction over summary ejectment actions.

Am Jur 2d, Landlord and Tenant §§ 1227 et seq.

3. **Ejectment § 21 (NCI4th)— summary ejectment action—lease terminated—lessees' interference with sale—no genuine issue of material fact**

The trial court properly entered summary judgment in favor of plaintiff where there was no genuine issue of material fact as to whether plaintiff had terminated defendants' lease and whether defendants had attempted to interfere with plaintiff's sale of the property.

Am Jur 2d, Landlord and Tenant §§ 1227 et seq.

Appeal by defendants from order entered 11 September 1992 by Judge William C. Griffin, Jr., in Craven County Superior Court. Heard in the Court of Appeals 22 October 1993.

Plaintiff owned a house situated on approximately eight acres of land which it leased to defendants. Plaintiff brought this action seeking to terminate the lease, to remove the defendants from the property, to restrain defendants from bothering any potential buyers who might visit the property, and to enjoin defendants from entering the property for any purpose other than removing their property. On 17 July 1992, Superior Court Judge Richard B. Allsbrook entered a temporary restraining order, and on 30 July 1992, he entered an order preliminarily enjoining defendants from interfering with prospective buyers of the property.

On 1 September 1992, plaintiff filed a motion for summary judgment, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 (1990). On 9 September 1992, defendants filed a motion to dismiss, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990), for failure to state a claim upon which relief can be granted. On the same day, defendants filed a motion, pursuant to N.C. Gen. Stat. § 7A-258 (1989), to transfer the case to the district court division, alleging that the case was really an action for summary ejectment. On 11 September 1992, Judge Griffin entered an order of summary judgment in favor of the plaintiff and an order denying defendants'

motion to dismiss and motion to transfer the case. From these orders, defendants appeal.

Everette, Everette, Warren & Harper, by Edward J. Harper, II, for plaintiff-appellee.

David P. Voerman, P.A., by David P. Voerman, for defendant-appellants.

McCRODDEN, Judge.

Defendants bring forward two assignments of error, one each to both of the court's orders. First, they assign error to the trial court's denial of their motions to transfer and to dismiss the case. The underlying basis of their motions is that plaintiff's action was one for summary ejectment, for which proper jurisdiction was in the district court division.

[1] N.C.G.S. § 7A-258, which governs motions to transfer cases between divisions of the general court of justice, provides:

> (a) Any party, including the plaintiff, may move on notice to all parties to transfer the civil action or special proceeding to the proper division when the division in which the case is pending is improper under the rules stated in this Subchapter . . . [or] if all parties to the action or proceeding consent thereto, and if the judge deems the transfer will facilitate the efficient administration of justice.
>
> . . . .
>
> (c) A motion to transfer by any party other than the plaintiff must be filed within 30 days after the moving party is served with a copy of the pleading which justifies transfer. . . . Failure to move for transfer within the required time is a waiver of any objection to the division in which the case is pending . . . .
>
> (d) A motion to transfer *is in writing* and contains:
>
> (1) A short and direct statement of the grounds for transfer with specific reference to the provision of this Chapter which determines the proper division; and
>
> (2) A statement by an attorney for the moving party . . . that the motion is made in the good faith belief that

> it may be properly granted and that he intends no amendment which would affect propriety of the transfer.

(Emphasis added).

In this case, defendants alleged the following in their 9 September 1992 motion to transfer:

> 1. The defendants in this case were served with process on or about the 17th day of July, 1992.
>
> . . . .
>
> 4. On or about July 29, 1992, the Honorable Richard E. Allsbrook held a hearing in respect to this case, on the issue of whether or not a preliminary injunction should issue.
>
> 5. At the time of this hearing, the attorney for the defendants moved the Court to dismiss the case, and furthermore, moved orally, for the Court to transfer the case to the proper division . . . .
>
> 6. At that time, the Court indicated it would make no ruling on the defendants' motion concerning the jurisdiction of the Superior Court to hear the matter, and made no decision in respect to whether the Superior Court was the proper division under the appropriate North Carolina General Statutes to hear the case.
>
> . . . .
>
> 8. This written motion, is made pursuant to N.C.G.S. § 7A-258 and 7A-259, to confirm the oral motion made in open Court by the attorney for the defendants herein.

On its face, defendants' motion is defective. Contrary to defendants' assertion, there is no such thing as an oral motion to transfer. N.C.G.S. § 7A-258 is plain and unambiguous; a motion to transfer is "in writing." Defendants filed no written motion to transfer until 9 September, more than 30 days after the date they allege they were served, 17 July 1992. Therefore, they have waived any objection to the case's pendency in the superior court division.

Defendants further argue, however, that a motion to dissolve the temporary restraining order and to dismiss the case, which they filed on 27 July 1992, included a timely motion to transfer.

This argument is meritless. The motion to which defendants refer contains no mention of transferring the case; nor does it contain the statements required by N.C.G.S. § 7A-258(d)(2) (that the motion was made in good faith and that the movant intends no amendment that would affect the propriety of the transfer). Having failed to comply with the statutory requirements for motions to transfer, defendants may not prevail on this contention.

[2] Under the same assignment of error, defendants argue that the trial court erred in denying their motion to dismiss because the district court division has exclusive jurisdiction over a summary ejectment action. Assuming, *arguendo*, that this action was purely an action to remove the defendants from their residence pursuant to the summary ejectment procedure, N.C. Gen. Stat. §§ 42-26 to -36.2 (1984 and Supp. 1993), defendants' argument is unavailing.

In *Stonestreet v. Means*, 228 N.C. 113, 115, 44 S.E.2d 600, 601 (1947), the Supreme Court held that the superior court and the courts of justices of the peace, which have since been replaced by magistrate's courts, had concurrent original jurisdiction over summary ejectment actions. In its opinion, the *Stonestreet* Court interpreted the then-existing version of the summary ejectment act, which has survived virtually unchanged, in conjunction with N.C. Gen. Stat. § 7-63, which has since been repealed. At that time, section 7-63 provided that "[t]he Superior Court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court." The Court read the statutes together and found that "*[e]xclusive* original jurisdiction is not vested in courts of justices of the peace in summary ejectment." *Id.* (emphasis added).

When the General Assembly created the district court division in 1965, it enacted N.C. Gen. Stat. § 7A-240 to provide:

> [O]riginal general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division.

N.C. Gen. Stat. § 7A-240 (1989). This statute leads to the conclusion that, when the legislature created the district court division and gave it concurrent original jurisdiction over all matters except probate and matters of decedents' estates, it did not thereby divest the superior court division of any of its original jurisdiction. Hence, although we rely upon updated statutes, we reaffirm the *Stonestreet* Court's conclusion that the superior court division has original jurisdiction over summary ejectment actions. In this case, the trial court properly denied the defendants' motion to dismiss and, as stated above, the defendants' motion to transfer the case.

[3] Defendants' second assignment of error pertains to the trial court's entry of summary judgment in favor of plaintiff. They argue that there were genuine issues of material fact that rendered summary judgment inappropriate.

Summary judgment is available when "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." Rule 56(c).

The trial court's summary judgment, among other things, ejected defendants from the property and enjoined them from interfering with prospective buyers. The material factual issues the court needed to address in order to enter this judgment in plaintiff's favor were whether the lease had been terminated and whether the defendants had attempted to interfere with plaintiff's attempt to sell the property.

There was no genuine issue of material fact as to whether the lease had been terminated. The lease between plaintiff and defendants provided:

> Lessee understands that this property is being offered for sale and agrees to cooperate with and make the property available to agents of Lessor and prospective purchasers during reasonable business hours.
>
> . . . .
>
> Lease will be on a 30 day automatic renewal. Lease will remain in effect until revoked in writing, with 30 days notice by lessor or lessee.

This lease created a tenancy from period to period, with a term of one month. *See* Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 88 (3d ed. 1988). Generally, periodic tenancies from month to month may only be terminated after the party seeking to terminate the tenancy has given notice to the other party at least seven days before the end of the current month. N.C. Gen. Stat. § 42-14 (Supp. 1993). However, the parties' lease may specify notice of termination that differs both in type and in extent from that called for in section 42-14. *Stanley v. Harvey*, 90 N.C. App. 535, 538, 369 S.E.2d 382, 384 (1988). In this case, it is clear that the plaintiff complied with the notice requirement of the statute, as well as that provided for in the lease. Plaintiff notified defendants in writing on 6 July 1992 demanding that they quit the premises by 4 August 1992. This notice, which was given more than seven days prior to the end of the month and which allowed defendants thirty days to remove themselves and their property from the premises, properly terminated the lease.

Further, there was no genuine issue as to whether defendants had attempted to interfere with the plaintiff's sale of the property. Defendants admitted in their affidavits that they would use any method they could to deter the sale, that they had, on several occasions, contacted two potential purchasers and attempted to dissuade them from buying the property, and that when potential purchasers visited the property, defendants had posted signs that read: "You are an intruder. You are not welcome. This would not be a good home to buy," and "The bank has taken our home. We need 9 more months to get it back." These admissions demonstrate that there was no genuine issue as to whether the defendants had attempted to interfere with the sale of the property.

Defendants' argument that there was another factual question, *i.e.*, whether the defendants had tendered their monthly rent, is not well taken. Defendants asserted in their affidavits and on appeal that they tendered their rent on 6 July 1992 and plaintiff refused to accept it. This, however, is simply irrelevant. Written notice of the termination of the lease was given on the day defendants tendered the rent and the lease was terminated thereby. Having given proper notice of termination, plaintiff was under no obligation to accept the rent and/or extend the lease.

We have determined that neither of the factual questions offered by defendant presented a genuine issue as to any material fact in the case. Accordingly, we conclude that the trial court properly entered summary judgment in plaintiff's favor. We affirm the orders of the trial court.

Affirmed.

Judges LEWIS and WYNN concur.

SOUTH RIVER ELECTRIC MEMBERSHIP CORPORATION AND NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION v. THE CITY OF FAYETTEVILLE, PUBLIC WORKS COMMISSION OF THE CITY OF FAYETTEVILLE AND MAIDENFORM, INC.

No. 9212SC1172

(Filed 18 January 1994)

Energy § 12 (NCI4th)— site within electric membership corporation's assigned territory—provision of service by city public works commission reasonable

The extension of electric service by defendant city's Public Works Commission, which was not an "electric supplier" within the meaning of N.C.G.S. § 62-110.2(a)(3), to a site the Utilities Commission had assigned to an electric supplier was "within reasonable limitations" as that phrase is used in N.C.G.S. § 160A-312, since an assignee does not have an exclusive right to serve within a territory; since the PWC was not an electric supplier, it was not prohibited from supplying electric service to the site; PWC served five other customers, including three who were industrial, within a mile radius of the site; PWC was ready, willing, and able to provide the required service to the site, while plaintiff electric membership corporation did not have the readiness to serve the site; and extension of service to the site by PWC was reasonable.

Am Jur 2d, Electricity, Gas, and Steam § 19; Public Utilities §§ 16 et seq.

Appeal by plaintiffs from judgment entered 22 July 1992 by Judge Giles R. Clark in Cumberland County Superior Court. Heard in the Court of Appeals 20 October 1993.

Plaintiffs South River Electric Membership Corporation (South River) and North Carolina Electric Membership Corporation (EMC) initiated this action on 13 August 1991, by filing a complaint seeking a temporary restraining order and preliminary and permanent injunctions to restrain and enjoin defendant Public Works Commission of the City of Fayetteville (PWC) from further constructing, upgrading, or connecting an electric distribution system outside the city limits of Fayetteville and to restrain defendant Maidenform, Inc. (Maidenform) from accepting electric service from PWC for its distribution facility. On the basis of the verified complaint, the trial court entered a temporary restraining order on 13 August 1991, but later denied plaintiffs' request for a preliminary injunction. Following trial without a jury on 6 and 7 July 1992, the court entered judgment on 22 July 1992, denying plaintiffs' claim for an injunction prohibiting PWC from providing Maidenform with electric power. Plaintiffs appeal from this judgment.

Robert H. Jones for plaintiff-appellant South River Electric Membership Corporation, and Thomas J. Bolch for plaintiff-appellant North Carolina Electric Membership Corporation.

Reid, Lewis, Deese & Nance, by Renny W. Deese and Richard M. Lewis, Jr., for defendant-appellees The City of Fayetteville and Public Works Commission of the City of Fayetteville.

R. Joyce Garrett for defendant-appellee Maidenform, Inc.

McCRODDEN, Judge.

The sole issue on appeal is whether the extension of electric service by PWC, not an "electric supplier," to a site the North Carolina Utilities Commission (Utilities Commission) had assigned to an electric supplier was "within reasonable limitations" as that phrase is utilized in N.C. Gen. Stat. § 160A-312 (Supp. 1993).

The underlying dispute arose as follows. In June 1983, Cumberland County purchased land within its borders for development of a County Industrial Park. In connection with this development, the county requested PWC to coordinate and participate in providing utility and electric services to the Industrial Park. Thereafter, Maidenform purchased a thirty-one acre tract of land

located in the Industrial Park, where it constructed a modern distribution facility to be used for processing and distributing women's intimate apparel. Maidenform requested electric service from PWC which had rates competitive with those of South River. The tract of land is located approximately five miles from the corporate limits of the City of Fayetteville and is wholly within service territory that, on 18 December 1969, the Utilities Commission had, pursuant to N.C. Gen. Stat. § 62-110.2(c)(1) (Supp. 1992), assigned to South River.

Plaintiffs claim that the extension of electric service by PWC was not within reasonable limitations and that consequently South River should be the exclusive provider of service to Maidenform. They have assigned no error to the trial court's findings which are, therefore, presumed to be supported by the evidence and are conclusive. *Insurance Co. v. Trucking Co.*, 256 N.C. 721, 725, 125 S.E.2d 25, 28 (1962).

The trial court found that South River is an electric distribution corporation and an "electric supplier," as defined by N.C.G.S. § 62-110.2(a)(3), and that EMC is a generation and transmission electric corporation. Further findings established that PWC is an agency of the City of Fayetteville and is not an "electric supplier" within the meaning of N.C.G.S. § 62-110.2(a)(3).

An "electric supplier" is defined in N.C.G.S. § 62-110.2(a)(3) as "any public utility furnishing electric service or any electric membership corporation." N.C.G.S. § 62-110.2(b)(8) provides an electric supplier with the *right* to serve all premises located wholly within the service area assigned to it. No other *electric supplier* may serve any premises located in the territory assigned to another electric supplier. *Domestic Electric v. City of Rocky Mount*, 285 N.C. 135, 143, 203 S.E.2d 838, 843 (1974). In the case at hand, since the Utilities Commission had assigned to South River the service territory within which Maidenform's tract is wholly located, no other public utility or electric membership corporation may serve the Maidenform facility. *See id.*

Subsection 110.2(b)(8), however, does not grant an assignee an exclusive right to serve within a territory. *Id.* Since a municipality is not an "electric supplier" as that term is used in section 62-110.2, *Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 735, 309 S.E.2d 209, 215 (1983), its PWC is not prohibited from supplying electric service to the Maidenform facility. *See Domestic Electric*, 285 N.C. at 143, 203 S.E.2d at 843. PWC

may serve the Maidenform site, so long as its extension of service is within "reasonable limitations," as provided for in N.C.G.S. § 160A-312.

In interpreting the term "reasonable limitations," the *Domestic Electric* Court stated that the term "does not refer solely to the territorial extent of the venture but embraces all facts and circumstances which affect the reasonableness of the [extension of service]." *Id.* at 144, 203 S.E.2d at 844 (quoting *Service Co. v. Shelby*, 252 N.C. 816, 115 S.E.2d 12 (1960)). In *Lumbee River*, our Supreme Court set out the determinative factors, listed in *Domestic Electric*, used to ascertain whether the extension of service is reasonable. These factors are the electric providers' current levels of service in the area in question, particularly in the immediate vicinity of the potential customer, and the readiness, willingness, and ability of each to serve the potential customer. *Lumbee River*, 309 N.C. at 738, 309 S.E.2d at 217.

Applying these factors to the instant case establishes that PWC's extension of electric service to the Maidenform site was reasonable. South River provides electric power to approximately 98 customers, none of whom is industrial, within a mile radius of Maidenform's facility, and within the same one mile radius PWC provides electric power to five customers, three of whom are industrial. Both South River and PWC are willing and able to provide and maintain adequate three-phase electric power to Maidenform. However, the following unchallenged findings of fact demonstrate that South River does not have the readiness to serve the Maidenform facility. South River does not presently have easements providing access to Maidenform's distribution facility. PWC does. South River cannot presently provide for dual feed electrical power to the Maidenform facility without making modifications to its equipment. PWC can provide the required dual feed electrical power. Furthermore, Maidenform's distribution facility requires three-phase electrical power in order to meet its industrial needs. At the time plaintiffs filed their complaint, PWC's three-phase electric distribution line was approximately eighty feet from Maidenform's distribution facility, while South River's nearest three-phase electric distribution line was approximately 6,400 feet by road and 3,600 feet by direct line from Maidenform.

Plaintiffs argue that public policy requires that the readiness, willingness, and ability of each provider to serve the potential

customer must be considered at the time the electric service is needed, not when the request is made. Although plaintiffs set forth a persuasive argument, they have failed to provide any authority for their position. Thus, we must rely upon our Supreme Court in *Lumbee River*, which considered each provider's present readiness to serve the potential customer. Since PWC demonstrated its present readiness to serve Maidenform, we overrule this challenge.

Based upon its findings of fact, the trial court properly concluded that PWC's extension of service to the Maidenform distribution facility in the Cumberland County Industrial Park was within reasonable limitations. We, therefore, affirm the judgment.

Affirmed.

Judges LEWIS and WYNN concur.

TRIAD MACK SALES AND SERVICE, INC. v. CLEMENT BROTHERS COMPANY

No. 9321SC199

(Filed 18 January 1994)

1. Arbitration and Award § 46 (NCI4th)— failure to attend mediated settlement conference—no good cause shown

Because the record was void of any evidence that defendant was unable to attend a court ordered mediated settlement conference for any reason beyond its control, the record supported the finding of the trial court that defendant offered no good cause for its failure to attend, and it was immaterial that the failure to attend did not prejudice plaintiff. An unsworn statement by defendant's lawyer that defendant's president was ill and that all other officers, directors and employees were outside the state was not proper evidence which could be considered by the trial court.

Am Jur 2d, Arbitration and Award § 9.

2. Arbitration and Award § 46 (NCI4th)— failure to attend mediated settlement conference—answer struck and default entered—sanctions appropriate

The trial court did not abuse its discretion by striking defendant's answer and entering default because the trial court properly found that defendant had no good cause for failing to attend a court ordered mediated settlement conference and was not excused from attending the conference; the order reflected that less severe sanctions were considered by the trial court and rejected as inappropriate, and the sanctions entered were specifically authorized by N.C.G.S. § 1A-1, Rule 37.

Am Jur 2d, Arbitration and Award § 9.

Appeal by defendant from order entered 21 October 1992 in Forsyth County Superior Court by Judge Judson D. DeRamus, Jr. Heard in the Court of Appeals 7 December 1993.

Hutchins, Tyndall, Doughton & Moore, by George E. Doughton, Jr. and Kent L. Hamrick, for plaintiff-appellee.

Kluttz, Reamer, Blankenship & Hayes, by Richard R. Reamer, for defendant-appellant.

GREENE, Judge.

Appeal by Clement Brothers Company (Clement Brothers) from an order filed 21 October 1992 entering default against Clement Brothers as a sanction for the failure of a representative of Clement Brothers to personally appear at a court-ordered mediated settlement conference.

In 1990, Blue Ridge Mack Sales and Service, Inc. (Blue Ridge) entered into a contract with Clement Brothers under which Blue Ridge was to sell Clement Brothers two new Mack trucks at a total purchase price of $205,664. When Blue Ridge tendered the two trucks for delivery, Clement Brothers refused delivery. Blue Ridge subsequently merged into Triad Mack Sales and Service, Inc. (Triad Mack), which brought suit against Clement Brothers seeking $222,981 in damages for Clement Brothers' breach of contract.

On 26 June 1992, Judge Judson D. DeRamus, Jr., entered an order for a mediated settlement conference pursuant to N.C.

Gen. Stat. § 7A-38, with such conference to be held on or before 28 September 1992. The order included the following provision:

> The following persons shall physically attend the mediated settlement conference:
>
> . . .
>
> 3. For a corporate party, a representative (*officer, director, employee, or in-house counsel*) with full authority to settle the claim must attend.

By consent of counsel for both parties, the mediated settlement conference was scheduled for 3 September 1992 at 10:00 a.m.

When the conference was held, Triad Mack was represented by its attorney and by its president, James E. Bland, while Clement Brothers was represented only by its attorney, Richard R. Reamer. No officer, director, employee, or in-house counsel of Clement Brothers was physically present at the mediated settlement conference. At the request of Triad Mack's counsel, Mr. Reamer unsuccessfully attempted to contact by telephone Clarence Clement, the president of Clement Brothers. Because Mr. Reamer had no settlement authority, the conference resulted in no progress toward a settlement.

On 10 September 1992, Triad Mack filed a motion seeking sanctions for Clement Brothers' failure to comply with the mediated settlement conference order, requesting among other things, that Clement Brothers' answer be stricken and that a default be entered. Triad Mack's motion came on for argument before Judge DeRamus on 19 October 1992, and following a hearing and review of the documents on file, Judge DeRamus entered an order finding that "there was no good cause for [Clement Brothers] failure to appear at the mediated settlement conference . . . , [and] that [Clement Brothers] was not excused from attending the conference." After considering the imposition of lesser sanctions, Judge DeRamus entered an order which struck Clement Brothers' answer, entered a default against Clement Brothers, taxed Clement Brothers with Triad Mack's share of the mediation expenses, and ordered Clement Brothers to pay Triad Mack $170.00 in attorney's fees. On 10 November 1992, Triad Mack motioned for a default judgment, and on 16 November 1992 Clement Brothers filed notice of appeal from the order imposing sanctions.

Although Triad Mack's motion for default judgment has not yet been decided by the trial court, this interlocutory appeal of the order striking Clement Brothers' answer and entering a default does affect a substantial right and is thus properly before this Court. *Adair v. Adair*, 62 N.C. App. 493, 495, 303 S.E.2d 190, 192, *disc. rev. denied*, 309 N.C. 319, 307 S.E.2d 162 (1983); *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554-55, 353 S.E.2d 425, 426 (1987).

The issues presented are whether: (I) Clement Brothers had good cause for failing to attend the settlement conference; and (II) the trial court abused its discretion by striking Clement Brothers' answer and entering default for Clement Brothers' failure to attend the conference.

Pursuant to N.C. Gen. Stat. § 7A-38, the North Carolina Supreme Court adopted "Rules Implementing Court Ordered Mediated Settlement Conferences" for those judicial districts selected by the Director of the Administrator of Courts to participate in the mediated settlement conference program. *See* N.C.G.S. § 7A-38 (Supp. 1991). Under these Rules the Senior Resident Superior Court Judge is authorized to "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." Rules Implementing Court Ordered Mediated Settlement Conferences, Rule 1(a) (1993). The Rules specifically require that a corporate party have "an officer, director or employee having authority to settle the claim" "physically attend" the conference. *Id.*, Rule 4(a)(1). Additionally, the corporate party's counsel of record must attend the conference. *Id.*, Rule 4(a)(2). "If a person fails to attend a duly ordered . . . conference without good cause [or an excuse from the Senior Resident Superior Court Judge, N.C. Gen. Stat § 7A-38(f)], a Resident or Presiding Judge may impose upon the party or his principal any lawful sanction, including . . . any . . . sanction authorized by Rule 37(b) of the Rules of Civil Procedure." Rules Implementing Court Ordered Mediated Settlement Conferences, Rule 5 (1993). "Good cause" for a person's failure to attend is an inability to attend caused "neither by its own conduct nor by circumstances within its control." *See Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197, 211, 2 L. Ed. 2d 1255, 1267 (1958) (discussing sanctions under Rule 37(b)). Rule 37(b)(2) permits the imposition of sanctions "as are just" in-

cluding "[a]n order striking out pleadings or parts thereof . . . or rendering a judgment by default against the disobedient party." N.C.G.S. § 1A-1, Rule 37(b)(2) (1990).

I

[1] At the hearing on sanctions, Triad Mack presented evidence that Clement Brothers, a corporation, was ordered to appear at the conference and that no officer, director, or employee appeared. Clement Brothers, who had the burden of showing its good cause for failing to attend, offered only the unsworn statement of its lawyer that its president was ill and that all other officers, directors and employees were outside the state. This statement is not evidence, *see Laing v. Liberty Loan Co. of Smithfield and Albermarle*, 46 N.C. App. 67, 71-72, 264 S.E.2d 381, 384, *disc. rev. denied and appeal dismissed*, 300 N.C. 557, 270 S.E.2d 109 (1980), and was properly not relied upon by the trial court. Furthermore, the record does not reflect that Clement Brothers made any effort to be excused from the conference or to delay the conference. Accordingly, because the record is void of any evidence that Clement Brothers was unable to attend the conference for any reason beyond its control, the record supports the finding of the trial judge that Clement Brothers offered no good cause for its failure to attend. It is immaterial that the failure to attend did not prejudice Triad Mack. *See Roane-Barker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 37, 392 S.E.2d 663, 668 (1990) (discussing sanctions under Rule 37(b)), *disc. rev. denied*, 328 N.C. 272, 400 S.E.2d 454 (1991).

II

[2] Clement Brothers argues that the severe sanction entered in this case must be reversed because there are less drastic sanctions available. Although the sanctions entered by the trial court are severe, the trial court did not abuse its discretion by striking Clement Brothers' answer and entering default because (1) the trial court found that Clement Brothers had no good cause for failing to attend the conference and was not excused from attending the conference, (2) the order reflects that less severe sanctions were considered by the trial court and rejected as inappropriate, and (3) the sanctions entered are specifically authorized by Rule 37(b)(2)c. *See Foy v. Hunter*, 106 N.C. App. 614, 620, 418 S.E.2d 299, 303 (1992) (requiring consideration of less drastic sanctions for violation of Rule 8(a)(2)).

Affirmed.

Judges COZORT and WYNN concur.

OLLEN BRUTON SMITH v. BONITA HARRIS SMITH

No. 9226SC1275

(Filed 18 January 1994)

1. **Husband and Wife § 26 (NCI4th)— breach of fiduciary duty—no transaction on which to base claim—claim properly dismissed**

The trial court properly dismissed plaintiff's action against his former spouse for breach of fiduciary duty, since plaintiff failed to provide evidence of any agreement or transaction between him and defendant which would constitute the basis for the breach of fiduciary duty; furthermore, the court refused to impose on the relationship of marriage the strict duties of a business partnership.

Am Jur 2d, Husband and Wife §§ 270-273.

2. **Quasi Contracts and Restitution § 18 (NCI4th); Divorce and Separation § 180 (NCI4th)— unjust enrichment claim—collateral attack on equitable distribution—claim properly dismissed**

The trial court properly dismissed plaintiff's action against his former spouse for unjust enrichment since plaintiff's argument was no more than an attempt to attack collaterally the parties' earlier equitable distribution proceeding and judgment.

Am Jur 2d, Restitution and Implied Contracts § 3.

3. **Divorce and Separation § 159 (NCI4th)— intentional marital destruction—no new tort—moral fault not considered in equitable distribution**

Since a spouse's moral fault not related to the economic condition of the marriage is not to be considered during the distribution of marital property, the Court refused to recognize a new tort of intentional marital destruction which would allow marital fault or misconduct to be relevant in a proceeding collateral to, but affecting, equitable distribution.

Am Jur 2d, Divorce and Separation §§ 927, 928.

Appeal by plaintiff from order entered 29 October 1992 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 October 1993.

Plaintiff Ollen Bruton Smith and defendant Bonita Harris Smith were married on 6 June 1972, separated on 24 June 1988, and divorced on 5 February 1990. In a complaint dated 5 November 1990, plaintiff sought compensatory and punitive damages from defendant for, *inter alia*, breach of fiduciary duty, unjust enrichment, and intentional marital destruction. More specifically, plaintiff alleged that defendant committed numerous acts of adultery, consciously schemed to destroy the marriage to benefit from the Equitable Distribution Act, failed to care appropriately for their children, used marital funds for her adulterous affairs, and abused alcohol in an attempt to destroy the marriage. On 4 January 1991, in response to the complaint, defendant filed a motion to dismiss, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990). The trial court entered an order on 29 October 1992, granting defendant's motion and dismissing plaintiff's complaint. From this order, plaintiff appeals.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., and Professor Alison Kitch of Washington & Lee University School of Law for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by Martin L. Brackett, Jr. and John B. Garver, III, for defendant-appellee.

MCCRODDEN, Judge.

In this appeal we must decide whether in North Carolina a spouse or former spouse may maintain actions against the other spouse for breach of fiduciary duty, unjust enrichment, and intentional marital destruction, all pertaining to the marital relationship and its dissolution. The trial court, in allowing the defendant's motion to dismiss, believed he may not. We agree.

On a motion to dismiss for failure to state a claim, the allegations of fact are taken as true. *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 351, 416 S.E.2d 166, 168 (1992). Dismissal is proper when (1) the complaint on its face reveals that no law supports plaintiff's claim, (2) the complaint reveals on its face that some fact essential to plaintiff's claim is missing, and (3) when some fact disclosed in the complaint defeats the plaintiff's claim. *Adver-*

tising Co. v. City of Charlotte, 50 N.C. App. 150, 152, 272 S.E.2d 920, 922 (1980).

Plaintiff initially contends that his causes of action, all alleging marital misconduct by defendant, are not barred by N.C. Gen. Stat. § 50-20 (Supp. 1993) (the Equitable Distribution Act), which provides for the equitable distribution of marital property upon divorce. He insists that the present action is separate and distinct from the equitable distribution proceeding and is based upon the defendant's wrongdoing during the marriage, which was not addressed in the equitable distribution proceeding.

A spouse's marital fault or misconduct not related to the economic condition of the marriage may not be considered during equitable distribution. *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985); *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). Although it is settled that one's wrongdoing during the marriage is not relevant in an equitable distribution proceeding, the question remains whether other proceedings alleging fault during the marriage may survive. In order to resolve this issue, we must review each of plaintiff's causes of action separately.

[1] Plaintiff first challenges the court's dismissal of his claim for damages for breach of fiduciary duty, stating that the allegations of the complaint state a cognizable legal theory. Plaintiff averred in his complaint:

> 67. Plaintiff and defendant stood in a fiduciary relationship to each other as husband and wife.
>
> 68. Defendant has intentionally breached such fiduciary duty by her conduct as described above.
>
> 69. As the direct and proximate cause of such breach of fiduciary duty, plaintiff has suffered loss and damage in an amount [as will] exceed $10,000.00.
>
> 70. All losses suffered by reason of defendant's breach of fiduciary duty were foreseeable and were known to defendant prior to her engaging in the conduct amounting to breach of fiduciary duty.

As Justice Sharp stated in *Eubanks v. Eubanks*, 273 N.C. 189, 195-96, 159 S.E.2d 562, 567 (1968), "[t]he relationship between husband and wife is the most confidential of all relationships, and

transactions between them, to be valid, must be fair and reasonable." Our Courts have found that a spouse breached this confidential relationship or breached his or her fiduciary duty only in specific situations: within the context of a distinct agreement or transaction between the spouses. *See Cline v. Cline*, 297 N.C. 336, 255 S.E.2d 399 (1979) (evidence was sufficient to establish a resulting or constructive trust where husband breached confidential relationship when he took title to a farm in his name only, after representing to his wife that the land would be theirs jointly after the mortgage was paid); *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971) (wife's assignment of stock to husband after breakup of marriage void due to husband's alleged fraud, duress, and undue influence); *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965) (a wife could be entitled to an equitable lien on real estate owned by her husband where the husband had expressly promised to convey her an interest in the land in consideration of the money she had advanced to him to make improvements on the land).

Plaintiff has failed to provide evidence of any agreement or transaction between him and the defendant which would constitute the basis for the breach of fiduciary duty. He does attempt to analogize the marital relationship to a business partnership, arguing that marital partners have a duty to exercise good faith and integrity in their dealings with each other in the affairs of their "partnership." According to this argument, since a business partner could be required to account to the partnership for misappropriated partnership funds, defendant should likewise be held accountable for misappropriated marital funds. Although we believe that the relationship between married persons demands the highest level of integrity, we refuse to impose on it the strict duties of a business partnership. Because a specific agreement or transaction between plaintiff and defendant is absent in the instant case, plaintiff failed to allege a cause of action for breach of fiduciary duty. Accordingly, we overrule this assignment of error.

[2] Under plaintiff's claim that defendant was unjustly enriched, he alleges that defendant's "extramarital affairs, intentional cruelty, and other wrongful actions precipitated the parties' divorce, and thereby allowed . . . [defendant] to take advantage of the . . . equitable distribution statute." We need not analyze North Carolina's unjust enrichment doctrine, because we find plaintiff's argument to be no more than an attempt to attack collaterally the equitable distribution proceeding and judgment. In his brief,

plaintiff maintains that he gave money and other property to defendant in the two years between their separation and divorce in return for her representations that she would work to improve the marriage, even though she had no intention of reconciling with plaintiff. Since plaintiff had an opportunity in the equitable distribution hearing to argue that certain property should not be assigned to defendant, he cannot now complain about the outcome of the equitable distribution judgment. We find no merit in this assignment of error.

[3] Finally, in another collateral attack on the equitable distribution of the marital property, plaintiff asks us to recognize a new tort of intentional marital destruction. He alleges that this tort is necessary to prevent a spouse from profiting from his wrongdoing, since, in his words, N.C.G.S. § 50-20 "allows a spouse who has committed adultery, abandonment or other wrongful action, to profit from the equitable distribution statute." Plaintiff urges this Court to create the tort of marital destruction to "remedy the harsh results produced by the current interpretation of the equitable distribution statute."

As discussed *supra*, a spouse's moral fault not related to the economic condition of the marriage is not to be considered during the distribution of marital property. The marital destruction tort advanced by plaintiff would allow circumvention of the aims of N.C.G.S. § 50-20, by allowing marital fault or misconduct to be relevant in a proceeding collateral to, but affecting, equitable distribution. The courts of our State do not recognize such a tort and we are without the power to create one.

We overrule plaintiff's assignments of error and affirm the dismissal of his complaint.

Affirmed.

Judges LEWIS and WYNN concur.

JONATHAN DUNBAR WESTON v. CAROLINA MEDICORP, INC., AND FORSYTH MEMORIAL HOSPITAL, INC., D/B/A FORSYTH MEMORIAL HOSPITAL

No. 9321SC229

(Filed 18 January 1994)

1. **Constitutional Law § 88 (NCI4th); Appeal and Error § 555 (NCI4th)— race discrimination alleged—relitigation precluded based on doctrine of the law of the case**

Even if the Civil Rights Act of 1991 did apply to plaintiff, he was prevented from relitigating the issue of race discrimination in his dismissal from the staff of defendant hospital based on the doctrine of the law of the case.

Am Jur 2d, Appeal and Error §§ 744 et seq.; Civil Rights §§ 3, 4.

Erroneous decision as law of the case on subsequent appellate review. 87 ALR2d 271.

2. **Hospitals and Medical Facilities or Institutions § 39 (NCI4th)— rejection of "captain of the ship doctrine"—no applicability to defendant's case—no relief from judgment**

There was no merit to plaintiff's contention that the Court's rejection of the "captain of the ship doctrine" in Harris v. Miller, 103 N.C.App. 312, entitled him to relief from judgment in his action alleging that defendants violated his right to due process and racially discriminated against him in revoking his staff privileges at defendant hospital, since defendant repeatedly engaged in conduct which led to a recommendation that, because plaintiff's medical judgment was impaired, his staff privileges should be revoked so as to protect his patients from risk of harm.

Am Jur 2d, Hospitals and Asylums §§ 8 et seq.

Exclusion of or discrimination against physician or surgeon by hospital. 37 ALR3d 645.

Appeal by plaintiff from order signed 28 August 1992 in Forsyth County Superior Court by Judge W. Douglas Albright denying plaintiff's motion to set aside the judgment. Heard in the Court of Appeals 8 December 1993.

In April 1988, plaintiff was suspended from the medical staff of Forsyth Memorial Hospital for violating the hospital policy which requires a physician admitting a patient with HIV infection to identify the patient to other health care providers as being potentially infectious. In 1989, plaintiff was summarily suspended from the medical staff because of various incidents which raised questions concerning whether plaintiff should continue to be allowed staff privileges. Plaintiff appealed the summary suspension to the Executive Committee and to the hospital's Board of Trustees. Both bodies affirmed the suspension pending a full investigation. After an investigation, the Executive Committee recommended that plaintiff's staff privileges be revoked because the Executive Committee found that plaintiff's medical judgment was impaired and that revocation of his staff privileges was necessary to protect patients from the risk of harm. The hospital's Board of Trustees subsequently revoked plaintiff's staff privileges.

On 21 October 1988, plaintiff filed this action alleging that defendants violated his right to due process under the North Carolina Constitution and the Constitution of the United States by suspending and revoking his staff privileges and racially discriminated against him in violation of 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the United States Constitution. The trial court entered judgment in favor of defendants, and, on appeal to this Court, we affirmed. *Weston v. Carolina Medicorp, Inc.*, 102 N.C. App. 370, 402 S.E.2d 653 (1991). Our Supreme Court dismissed plaintiff's appeal and denied his petition for discretionary review. *Weston v. Carolina Medicorp, Inc.*, 330 N.C. 123, 409 S.E.2d 611 (1991).

On 25 February 1992, plaintiff filed a motion to set aside the judgment and for a new trial pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. On 28 August 1992, the trial court entered an order denying plaintiff's motion. Plaintiff appeals from that order to this Court.

Kennedy, Kennedy, Kennedy & Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Anthony H. Brett, Dale E. Nimmo, and Joel M. Leander, for defendants-appellees.

WELLS, Judge.

[1] Plaintiff argues in his first assignment of error that the trial court erred in denying his motion to set aside the judgment and award him a new trial pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiff contends that the Civil Rights Act of 1991 (the Act) applies retroactively to his claim so as to entitle him to relief from judgment. We disagree.

The Act was signed into law on 21 November 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991). In section 3 of the Act, Congress stated that one of the purposes of the Act was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Section 101 of the Act prohibits all racial discrimination in the making and enforcement of contracts, and, in response to *Patterson v. McLean Credit Union*, 491 U.S. 164, 105 L. Ed. 2d 132 (1989), section 101 of the Act provides that "make and enforce contracts" includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (1991).

Even if the Act did apply retroactively to plaintiff's claim, plaintiff is prevented from relitigating the issue of race discrimination based on the doctrine of the law of the case. According to the doctrine of the law of the case, once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal. *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E.2d 181 (1974). *See also NCNB v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E.2d 629 (1983).

When the trial court entered judgment against plaintiff, the trial court made the following finding of fact: "The actions taken by the Hospital in summarily suspending and revoking plaintiff's staff privileges were not taken on account of his race. Dr. Weston's race played no role in the proceedings." On his first appeal to this Court, we held that "plaintiff's assignments of error with regard to the findings of fact [were] . . . ineffective to challenge the sufficiency of the evidence to support the findings under the 'any competent evidence standard' of appellate review" and that "the trial court's findings of fact [were] conclusive on this appeal." *Weston, supra.*

The prior decision of this Court is the law of the case and as such is binding upon this panel. Plaintiff therefore is foreclosed from relitigating the question of race discrimination in this or any other subsequent proceeding. Furthermore, under general rules of estoppel by judgment, plaintiff is similarly precluded from relitigating an issue adversely determined against him. *Poindexter v. First Nat'l Bank*, 247 N.C. 606, 101 S.E.2d 682 (1958).

[2] Plaintiff next argues that the trial court erred in denying his motion to set aside the judgment because there occurred a change in the law as announced by this Court in the case of *Harris v. Miller*, 103 N.C. App. 312, 407 S.E.2d 556, *rev. granted*, 329 N.C. 788, 408 S.E.2d 520 (1991). We disagree.

In *Harris*, we rejected the "captain of the ship doctrine" which plaintiff contends was relied upon by the trial court in ruling against him. Plaintiff argues that our rejection of the "captain of the ship doctrine" in *Harris* entitles him to relief from judgment.

In support of this argument, plaintiff makes the following statement in his brief: "In the present case, Dr. Weston had his staff privileges revoked *mainly* because of the actions of the anesthesiologist in overloading [a] myomectomy patient with fluid." (Emphasis added). This statement is a gross distortion of the findings made by the trial court in the original judgment. Those findings reflect a history of repeated conduct on the part of Dr. Weston which, as we have noted earlier, required the Executive Committee to recommend that, because his medical judgment was impaired, his staff privileges be revoked so as to protect his patients from a risk of harm. Under these circumstances, the *Harris* rule has no application which would require the trial court to grant plaintiff's motion.

Our determination is that the trial court's denial was not a discretionary ruling but one which was required by the doctrine of the law of the case and issue preclusion. The order of the trial court is

Affirmed.

Chief Judge ARNOLD and Judge EAGLES concur.

IN RE THE ESTATE OF SAMUEL W. WALKER, DECEASED

No. 9319SC127

(Filed 18 January 1994)

Judgments § 27 (NCI4th)— announcement of judgment in open court—no entry of judgment—no jurisdiction in Court of Appeals

Announcement of judgment in open court merely constituted rendition of judgment, not its entry, and entry of judgment was required before jurisdiction vested in the Court of Appeals. N.C.G.S. § 1A-1, Rule 58.

Am Jur 2d, Judgments §§ 160 et seq.

Appeal by executor and trustee Wachovia Bank of North Carolina, N.A. from order rendered in open court 12 November 1992 by Judge Thomas W. Ross in Randolph County Superior Court. Heard in the Court of Appeals 2 December 1993.

Wyatt Early Harris Wheeler & Hauser, by William E. Wheeler, for appellant Wachovia Bank of North Carolina, N.A.

Ivey and Wilhoit, by William W. Ivey, for appellee Lurlene S. Millikan.

WYNN, Judge.

On 21 July 1989, Samuel W. Walker executed an inter vivos revocable trust and a will naming appellant Wachovia Bank of North Carolina, N.A. (Wachovia) as both trustee and executor. The terms of the trust directed Wachovia, upon Mr. Walker's death, to use all the trust income and principal for the support of Mr. Walker's wife, Verda Morgan Walker. Mrs. Walker was adjudicated an incompetent in 1990 and Lurlene S. Millikan was appointed as her general guardian.

Mr. Walker died on 4 June 1991, and Wachovia was granted letters testamentary as executor of the estate. Mrs. Millikan wrote Wachovia and requested monthly payments from the trust in the amount of $3,800 to cover Mrs. Walker's care. On 10 December 1991, Mrs. Millikan, on Mrs. Walker's behalf, filed a dissent to Mr. Walker's will. Wachovia then stopped making the monthly payments from the trust. Wachovia challenged the dissent, assert-

ing that by accepting the monthly payments from the trust Mrs. Walker had waived her right to dissent from the will. The clerk of court ruled Mrs. Walker had not waived her right to dissent. Wachovia appealed to the superior court and, after conducting a hearing, the court rendered an oral order that Mrs. Walker had not waived her right to dissent. From that order, Wachovia appeals.

The dispositive issue is whether entry of judgment has occurred in this case such that this Court has jurisdiction to address the merits. We conclude that we lack jurisdiction over this appeal.

The record reveals that no judgment was entered by the superior court. The only indication there was a judgment in this case is the following statement in the record:

> Judge Ross duly conducted a hearing in the above-entitled matter on November 12, 1992 upon the issue of whether or not any right that Mrs. Verda Morgan Walker may have had to dissent from the last will and testament of Samuel W. Walker was waived, of which hearing all parties had due and proper notice. [At the conclusion of that hearing, Judge Ross ruled in open court that based on the evidence presented, Ms. Verda Morgan Walker had not waived any right of dissent that she may have had to the last will and testament of Samuel W. Walker,] which order was not reduced to writing.

This purported order is not sufficient to vest this Court with jurisdiction. This announcement of judgment in open court merely constitutes the rendition of judgment, not its entry. *Searles v. Searles*, 100 N.C. App. 723, 398 S.E.2d 55 (1990). N.C. Gen. Stat. § 1A-1, Rule 58 specifies the requirements for entry of judgment. Since none of the requirements have been met in the instant case, there was no entry of judgment.

Entry of judgment by the trial court is the event which vests jurisdiction in this Court, and the judgment is not complete for the purpose of appeal until its entry. *Searles*, 100 N.C. App. at 726, 398 S.E.2d at 57. Since entry of judgment is jurisdictional, this Court has no authority to hear an appeal where there has been no entry of judgment. *Id.* at 725, 398 S.E.2d at 55.

At oral argument, both parties acknowledged that if this appeal was dismissed they would merely obtain an entry of judgment and appeal again. Despite this acknowledgment, we still must dismiss

this appeal since we lack jurisdiction. *See Mason v. Moore County Bd. of Comm'rs*, 229 N.C. 626, 629, 51 S.E.2d 6, 8 (1948) ("If [the record] fails to disclose the necessary jurisdictional facts we have no authority to do more than dismiss the appeal.")

For the foregoing reasons, this appeal must be

Dismissed.

Judges COZORT and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 JANUARY 1994

A&B MECHANICAL SERVICE, INC. v. WOOLARD No. 922DC750	Beaufort (90CVD839)	Reversed & Remanded
BALLARD TIRE AND OIL CO. v. TEEL No. 923DC692	Craven (89CVD1206)	Affirmed
BEATY v. FREIGHTLINER CORP. No. 9310IC565	Ind. Comm. (633517)	Affirmed
BLANKENSHIP v. AMP, INC. No. 9310IC130	Ind. Comm. (969226)	Affirmed
CARTER v. FLOWERS BAKING CO. No. 9210IC899	Ind. Comm. (926621)	Affirmed in part, reversed in part & remanded
FENDER v. N.C. DEPT. OF HUMAN RESOURCES No. 9229SC1132	McDowell (91CVS496)	Reversed & the petition dismissed
IN RE CONNER No. 9330DC314	Haywood (91CVD427) (91CVD428) (91CVD429)	Affirmed
IN RE MAPP No. 9210SC868	Wake (92M35)	Affirmed
KINGSTON v. K-MART CORP. No. 9318SC587	Guilford (91CVS5600)	Affirmed
ROBINSON v. ROBINSON No. 933DC527	Craven (92CVD205)	Affirmed
SMITH v. JACK ECKERD CORP. No. 9121SC1249	Forsyth (88CVS40)	Reversed in part, remanded for new trial in part
STATE v. BOWEN No. 9327SC621	Lincoln (92CRS956) (92CRS957) (92CRS958) (92CRS959) (92CRS960) (92CRS961) (92CRS962)	Dismissed

	(92CRS963) (92CRS964) (92CRS965) (92CRS992) (92CRS993) (92CRS1008) (92CRS1010) (92CRS1011) (92CRS1059)	
STATE v. CONNARD No. 9310SC60	Wake (91CRS52119) (91CRS52121) (91CRS58776) (92CRS58777)	Remand for resentencing
STATE v. COX No. 938SC315	Lenoir (91CRS10442) (91CRS10443) (91CRS10444) (91CRS10031) (91CRS11330)	Affirmed
STATE v. GODETTE No. 9311SC560	Johnston (92CRS8950) (92CRS8951)	Affirmed
STATE v. JONES No. 9318SC99	Guilford (91CRS037874)	Affirmed
STATE v. PENN No. 9221SC1313	Forsyth (88CRS2504)	No Error
STATE v. ROSEBORO No. 9327SC604	Lincoln (92CRS4719)	Affirmed
STATE v. SMITH No. 9310SC597	Wake (92CRS50329) (92CRS72767)	No Error
TURNER v. LEMMONS No. 9221SC1250	Forsyth (91CVS5732)	Affirmed

FILED 18 JANUARY 1994

BOWLING v. BOWLING No. 9318DC709	Guilford (92CVD7811)	Affirmed
BOWMAN v. MORALES No. 9319SC375	Rowan (91CVS1049)	Affirmed
BRANCH BANKING & TRUST CO. v. YATES No. 9212SC338	Cumberland (91CVS3070)	Reversed

COX v. DEAN No. 9310SC7	Wake (91CVS10460)	Affirmed
EBERLY v. MEMOREX TELEX CORP. No. 9310SC226	Wake (91CVS10875)	Affirmed
EDWARDS v. EDWARDS No. 922DC994	Beaufort (87CVD363) (88CVD218)	Affirmed
FULKS v. STRATEGIC ORGANIZATIONAL SYSTEMS No. 9310IC85	Ind. Comm. (812087)	Appeal Dismissed
GODLEWSKI v. CLEMMONS MORAVIAN PRESCHOOL No. 9210IC1320	Ind. Comm. (857057)	Appeal Dismissed
IN RE BARTLEY No. 9316DC847	Robeson (92J044)	Affirmed
IN RE SHAVER v. MAJORS No. 9326SC286	Mecklenburg (90CVS16300)	Dismissed
KEMP v. KEMP No. 924DC684	Sampson (91CVD396)	Affirmed in part, reversed in part and remanded
KING v. KING No. 938DC148	Lenoir (90CVD955)	Affirmed
KING v. SOUTHERN RAILWAY CO. No. 9218SC759	Guilford (90CVS8357)	Affirmed
LANCASTER v. LANCASTER No. 9329DC22	Rutherford (89CVD570)	Vacated & Remanded
MAIN STREET SHOPS, INC. v. ESQUIRE COLLECTIONS, LTD. No. 9330SC824	Macon (90CVS190) (91CVS200)	Affirmed
McMENAMIN v. DOE No. 9326SC32	Mecklenburg (89CVS16978)	Affirmed
NORTHWESTERN FINANCIAL GROUP v. COUNTY OF GASTON No. 9227SC1214	Gaston (88CVS2513)	Dismissed

ONE NORTH McDOWELL ASSN. v. McDOWELL DEV. CO. No. 9226SC469	Mecklenburg (88CVS13300)	Affirmed in part; reversed in part
PATRICK v. CATHEY No. 9230SC1170	Haywood (91CVS633)	Affirmed
PEELER v. TANNER No. 9314SC55	Durham (91CVS02980)	Affirmed
PITTS v. WARCUP No. 9312SC713	Cumberland (91CVS4216)	Appeal Dismissed
SELF v. DANCY No. 927SC1295	Nash (92CVS998)	Affirmed
SMITH v. FOOD LION, INC. No. 9327SC105	Gaston (91CVS2188)	Affirmed
STATE v. BISHOP No. 9218SC886	Guilford (91CRS52628) (91CRS20761)	No Error
STATE v. BROWN No. 923SC55	Pitt (91CRS1475)	New Trial
STATE v. GOODE No. 9328SC727	Buncombe (92CRS9848) (92CRS64800) (92CRS65284) (92CRS65285) (92CRS65286) (92CRS65287)	Affirmed
STATE v. HALL No. 9325SC798	Catawba (89CRS15600) (90CRS1033) (92CRS8385)	No Error
STATE v. JONES No. 9311SC348	Harnett (92CRS6293)	Affirmed
STATE v. LAVENDER No. 9227SC660	Cleveland (90CRS8884)	Reversed & Remanded
STATE v. NEAL No. 9321SC751	Forsyth (92CRS27168) (92CRS27169)	No Error
STATE v. PACE No. 935SC367	New Hanover (91CRS18314) (91CRS18315) (92CRS1440)	No Error

STATE v. PORTER No. 9318SC758	Guilford (92CRS51399)	No Error
STATE v. STATEN No. 9326SC822	Mecklenburg (92CRS32361)	No Error
STATE v. WARD No. 937SC389	Wilson (92CRS6028) (92CRS6029) (92CRS6628) (92CRS8112) (92CRS8113)	Affirmed
STATE v. WARDRUP No. 9328SC836	Buncombe (93CRS55740) (93CRS55741) (93CRS55743) (93CRS55745) (93CRS55746) (93CRS55748)	Affirmed
TAYLOR v. NEWRENT, INC. No. 9312SC15	Cumberland (92CVS2609)	Affirmed
TRANTHAM v. ESTATE OF SORRELLS No. 9230SC576	Haywood (91CVS650)	Affirmed
WILKINS v. WILKINS No. 9326DC372	Mecklenburg (92CVD4601)	Affirmed

STATE OF NORTH CAROLINA v. PETE DRAKE IRBY

No. 9217SC696

(Filed 1 February 1994)

1. **Homicide § 287 (NCI4th)— second-degree murder—self-defense—sufficiency of evidence**

The State presented substantial evidence of each element of second-degree murder and substantial evidence from which the jury could infer that defendant did not act in self-defense or in defense of his family where the evidence tended to show that there was a forty-five minute delay between the firing of shots and a telephone call for emergency help; it could be inferred from this delay that defendant intended to assure the deaths of the victims rather than merely to stop any aggression by the victims toward defendant's father; evidence of the physical conditions of defendant's father and the victims after the shootings was inconsistent with defendant's contention that the victims had pulled his father from his car and beaten him while defendant's mother went for help; and defendant's self-defense statement was contradicted by evidence of the location of the gunshot wounds on one victim, the location of one victim's shotgun seventeen feet from his body, and the simultaneous blasts of a rifle and a shotgun.

Am Jur 2d, Homicide §§ 425 et seq.

2. **Evidence and Witnesses § 367 (NCI4th)— second-degree murder—self-defense—evidence of prior shootings—erroneous admission**

The trial court in a second-degree murder case erred in admitting evidence of two prior shooting incidents by defendant and his father, though the State ostensibly offered evidence of the prior shooting incidents to show defendant's intent, since there was no connection between those shootings and the crimes charged other than to show defendant's character and propensity for violence and that he must have acted in conformity with that character and not in self-defense. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Homicide § 310.

3. Criminal Law §§ 1122, 1126 (NCI4th)— second-degree murders—sentencing—finding of two aggravating factors error

The trial court erred as a matter of law in making two findings in aggravation for each of two second-degree murders: (1) that there was a pattern or course of violent conduct in shooting at people with a rifle on one or more occasions making defendant a danger to the community and other people, and (2) that defendant failed to render aid to the victim.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgments entered 30 September 1991 by Judge William Z. Wood, Jr., in Caswell County Superior Court. Heard in the Court of Appeals 25 May 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mary Jill Ledford, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant appellant.

COZORT, Judge.

Defendant was convicted of two counts of second degree murder and sentenced to life in prison. We find the trial court committed prejudicial error in admitting evidence that the defendant had been involved in a shooting incident three years earlier, and we remand for a new trial.

The State presented the following evidence. On 1 December 1990, Keith Dunevant, aged 33, Kim Dunevant, aged 30, and Coy Dunevant were on a farm owned by Coy Dunevant's mother and located in southern Caswell County. Keith and Kim had gone to the farm to hunt. Keith had a pump shotgun and a fixed blade knife. Kim was armed with a 30-06 rifle. Defendant and his family lived near the farm. At approximately 5:45 p.m., two neighbors, Virginia and Marvin Jones, heard a total of six gunshots coming from the direction of the Irby property. Virginia Jones testified that she first heard three rifle shots, then, three seconds later, a shotgun blast and an almost simultaneous rifle shot, and then three or four seconds later, another rifle shot. Craig Cox testified that sometime after 5:00 p.m., on 1 December 1990, he heard three

shotgun blasts and two rifle shots coming from the direction of the Irby property. At 6:15 p.m., Laura Wilson, the daughter of an Emergency Medical Technician, received a telephone call from a woman seeking assistance for her husband who had been shot on Smith Loop Road. Wilson gave the caller the number for emergency assistance. At 6:28 p.m., a caller identifying herself as Vicky Irby called the Sheriff's Department and reported a shooting on Smith Loop Road. The woman stated that her father had been shot and needed an ambulance.

Emergency Medical Technician David R. Smith, and Deputy Sheriff Gywnn Brandon arrived at the scene and found Kim's truck sitting sideways off the right-hand side of the road with the headlights on, the driver's door open, and the passenger window down. The truck was running, in neutral, and the hand brake was set. Kim's rifle was unloaded in the gun rack. Smith observed an orange hunting cap lying left of center in the road and a pump shotgun lying sideways in the road approximately 30 to 50 feet from the hat. Deputy Sheriff Brandon ran over the shotgun when approaching the house. When Smith and Brandon arrived at the Irby house, they saw defendant, his father Acie Irby, Acie's wife Brenda, Acie's daughter Vicky, and another woman. Defendant immediately stated that two men had attacked his father and that he had shot them down at the creek with a 30.30 lever-action rifle, which now was propped against the porch. Deputy Sheriff Brandon secured the rifle, which contained five rounds of ammunition. Smith examined Acie and determined that he had no life threatening injuries.

Deputy Sheriff Brandon examined Keith's .12 gauge shotgun. The breach was closed and ready to fire, but there was no ammunition. Kim's body was discovered approximately 5 to 10 yards off the south side of the road according to Smith, 5 to 50 feet according to Brandon. Kim was lying on his back with a gunshot wound to the face and no vital signs. Keith's body was discovered in a ditch on the north side of the road, approximately 20 to 40 yards from Kim. Keith had a gunshot wound to his chest and had been dead no more than three minutes when his body was discovered. His hunting knife was above his head. His shotgun was approximately 17 feet away. The medical evidence showed that at the time of death, Keith had a blood alcohol level of .24 percent and Kim had a blood alcohol level of .17 percent.

Defendant was taken into custody and advised of his *Miranda* rights. He gave the following statement while seated in a deputy's car. He stated that the Dunevant's truck came down the road when his parents left in the car to go to the store. His mother returned to the house and told him that two hunters stopped in the road, approached the car, pointed a gun in Acie's face, pulled him out of the car, and started to beat him. His mother pushed the truck out of the road with her car and returned to the house. She told defendant to bring his gun because the men were going to kill his father. When defendant arrived, the two men were still beating his father. One of the men, Keith, started walking towards him with a switchblade knife. Keith shoved the defendant into the ditch, and as defendant tried to get out of the ditch, Keith reached for his shotgun. Defendant thought he heard Keith say that he was going to kill him, but Keith was drunk and difficult to understand. Defendant shot Keith. Keith spun around and fell into the ditch. Defendant heard his father yell for help. Defendant heard Kim say he was going to kill Acie and saw Kim with something in his hand continuously beating Acie. Although Kim's back was to defendant, Kim had turned his face towards him. Defendant was 50 to 60 feet away when he shot Kim in the head. Defendant and his father walked back to the house.

At the police station, defendant signed a waiver of his *Miranda* rights. He stated that he wanted to correct part of his earlier statement. He had not given the information earlier because he did not want to get his mother in trouble. In his revised statement, defendant stated that he heard five or six gunshots as his parents were going down the road. When defendant's mother came back to get him, she grabbed a .12 gauge shotgun and some birdshot shells. When they arrived at the scene, defendant saw Keith and Kim beating Acie. Keith approached defendant and shoved him into a gully. Defendant's mother told him that Keith had a shotgun and was going to shoot defendant who was face down in the ditch. Defendant's mother grabbed the .12 gauge shotgun and shot Keith in the legs to stop him. When defendant got up, Keith was sitting in the gully with the shotgun and was getting ready to turn around and shoot defendant when defendant shot Keith. When Keith fell back, the shotgun went to his side. The remainder of defendant's statement did not change.

Dr. John D. Butts, the chief medical examiner for the State of North Carolina, testified that Keith Dunevant was fatally wound-

ed by a bullet shot once in the upper right back, just right of the base of the neck and shoulder. The bullet exited in the midline center of the chest. Keith also suffered a shotgun wound to the lower back of his legs. The shotgun pellets came from behind Keith and traveled downwards. From the pattern of the buckshot on the legs, Dr. Butts testified that it was possible that the wounds were inflicted while Keith was running. The wounds to the legs were inflicted by a gun approximately 30 feet away. Keith had bruises on his right knuckles and a fresh cut on one of his knuckles. There were no injuries to his left hand.

Dr. Butts further testified that Kim Dunevant died as a result of a bullet entering the left side of the neck and exiting at the edge of his jaw on the right. Kim's hands were free of bruising, with no scrapes or cuts. On the back of his left hand, Kim had a small discoloration.

Dr. David Dubois, the emergency room physician who examined Acie on 1 December 1990, testified that Acie was unable to recall his birthday or state why he was at the hospital. A physical examination showed that Acie had a bruise to the right eyebrow and some blood in the right nasal passage. There was no evidence that Acie had been hit in the abdomen or any other area of the face. There were no broken bones or deep lacerations.

The State also presented evidence that on 23 December 1988, Sam Butler and some friends were driving on the road and threw some firecrackers in the road. Butler accelerated down the road and heard two gunshots from two guns. He lost control and had a flat tire. As he tried to get the truck out of the ditch, he heard bullets whizzing over his head. Later that day, defendant told a neighbor that he had shot at someone who had thrown firecrackers in his yard.

Defendant presented no evidence. On appeal, defendant argues that the trial court erred in (1) denying defendant's motion to dismiss the charges; (2) permitting evidence about a prior incident in which defendant fired shots at a truck on the road; (3) relying upon aggravating factors which were not supported by the evidence or were improper as a matter of law; and (4) failing to find as a mitigating factor that defendant acted under strong provocation.

[1] In his first assignment of error, defendant argues that the trial court erred in denying defendant's motion to dismiss because

the State failed to present substantial evidence that defendant acted with malice. The trial court must grant defendant's motion to dismiss if, viewing the evidence in the light most favorable to the State, the State fails to present substantial evidence of each element of the crime charged. *State v. Herring*, 322 N.C. 733, 738, 370 S.E.2d 363, 367 (1988). "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* The test of sufficiency of the evidence is the same whether the evidence is direct, circumstantial, or a combination of the two. *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978). Where evidence is circumstantial, " 'the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy them beyond a reasonable doubt that the defendant is actually guilty.' " *Id.* at 244-45, 250 S.E.2d at 209 (quoting *State v. Rowland*, 263 N.C. 353, 139 S.E.2d 661 (1965)).

First degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Norris*, 303 N.C. 526, 529, 279 S.E.2d 570, 572 (1981). Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *Id.* "As a general rule, malice exists as a matter of law whenever there has been an unlawful and intentional homicide without an excuse or mitigating factors." *State v. Torres*, 99 N.C. App. 364, 370, 393 S.E.2d 535, 539-40 (1990), *rev'd on other grounds*, 330 N.C. 517, 412 S.E.2d 20 (1992). "Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation." *Norris*, 303 N.C. at 529, 279 S.E.2d at 572.

The defendant contends the State failed to present substantial evidence that the defendant acted with malice and not in lawful defense of himself and his father. In *Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73, the North Carolina Supreme Court set forth the following requirements of "perfect self-defense" which negate any criminal responsibility for the killing of another person:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were suffi-

cient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

"The reasonableness of [defendant's] belief is to be determined by the jury from the facts and circumstances as they appeared to the defendant at the time of the killing." *State v. Jones*, 299 N.C. 103, 111, 261 S.E.2d 1, 7 (1980).

Imperfect self-defense arises if the first two elements in the above quotation are present and neither of the latter two elements are present. *State v. Maynor*, 331 N.C. 695, 699, 417 S.E.2d 453, 456 (1992). If defendant acted in imperfect self-defense, the charge of murder is reduced to manslaughter. *State v. McAvoy*, 331 N.C. 583, 596, 417 S.E.2d 489, 497 (1992). The above principles are equally applicable when a person acts in defense of a family member. *Jones*, 299 N.C. at 111, 261 S.E.2d at 7.

The State has the burden of proving by substantial evidence that defendant did not act in perfect or imperfect self-defense. *State v. Hamilton*, 77 N.C. App. 506, 513, 335 S.E.2d 506, 511, *cert. denied*, 315 N.C. 593, 341 S.E.2d 34 (1985). "When evidence introduced by the State consists of exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by those statements." *State v. Meadlock*, 95 N.C. App. 146, 149, 381 S.E.2d 805, 806, *disc. review denied*, 325 N.C. 434, 384 S.E.2d 544 (1989).

Defendant argues that the State is bound by his exculpatory statements which show that he was acting in self-defense when he shot Keith Dunevant and acting in defense of his father when he shot Kim Dunevant. The State argues that physical and other evidence contradicts defendant's version of the encounter and that the State carried its burden of proving that defendant did not act in self-defense. Specifically, the State first argues that the forty-five minute delay between the firing of the shots and the

telephone call for emergency help showed that defendant intended to assure the deaths of the victims rather than merely to stop any aggression. Witnesses heard a shotgun blast and several rifle shots near the Irby property at approximately 5:45 p.m. Vicky Irby did not call emergency personnel until 6:15 p.m. After Laura Wilson instructed Vicky to call 911, Vicky did not make that call until 6:28 p.m., nearly forty-five minutes after the shots were heard. At that time, she stated that her father had been shot and needed help.

Second, the State argues that the evidence of the physical conditions of Acie Irby, Keith Dunevant and Kim Dunevant, after the shootings is inconsistent with defendant's statement that Keith and Kim had pulled Acie from his car and beat him while defendant's mother went for help. The State argued at trial that Acie's injuries were not severe enough to support defendant's statement that Keith and Kim, two large men, had beaten Acie for several minutes while defendant's mother went for help. The State contended that the minor injuries to Acie could have been inflicted by a family member as part of a cover-up story. The medical evidence showed that Acie had a bruise to the right eyebrow, an abrasion on his face, and some blood in his right nasal cavity. Acie's dentures were not dislodged and he had no broken bones. Keith had bruises on his right knuckles which could have been caused by striking a hard object or having his hand struck by a hard object. Kim had only a small discoloration on the back of his left hand; there were no scrapes or significant bruising on either hand.

Finally, the State argues that defendant's statement was contradicted by evidence of the location of the gunshot wounds on Keith's body, the location of Keith's shotgun seventeen feet from Keith's body, and the simultaneous blasts of a rifle and shotgun. Defendant stated that Keith had pushed him in a gully. While he was in the gully, defendant's mother shot Keith in the back of the legs because Keith was attempting to shoot defendant. Defendant shot Keith as Keith attempted to turn around and shoot defendant. Keith's shotgun flew to his side after he was hit by the bullets. The State contended at trial that the medical evidence permitted an inference that Keith was shot from behind as he was running away. The medical evidence showed that Keith was shot in the back of the legs with birdshot. The pattern of the birdshot on the legs supported an inference that defendant was running when he was shot. In addition, the bullet entered Keith's

body in the upper back. The State further contended that the physical evidence contradicted defendant's statement. Keith's shotgun was found seventeen feet from his body, permitting an inference that he was not armed when defendant shot him. Finally, witnesses testified that they heard a shotgun blast simultaneously with a rifle shot, permitting a reasonable inference that defendant and his mother shot Keith as he was running away.

Reviewing the evidence, we find that the State presented substantial evidence of each element of the crime charged. We further find that the State presented substantial evidence from which the jury could infer that defendant did not act in self-defense or in defense of his family. Accordingly, we find that the trial court did not err in denying defendant's motion to dismiss.

[2] In his second assignment of error, defendant argues that the trial court erred in permitting into evidence defendant's following statements:

> A. Okay, the question was, "Has your daddy ever had any problems with these boys themselves?"
>
> Answer, "No, the only person Daddy had problems with hunting was Fred Cox, but he hasn't ever had fighting problems, just words."
>
> Question, "You're being pretty truthful right now, I think, I don't want you to stop, but it's a fact your daddy has shot over somebody's truck in the past."
>
> "He shot up in the air, not over the truck," that was his answer.

Defendant further argues that the trial court erred in allowing two witnesses to testify that in December 1988, defendant and his father fired shots over a truck driving on the road near defendant's house. The State argues that the evidence was admissible to show defendant's intent. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) provides:

> *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.

"Rule 404(b) state[s] 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, 278-79, 389 S.E.2d 48, 54 (1990).

> Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried."

State v. Bagley, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L.Ed.2d 912 (1988) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)).

In *Morgan*, the North Carolina Supreme Court found that the trial court erred in permitting testimony that approximately three months before defendant allegedly killed the decedent, defendant had pointed his shotgun at two other men. Rejecting the State's argument that the evidence was admissible to show "that defendant's pointing of the shotgun at the decedent and shooting him was not in self-defense," the Court stated:

> The State's rationale here is precisely what is prohibited by Rule 404(b). In order to reach its conclusion, the State is arguing that, because defendant pointed a shotgun at Mr. Hill three months earlier, he has a propensity for violence and therefore he must have been the aggressor in the alleged altercation with Mr. Harrell and, thus, could not have been acting in self-defense. Indeed, the Commentary to N.C.G.S. § 8C-1, Rule 404(b) infers that "evidence of a violent disposition to prove that the person was the aggressor in an affray" is an impermissible use of "evidence of other crimes, wrongs, or acts."

Id. at 638, 340 S.E.2d at 92. In *Morgan*, the Court rejected the State's argument:

> In the instant case, defendant claimed neither that his shooting Mr. Harrell was accidental or inadvertent nor that

> he was unable to form the requisite criminal intent to shoot Mr. Harrell. He claimed that he shot Harrell in self-defense. The proper inquiry in a self-defense claim focuses on the reasonableness of defendant's belief as to the apparent necessity for, and reasonableness of, the force used to repel an attack upon his person. The fact that defendant may have pointed a gun at another person sometime in the past, without more, has no tendency to show that the defendant did not fear Mr. Harrell or to make the existence of his belief as to the apparent necessity to defend himself from an attack "more or less probable than it would be without the evidence."

Id. at 639, 340 S.E.2d at 92 (citation omitted) (quoting N.C. Gen. Stat. § 8C-1, Rule 401). The Court further reasoned:

> Had the State's evidence been to the effect that defendant had pointed a gun at or threatened *Mr. Harrell* three months earlier, such evidence would more likely be relevant as tending to show a plan or design, or as negating defendant's claim that Mr. Harrell's attack on him was unprovoked.

Id. at 639, 340 S.E.2d at 92-93.

In *State v. Mills*, 83 N.C. App. 606, 351 S.E.2d 130 (1986), defendant was convicted of second degree murder after a witness testified that three years prior to the shooting death of the victim, defendant had pointed a .22 Magnum at the victim, told him to "hush," and fired the gun into the ceiling. Defendant and victim laughed after the shot. In finding the evidence inadmissible, this Court quoted from *State v. McClain*, 240 N.C. 171, 177, 81 S.E.2d 364, 368 (1954):

> "[T]he dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected."

Mills, 83 N.C. App. at 610, 351 S.E.2d at 133 (quoting *McClain*, 240 N.C. at 177, 81 S.E.2d at 368).

Disagreeing with the State's contention that the evidence was admissible to show defendant had the requisite intent for first degree murder, the *Mills* Court reasoned:

> Ms. Moser testified that the defendant told Danny to hush, pointed his gun at him and then fired up into the ceiling. No verbal threats to kill him were communicated, and both men laughed afterward; there is no indication that any ill will might be ongoing from the incident. Nor does the evidence tend to show that, when he pointed the gun at Danny in 1982, the defendant formed the intent to kill which was only realized three years later. Due to the circumstances of the incident and its extreme remoteness, the evidence has no tendency to make the existence of premeditation or deliberation "more or less probable than it would be without the evidence." Rule 401.

Id. at 611, 351 S.E.2d at 133. The Court further noted that "[i]t is apparent from the record that the prosecution introduced the evidence at trial in order to show that the defendant was the aggressor and did not act in self-defense." *Id.* Although recognizing that the *Morgan* court had specifically stated that its ruling might have been different if prior to the shooting defendant had pointed a shotgun at the victim rather than two other men, the *Mills* Court concluded that the evidence of prior conduct offered in the *Mills* case was irrelevant and inadmissible. Reasoning that "the fact that defendant pointed his gun at Danny does not indicate that three years later he did not fear Danny or 'make the apparent necessity to defend himself more or less probable than it would be without the evidence,' " the Court concluded that "it was error to allow testimony of this extrinsic act of misconduct in order to show defendant's character for violence and that therefore he must have acted in conformity with that character, and not in self defense, when he shot Danny Lee Smith." *Id.* at 612, 351 S.E.2d at 134. The Court further found inadmissible evidence that defendant had shot an alarm clock, his motorcycle, a windowpane, wall, floor, bathroom mirror, antenna and meter box in a mobile home, into a garden to scare chickens, and through trees in the direction of a neighbor's house.

We find the principles stated in *Morgan* and *Mills* controlling in this case. Although the State ostensibly offered evidence of

the prior shooting incidents to show defendant's intent, we perceive no connection between those shootings and the crimes charged other than to show defendant's character and propensity for violence and that he must have acted in conformity with that character and not in self-defense. The prosecutor argued to the jury that the shooting incident was "the most direct evidence of Pete Irby's specific intent to kill and the lack of aggression on the part of our victims . . . ." As in *Morgan*, defendant did not claim that the shooting was accidental or inadvertent, nor did he claim that he was unable to form the requisite criminal intent to shoot the victims. Rather, he claimed that he shot in self-defense and defense of his father. The fact that defendant may have fired shots at a third person three years before has no tendency to show that defendant did not fear Keith and Kim or to make the existence of his belief as to the apparent necessity to defend himself from an attack more or less probable than it would be without the evidence. Therefore, we find the evidence that defendant shot over a truck in 1988 irrelevant and inadmissible. We further find defendant's statements that his father had shot in the air and not over a truck irrelevant and inadmissible. The evidence bears no relation to defendant's intent or the apparent necessity to defend himself. Accordingly, we find that the trial court erred in admitting the evidence of both prior shooting incidents by defendant and his father. We also find, given all the evidence in this case, that the admission of the evidence cannot be deemed harmless error. Defendant is entitled to a new trial.

[3] Two of the defendant's arguments regarding sentencing need to be addressed because the issues may arise at retrial. Defendant correctly argues that the trial court erred as a matter of law in making two findings in aggravation: (1) that there was a pattern or course of violent conduct in shooting at people with a rifle on one or more occasions making the defendant a danger to the community and other people, *see State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988); and (2) that the defendant failed to render aid to the victim, *see State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985). The other sentencing issues need not be addressed here.

New trial.

Judges WELLS and JOHN concur.

LOUZALIA RADICA, EMPLOYEE, PLAINTIFF v. CAROLINA MILLS, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 9210IC1239

(Filed 1 February 1994)

1. **Master and Servant § 69.1 (NCI3d)— workers' compensation—back injury—release to return to work—additional disability benefits**

Defendants in a workers' compensation action arising from a back injury failed to overcome the presumption that plaintiff's temporary total disability continued until she returned to work at the same wage earned prior to the injury where there was no evidence to support a finding that plaintiff retained any earning capacity as of the date on which she was released to return to work by defendant-employer's physician and on which her temporary total disability benefits were terminated. An employee's release to return to work is not the equivalent of a finding that the employee is able to earn the same wage earned prior to the injury, nor does it automatically deprive an employee of the presumption of disability.

Am Jur 2d, Workers' Compensation § 382.

2. **Master and Servant § 96.6 (NCI3d)— workers' compensation—continuing disability—denial of award—conclusion that connection between injury and inability to work not shown—error**

The Industrial Commission erred in a workers' compensation case by denying benefits for continuing disability based on plaintiff's failure to show that her work-related injury caused her inability to work where the parties executed I.C. Forms 21 and 26, which were approved by the Commission; the sole issue before the Deputy Commissioner was whether plaintiff was entitled to further benefits; defendant conceded in its appellate brief that there was no dispute that plaintiff was injured at work while pulling a bobbin from a spindle; the record is devoid of evidence that plaintiff's injury was caused by any event other than pulling a bobbin from a spindle; and defendant failed to produce expert testimony that the alleged precipitating event could not have caused the injury.

Am Jur 2d, Workers' Compensation § 263.

3. Master and Servant § 75 (NCI3d)— back injury—compensation for treatment—remanded

A workers' compensation action was remanded for a determination of plaintiff's entitlement to medical expenses pursuant to N.C.G.S. § 97-25 for treatment by her own four doctors where defendant contended that it had authorized only its own physician, that plaintiff had been told that she would not be paid for treatments by her doctors, and that the treatments provided by plaintiff's doctors did not relate to her injury.

Am Jur 2d, Workers' Compensation § 436.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission filed 14 September 1992. Heard in the Court of Appeals 26 October 1993.

The parties in this action do not dispute that plaintiff was injured at work while pulling a spinning bobbin from a spindle on 18 April 1988. On or about 3 May 1988, defendant-employer filed an "Employer's Report of Injury to Employee" (I.C. Form 19), listing plaintiff's "lower back pain" as the nature and location of injury and Dr. Dickerson as the treating physician. On 13 May 1988, the parties entered an "Agreement for Compensation for Disability" (I.C. Form 21) for plaintiff's "lower back pain" with payments beginning 8 May 1988 and continuing for the necessary number of weeks. This form was approved by the Industrial Commission on 26 May 1988. Plaintiff returned to work briefly on 29 August 1988, but could not perform her duties because of her continuing back pain. Consequently, on 6 September 1988, the parties entered a "Supplemental Memorandum of Agreement as to Payment of Compensation" (I.C. Form 26) stating that plaintiff became totally disabled on 30 August 1988 and that payments were to begin on that date and continue for the necessary number of weeks. This form was approved by the Industrial Commission on 7 October 1988.

On 21 September 1988, plaintiff was released to return to work with no disability. Plaintiff alleges that she was unable to return to work on 21 September 1988 because of her continuing pain. On 1 November 1988, plaintiff filed a "Request that Claim Be Assigned For Hearing" (I.C. Form 33), claiming that she was "still injured and unable to work" and seeking compensation for

work days missed after 20 September 1990 and the payment of medical expenses and treatment.

On 18 April 1991, a Deputy Commissioner of the North Carolina Industrial Commission rendered the following opinion and award:

FINDINGS OF FACT

1. Plaintiff, who is 47 years old, attended school to the ninth grade. She has worked in textiles in a variety of capacities since age 17, and has always worked, except one year when her son was sick.

2. Plaintiff's injury occurred on 18 April 1988 when, while pulling a spinning bobbin from a spindle she experienced a pain in her left lower back which radiated posteriorly into the left calf and plantar left foot with numbness of the foot. She was seen by her family doctor on 20 and 24 April 1988, after which defendants directed her to seek treatment with Dr. Dickerson at the Gaul Orthopedic Group.

3. Plaintiff followed up with Dr. Dickerson from 29 April 1988 to 20 September 1988. Ct-Scan was negative and Dr. Dickerson assured plaintiff that surgery would not be required. Dr. Dickerson noted symptom magnification. Plaintiff underwent physical therapy, but her pain continued, prompting Dr. Dickerson to order at least two pain studies, the results of which revealed minimal physicogenic [sic] pain. On the advice of Dr. Dickerson, plaintiff attempted to return to work on 29 August 1988, but had to leave during the middle of her shift. Dr. Dickerson was never able to identify anything that was specifically wrong with plaintiff that was severe enough to cause the kind of pain of which she complained, and released her to return to work on 21 September 1988 with not [sic] disability.

4. Ronnie Thompson, defendant-employer mill nurse, told plaintiff she was not to see Dr. Shah or Dr. Phillips.

5. Plaintiff returned to Dr. Shah on 22 September 1988 after she was released by Dr. Dickerson, because she was still having increasing discomfort in her low back and left leg. Dr. Shah referred plaintiff to Dr. Phillips, an orthopedist, and Dr. Kelly, a neurosurgeon at Bowman-Gray.

6. An MRI scan of the lumbar spine was done and the results were normal. Plaintiff saw Dr. Phillips until 5 October 1988, at which time he did not feel she was able to work. Dr. Phillips was unable to identify a physical cause for plaintiff's pain and thought perhaps she needed to go to a pain clinic. He had nothing to offer her.

7. Dr. Shah's records do not reflect that he is able to offer an explanation for plaintiff's continued complaints of pain. He referred her to Dr. Phillips, who was unable to identify the source of plaintiff's pain, found all the studies to be normal, and had nothing to offer her. Except for the fact that plaintiff's symptoms developed and continued after the injury of 18 April 1988, Dr. Shah never causally relates plaintiff's unexplained continued complaints of pain to the injury of 18 April 1988.

8. Plaintiff saw Dr. Kelly on 11 November 1988. Dr. Kelly recommended a myelogram and CT-Scan, but defendants refused to pay for this treatment.

9. Plaintiff did not return to Dr. Kelly until 6 July 1990, at which time plaintiff complained of continuing pain on the left side down the left leg to the foot. On exam she had positive straight leg raising on the left. Dr. Kelly proceeded with a myelogram and post-myelogram CT-Scan, the results of which were again normal.

10. On 26 July 1990 plaintiff exhibited limited straight leg raising, but no weakness or reflex changes. Voltare and Soma were prescribed and plaintiff was to return to Dr. Kelly in two months.

11. On 27 September 1990, plaintiff returned to Dr. Kelly and reported that she was doing better. Dr. Kelly concluded that she had reached maximum medical improvement on 27 September 1990, that she retained a ten percent permanent impairment to her back, and that she could return to full time work that did not require lifting over 30 to 40 pounds.

12. Defendants advised plaintiff through her attorney in May 1990 that they would have no objection to plaintiff returning to Dr. Dickerson for follow up treatment, but they would not authorize Dr. Kelly.

13. Plaintiff is of the opinion that there is no job which she is able to perform which pays more than minimum wage. She complains that her back pain prevents her from sitting, standing or walking for long periods of time. There is no evidence that her continued complaints of pain are causally related to the injury of 18 April 1988.

14. There is no evidence that the treatment plaintiff received from Dr. Shah in September 1988 and the treatment she received from Dr. Phillips in 1988, gave relief, tended to effect a cure, lessened the period of plaintiff's disability, or was causally related to the injury of 18 April 1988.

15. The treatment plaintiff received from Dr. Kelly, a neurosurgeon, did tend to give relief. However, there is no evidence that the condition which Dr. Kelly treated in plaintiff was causally related to the injury of 18 April 1988.

16. As a result of the injury of 18 April 1988, plaintiff was unable to earn the same wages she was earning at the time of the injury in the same or any other employment, from the date of injury to 21 September 1988.

17. There is insufficient evidence to support a finding that plaintiff's injury of 18 April 1988 is causally related to any permanent impairment to her back or to the complaints of pain which have prevented plaintiff from returning to work. Plaintiff has failed to establish that she suffered a total or partial loss of wage earning capacity after 21 September 1988 as a result of the injury of 18 April 1988.

The foregoing findings of fact engender the following

CONCLUSIONS OF LAW

1. As a result of the injury of 18 April 1988, plaintiff was temporarily and totally disabled from the date of injury to 21 September 1988. G.S. 97-29.

2. Plaintiff has the burden of establishing by expert medical testimony the causal connection between her injury of 18 April 1988 and the treatment she received and any periods of disability she may have suffered after 21 September 1988. *Click v. Pilot Freight Carriers*, 300 N.C. 164[, 265 S.E.2d 389] (1980). Inasmuch as the stipulated medical records fail to show that

the problems for which plaintiff sought treatment from Dr. Shah, Dr. Phillips, and Dr. Kelly, and her inability to return to work after 21 September 1988, were causally related to the injury of 18 April 1988, her claim for additional workers' compensation benefits is DENIED.

******

The foregoing findings of fact and conclusions of law engender the following

AWARD

1. Plaintiff's claim for additional workers' compensation benefits is hereby denied.

2. Defendants shall not be responsible for paying for the medical treatment plaintiff received from Dr. Shah, Dr. Phillips, and Dr. Kelly.

3. Each side shall pay its own costs.

On 14 September 1992, the Full Commission found "no adequate ground to amend the award" and "adopt[ed] as its own the Opinion and Award as filed." Plaintiff appeals.

Malcolm B. McSpadden for plaintiff-appellant.

Alala Mullen Holland & Cooper, P.A., by H. Randolph Sumner, for defendant-appellees.

EAGLES, Judge.

I.

[1] Plaintiff argues that the Industrial Commission "erred by failing to apply the presumption that the plaintiff's temporary total disability continues until she returns to work at the same wage earned prior to the injury." We agree.

In *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106, *disc. review denied*, 332 N.C. 347, 421 S.E.2d 154 (1992), this Court stated:

> Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of

> the Commission. *Cody v. Snider Lumber Co.*, 328 N.C. 67, 399 S.E.2d 104 (1991) (citations omitted). This is so even though there is evidence which would support a finding to the contrary. *Crawford v. Warehouse Co.*, 263 N.C. 826, 140 S.E.2d 548 (1965). However, if the findings are predicated on an erroneous view of the law or a misapplication of the law, they are not conclusive on appeal. *See e.g., Bailey v. Dept. of Mental Health*, 272 N.C. 680, 159 S.E.2d 28 (1968) (remand required to consider evidence in its true legal light). Furthermore, findings of fact which are essentially conclusions of law will be treated as such upon review. *Cody*, 328 N.C. 67, 399 S.E.2d 104.

Furthermore, it is well established that the Workers' Compensation Act " 'should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation.' " *Hall v. Chevrolet Co.*, 263 N.C. 569, 576, 139 S.E.2d 857, 862 (1965) (citations omitted).

Here, plaintiff seeks additional disability benefits for the period after which she was released by defendant-employer's physician to return to work. Regarding an employee's claim to disability benefits, this Court has stated:

> The [Workers' Compensation] Act compensates a worker for work related injuries which prevent him from earning the equivalent amount of wages he was making before his injury. *See Little v. Food Service*, 295 N.C. 527, 246 S.E.2d 743 (1978). Our courts have ruled that in order to receive compensation for disability, the mere fact of an injury is not sufficient but rather the injury must have caused some impairment in the worker's earning capacity. *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 155 S.E.2d 755 (1967).
>
> G.S. § 97-2(9) defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Accordingly, in *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982), our Supreme Court ruled that in order to find a worker disabled under the Act the Commission must find:
>
> > (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,

> (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
>
> (3) that this individual's incapacity to earn was caused by plaintiff's injury.
>
> Initially, the claimant must prove the extent and degree of his disability. *Armstrong* [71 N.C. App.] at 784, 323 S.E.2d at 49. On the other hand, once the disability is proven, there is a presumption that it continues until "the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971).

Watson v. Winston-Salem Transit Authority, 92 N.C. App. 473, 475-76, 374 S.E.2d 483, 485 (1988). In this record, there is no evidence to support a finding that plaintiff retained any earning capacity as of 21 September 1988, the date on which she was released to return to work by Dr. Dickerson and on which her temporary total disability benefits were terminated. Here, plaintiff has carried her initial burden, *id.*, of showing that she was disabled. The record discloses that defendant admitted liability under the Workers' Compensation Act through approved settlements (I.C. Form 21 and I.C. Form 26). Plaintiff began to receive temporary total disability payments on 8 May 1988 and the parties have stipulated that these payments continued until her release to return to work was authorized by defendant-employer's physician on 21 September 1988. An employee's release to return to work is not the equivalent of a finding that the employee is able to earn the same wage earned prior to the injury, nor does it automatically deprive an employee of the benefit of the *Watkins v. Motor Lines* presumption. *Cf. Watson*, 92 N.C. App. at 476, 374 S.E.2d at 485 (finding of maximum medical improvement is not the same as a finding that the employee is able to earn the same wage earned prior to the injury). After plaintiff meets her initial burden, the burden shifts to defendants who must show that plaintiff is employable. *Id.; Lackey v. R.L. Stowe Mills*, 106 N.C. App. 658, 662, 418 S.E.2d 517, 519-20, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 150 (1992). The Deputy Commissioner's findings and conclusions are devoid of any indication that defendant met its burden of showing that on 21 September 1988 plaintiff was capable of earning the same wage that she had earned prior to the injury. Accordingly, we conclude that defend-

ants have failed to overcome the *Watkins v. Motor Lines* presumption.

II.

[2] Plaintiff contends that the Industrial Commission erred "by denying workers' compensation benefits for continuing disability to the plaintiff on the basis that she had failed to show that her work-related injury to her back caused her inability to work after September 21, 1988." We agree.

We note that the parties here have executed I.C. Forms 21 and 26, which were subsequently approved by the Industrial Commission. Furthermore, the sole issue before the Deputy Commissioner in this proceeding was a determination of whether plaintiff was entitled to further benefits. In *Lucas v. Thomas Built Buses*, 88 N.C. App. 587, 591, 364 S.E.2d 147, 150 (1988), this Court stated:

> The record contains two agreements, IC Forms 21 and 26, in which defendants agree to pay compensation for plaintiff's back injury. The record also reveals that the only issue before the Commission was whether plaintiff's compensation should continue, not whether his alleged disability was the result of [the employee's] accident. G.S. 97-17 provides that, "no party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of matters [therein] set forth, unless it shall be made to appear . . . that there ha[s] been error due to fraud, misrepresentation, undue influence or [mutual] mistake." This is a case of admitted liability and the Commission's conclusion that there was no evidence to show causation is not a basis for denying plaintiff's award.

Accordingly, we conclude that the Deputy Commissioner erred in concluding that "[p]laintiff has the burden of establishing by expert medical testimony the causal connection between her injury of 18 April 1988 and . . . any periods of disability she may have suffered after 21 September 1988. *Click v. Pilot Freight Carriers*, 300 N.C. 164[, 265 S.E.2d 389] (1980)." We note that in *Click* the employer did not admit liability as the employee there provided conflicting accounts as to the origin of his injury. *Id.* Furthermore, upon a careful examination of *Click* we find that the precise holding of that case would be inapplicable to the facts presented here even in the absence of defendant-employer's admission of liability.

In *Click*, our Supreme Court expressly set forth the specific admonition concerning the requirement of a plaintiff's presentation of expert opinion evidence regarding causation:

> We do not rule out the possibility that a disc injury case may arise in the future wherein the facts are so simple, uncontradictory, and obvious as to permit a finding of a causal relationship between an accident and the injury absent expert opinion evidence. For instance, in *Tickle v. Insulating Co.*, 8 N.C. App. 5, 173 S.E.2d 491 (1970), the Court of Appeals upheld a workmen's compensation award for temporary total disability resulting from a nonspecific lower back injury (not a disc injury), despite the lack of expert medical evidence linking the back condition with the work place accident. The court held evidence that the onset pain of which plaintiff complained was simultaneous with the accident, along with other evidence in the case, was sufficient to allow the trier of fact to draw a reasonable inference that the injury was the proximate result of the accident. The Supreme Court of Oregon has noted that the "distinguishing features" of most compensation cases holding medical testimony unnecessary to make a *prima facie* case of causation include:
>
> > "[A]n uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to his superior and consultation with a physician, and the fact that the plaintiff was theretofore in good health and free from any disability of the kind involved. A further relevant factor is the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury . . . ." *Uris v. State Compensation Department*, 247 Or. 420, 426, 427 P.2d 753, 756 (1967). (Citations omitted.)

Click, 300 N.C. at 168-69, 265 S.E.2d at 391-92. Our Supreme Court proceeded to state that the facts in *Click* did not present this type of situation because other evidence in the case suggested that the employee's injury was caused by an occurrence unrelated to work and at the employee's home. Accordingly, our Supreme Court held that medical testimony was needed to provide a proper foundation for the Industrial Commission's finding on the question of the injury's origin. *Id.* at 169, 265 S.E.2d at 392. These facts are readily distinguishable from the simple and uncontroverted

facts regarding the origin of the injury presented here. In its appellate brief, defendant concedes that "[t]he parties do not dispute that the appellant was injured *at work* while pulling a spinning bobbin from a spindle on April 18, 1988." (Emphasis added.) The record is devoid of any evidence that plaintiff's injury was caused by any event other than pulling the spinning bobbin from a spindle at work. More particularly, defendant has failed to produce " 'expert testimony that the alleged precipitating event could not have been the cause of the injury . . . .' " *Click*, 300 N.C. at 169, 265 S.E.2d at 392 (*quoting Uris*, 247 Or. at 426, 427 P.2d at 756 (1967)). We find the facts presented here to be an archetype of the " 'uncomplicated situation' " described in *Click. Id.*

Accordingly, we vacate the opinion and award of the Industrial Commission and remand for further proceedings to determine the type and amount of disability benefits to which plaintiff is entitled.

III.

[3] Plaintiff argues that the Industrial Commission "erred by denying workers' compensation benefits for medical treatment to the plaintiff on the basis that the problems for which she sought treatment were not related to her work-related injury or did not give relief, tend to effect a cure, or lessen the period of the plaintiff's disability." Defendant contends that Dr. Dickerson was the only physician that was authorized by defendant, that plaintiff was expressly told that she would not be paid for treatment provided by her own doctors, and that the treatment provided by plaintiff's four doctors (Dr. Kelly, Dr. Shaw, Dr. Phillips, and Dr. Siva) did not relate to the injury for which she seeks compensation. This Court has stated:

> A reading of G.S. § 97-25, regarding medical treatment of employees, fails to indicate any limitation on the number of physicians an employee may choose. The only requirements are that the physician be approved by the Commission, and treatment must facilitate recovery and rehabilitation. *Schofield v. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980). The determinations for the Commission to make are whether there was Commission approval of plaintiff's choice of [doctors] and whether treatment was to effect a cure or rehabilitation.

Lucas, 88 N.C. App. at 590, 364 S.E.2d at 150. We further note that this Court has recently held that "relief from pain constitutes

'relief' as that term is used in N.C. Gen. Stat. § 97-25." *Simon*, 106 N.C. App. at 43, 415 S.E.2d at 107. Given our holding that plaintiff was entitled to the *Watkins v. Motor Lines* presumption and that plaintiff was entitled to benefits for her disability, we remand to the Industrial Commission for a determination of plaintiff's entitlement to medical expenses pursuant to G.S. 97-25 for the services provided by Dr. Kelly, Dr. Shaw, Dr. Phillips, and Dr. Siva.

IV.

For the foregoing reasons, we vacate in its entirety the opinion and award of the Industrial Commission and remand for an opinion and award not inconsistent with this opinion.

Vacated and remanded.

Judges COZORT and ORR concur.

STATE OF NORTH CAROLINA v. CHARLES FRANKLIN BROOKS

No. 9226SC1163

(Filed 1 February 1994)

1. **Evidence and Witnesses § 3045 (NCI4th)— second-degree murder—cross-examination—prior assaultive conduct—not admissible under Rule 608(b)**

The trial court erred in a second-degree murder prosecution by allowing the State to cross-examine defendant under N.C.G.S. § 8C-1, Rule 608(b) regarding domestic violence by defendant against his wife, who was not the victim of the murder. The cross-examination was not proper because extrinsic instances of assaultive behavior, standing alone, are not in any way probative of the witness' character for truthfulness or untruthfulness.

Am Jur 2d, Witnesses §§ 814, 816, 830.

2. **Evidence and Witnesses §§ 344, 355 (NCI4th)— second-degree murder—prior assaultive conduct—not admissible under Rule 404(b)**

The trial court erred in a second-degree murder prosecution by allowing the State to cross-examine defendant under N.C.G.S. § 8C-1, Rule 404(b) regarding domestic violence by defendant against his wife, who was not the victim in this case. Defendant's past violent behavior toward his wife was not relevant to prove his character in relation to motive, opportunity, intent, etc. Furthermore, there was prejudice in that the case was close, the questions alone were inflammatory and damaging, and, because defendant admitted to some violent action toward his wife, it cannot be said that the jury did not consider the evidence for the purpose of concluding that defendant had a violent disposition.

Am Jur 2d, Evidence §§ 324, 325.

3. **Criminal Law § 433 (NCI4th)— second-degree murder—prior acts of domestic violence—argument to jury**

The trial court erred in a second-degree murder prosecution by allowing the State to comment on defendant's past abusive behavior toward his wife and to characterize him as a "liquor-drinking, dope-smoking, defendant." The State's characterization appears to have been calculated to prejudice and to inflame the jury and compounded earlier error in the admission of evidence.

Am Jur 2d, Trial §§ 280 et seq.

Appeal by defendant from judgment entered 9 April 1992, by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 September 1993.

Attorney General Michael F. Easley, by Assistant Attorney General LaVee Hamer Jackson, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., and Assistant Appellate Defender Susan G. White for defendant appellant.

COZORT, Judge.

Defendant Charles Franklin Brooks was convicted of second degree murder and received the maximum sentence of life in prison.

We find the trial court erred by (1) allowing the State to cross-examine defendant regarding incidents of domestic violence against his wife; and (2) overruling defendant's objections to remarks made by the State in closing argument characterizing defendant as a "wife-abuser," "liquor-drinker," and "dope-smoker." We find the errors prejudicial and order a new trial.

The State's evidence consisted in part of the testimony of law enforcement officials of the Mecklenburg County Police Department who responded to two calls on the evening of 31 January 1991, regarding disturbances at 7827 Beatties Ford Road in Charlotte, North Carolina. The first call came in at approximately 9:40 p.m. and concerned a domestic disturbance between a man and a woman. Officer D. L. Phillips testified that Ms. Tina Locklear, the defendant's stepdaughter, met the responding officers in the front yard of the residence. She was intoxicated, combative, would not identify herself, and ordered the police to leave. She had blood on her hands and mouth. Having obtained no other information at that time, Officer Phillips and the other officers left the scene.

Officer Phillips returned to the house on Beatties Ford Road at approximately 10:30 p.m. in response to a call that someone had been shot; Sergeant Ricky Robbins also responded to the call. Upon arrival, the officers observed defendant standing in the yard, holding a .38 revolver raised in the air with the cylinder open. The victim, Doug Crawley, had been shot and was lying on the floor in a bedroom. Defendant admitted to shooting Crawley and cooperated with police by answering questions. Officers noted the smell of alcohol on defendant's breath. Evidence presented by the medical examiner indicated that the barrel of the gun was against Crawley's left ear when the gun was fired.

Ms. Locklear testified that Mr. Crawley was her boyfriend and had been living with her for about three months. On the evening of the shooting, Ms. Locklear and the victim had gone to a bar called the "Corral," after playing a drinking game called "quarters" with friends in their home. Ms. Locklear saw defendant at the bar and accompanied him outside behind the bar where the two smoked marijuana. After spending approximately two hours at the bar, Locklear and Crawley left the Corral. On the way home, the couple got into an argument during which Locklear punched her fist through the back window of Crawley's truck. The two arrived at the residence on Beatties Ford Road and con-

tinued to argue. At some point, Crawley became involved in an altercation with Locklear's stepbrother, Mark Brooks. Ms. Locklear testified that she was accidentally hit with an ax handle when Crawley grabbed the ax from the hands of Brooks. Crawley went into the bedroom and began packing clothes to leave.

Ms. Locklear stated that she then saw defendant in the hallway of the house. She noticed defendant was holding a gun, and she told him to leave the couple alone. Defendant proceeded down the hall and walked up to the bedroom door. Locklear stood between defendant and Crawley, who was in the bedroom, and tried to physically restrain defendant. A struggle between Locklear and the defendant ensued; the gun fired, fatally wounding Crawley. Locklear testified that she was "[l]ike in front of him; his arm up under my arm; I was like got on him. Just when he stepped back, when he stepped right there in my doorway, I had got on him right then and that's when the gun went off."

Defendant testified that he considered Crawley a friend. On the evening of 31 January, defendant had several drinks at the Corral. He admitted to smoking a marijuana cigarette with Locklear behind the bar. Later in the evening, he became aware that a fight was ongoing at the Beatties Ford Road residence. Defendant testified that he was the owner of the residence. He went to the house to tell Crawley to leave the premises and to leave his children alone. Defendant's wife, Nancy Brooks, accompanied him to the "Big House." As defendant approached the house, he saw two silhouettes in Locklear's bedroom; he thought the two were still fighting. Defendant took his gun for self-protection and entered the house. Defendant testified that as soon as he entered the house, Locklear tried to restrain him. During the struggle, the gun fired and Crawley was hit. Defendant stated that he had not intended to shoot Crawley. Defendant directed his wife to call 911. When police arrived at the scene, defendant accompanied officers through the house and showed investigators how the shooting occurred.

[1] Defendant's primary argument on appeal contends the trial court erred by permitting the State to cross-examine defendant regarding incidents of domestic violence by him against his wife Nancy. The following exchange occurred between the Assistant District Attorney and the defendant:

> Q. [MR. BUTLER (State):] Okay. And, your wife knows how violent you are; doesn't she?

MR. RAWLS [Defense]: OBJECTION.

THE COURT: OVERRULED.

A. [DEFENDANT:] I guess; she's married to me.

Q. Well, you beat her up before; haven't you?

MR. RAWLS: OBJECTION; MOTION TO STRIKE.

THE COURT: OVERRULED.

Q. Sir?

A. We've had our marital fights.

Q. Well, back April 15, 1989, you beat her and you threatened to kill her; didn't you?

MR. RAWLS: OBJECTION.

THE COURT: OVERRULED.

A. No sir; I didn't threaten to kill her.

Q. You assaulted her. Isn't that right?

MR. RAWLS: OBJECTION.

A. I slapped her.

THE COURT: OVERRULED.

Now Members of the jury, that evidence was received to show and what it does show is for you, the jury, to determine, that the defendant, Mr. Brooks, assaulted Nancy Brooks. This evidence is received solely for the purpose, for the limited purpose of showing that the defendant had the motive or opportunity for [*sic*] the intent for [*sic*] the preparation of the plan or the absence of mistake, which is a part of the crime charged in this case.

If you believe this evidence, you may consider it; but, only for the limited purpose for which it was received.

MR. BUTLER: Thank you, Your Honor.

MR. RAWLS: We OBJECT to that evidence, Judge.

THE COURT: You did and the OBJECTION IS OVERRULED.

Q. And, you dragged her by her hair around the residence; didn't you?

MR. RAWLS: OBJECTION.

THE COURT: OVERRULED.

A. No, sir.

Q. And, you struck her several times in the stomach and kicked her and punched her?

MR. RAWLS: OBJECTION.

THE COURT: OVERRULED.

MR. RAWLS: Judge, there is absolutely no—

THE COURT: OVERRULED. The answer was what?

A. No, sir. I didn't kick her and punch her in the stomach. I smacked her with an open hand.

Q. And, you caused her right eye to swell up; isn't that right?

MR. RAWLS: OBJECTION.

A. Yes, sir.

THE COURT: OVERRULED.

Q. Sir?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Defendant argues that the sole purpose for the State's line of questioning was to show that defendant's character was violent and abusive. Defendant contends the evidence was not admissible under either Rule 608 or Rule 404(b) of the North Carolina Rules of Evidence. We agree.

The evidence of past abusive behavior is not admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 608(b), which allows into evidence specific instances of conduct of a witness for the purpose of attacking his credibility, when the evidence is probative of *truthfulness* or *untruthfulness*. The State's cross-examination of defendant here "was improper under Rule 608(b) because extrinsic

instances of assaultive behavior, standing alone, are not in any way probative of the witness' character for truthfulness or untruthfulness." *State v. Morgan*, 315 N.C. 626, 635, 340 S.E.2d 84, 90 (1986).

[2] We also find the evidence inadmissible under N.C.R. Evid. 404(b), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1992). "Before extrinsic conduct evidence is admissible pursuant to Rule 404(b), the trial court is required to *first*, determine whether conduct is being offered pursuant to Rule 404(b); *second*, the trial court is required to make a determination of the evidence's relevancy." *State v. Rowland*, 89 N.C. App. 372, 383, 366 S.E.2d 550, 556 (1988) (emphasis in original). "If the trial judge makes the initial determination that the evidence is of the *type* and offered for the proper *purpose* under Rule 404(b), the record should so reflect." *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986) (emphasis in original). In the case below, the trial court appears to have found that the evidence was proper for admission pursuant to Rule 404(b), as evidence of motive, intent, preparation, and absence of mistake. We cannot agree with the admission of this evidence.

Evidence introduced under Rule 404(b) must be relevant pursuant to N.C.R. Evid. 401. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Accordingly, the evidence sought to be admitted must be relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. While Rule 404(b) is a general rule of inclusion of relevant evidence of other crimes, wrongs, or acts, evidence must nonetheless be excluded where "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, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original).

The State contends the evidence was properly admitted under Rule 404(b). The State submits that instances of defendant's past physical violence involving his wife were relevant to show "defendant's motive and intent when he carried the loaded gun into the house with his finger on the trigger." The State further claims the examples of prior physical violence were appropriate to show the absence of accident, since the defendant knew his own physical strength in comparison to the size of his victim. The State's argument is unpersuasive; we find no relevancy for the admission of defendant's past violent behavior toward his wife to prove the character of the defendant in relation to motive, opportunity, intent, etc. It was error for the trial court to permit the State to question defendant about previous incidents of violence directed toward his wife.

Furthermore, we conclude the error was not harmless in its effect. We cannot say with certainty that there is no "reasonable possibility that, had the error in question not been committed," the jury would have arrived at a different result. N.C. Gen. Stat. § 15A-1443(a) (1988). The questions alone posed by the State were inflammatory and damaging. And, because defendant admitted to some violent action toward his wife in the past, we cannot say that the jury did not consider the evidence for the purpose of concluding that defendant was of a violent disposition. As the evidence shows, the case was close. The possibility existed that the jury could have found defendant guilty of manslaughter, or even have acquitted him. As a result, we find the admission of the evidence constituted prejudicial error requiring a new trial.

[3] We also find error in the trial court's allowing the State to argue defendant's past conduct to the jury. Over defendant's objection, the trial court allowed the State to comment, during argument to the jury, on defendant's past abusive behavior toward his wife, and to characterize defendant as a "liquor-drinking, dope-smoking, defendant."

In general, arguments of counsel are within the domain of the trial judge's discretion. *State v. Sanders*, 327 N.C. 319, 342, 395 S.E.2d 412, 427 (1990), *cert. denied*, 498 U.S. 1051, 112 L.Ed.2d 782 (1991). In this case, however, the State's characterization of defendant appears to have been calculated to prejudice and to inflame the jury. Although defendant testified to drinking alcohol and to smoking marijuana on the night in question, the prosecu-

tion's remarks concerning defendant's relationship with his wife served to compound the error in admitting the evidence of physical abuse under Rule 404(b). Consequently, we find the trial court erred by failing to sustain defendant's objections to the inflammatory comments made by the State during its closing argument.

We hold these two prejudicial errors deprived the defendant of a fair trial. Other alleged errors may not reoccur upon retrial, and we decline to discuss them. Defendant is entitled to a

New trial.

Judges JOHNSON and McCRODDEN concur.

BILTMORE SQUARE ASSOCIATES, A NORTH CAROLINA JOINT VENTURE, DEBARTOLO ASHEVILLE ASSOCIATES, AN OHIO GENERAL PARTNERSHIP, SEVEN SEAS PARTNERSHIP, A NORTH CAROLINA GENERAL PARTNERSHIP, CROWN AMERICAN CORPORATION, A PENNSYLVANIA CORPORATION, HESS'S DEPARTMENT STORES, INC., A PENNSYLVANIA CORPORATION, PROFFITT'S, INC., A TENNESSEE CORPORATION, RAY BRIDGES AND WIFE, DEBORAH BRIDGES, WESLEY ANGEL AND WIFE, GWENDA ANGEL, BRENT WILLIAMSON, PAUL MARTIN JONES AND WIFE, MARY SUE JONES, *PETITIONERS* v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, RESPONDENT

No. 9228SC814

(Filed 1 February 1994)

1. Municipal Corporations § 117 (NCI4th)— annexation proceeding allegedly violating Voting Rights Act—no standing of petitioners to challenge

The trial court did not err in concluding that petitioners did not have standing to challenge an annexation proceeding as violating the Voting Rights Act, since petitioners failed to show that they were asserting their own legal rights and interests and not those of third parties, as they stipulated that none of them were members of a racial or ethnic minority and that none of them were registered to vote within the City of Asheville.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 70 et seq.

Capacity to attack the fixing or extension of municipal limits or boundary. 13 ALR2d 1279.

2. **Municipal Corporations § 61 (NCI4th)— annexation area—standards of subdivision test met—cut off date for calculating percentages—date of public hearing, not adoption of ordinance**

The trial court did not err in concluding that an annexation area met the standards of the subdivision test set forth in N.C.G.S. § 160A-48(c)(3), since throughout the annexation process, the percentages for the subdivision tests changed to reflect updated findings, changes in tax records, and changes in the character of the property; the court properly found that the termination date for calculation of the subdivision test percentage could be no later than the date of the public hearing; figures which existed then showed compliance with the statute; and there was no merit to petitioners' contention that the time of adoption of the annexation ordinance should be the controlling time.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 66 et seq.

Appeal by petitioners from judgment entered 10 March 1992 by Judge Robert W. Kirby in Buncombe County Superior Court. Heard in the Court of Appeals 16 June 1993.

Adams Hendon Carson Crow & Saenger, P.A., by S. J. Crow and Martin Reidinger, for petitioner appellants.

Nesbitt & Slawter, by William F. Slawter; and Assistant City Attorney Sarah Patterson Brison, for respondent appellee.

COZORT, Judge.

On 4 June 1991, the Asheville City Council adopted Ordinance No. 1911 which annexed a certain area of land southwest of the City. On 3 July 1991, petitioners filed a petition for judicial review of the annexation ordinance, alleging, in pertinent part that (1) petitioners are owners of real property located in the annexation area; (2) all annexation proceedings are invalid and that Ordinance 1911 is void because incorporation of the annexation area violates the Voting Rights Act of 1965; (3) the City failed to meet the requirements of N.C. Gen. Stat. §§ 160A-47, 160A-48, and 160A-49 (1987); (4) the ordinance was not adopted in accordance with pro-

cedures of the City Council; (5) petitioners were not given proper notice and were deprived of due process of law; and (6) the annexation statutes as applied deprived petitioners of due process of law, equal protection, and benefits of law of the land. Petitioners asked the court to declare that the ordinance was void and that the area purported to be annexed was not eligible for annexation. They also requested a remand for proceedings in accordance with annexation statutes, costs of the action, and other relief.

On 10 March 1992, Superior Court Judge Robert W. Kirby found, in pertinent part:

Voting Rights Act

3. Petitioners in this matter include two general partnerships involved in a joint venture, with one of the partnerships being an Ohio General Partnership; a Pennsylvania corporation; a Tennessee corporation; and seven individual petitioners. All of the individual petitioners are white. None of the individual petitioners were registered to vote within the City of Asheville at the time of this annexation.

* * * *

Subdivision Test

* * * *

11. Respondent performed calculations for the subdivision test prior to approval by the Asheville City Council of the report setting forth plans to provide for extension of major municipal services to the Annexation Area (the "Plan"). The Plan was approved on March 19, 1991.

12. The Plan approved on March 19, 1991, included a statement showing that the Annexation Area is developed for urban purposes as defined in *N.C. Gen. Stat.* sec. 160A-48 (c) (3). The Plan showed that of the 363.90 acres of land in the Annexation Area not used for commercial, industrial, governmental or institutional purposes, 262.25 acres, or 72.07%, are divided into lots and tracts of five acres or less.

13. Property owners in the Annexation Area caused changes to be made to the Buncombe County tax maps and records after the Plan was adopted on March 19, 1991, but before City of Asheville Ordinance No. 1911 ("Annexation Or-

dinance") was adopted on June 4, 1991. The parties stipulated that those changes were made on May 6 and 7, 1991.

* * * *

16. The public hearing on the Annexation Area was held on April 23, 1991.

17. The Annexation Ordinance was adopted on three readings—May 7, 1991; May 21, 1991; and June 4, 1991. The effective date of the annexation, as established by the Annexation Ordinance, was July 31, 1991. The effective date of the annexation was stayed, however, by the filing of a petition in this matter on July 3, 1991.

18. Respondent made changes to the boundaries of the Annexation Area by deleting some lots and tracts at the southern end of the area described in the resolution of intent after the approval of the Plan and before the adoption of the Annexation Ordinance. Those changes were reflected in the second paragraph of subsection (2) of the "Statement of Statutory Standards" found on pages 1 and 2 of the Amendment to the Plan for Extension of Major Municipal Services approved on June 4, 1991 ("Amended Plan"). In addition, Respondent showed the addition of one lot within the Annexation Area which was inadvertently omitted from calculations made prior to adoption of the Plan.

19. At the trial of this matter, Respondent conceded that it had made an 18.0 acre error in its subdivision test calculations. As a result of that error the subdivision test calculation in paragraph 2 of subsection (2) of the "Statement of Statutory Standards" should be changed to show that of the 360.45 acres of land in the Annexation Area not used for commercial, industrial, governmental or institutional purposes, 240.80 acres, or 66.81%, are divided into lots and tracts of five acres or less.

20. The General Assembly has determined that certain steps must be taken in the annexation process and those procedural steps require that there be a cutoff date for determining what changes had been made to lots and tracts for the purposes of the subdivision test in *N.C. Gen. Stat.* sec. 160A-48 (c) (3). That date can be no later than the date of the public hearing, at which time the public has

ample opportunity to provide cities in North Carolina with information as to incorrect use or size determinations for the purposes of that test.

21. Respondent's calculations of the subdivision test as set forth in paragraph 2, with the revision for the 18 acre error, are the calculations to be used as of the "time of annexation."

22. At the time of annexation, therefore, the Annexation Area was subdivided into lots and tracts such that 68.81% of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consisted of lots and tracts five acres or less in size.

23. Respondent included in paragraphs 3 and 4 of subsection (2) of the "Statement of Statutory Standards" calculations which would result if one did take into consideration actions taken by various property owners within the Annexation Area following adoption of the Plan (and after the public hearing), by which they caused changes to be made to the size and number of lots shown on the Buncombe County tax maps and records. Respondent also included in paragraph 4 changes in use to an 18.0 acre tract and a 6.1 acre tract which occurred following the approval of the Plan.

Based upon the findings of fact, the trial court concluded in part:

2. This Court does not have jurisdiction in this proceeding to determine whether or not this annexation results in a violation of the Voting Rights Act of 1965, as amended.

3. Even if this Court had such jurisdiction, Petitioners herein do not have standing in this proceeding to challenge this annexation as violating the Voting Rights Act of 1965, as amended.

4. Even if this Court had such jurisdiction and Petitioners had such standing, Petitioners have failed to show that this annexation violates the Voting Rights Act of 1965, as amended.

5. The Annexation Area complies with the provisions of *N.C. Gen. Stat.* sec. 160A-48 (c) (3) in that it was subdivided

into lots or tracts such that at least 60% of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

6. The Annexation Area substantially complies with the coincidence requirements of *N.C. Gen. Stat.* sec. 160A-48 (b) (2).

The trial court affirmed the annexation ordinance. Petitioners appeal.

On appeal, petitioners argue that the trial court erred in (1) finding and concluding that Ordinance 1911 did not violate the Voting Rights Act; (2) concluding that it did not have jurisdiction to decide a challenge to the ordinance based on the Voting Rights Act; (3) concluding that petitioners did not have standing to challenge the ordinance based on a violation of the Voting Rights Act; and (4) finding and concluding that the annexation area met the requirements of N.C. Gen. Stat. § 160A-48(c)(3).

[1] We first consider whether petitioners have standing to challenge the annexation on the basis that the ordinance violated the Voting Rights Act. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973(a) (Cum. Supp. 1993), provides in part that

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

Our research revealed no North Carolina cases addressing the requirement of standing to challenge an ordinance on the basis of the Voting Rights Act. "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues . . . .' " *Stanley v. Dept. Conserv. & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 20 L.Ed. 2d 947, 961 (1968)). We turn to federal cases for further guidance. To establish standing under the Voting Rights Act, petitioner must show:

(1) he has personally suffered or will suffer some distinct injury-in-fact as a result of defendant's putatively illegal conduct; (2) the injury can be traced with some degree of causal certainty to defendant's conduct; (3) the injury is likely to be redressed by the requested relief; (4) the plaintiff must assert his own legal rights and interests, not those of a third party; (5) the injury must consist of more than a generalized grievance that is shared by many; and (6) the plaintiff's complaint must fall within the zone of interests to be regulated or protected by the rule of law in question.

Newman v. Voinovich, 789 F. Supp. 1410, 1415 (S.D. Ohio 1992) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-77, 70 L.Ed. 2d 700, 709 (1982)), *aff'd*, 986 F.2d 159 (6th Cir. 1993), *cert. denied*, --- U.S. ---, 125 L.Ed. 2d 727 (1993). Petitioners alleged that the annexation in violation of the Voting Rights Act "could dilute the minority voting strength within the existing City boundary and that therefor the citizens of this annexation area . . . could be deprived of the full benefit of their rights as citizens of the City of Asheville if annexed . . . ." We find that petitioners have failed to show that they were asserting their own legal rights and interests and not those of third parties. The parties stipulated that none of the petitioners is a member of a racial or ethnic minority and that none of the petitioners were registered to vote within the City of Asheville. The annexation does not deny or abridge the right to vote on account of petitioners' race or color. Accordingly, we find that the trial court did not err in concluding that the petitioners did not have standing to challenge the annexation proceeding as violating the Voting Rights Act. We need not address petitioners' remaining arguments based upon a violation of the Voting Rights Act.

[2] We next consider petitioners' argument that the trial court erred in concluding that the annexation area met the standards of the subdivision test set forth in N.C. Gen. Stat. § 160A-48(c)(3) (1987). The parties stipulated that the use test required by N.C. Gen. Stat. § 160A-48(c)(3) has been met. N.C. Gen. Stat. § 160A-48 provides in part:

(a) A municipal governing board may extend the municipal corporate limits to include any area

(1) Which meets the general standards of subsection (b), and

(2) Every part of which meets the requirements of either subsection (c) or subsection (d).

* * * *

(c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:

* * * *

(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at *the time of annexation* for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size. (Emphasis added.)

N.C. Gen. Stat. § 160A-49(e)(1) requires an ordinance to contain specific findings that the area to be annexed meets the requirements of N.C. Gen. Stat. § 160A-48. Throughout the annexation process, the percentages for the subdivision tests changed to reflect updated findings, changes in tax records, and changes in the character of property. As a result, Ordinance No. 1911 contains four different paragraphs concerning the subdivision test with each paragraph showing calculations based upon different data. The Ordinance states that all four paragraphs reflect numbers above the threshold sixty percent. At trial, however, the City conceded that an eighteen-acre error had been made which changed the subdivision test percentages. Although percentages set forth in the first, second, and fourth paragraphs remained above sixty percent, the percentage in the third paragraph did not. The trial court found that the termination date for calculation of the subdivision test percentage could be no later than the date of the public hearing. Accordingly, the trial court found that the second paragraph satisfied the requirements of N.C. Gen. Stat. § 160A-48(c)(3).

Petitioners argue on appeal that the annexation was improper because the trial court erred in relying upon the calculations in the second paragraph reflecting the subdivision test percentage *four months before the adoption of the ordinance*. Petitioners argue that the trial court misinterpreted the phrase "time of annexation." The phrase, petitioners contend, means the time of the adoption of the annexation ordinance, not the time of the public hearing. Therefore, petitioners argue, the trial court should have considered the percentage in the third paragraph, which did not satisfy the requirements of N.C. Gen. Stat. § 160A-48(c)(3).

Reviewing the statutory scheme, we agree with the trial court that the date of the public hearing is the latest appropriate cutoff date for determining the subdivision test percentages. As found by the trial court, the legislature has created procedural steps in the annexation scheme which require certainty. The City argues persuasively that if "time of annexation" means time of adoption of the ordinance, then landowners could thwart the annexation process indefinitely by making changes on the day the City Council is scheduled to vote on the adoption of the ordinance. Therefore, we find the trial court did not err in finding that the provisions of N.C. Gen. Stat. § 160A-48(c)(3) were met in paragraph 2 of subsection (2) of the Statement of Statutory Standards.

Affirmed.

Chief Judge ARNOLD and Judge MARTIN concur.

IN THE MATTER OF THE ESTATE OF BRITT MILLIS ARMFIELD, II, AN INCOMPETENT

No. 9318SC102

(Filed 1 February 1994)

Guardianship § 97 (NCI4th)— interests of ward and guardian— potential conflict—removal of guardian allowed by statute

N.C.G.S. § 35A-1290(b)(7) authorizes the removal of a guardian where there is a showing of any potential for conflict between the interests of the ward and those of the guardian. Removal of the guardians of the estate of an incompetent

ward was proper where the guardians have formed corporations which do business with corporations in which both the guardians and the ward own stock and thus have private interests that might tend to hinder or be adverse to carrying out their duties as guardians.

Am Jur 2d, Guardian and Ward §§ 57-59.

Appeal by respondents from order filed 14 October 1992 in Guilford County Superior Court by Judge Melzer A. Morgan, Jr. affirming the order of the Assistant Clerk of Superior Court removing respondents as co-guardians of Britt Millis Armfield, II. Heard in the Court of Appeals 1 December 1993.

On 8 February 1991, Edward Armfield, Sr. filed a petition to remove Edward M. Armfield, Jr. and Everette C. Sherrill, respondents, as guardians of the estate of Britt Millis Armfield, II, the ward. On 29 April 1991, the Assistant Clerk of Superior Court entered an order staying the action pending resolution of two declaratory judgment actions filed in Surry County Superior Court. Petitioner appealed the order to the Superior Court, and, on 20 December 1991, Judge Peter M. McHugh entered an order vacating the order staying the proceeding and remanding the proceeding to the Clerk of Superior Court with directions to render a determination on the merits of the petition. On 17 January 1992, the respondents filed notice of appeal to this Court. By order dated 7 April 1992, this Court dismissed the appeal.

The Assistant Clerk of Superior Court held a hearing on the petition to remove respondents and on 10 July 1992 entered an order removing respondents as guardians of the ward, appointing First Citizens Bank and Trust Company as successor guardian, and directing respondents to deliver possession of all the assets of the estate of the ward to the successor guardian. On 29 July 1992, Judge Thomas W. Ross entered an order staying the order of the Assistant Clerk pending an appeal by respondents to Superior Court. On 13 October 1992, Judge Melzer A. Morgan, Jr. entered an order affirming the removal of respondents as guardians of Britt Millis Armfield, II. On 19 October 1992, respondents filed notice of appeal from Judge Morgan's order to this Court. On 20 October 1992, respondents filed a motion to stay the effect of the 13 October 1992 order pending appeal to this Court. On 3 November 1992, Judge Morgan denied the motion. On 6 November

1992, respondents renewed their notice of appeal from Judge McHugh's 20 December 1991 order and filed notice of appeal from Judge Morgan's 3 November 1992 order.

McNairy, Clifford & Clendenin, by R. Walton McNairy; and Wyatt, Early, Harris, Wheeler & Hauser, by Thomas E. Terrell, Jr., for petitioner-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Lindsay R. Davis, Jr. and Richard J. Votta, for respondent-appellants.

WELLS, Judge.

These proceedings were initiated and determined pursuant to the pertinent provisions of Chapter 35A, Incompetency and Guardianship, N.C. Gen. Stat. Chapter 35A (1987). The Clerk of Superior Court has the responsibility and authority to appoint guardians for incompetent persons. Article 5, Chapter 35A. Article 13 of the Act provides for termination of guardianship, and § 35A-1290 provides in pertinent part:

> (a) The clerk has the power and authority on information or complaint made to remove any guardian appointed under the provisions of this Subchapter, to appoint successor guardians, and to make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents.
>
> (b) It is the clerk's duty to remove a guardian or to take other action sufficient to protect the ward's interest in the following cases:
>
> * * * *
>
> (7) The guardian has a private interest, whether direct or indirect, that might tend to hinder or be adverse to carrying out his duties as guardian.

In this case, the Assistant Clerk applied the provisions of § 35A-1290(b)(7) in finding and concluding that respondents had private interests, both direct and indirect, that might tend to hinder or be adverse to carrying out their duties as guardians. The questions presented to the Superior Court on appeal from the Assistant Clerk and to this Court on appeal from the Superior Court are: (1) whether the Assistant Clerk's findings of fact are supported by the evidence, and (2) whether those findings support the Assist-

ant Clerk's conclusions and order. *In re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967); *In re Estate of Moore*, 25 N.C. App. 36, 212 S.E.2d 184, *cert. denied*, 287 N.C. 259, 214 S.E.2d 430 (1975).

The Assistant Clerk's dispositive findings of fact, not challenged by respondents and therefore deemed to be supported by the evidence, are as follows:

FINDINGS OF FACT

1.

Britt Millis Armfield, II, born December 8, 1947, is a ward of this Court who was adjudicated incompetent by a Guilford County jury on December 23, 1968. . . . Letters of Trusteeship pursuant to former N.C.G.S. § 33-1 et seq. were issued to Edward M. Armfield, Jr. on February 18, 1969, and on November 28, 1979 letters were issued appointing Everette C. Sherrill as Co-Trustees (hereinafter "Co-Guardians").

2.

Petitioner, Edward M. Armfield, Sr. is the natural parent of the Ward. The Ward's mother, Mary McKissick Armfield, died on November 23, 1980.

3.

The Ward is one of Petitioner's four children: Jean A. Armfield Sherrill, Edward M. Armfield, Jr., Britt Millis Armfield, II, and Ellison M. Armfield. The co-guardian, Everette C. Sherrill is married to the Ward's sister, Jean Armfield Sherrill.

4.

The Ward is expected to remain incompetent for the duration of his natural life.

5.

Among the assets of the guardianship estate are shares of stock in Armtex, Inc. ("Armtex") which is a closely held, family-owned corporation. The Armtex stock is owned as follows:

Edward M. Armfield, Sr.	81-1/4 shares	46.4%
Jean Armfield Sherrill	25 shares	14.3%
Edward M. Armfield, Jr.	25 shares	14.3%
Ellison M. Armfield	25 shares	14.3%
Britt M. Armfield, II	18-3/4 shares	10.7%

As of December 31, 1991, Armtex had a book value or net worth of $21,362,989. The book value of Britt Armfield's Armtex stock was $2,285,840. The Co-guardians vote Britt Armfield's stock in Armtex. The Co-guardians have private interests in Armtex, direct and indirect, through stock ownership (Sherrill through his wife, Jean), employment, the exercise of day-to-day management, officer positions, and membership on its Board of Directors.

Edward Armfield, Jr. is the Chief Executive Officer and Chairman of the Board of Directors of Armtex. Everette Sherrill is the President of Armtex and a member of the Board of Directors. Jean Armfield Sherrill is a member of the Board of Directors. . . .

6.

Surry Industries, Inc. ("Surry") is another closely held, family-owned corporation. Surry's major customer is Armtex. Armtex manages Surry pursuant to a management agreement for a fee. Its stock is owned as follows:

Edward M. Armfield, Sr.	228 shares	45.6%
Jean Armfield Sherrill	68 shares	13.6%
Edward M. Armfield, Jr.	68 shares	13.6%
Ellison M. Armfield	68 shares	13.6%
Britt M. Armfield, II	68 shares	13.6%

As of December 31, 1991, Surry had a book value or net worth of $26,678,713. The book value of Britt Armfield's stock was $3,628,305. Britt Armfield's stock in Surry Industries, Inc. is held in trust by Wachovia Bank & Trust Co. pursuant to an irrevocable Trust created by Mr. Armfield, Sr. and Mrs. Armfield in 1957. Edward, Jean and Ellison Armfield form an Advisory Committee which advises Wachovia Bank regarding that stock. Wachovia Bank, as Trustee, votes Britt Armfield's stock in Surry. The Co-guardians have private interests in Surry, direct and indirect, through stock ownership (Sherrill

through his wife, Jean), management, as well as being officers and directors.

Everette Sherrill is the Chief Executive Officer and Chairman of the Board of Directors of Surry. Edward Armfield, Jr. is President of Surry and a member of the Board of Directors. Jean Armfield Sherrill is a member of the Board of Directors. . . .

7.

Technical Wire Products is another closely held family-owned corporation. Technical Wire is a New Jersey corporation with its stock owned as follows:

Edward M. Armfield, Sr.	1,253.3345	(50.1%)
Jean Armfield Sherrill	332.4468	
Edward M. Armfield, Jr.	332.4468	
Ellison M. Armfield	332.4468	
Britt M. Armfield, II	249.3351	

As of December 31, 1991, Technical Wire had a book value or net worth of $16,374,624. The book value of Britt Armfield's stock was $1,637,462. The Co-guardians vote Britt Armfield's stock in Technical Wire. The Co-guardians have a private interest, direct and indirect, in Technical Wire, through stock ownership (Sherrill through his wife, Jean) but are not officers. Edward M. Armfield, Sr., by virtue of stock ownership, controls Technical Wire.

* * * *

13.

Refloat, Inc. is a corporation owned entirely by Edward Armfield, Jr., Jean Armfield Sherrill, and Ellison M. Armfield who also serve with Co-guardian Everette Sherrill and Frank Lord, as officers and/or on the Board of Directors. . . .

14.

Since 1986, Refloat has entered into numerous and substantial transactions in which it has leased equipment to Armtex, a corporation in which the Ward has a substantial minority interest. . . . The leasing transactions pay rent from Armtex, in which the Ward and Co-guardians have a private interest to Refloat, direct or indirect, and the Ward does not.

15.

From 1986 through December 31, 1991, Armtex paid Refloat, for real property leases, the sum of $2,993,200 and the sum of $15,590,151 for equipment leases. From 1986 through December 31, 1991, Refloat's increase in net worth was $8,483,818. Refloat's sole source of income, other than interest from investments, was from Armtex lease payments. On December 31, 1991, Refloat had a net worth of $12,007,912. . . .

16.

Edward Armfield, Jr., Jean Armfield Sherrill and Ellison M. Armfield are also the sole owners of JE&E, a partnership formed in 1988. JE&E then borrowed $800,000 from Surry, a company in which the partners of JE&E and also the Ward own a substantial minority interest. . . .

17.

The funds JE&E borrowed from Surry were used to construct a building which was leased to Armtex, a company in which the Ward owns a substantial minority interest. . . . The building was leased to Armtex as an office building (it also houses Refloat's offices at no cost to Refloat) for 15 years at a rent of $31,200 per quarter. . . .

* * * *

20.

Edward M. Armfield, Jr. and Everette Sherrill have private interests, both direct and indirect, that might tend to hinder or be adverse to carrying out their duties as guardians.

* * * *

Upon the foregoing findings, the assistant clerk made the following conclusion:

CONCLUSIONS OF LAW

1.

Edward M. Armfield, Jr. and Everette Sherrill have private interests, both direct and indirect, that might tend to hinder or be adverse to carrying out their duties as guardians.

* * * *

It was upon these findings and this conclusion that the Assistant Clerk applied the statute to order respondents' removal. We are not aware of any previous decision of our appellate courts interpreting § 35A-1290(b)(7), but we find guidance and direction in previous decisions of our courts in the area of the administration of estates and trusts.

Chapter 28A of our General Statutes, dealing with the administration of decedent's estates, contains a removal provision identical in legal context to § 35A-1290(b)(7). Respondents argue that the Superior Court erred in affirming the order of the Assistant Clerk granting the petition to remove respondents as guardians of Britt Millis Armfield, II because removal under § 35A-1290(b)(7) requires a showing that the private interest of the guardian has an actual and adverse effect upon the interests of the ward.

In *In re Moore*, 292 N.C. 58, 231 S.E.2d 849 (1977), our Supreme Court concluded that "it is not necessary to show an actual conflict of interest to justify a refusal to issue letters of administration; it is sufficient that the likelihood of a conflict is shown." Cause for revocation of letters under § 28A-9-1 exists "when conditions arise after [a personal representative's] appointment which will prevent him from faithfully and impartially executing the duties which he has assumed." *Id.* Consistently, this Court has held that, "a person occupying a place of trust and confidence may not place himself in a position where his own interest may conflict with the interest of those for whom he acts." *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

A guardianship is a trust relation and in that relationship the guardian is a trustee who is governed by the same rules that govern other trustees. *Owen v. Hines*, 227 N.C. 236, 41 S.E.2d 739 (1947). A guardian, like a personal representative, acts in a fiduciary capacity. N.C. Gen. Stat. §§ 32-2 (1991) and 36A-1(a) (1991); *Moore, supra.* A fiduciary is charged with the duty of acting for the benefit of another party as to matters coming within the scope of the relationship. N.C. Gen. Stat. § 36A-1(a). The duties of a fiduciary include the duty of loyalty and the tradition surrounding this duty is "unbending and inveterate." *Trust Co. v. Johnston*, 269 N.C. 701, 153 S.E.2d 449 (1967) (*quoting Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928). In interpreting § 35A-1290(b)(7), we must honor this tradition.

When the language of a statute is clear and unambiguous, 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. *State v. Camp*, 286 N.C. 148, 209 S.E.2d 754 (1974). The words "might tend" in § 35A-1290(b)(7) establish a minimal showing of possible conflicting interest for the removal of a guardian. The word "tend" is defined as "to be likely or to be disposed or inclined," and the word "might" is defined as "used to indicate a possibility or probability that is weaker than may." The American Heritage Dictionary (Second College Edition 1982). We hold, therefore, that § 35A-1290(b)(7) authorizes the removal of a guardian where there is a showing of any potential for conflict between the interests of the ward and those of the guardian.

The record in this case discloses substantial potential for conflict between the interests of the ward and respondents. Because respondents are governed by the same rules that govern other trustees they are "held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd." *Trust Co., supra* (*quoting Meinhard, supra*). The standard established by § 35A-1290(b)(7) acknowledges and confirms the "unbending and inveterate" tradition of fiduciary duty.

Applying the facts in this case to the foregoing principles of law, we hold that the trial court did not err in affirming the order of the Assistant Clerk removing respondents as guardians. The evidence supports the findings of fact and the findings support the conclusion of law that respondents have private interests, both direct and indirect, which might tend to hinder or be adverse to carrying out their duties as guardians.

Based upon our holding, respondents' other assignments of error are without merit and the order of the trial court is

Affirmed.

Chief Judge ARNOLD and Judge EAGLES concur.

BELL ATLANTIC TRICON LEASING CORPORATION, PLAINTIFF v. JOHNNIE'S GARBAGE SERVICE, INC. AND JOHNNIE McBROOM, DEFENDANTS

No. 9315SC169

(Filed 1 February 1994)

1. Courts § 145 (NCI4th); Venue § 1 (NCI3d)— forum selection or consent to jurisdiction clause—absence of intelligent consent—invalidity

A North Carolina defendant did not knowingly and intelligently consent to forum selection and consent to jurisdiction clauses giving the courts of New Jersey jurisdiction over a computer lease agreement where defendant was a seventy-nine-year-old man who ran a small family business; there was no bargaining over the terms of the contract between the parties, who were far from equal in bargaining power; the forum selection and consent to jurisdiction clauses were on the back side of the one-page preprinted form, where there was no place for defendant to sign or initial; the clauses were in fine print under a paragraph labeled "Miscellaneous" and were never called to defendant's attention or explained to him; and there was no showing that defendant was aware of the significance of the clauses. Therefore, the clauses were unenforceable.

Am Jur 2d, Conflict of Laws §§ 78, 79.

2. Constitutional Law § 149 (NCI4th); Judgments § 405 (NCI4th)—foreign judgment—insufficient minimum contacts—no full faith and credit

Defendant North Carolina resident did not have sufficient minimum contacts with New Jersey to give the courts of that state personal jurisdiction over him, and the North Carolina courts were not required to give full faith and credit to a default judgment entered against defendant in New Jersey, where defendant had no contact with New Jersey except for his agreement to lease computer equipment from a New Jersey company; defendant was a seventy-nine-year-old man who ran a small business operated exclusively in North Carolina; plaintiff is a large corporation which does business in several states; when defendant signed the lease, it was not called to his attention that he was contracting with a New Jersey company; and defendant does no business in New Jersey, has never

solicited or purposefully directed his activities at New Jersey residents, and has not attempted to avail himself of the protections of the laws of New Jersey.

Am Jur 2d, Constitutional Law §§ 860 et seq.; Judgments §§ 1214 et seq.

Comment note.—"Minimum contacts" requirement of Fourteenth Amendment's due process clause (Rule of International Shoe Co. v. Washington) for state court's assertion of jurisdiction over nonresident defendant. 62 L. Ed. 2d 853.

Appeal by defendants from judgment entered 12 November 1992 by Judge Orlando F. Hudson in Alamance County Superior Court. Heard in the Court of Appeals 6 December 1993.

On 31 January 1991, defendant Johnnie McBroom, acting as president of Johnnie's Garbage Service, Inc., received certain computer equipment from National Software Systems, Inc. of Sparks, Maryland. On the same day, a representative of National Software installed the equipment in Mr. McBroom's office in Alamance County. After the equipment was installed, Mr. McBroom signed a lease application and a standardized lease agreement. The lease agreement contained a forum selection clause which stated that the guaranty was governed by New Jersey law and a consent to jurisdiction clause which stated that the guarantor consented to the jurisdiction of the court of the State of New Jersey for Bergen County for resolution of any disputes arising under the agreement. Under the lease agreement, defendant was to make payments to Bell Atlantic at its Atlanta, Georgia office.

In addition to a security deposit given to the National Software representative when he was present in defendant's office, defendant made monthly payments in February and March pursuant to the lease. In April of 1991, defendant wrote to National Software and requested that the company pick up its equipment because it did not function as promised. A copy of this letter was sent to Bell Atlantic. Pursuant to the telephone instructions of National Software, defendant shipped the equipment back to National Software in boxes which had been sent to him for that purpose. Defendant ceased making payments for the equipment and plaintiff eventually declared that defendant was in default.

In September of 1991, plaintiff's attorney filed a complaint against defendant in the New Jersey court for Bergen County. Defendant did not answer the complaint. The Clerk of Superior Court of Bergen County entered default judgment against defendant on 29 January 1992.

On 8 June 1992, plaintiff filed an action with the Clerk of Superior Court of Alamance County seeking to enforce the New Jersey judgment pursuant to the Uniform Enforcement of Foreign Judgments Act. Attached to this Notice was a certified copy of the New Jersey judgment which had been entered on 19 January 1992 and recorded on 6 February 1992. On 10 June 1992, defendant was served with the Notice. On 10 July 1992, the thirty days for responding to the Notice expired with no response filed by defendant.

On 5 August 1992, defendant filed a Motion for Relief from Judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. On 26 October 1992, defendant filed a Motion to Quash Execution or in the Alternative to Stay Execution. Both motions were denied. From the Order denying these motions, defendant appeals.

Smith, Debnam, Hibbert & Pahl, by Bettie Kelley Sousa and Byron L. Saintsing, for plaintiff-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by ToNola D. Brown, for defendants-appellants.

WELLS, Judge.

This appeal presents the issue of whether North Carolina should afford full faith and credit to a default judgment of a New Jersey court against a North Carolina defendant. Defendant argues that New Jersey's exercise of *in personam* jurisdiction over defendant was constitutionally impermissible, rendering the New Jersey judgment void and unenforceable. We agree, and therefore reverse the superior court's denial of defendant's motion for relief from judgment.

Generally, one state must accord full faith and credit to a judgment rendered in another state. *Florida National Bank v. Satterfield*, 90 N.C. App. 105, 367 S.E.2d 358 (1988). However, because a foreign state's judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state, the

foreign judgment must satisfy the requisites of a valid judgment under the laws of the rendering state before it will be afforded full faith and credit. *Boyles v. Boyles*, 308 N.C. 488, 302 S.E.2d 790 (1983).

To meet the requirements of a valid judgment, the rendering court must comport with the demands of due process such that it has personal jurisdiction—otherwise known as minimum contacts—over defendant. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 90 L.Ed. 95 (1945). The Due Process Clause protects an individual's liberty interest in not being subject to the judgment of a forum with which he has established no meaningful contacts or relations. *Id.* "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490 (1980). N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) allows a party to petition for relief from judgment on the grounds that the judgment is void. A void judgment is a legal nullity which may be attacked at any time. *Allred v. Tucci*, 85 N.C. App. 138, 354 S.E.2d 291, *cert. denied*, 320 N.C. 166, 358 S.E.2d 47 (1987).

There are two theories under which plaintiff contends the New Jersey court could properly exercise personal jurisdiction: that defendant consented to jurisdiction, and that defendant established minimum contacts with the State of New Jersey such that the maintenance of the suit in New Jersey would not offend traditional notions of fair play and substantial justice.

[1] We first address the issue of whether the consent to jurisdiction clause contained in the agreement signed by defendant operated as a valid consent to personal jurisdiction of the New Jersey court. Our Supreme Court discussed this type of provision in *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30 (1992), and noted that:

> [T]he consent to jurisdiction provision concerns the submission of a party or parties to a named court or state for the exercise of personal jurisdiction over the party or parties consenting thereto. By consenting to the jurisdiction of a particular court or state, the contracting party authorizes that court or state to act against him.

In the subsequent case of *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 423 S.E.2d 780 (1992), our Supreme Court discussed the validity of choice of law, forum selection and consent to jurisdiction clauses. In *Perkins*, the Court upheld the enforcement of forum selection clauses and stated that "Recognizing the validity and enforceability of forum selection clauses in North Carolina is consistent with the North Carolina rule that recognizes the validity and enforceability of choice of law and consent to jurisdiction provisions," *citing Johnston County v. R.N. Rouse & Co., supra.* The Court held that forum selection clauses are valid in North Carolina unless the litigant demonstrates that the clause was "the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable." *Perkins v. CCH Computax, Inc., supra.* These cases indicate that generally, the courts of our State will enforce consent to jurisdiction clauses. The United States Supreme Court has held that because the personal jurisdiction requirement is a waivable right, a litigant may give express or implied consent to the personal jurisdiction of the court. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 72 L.Ed.2d 492 (1982). Such forum selection or consent provisions do not offend due process where they have been "freely negotiated" and are not "unreasonable and unjust." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L.Ed.2d 513 (1972).

In *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 31 L.Ed.2d 124 (1972), the United States Supreme Court outlined the factors relevant to determination of a contractual waiver of due process rights. The Court applied the standards governing waiver of constitutional rights in a criminal setting, and although the Court did not find that such standards must apply, it held that based on the specific circumstances of the case, the contractual waiver of due process rights was "voluntarily, intelligently, and knowingly" made. *Id.* In that case, the contract was negotiated between two corporations and was not a contract of adhesion. Furthermore, the waiver provision was expressly bargained for and drafted by the parties' attorneys, and both parties were "aware of the significance" of the waiver provision. *Id.*

With these cases in mind, we now examine the circumstances surrounding defendant's signing of the lease agreement. When he signed the lease agreement, defendant was a 79-year-old man who ran a small family business. There was no bargaining over the terms of the contract between the parties, who were far from

equal in bargaining power. The lease agreement itself was a one page pre-printed form with type on the front and back. The forum selection and consent to jurisdiction provisions were on the back side of the paper, where there was no place for defendant to sign or initial. The provisions were in fine print under a paragraph labeled "Miscellaneous," and were never called to defendant's attention or explained to him. Plaintiff made no showing whatsoever that defendant was actually aware or made aware of the significance of the consent to jurisdiction clause.

Considering all of these factors, we find that defendant did not knowingly and intelligently consent to the jurisdiction of the New Jersey courts. Therefore, enforcement of this provision would be both unfair and unreasonable.

[2] Defendant next argues that no minimum contacts existed such that New Jersey could exercise personal jurisdiction over him. We find merit in this argument.

It is a well recognized principle of our law that in order to resolve the question of the existence of *in personam* jurisdiction of a forum state over a non-resident defendant, a two-step inquiry must be made. If a defendant is not physically present within the forum, constitutional due process requirements may still be met if defendant had certain "minimum contacts" with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95 (1945). In order to be subject to personal jurisdiction, defendant must take some purposeful action within the forum state that invokes for defendant the benefits and protections of the state's laws. *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed.2d 1283 (1958). The activity of defendant should be of such a nature that defendant could reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490 (1980).

In determining when a potential defendant should reasonably anticipate litigation in an out-of-state forum, the Supreme Court has often referred to the reasoning of *Hanson v. Denckla*, *supra*, which provided that:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule

> will vary with the quality and nature of defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *Id.*

The "purposeful availment" requirement ensures that a defendant will not be brought into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 79 L.Ed.2d 790 (1984). Neither should a defendant be haled into a forum solely as a result of the "unilateral activity of another party or a third person." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 80 L.Ed.2d 404 (1984). Furthermore, minimum contacts are determined by judging each case on its specific facts considering the traditional notions of fair play and justice. *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985). In *Marion v. Long*, 72 N.C. App. 585, 325 S.E.2d 300, *appeal dismissed and rev. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985), this Court, *citing Sola Basic Industries, Inc. v. Parke County*, 70 N.C. App. 737, 321 S.E.2d 28 (1984), noted that the factors to be considered in determining whether minimum contacts exist are: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience.

Applying the above stated principles of law to the facts before us, we find that defendant had no minimum contacts sufficient to allow a New Jersey court to assert personal jurisdiction over him. The existence of minimum contacts in this case can depend on only one contact: a lease agreement between defendant and Bell Atlantic. Defendant, as noted earlier, was a 79-year-old man who ran a small business operated exclusively in North Carolina. Plaintiff, on the other hand, is a large corporation which does business in several states. When defendant signed the lease agreement, it was not called to his attention that he was contracting with a New Jersey company. Defendant does no business in New Jersey, has never solicited or purposefully directed his activities at New Jersey residents, and has not attempted to avail himself of the protections of the laws of New Jersey.

The exercise of personal jurisdiction by New Jersey over this defendant offends any idea of fair play and substantial justice. Representatives of National Software approached defendant, con-

vinced him to purchase a computer system, installed it in his office, and then had him sign a standardized, pre-printed contract which purports to be the only basis for the State of New Jersey to have jurisdiction over him. Throughout these dealings, defendant was never even informed that he was contracting with a New Jersey company, much less that if a dispute arose and this company decided to sue him, he would have to travel to New Jersey to defend himself.

Based on our evaluation of the circumstances of this case as shown by this record, we conclude that it would be inconsistent with due process of law for a New Jersey court to exercise personal jurisdiction over this defendant. Accordingly, the courts of our State cannot give full faith and credit to the New Jersey judgment. For the reasons stated, the order denying relief from judgment must be reversed and the cause remanded for entry of judgment for defendant.

Reversed and remanded.

Judges EAGLES and WYNN concur.

ABLE OUTDOOR, INC., PETITIONER-APPELLANT v. THOMAS J. HARRELSON, AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT-APPELLEE

No. 9310SC48

(Filed 1 February 1994)

1. Costs § 37 (NCI4th)— attorney fees against State—time for motion

The trial court erred by vacating an order requiring the State to pay petitioner's attorney fees on the ground that it was entered without authority in that N.C.G.S. § 6-19.1 requires a party seeking attorney fees under that statute to petition within 30 days following final disposition of the case, and petitioner's motion for attorney fees was filed before final disposition. The 30-day period in the statute is a deadline, not a starting point.

Am Jur 2d, Costs §§ 79 et seq.

2. Costs § 37 (NCI4th)— attorney fees against State—execution and order in aid of execution—valid

The trial court erred by vacating an execution and order in aid of execution where the court had erroneously held that the original judge had not had jurisdiction. Since the original judge had jurisdiction to enter the order awarding attorney fees, there was jurisdiction to enter the execution and order in aid of execution.

Am Jur 2d, Costs §§ 79 et seq.

3. Judgments § 474 (NCI4th)— attorney fees awarded against State—Rule 60 motion—no showing of extraordinary circumstances

The trial court erred by granting DOT relief under N.C.G.S. § 1A-1, Rule 60(b)(6) where an earlier judgment had awarded petitioner attorney fees against DOT. There is nothing in the record which indicates that DOT made any showing of extraordinary circumstances, that the interests of justice required relief from the earlier order, or that DOT presented a meritorious defense which justifies the relief.

Am Jur 2d, Judgments §§ 708 et seq.

Appeal by petitioner from order entered 4 December 1992 by Judge Wiley F. Bowen in Wake County Superior Court. Heard in the Court of Appeals 18 November 1993.

Wilson and Waller, P.A., by Betty S. Waller and Brian E. Upchurch, for the petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth N. Strickland, for the respondent-appellee.

WYNN, Judge.

This is an appeal from the trial court's order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) vacating Judge Cashwell's 8 March 1991 order granting petitioner attorney's fees under N.C. Gen. Stat. § 6-19.1 and N.C. Gen. Stat. § 1A-1, Rule 11 and the execution and order in aid of execution issued thereto. We hold that the trial court erred in vacating Judge Cashwell's order and reverse.

On 2 November 1989 the Department of Transportation (DOT) issued an advertising permit to petitioner Able Outdoor, Inc. for a billboard on Interstate 26 in Buncombe County. On 24 April 1990 DOT determined that trees in front of the sign had been cut in violation of 19A NCAC 2E.0210(8) and revoked petitioner's permit. Petitioner appealed to the Secretary of Transportation who upheld the permit revocation. Petitioner then sought judicial review of the Secretary's decision. While this action was pending, DOT reinstated the permit on 7 December 1992.

Petitioner then filed a motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1 and N.C. Gen. Stat. § 1A-1, Rule 11. On 8 March 1991, after an evidentiary hearing, Judge Narley L. Cashwell awarded petitioner attorney's fees in the amount of $8,978.75. DOT appealed this award and in an unpublished opinion this Court dismissed the appeal because the order was interlocutory and there was no indication in the record that a final judgment had been entered.

Petitioner then obtained a voluntary dismissal of its action for judicial review of the permit revocation which both parties concede was a final disposition of the case. On 22 October 1992 the Wake County Clerk of Court issued an execution against DOT seeking enforcement of Judge Cashwell's order for attorney's fees. The execution was returned unsatisfied. On 19 November 1992 Judge Cashwell entered an order in aid of execution requiring DOT to appear in Wake County Superior Court to answer regarding property in its possession which could satisfy the execution.

DOT then filed a motion pursuant to Rule 60(b)(4) and (6) for relief from the order granting attorney's fees, execution, and order in aid of execution. The trial court granted the motion, concluding that Judge Cashwell had no jurisdiction or authority to enter the 8 March 1991 order and there was no jurisdiction or authority to enter the execution and order in aid of execution. The trial court also concluded that execution is not available against the State. From this order, petitioner appeals.

I.

[1] Petitioner first contends that the trial court erred in vacating Judge Cashwell's order on the grounds it was entered without jurisdiction or authority. Petitioner argues Judge Cashwell's order

was properly entered and could not be set aside pursuant to a Rule 60(b) motion. We agree.

Judge Cashwell's order for attorney's fees was entered under N.C. Gen. Stat. § 6-19.1 and § 1A-1, Rule 11. N.C. Gen. Stat. § 6-19.1 reads in pertinent part:

> 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 there are no special circumstances that would make the award of attorney's fees unjust.
>
> The party shall petition for attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

N.C. Gen. Stat. § 6-19.1 (1986).

In *Whiteco Industries, Inc. v. Harrelson*, 111 N.C. App. 815, 434 S.E.2d 229 (1993) and its companion case, *Whiteco Industries, Inc. v. Harrington*, 111 N.C. App. 839, 434 S.E.2d 234 (1993), this Court addressed the 30-day filing period requirement. This Court held that the requirement is a jurisdictional prerequisite to the award of attorney's fees and the 30-day period starts to run after the decision has become final and the time in which to appeal has expired. *Harrelson*, 111 N.C. App. at 818, 434 S.E.2d at 232. The 30-day period, however, does not establish a starting point as well as a deadline. *Id.* In both *Harrelson* and *Harrington*, this Court held that a petitioner's motion for attorney's fees which was filed well before final judgment was timely and the trial court had jurisdiction over the matter. *Harrelson*, 111 N.C. App. at 818, 434 S.E.2d at 232; *Harrington*, 111 N.C. App. at 842, 434 S.E.2d at 236. *Harrelson* noted, however, that judicial economy favors the hearing of a motion for attorney's fees only after the judgment

has become final in order to prevent piecemeal litigation. *Harrelson*, 111 N.C. App. at 818, 434 S.E.2d at 232.

In the instant case, the trial court concluded, *inter alia*, that N.C. Gen. Stat. § 6-19.1 "requires a party seeking attorney's fees under this statute to petition for the attorney's fees within 30 days following final disposition of the case, and petitioner failed to petition for attorney's fees within 30 days following final disposition of the case." The trial court then concluded Judge Cashwell had no jurisdiction or authority to enter his order awarding petitioner attorney's fees. This conclusion is contrary to the holding in both *Whiteco* decisions that the 30-day period is a deadline, not a starting point. Therefore, the trial court erred by concluding Judge Cashwell did not have jurisdiction or authority to enter the order awarding petitioner attorney's fees.

II.

[2] Petitioner next argues that the trial court erred by vacating the execution and order in aid of execution. Petitioner contends that since Judge Cashwell's order awarding attorney's fees is valid the subsequent execution and order in aid of execution are also valid. We agree.

In ruling on DOT's Rule 60(b) motion, the trial court made the following conclusions of law:

> 5. Judge Cashwell had no jurisdiction or authority to enter the Order granting attorney's fees pursuant to N.C.G.S. § 6-19.1. Because of sovereign immunity, there was no jurisdiction or authority to grant attorney's fees against the State under Rule 11. There are also extraordinary circumstances existing to preclude the award of attorney's fees pursuant to Rule 11 under prevailing caselaw since there was another statutory provision which more specifically addressed the situation in this case, N.C.G.S. § 6-19.1. The record and evidence show that justice demands that attorney's fees not be granted pursuant to Rule 11. There are reasons existing and shown to the Court which justify relief from the operation of the Order granting attorney's fees.
>
> 6. Respondent is entitled to relief from the March 8, 1991 Order granting attorney's fees.

7. The Execution and the Order in Aid of Execution were entered because of the March 8, 1991 Order granting attorney's fees, and, because the Order granting attorney's fees was entered without jurisdiction and authority and because there are valid reasons which justify relief from the operation of the March 8, 1991 Order granting attorney's fees, there was no jurisdiction or authority to enter either the Execution and Order in Aid of Execution.

8. Also, because the process of Execution is not available against the State, the Execution and Order in Aid of Execution were entered without jurisdiction or authority.

9. Respondent is entitled to relief from the Execution and the Order in Aid of Execution.

Rule 60(b) provides in pertinent part as follows:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

. . . .

(4) The judgment is void;

. . . .

(6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60 (1990).

A judgment can be valid, irregular, erroneous, or void. *Wynne v. Conrad*, 220 N.C. 355, 17 S.E.2d 514 (1941). "An irregular judgment is one entered contrary to the course of the court—contrary to the method of procedure and practice under it allowed by law in some material respect." *Mills v. Richardson*, 240 N.C. 187, 81 S.E.2d 409 (1954). An erroneous judgment is one rendered according to the course and practice of the court but contrary to the law or upon a mistaken view of the law. *Wynne*, 220 N.C. at 360, 17 S.E.2d at 518. A void judgment resembles a valid judgment, but lacks an essential element such as jurisdiction or service of process. *Windham Distributing Co., Inc. v. Davis*, 72 N.C. App. 179, 323 S.E.2d 506 (1984), *disc. rev. denied*, 313 N.C. 613, 330

S.E.2d 617 (1985). A judgment is not void if " 'the court had jurisdiction over the parties and the subject matter and had authority to render the judgment entered.' " *Id.* at 181-182, 323 S.E.2d at 508 (quoting *In re Brown*, 23 N.C. App. 109, 110, 208 S.E.2d 282, 283 (1974)).

Since we have determined Judge Cashwell had jurisdiction to enter the order awarding petitioner attorney's fees, it follows that his order is not void. Once jurisdiction attaches over an action it exists until the cause is fully and completely determined. *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 102 S.E.2d 469 (1958). Therefore, there was jurisdiction to enter the execution and order in aid of execution. Thus, the trial court erred in its conclusion to the contrary.

[3] Since the orders are valid, the only question that remains is whether the trial court erred in granting relief to DOT under Rule 60(b)(6). Rule 60(b)(6) is equitable in nature and authorizes the trial court to exercise its discretion in granting or denying the relief sought. *Howell v. Howell*, 321 N.C. 87, 361 S.E.2d 585 (1987). The rule empowers the trial court to vacate judgments whenever such action is necessary to accomplish justice. *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E.2d 148, *disc. rev. denied*, 291 N.C. 176, 229 S.E.2d 689 (1976).

> The setting aside of a judgment pursuant to . . . Rule 60(b)(6) should only take place where (i) extraordinary circumstances exist and (ii) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist. In addition to these requirements, the movant must also show that he has a meritorious defense.

Huggins v. Hallmark Enterprises, Inc., 84 N.C. App. 15, 24-25, 351 S.E.2d 779, 785 (1987) (citations omitted); *State ex rel. Envtl. Management Comm'n v. House of Raeford Farms*, 101 N.C. App. 433, 400 S.E.2d 107 (1991).

A motion under Rule 60(b)(6), however, cannot be used as a substitute for an appeal, and an erroneous judgment cannot be attacked under this clause. *Concrete Supply Co. v. Ramseur Baptist Church*, 95 N.C. App. 658, 383 S.E.2d 222 (1989). *See J.D. Dawson Co. v. Robertson Marketing, Inc.*, 93 N.C. App. 62, 376 S.E.2d 254 (1989); *Town of Sylva v. Gibson*, 51 N.C. App. 545, 277 S.E.2d 115, *disc. rev. denied*, 303 N.C. 319, 281 S.E.2d 659 (1981). The

proper remedy for an erroneous judgment is either an appeal or a timely motion for relief under N.C. Gen. Stat. § 1A-1, Rule 59(a)(8). *Hagwood v. Odom*, 88 N.C. App. 513, 364 S.E.2d 190 (1988).

In the instant case, there is nothing in the record which indicates that DOT made any showing of extraordinary circumstances or that the interests of justice require relief from Judge Cashwell's order. In addition, there is nothing in the record to indicate DOT presented a meritorious defense which justifies Rule 60(b)(6) relief. A court may, for sufficient cause shown, recall or set aside an execution in response to a motion in the cause. *Abernethy Land & Finance Co. v. First Security Trust Co.*, 213 N.C. 369, 196 S.E. 340 (1938); *Davis v. Federal Land Bank of Columbia*, 217 N.C. 145, 7 S.E.2d 373 (1940). An order should not be vacated under Rule 60(b)(6), however, except in extraordinary circumstances and after a showing that justice demands it. *Vaglio v. Town and Campus Int'l., Inc.*, 71 N.C. App. 250, 322 S.E.2d 3 (1984). Therefore, since DOT made no showing of extraordinary circumstances or that justice requires relief from the execution and order in aid of execution, the trial court erred by granting DOT such relief.

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

Reversed.

Judges LEWIS and McCRODDEN concur.

UNIVERSAL LEAF TOBACCO CO., INC., D/B/A R. P. WATSON COMPANY AND THORPE-GREENVILLE EXPORT TOBACCO COMPANY, PLAINTIFFS v. ROBERT OLDHAM AND ELIZABETH OLDHAM; JOHN THOMAS WORTHINGTON AND ADDIE BEAMON WORTHINGTON; INDIVIDUALLY AND D/B/A LIBERTY WAREHOUSE; LLOYDS, NEW YORK, DEFENDANTS

No. 927SC1105

(Filed 1 February 1994)

1. Pleadings § 19 (NCI4th)— insurance policy—clauses included in answer—error in clause—binding

The trial court erred in an action between two insurance companies to determine which excess insurance clause applied by finding that an allegation in INA's counterclaim which re-

ferred to other "valued" insurance contained a typographical error and should have referred to other "valid" insurance. Allegations contained in the pleadings of the parties constitute judicial admissions which are binding on the pleader as well as the court and the court should not have considered affidavits to the extent that they were inconsistent with, or contradictory to, the allegations in INA's pleading.

Am Jur 2d, Pleading §§ 174 et seq.

2. **Evidence and Witnesses § 1993 (NCI4th)— pleading of insurance contract—affidavits as to intent of parties—not admissible—parol evidence rule**

The trial court should not have considered affidavits as proof that the intent of the parties to insurance contracts was other than that appearing on the face thereof in an action to determine which of two excess insurance clauses applied. The pleadings do not contain any allegation of fraud or mistake and the policy, as written, is not ambiguous. Use of the word "valued" rather than "valid" does not make the meaning of INA's clause uncertain because "valued" is a term of art which is used to describe a particular type of insurance policy.

Am Jur 2d, Evidence § 1066.

3. **Insurance § 123 (NCI4th)— two insurance policies—excess insurance clauses—construction**

Insurance coverage provided by Lloyds to protect tobacco from fire loss was rendered excess by coverage provided by INA where both policies contained excess insurance clauses; the INA clause referred to the existence of other valued insurance; a valued policy is one in which the value of the insured property is fixed in the policy by agreement of the parties; the amount of the Lloyds policy was not fixed but left open to be determined by the actual loss; the Lloyds policy was therefore not valued insurance and its existence did not shut off INA's liability; Lloyds' liability is shut off by the existence of specific insurance as defined in the Lloyds policy; and the INA policies fall within the definition of "specific insurance" in the Lloyds policy.

Am Jur 2d, Insurance § 1791.

Resolution of conflicts, in non-automobile liability insurance policies, between excess or pro-rata "other insurance" clauses. 12 ALR4th 993.

Appeal by defendant Lloyds, New York, from order entered 16 June 1992 by Judge Franklin R. Brown in Wilson County Superior Court. Heard in the Court of Appeals 5 October 1993.

Yates, McLamb & Weyher, by Kirk G. Warner and Andrew A. Vanore, III, for plaintiff-appellee.

Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr., and Ralph W. Meekins, for defendant-appellant.

MARTIN, Judge.

Plaintiffs instituted this action to recover the value of tobacco owned by them which was destroyed by fire on 3 October 1986 while stored in the Liberty Warehouse in Wilson, North Carolina. At the time of the fire, Insurance Company of North America (hereinafter "INA") had in full force and effect policies of insurance issued to plaintiffs insuring tobacco owned by them against loss by fire. Defendant Lloyds, New York, (hereinafter "Lloyds") had in full force and effect a policy of insurance issued to Liberty Warehouse which insured tobacco stored in the warehouse against loss by fire. By stipulation, INA, being a real party in interest with respect to the claims between plaintiffs and Lloyds, agreed to be deemed a party plaintiff in the action and to be subject to any judgment rendered herein. Thus, this case is essentially a dispute between the two insurance companies, INA and Lloyds, over the amount of coverage provided by each for the loss of the tobacco.

Both insurers moved for summary judgment on the ground that the coverage provided by their respective policies is excess to the extent of the coverage provided by the other insurer. Based on the pleadings, stipulations and affidavits submitted by the parties, the trial court found facts and concluded that the policy issued by Lloyds provided primary coverage for the loss and that the coverage provided by INA was excess. Lloyds appealed. For the reasons set forth in this opinion, we reverse the judgment of the trial court and hold that INA's policies provide primary coverage and the coverage provided by Lloyds is excess.

[1] Lloyds first assigns error to the trial court's finding that the insurance policies issued by INA contained a typographical error. The policies issued by INA to Watson and Thorpe-Greenville provide in pertinent part:

> 7. It is expressly agreed that this insurance shall not cover to the extent of any other **valued** and collectible insurance, whether prior or subsequent hereto in date, and by whomsoever affected, directly or indirectly covering the same property, and this Assurer shall be liable for loss or damage only for the excess value beyond the amount collectible for such other insurance. (Emphasis added.)

The trial court found that the foregoing paragraph in the policies issued to Watson and Thorpe-Greenville contained a typographical error and that the word "**valued**" should actually have been "**valid**" so paragraph 7 should have read that the insurance provided by INA ". . . shall not cover to the extent of any other **valid** and collectible insurance[.]" Lloyds contends that this finding of fact is erroneous. We agree.

In its Answer to Lloyds' Counterclaim, INA alleged as an affirmative defense that:

> INA issued policy number 434973 to Universal Leaf, which policy was in effect on October 3, 1986 and provided as follows regarding other insurance:
>
> 7. It is expressly agreed that this insurance shall not cover to the extent of any other **valued** and collectible insurance . . . .

It is well established in this jurisdiction that "[a] party is bound by his pleadings and, unless withdrawn, amended, or, otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader." *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964). Allegations contained in the pleadings of the parties constitute judicial admissions which are binding on the pleader as well as the court. *Ballance v. Wentz*, 286 N.C. 294, 210 S.E.2d 390 (1974); *Crowder v. Jenkins*, 11 N.C. App. 57, 180 S.E.2d 482 (1971).

Despite the binding allegation contained in INA's Answer, the trial court considered certain affidavits submitted by INA for the purpose of proving that the parties to the insurance contracts intended the coverage therein to be excess where there was other

"**valid** and collectible" insurance. Each affiant stated that he was employed to procure or review insurance policies on behalf of Thorpe-Greenville and that it was the affiant's intent and belief that the policies at issue would not provide coverage to the extent of any other "**valid** and collectible insurance."

These affidavits contradicted the allegations of INA's Answer. However, INA's allegation that the coverage provided by its policies was excess to the extent of any other "**valued** and collectible" insurance constituted a judicial admission which INA could not thereafter contradict and which the trial court was bound to accept as true. Thus, we hold that the trial court erred by considering the affidavits to the extent that they were inconsistent with, or contradictory to, the allegation in INA's pleading.

[2] However, even if we assume that the trial court could properly consider evidence which contradicted INA's pleading, the court should not have considered the affidavits because they did not set forth facts which would have been admissible in evidence. ("Supporting and opposing affidavits . . . shall set forth such facts as would be admissible in evidence[.]" N.C. Gen. Stat. § 1A-1, Rule 56(e)). INA offered the affidavits as proof that the intent of the parties to the insurance contracts was other than that appearing on the face thereof.

"[I]n the absence of fraud, or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which *tend to substitute a new and different contract* from the one evidenced by the writing, is incompetent." (Emphasis added.) *Town of West Jefferson v. Edwards*, 74 N.C. App. 377, 379, 329 S.E.2d 407, 409 (1985), *quoting Neal v. Marrone*, 239 N.C. 73, 79 S.E.2d 239 (1953). Where the contract is ambiguous, parol or extrinsic evidence is competent not to contradict the terms of the contract, but to make certain what the agreement was between the parties. *Id.*

In the present case, the affidavits submitted by INA constitute extrinsic evidence which contradicts the plain terms of the parties' contract. The pleadings do not contain any allegation of fraud or mistake and the policy, as written, is not ambiguous. Use of the word "valued" as opposed to the word "valid" does not make the meaning of INA's other insurance clause uncertain. As recognized by both parties, the word "valued" is a term of art in the insurance industry which is used to describe a particular type of insurance

policy. Thus, the affidavits submitted by INA constituted extrinsic evidence which, if offered at trial, would have been inadmissible, and, therefore, should not have been considered by the trial court. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E.2d 375 (1976). Accordingly, for both of the above reasons, the trial court erred when it found that the INA policies were excess to the extent of any other "**valid** and collectible insurance." We hold that according to the terms of the INA policies, the coverage provided thereby was excess only to the extent of any other "**valued** and collectible insurance."

[3] Having determined the proper construction of the INA policies, we must now review the policies to determine which of the two insurers provides primary coverage for the destroyed tobacco, guided by the decision of our Supreme Court in *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967). In *Insurance Co.*, the Court undertook to determine which of two automobile liability policies provided primary coverage for a single loss. Describing the principles which governed its inquiry, the Court said:

> The terms of another contract between different parties cannot affect the proper construction of the provisions of an insurance policy. The existence of the second contract, whether an insurance policy or otherwise, may or may not be an event which sets in operation or shuts off the liability of the insurance company under its own policy. Whether it does or does not have such effect, first requires the construction of the policy to determine what event will set in operation or shut off the company's liability and, second, requires a construction of the other contract, or policy, to determine whether it constitutes such an event.

Id. at 346, 152 S.E.2d at 440. Thus, we must examine the pertinent language of each policy, without reference to the provisions of the other policy, to determine what events set in operation or shut off the liability of the insurers under their respective policies.

Properly construed, the INA policies do "not cover to the extent of any other valued and collectible insurance[.]" Thus, the existence of valued and collectible insurance covering the same property is the event which sets in operation INA's excess clause. As an alternative basis for its ruling, the trial court found that the Lloyds policy is a "valued" policy. Lloyds assigns error to this finding and we must agree.

A "valued" policy is one where the value of the property insured is fixed in the policy by agreement of the parties and in the event of a total loss that valuation is conclusive. *Couch on Insurance* 2d (Rev. ed. 1983) § 54:104. However, an amount stated in the policy as the maximum amount of coverage provided does not make a policy a valued policy. *Id.* § 54:105. In contrast, an "open" or "unvalued" policy is one in which the value of the subject matter is not fixed, but left open to be determined according to the actual loss. *Id.; see Williford v. Insurance Co.*, 248 N.C. 549, 103 S.E.2d 804 (1958).

The Lloyds policy states that it insures the named insured "to the extent of the actual cash value of the property at the time of loss" not to exceed the amount stated therein. Thus, the amount of insurance provided by the Lloyds policy is not fixed, but is left open to be determined according to the actual loss. Where the liability of the insurer is measured by the actual amount of damages sustained, the policy is an open policy, not a valued policy. *Williford*, 248 N.C. 549, 103 S.E.2d 804; 46 C.J.S. *Insurance* § 1242. We hold that the Lloyds policy is not a valued policy and, therefore, its existence is not an event which shuts off INA's liability under the policies it issued to Watson and Thorpe-Greenville.

Next, we examine the terms of the Lloyds policy to determine whether the existence of the INA policies is an event which shuts off Lloyds' liability. The policy issued by Lloyds to Liberty Warehouse provides in pertinent part:

> Contributing Insurance Clause—Permission granted for other insurance written upon the same plan, terms, conditions and provisions as those contained in this form; i.e., insurance written upon the premium adjustment form. This policy shall contribute, in accordance with its conditions, only with other insurance as herein defined.
>
> Specific Insurance Clause—Insurance other than described in the Contributing Insurance Clause shall be known as Specific Insurance.
>
> Excess Clause—This policy does not attach to or become insurance against any hazard upon property herein described, which at the time of any loss is insured as defined by the Specific Insurance Clause, until the liability of such specific insurance has been exhausted and then shall cover only such

> loss or damage as may exceed the amount due from such specific insurance (whether valid or not and whether collectible or not) after application of any contribution, coinsurance, average or distribution or other clauses contained in policies of such specific insurance affecting the amount collectible thereunder, not however, exceeding the limits as set forth herein.

According to its terms, the Lloyds policy "does not attach to or become insurance against any hazard upon property herein described, which at the time of any loss is insured as defined in the specific insurance clause . . . ." The specific insurance clause states that "specific insurance" is any insurance "other than described in the Contributing Insurance Clause." The contributing insurance clause defines contributing insurance as insurance "written upon the same plan, terms, conditions, and provisions as those contained in this form; i.e., insurance written upon this premium adjustment form."

Clearly, the insurance provided by the INA policies is not written upon the same plan, terms, conditions, and provisions as the insurance provided by the Lloyds policy. Thus, the INA policies fall within the definition of "specific insurance" as described in the Lloyds policy. The existence of "specific insurance" is the event which shuts off Lloyds' liability under the terms of its policy. Therefore, we conclude that the existence of the INA policies renders excess the coverage provided by Lloyds and that Lloyds is entitled to entry of summary judgment in its favor.

For the reasons stated, the decision of the Superior Court of Wilson County is reversed, and this case is remanded to that court for entry of summary judgment in favor of Lloyds.

Reversed and remanded.

Judges WELLS and LEWIS concur.

LOIS T. MALONE, PLAINTIFF v. TOPSAIL AREA JAYCEES, INC., NEUWIRTH MOTORS, INC., PHILIP W. MATTHEWS, TOMMY ALLEN, GINNY COATES, AND GENE COATES, DEFENDANTS

No. 925SC1276

(Filed 1 February 1994)

1. **Unfair Competition § 1 (NCI3d)— golf tournament—prize not awarded—unfair or deceptive practices—summary judgment for defendants**

The trial court did not err by granting summary judgment for the Jaycees on an unfair or deceptive practices claim where the Jaycees organized and sponsored a golf tournament; they advertised a prize of $10,000 or a new car for anyone who hit a hole in one on the 17th hole; plaintiff entered the tournament and made the hole in one; the Jaycees announced that she had won the prize, presented her with a simulated check, and took her picture with the check; the local media covered the story; and plaintiff was subsequently informed that she would not be receiving any prize because an insurance policy had not been in place as planned and the organization did not have the resources to pay the prize. The golf tournament was not a business activity as defined by Chapter 75; raising money has been specifically disavowed as a "business activity." The mere payment of an entry fee does not qualify a golf tournament as a business activity for purposes of Chapter 75 in the absence of other evidence or allegations concerning defendant's business activities.

Am Jur 2d, Consumer and Borrower Protection §§ 294, 295, 297, 299; Fraud and Deceit §§ 1-3, 12-19, 41-44.

2. **Fraud, Deceit, and Misrepresentation § 17 (NCI4th); Unfair Competition § 1 (NCI3d)— golf tournament—prize not awarded—unfair or deceptive practices—fraud—no intent to deceive**

Plaintiff failed to show evidence of intent to deceive where defendant Jaycees sponsored a golf tournament which included a prize for a hole in one on the 17th hole, plaintiff made the hole in one, the Jaycees presented plaintiff with a simulated check and photographs were taken, plaintiff was later told that there would be no prize because an insurance policy had not been purchased, and plaintiff brought an action for

unfair or deceptive practices, claiming fraud. Plaintiff failed to show any evidence of intent to deceive; reckless indifference to a representation's truth or falsity is not sufficient to satisfy the element of scienter. The Jaycees fully intended to honor their offer when they advertised the tournament and were not aware at the time of the tournament that insurance coverage had not been obtained.

Am Jur 2d, Fraud and Deceit §§ 183-196.

3. **Unfair Competition § 1 (NCI4th)— golf tournament—prize not awarded—not a false representation of winning a contest**

Defendant Jaycees did not violate N.C.G.S. § 75-32 where they sponsored a golf tournament with a prize for a hole in one on a particular hole, plaintiff made that hole in one, the Jaycees presented her with a simulated check and took pictures, and plaintiff later learned that insurance had not been obtained and that there was no money for the prize. The statute specifically governs the use of language that has a tendency to lead a reasonable person to believe he has won a contest or anything of value; because plaintiff was the winner of this contest, it was not a violation for defendants to represent that fact to the public.

Am Jur 2d, Fraud and Deceit §§ 41-48, 81.

4. **Unfair Competition § 1 (NCI4th)— golf tournament—prize not awarded—simulated check—not an unfair practice**

Defendant Jaycees did not violate N.C.G.S. § 75-35 where they sponsored a golf tournament with a prize for a hole in one on a particular hole, plaintiff made the hole in one and was presented with a simulated check while pictures were taken, and plaintiff later learned that insurance had not been purchased and that there was no money for the prize. While N.C.G.S. § 75-35 provides that no person engaged in commerce may issue a writing which resembles a negotiable instrument or an invoice unless the recipient has actually contracted for goods, property, or services for which the issuer seeks payment, the statute does not prevent the described conduct if the recipient has actually contracted for the goods, property, or services. Plaintiff contracted for the prize money by entering the tournament and hitting the hole in one.

Am Jur 2d, Consumer and Borrower Protection §§ 280, 282, 284-286, 294, 295, 297, 299.

Appeal by plaintiff from judgment entered 29 October 1992 *nunc pro tunc* for 5 October 1992 by Judge G. K. Butterfield in New Hanover County Superior Court. Heard in the Court of Appeals 27 October 1993.

Shipman & Lea, by Gary K. Shipman, for plaintiff-appellant.

Raynor & Fisher, by Glenn O'Keith Fisher, for defendant-appellee Philip W. Matthews.

No brief filed for defendant-appellee Topsail Area Jaycees, Inc.

LEWIS, Judge.

On 16 January 1991 plaintiff filed this action against defendant Topsail Area Jaycees, Inc. (hereafter "Jaycees"), several of its officers and directors, and Neuwirth Motors, Inc., alleging entitlement to certain prize money and asserting claims for negligence, fraud and unfair or deceptive practices. Plaintiff filed a voluntary dismissal as to defendant Neuwirth Motors on 22 May 1991 and a motion for summary judgment on 16 September 1992. Defendant Matthews filed a summary judgment motion on 28 September 1992. After a 5 October 1992 hearing, Judge Butterfield entered summary judgment for plaintiff against the Jaycees in the amount of $10,000, but otherwise denied plaintiff's motion. The court granted summary judgment for the Jaycees on plaintiff's unfair or deceptive practices claim, and granted summary judgment for defendants Philip Matthews and Ginny Coates. Plaintiff now appeals to this Court, contending she was entitled to summary judgment as a matter of law on each of her claims.

The Jaycees organized and sponsored a golf tournament to be held 12 May 1990 at the North Shore Country Club in Onslow County, North Carolina. The entry fee was $160 for each team of four players. The Jaycees advertised the tournament and advertised a prize of either $10,000 or a new car for anyone who hit a hole in one at the 17th hole. Plaintiff entered the tournament and made the hole in one, and the Jaycees announced that she had won the prize. The Jaycees presented plaintiff with a simulated

check made out to her for $10,000, and took her picture with the check. The local media covered the story of plaintiff's win.

However, in a letter dated 19 September 1990 the Jaycees informed plaintiff that she would not be receiving any prize, because an insurance policy was not in place as they had planned on the date of the tournament, and the organization did not have the resources to pay $10,000 without the coverage. Upon the Jaycees' refusal to pay, plaintiff filed the present lawsuit.

[1] Plaintiff contends that the court erred in granting summary judgment to the Jaycees on her Chapter 75 unfair or deceptive practices claims, and argues that she is entitled to summary judgment on these claims. Plaintiff presents two theories in support of her claim of entitlement to treble damages under Chapter 75. She argues that the Jaycees' actions were unfair or deceptive in violation of section 75-1.1, and that the Jaycees committed per se violations of section 75-32. In addition to her unfair or deceptive practices claims, plaintiff contends there are genuine issues of material fact regarding her fraud claims and the possible individual liability of defendants.

Summary judgment is only appropriate where there are no genuine issues of material fact, N.C.G.S. § 1A-1, Rule 56(c) (1990), and we find none here.

According to section 75-1.1, "unfair or deceptive acts or practices in or affecting commerce[ ] are declared unlawful." N.C.G.S. § 75-1.1(a) (1988). In order to prevail on a claim asserted under this section, plaintiff must show "(1) an unfair or deceptive act or practice, . . ., (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff . . . ." *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 461, 400 S.E.2d 476, 482 (1991). We find that plaintiff's claim under this section must fail because there is no evidence that the Jaycees committed unfair or deceptive acts which were in or affecting commerce.

"Commerce" is defined in Chapter 75 as "all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." § 75-1.1(b). Our Supreme Court has interpreted the phrase "business activities" to mean "the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages

in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). In *HAJMM*, the Court found that the issuance and redemption of securities, a practice used to raise capital, was not a business activity for the purposes of Chapter 75. It merely enabled the enterprise to organize itself for the purpose of conducting business or to continue ongoing business activities. *Id.*

We find no evidence indicating that the golf tournament sponsored by the Jaycees was a business activity as defined by Chapter 75 and our Supreme Court. In a letter to plaintiff, defendant Philip Matthews, president of the Jaycees, explained that the purpose of the tournament was to raise the visibility of the Jaycees in the community and to "raise the funds necessary to sustain the organization throughout the 1990-1991 year." As stated above, raising money was specifically disavowed as a "business activity" in *HAJMM*. Plaintiff's only argument on this issue is that payment of the entry fee constituted "trade or commerce" under Chapter 75. We hold that, in the absence of any other evidence or allegations relating to the business activities of the Jaycees, the mere payment of an entry fee does not qualify a golf tournament as a business activity "in or affecting commerce" for the purposes of Chapter 75.

[2] Notwithstanding any failure to raise a genuine issue of material fact as to the above factors, plaintiff points out that "[p]roof of fraud would necessarily constitute a violation of the prohibition against unfair [or] deceptive acts." *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991) (quoting *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975)). The elements of fraud are: "(1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party." *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468, 343 S.E.2d 174, 178 (1986).

Plaintiff has failed to show any evidence of at least one of the elements of fraud, the intent to deceive. Contrary to plaintiff's argument, evidence of reckless indifference to a representation's truth or falsity is not sufficient to satisfy the element of scienter. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988). "Without the element of intent to deceive, the required scienter for *fraud* is not present. The term 'scienter' embraces both knowledge *and* an intent to deceive,

manipulate or defraud." *Id.* (emphasis in original). In the case at hand, when the Jaycees advertised the tournament they fully intended to honor their offer and pay the prize money. They had delegated the task of procuring insurance to one of their members, Tommy Allen. According to the Jaycees, Allen had attempted to purchase the insurance and "believed his purchase was transacted the day prior to the tournament." At the time of the tournament the Jaycees were not aware that the insurance coverage had not been obtained. Because the element of scienter is lacking, there is no basis upon which to find fraud.

We find that plaintiff has not shown any evidence supporting the elements of an unfair or deceptive practices claim. Summary judgment was appropriately entered for the Jaycees on this issue.

[3] Notwithstanding the failure of her section 75-1.1 claim, plaintiff contends she is entitled to treble damages because defendants have violated another provision of Chapter 75. Section 75-32 addresses representations involving winning a prize, and provides:

> No person, firm or corporation engaged in commerce shall, in connection with the sale or lease or solicitation for the sale or lease of any goods, property, or service, represent that any other person, firm or corporation has won anything of value or is the winner of any contest, unless all of the following conditions are met:
>
> (1) The recipient of the prize must have been selected by a method in which no more than ten percent (10%) of the names considered are selected as winners of any prize;
>
> (2) The recipient of the prize must be given the prize without any obligation; and
>
> (3) The prize must be delivered to the recipient at no expense to him, within 10 days of the representation.
>
> The use of any language that has a tendency to lead a reasonable person to believe he has won a contest or anything of value, including but not limited to "congratulations," and "you are entitled to receive," shall be considered a representation of the type governed by this section.

N.C.G.S. § 75-32 (1988).

Plaintiff contends the Jaycees committed per se violations of this section by representing that she won the $10,000 prize and by failing to pay the prize within ten days, as required by subsection (3). We disagree, because we find that this statute is meant to apply to situations in which representations of winning a prize are made when in fact the person, firm or corporation identified has not won a prize. The statute specifically governs "the use of any language that has a tendency to lead a reasonable person to believe he has won a contest or anything of value . . . ." It certainly would not be unlawful to "lead a reasonable person to believe he has won a contest" if, in fact, that person has won a contest. Because plaintiff was the winner of the contest, it was not a violation of this statute for defendants to represent that fact to the public.

[4] Plaintiff also contends defendants violated section 75-35, which provides that "[n]o person engaged in commerce" may issue a writing resembling a negotiable instrument or an invoice unless the recipient "has actually contracted for goods, property, or services for which the issuer seeks proper payment." § 75-35 (1988). Plaintiff argues the Jaycees violated this section by providing plaintiff with a simulated check made out to her for $10,000. However, the statute does not prevent the described conduct if the recipient of the "check" "has actually contracted for the goods, property, or services . . . ." *Id.* In this case, plaintiff had essentially contracted for the prize money by entering the tournament and by hitting the hole in one. She was entitled to receive the check; thus, issuance of the simulated "check" to represent her prize did not violate section 75-35.

Plaintiff claims entitlement to treble damages under section 75-16 based on the alleged violations of Chapter 75. Section 75-16 provides a private cause of action for any person injured as a result of any violation of Chapter 75. N.C.G.S. § 75-16 (1988). It is clear that plaintiff's claim for treble damages under section 75-16 must fail, because plaintiff has failed to point to any evidence that defendants' actions violated any section of Chapter 75.

Plaintiff also contends summary judgment was inappropriately rendered on the issue of her fraud claims, when considered separately from her Chapter 75 claims. As stated above, there is no evidence that defendants possessed the necessary scienter upon which to

base a claim of fraud. We find that summary judgment was correctly entered against plaintiff on this issue.

Because we find that summary judgment was appropriately granted on all issues, we find it unnecessary to address whether or not the individual defendants may have been liable for either unfair or deceptive practices or fraud. Plaintiff's argument regarding the individual defendants' liability for negligence is without merit.

We conclude that the court correctly entered summary judgment against plaintiff and in favor of defendants on plaintiff's unfair or deceptive practices and fraud claims.

Affirmed.

Judges WYNN and McCRODDEN concur.

PATRICIA W. FRIEL v. ANGELL CARE INCORPORATED AND DON G. ANGELL

No. 9221SC1305

(Filed 1 February 1994)

1. Libel and Slander § 43 (NCI4th)— statements to person acting for plaintiff—no slander

Where plaintiff asked a friend to call defendant to "check out (her) references," statements made by defendant to the friend could not form the basis of a slander claim.

Am Jur 2d, Libel and Slander § 444.

2. Libel and Slander § 44 (NCI4th)— true statements about former employee—no slander per se

Plaintiff failed to establish a claim for slander *per se* where her forecast of evidence tended to show that the individual defendant told plaintiff's prospective employer that he would not rehire plaintiff, that there was an unproven sexual harassment charge when she left defendant company, and that plaintiff left the company under adverse circumstances, and all

the evidence suggested that these statements were in fact true.

Am Jur 2d, Libel and Slander § 444.

3. **Labor and Employment § 90 (NCI4th)— interference with prospective employment—failure to establish malice**

Plaintiff's forecast of evidence was insufficient to support her claim against her former employer for malicious interference with her right to enter into an employment contract where it failed to establish that her former employer intended to injure her or gain some advantage at her expense.

Am Jur 2d, Interference § 51.

4. **Labor and Employment § 90 (NCI4th)— blacklisting of former employee—statements to prospective employer—statute inapplicable**

The statute prohibiting the blacklisting of discharged employees, N.C.G.S. § 14-355, did not apply where defendant's statements came only upon inquiry from people he believed to be prospective employers of his former employee.

Am Jur 2d, Interference § 51.

Appeal by plaintiff from summary judgment entered 23 July 1992 by Judge Peter M. McHugh in Forsyth County Superior Court. Heard in the Court of Appeals 29 October 1993.

Kennedy, Kennedy, Kennedy & Kennedy, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellant.

Robinson Maready Lawing & Comerford, by Robert J. Lawing and Jane C. Jackson, for defendant-appellee.

WYNN, Judge.

Plaintiff Patricia W. Friel was employed as a secretary by defendant company Angell Care Incorporated ("Angell Care") from July 1982 until 17 April 1987. She held several positions within the company before being assigned to be the personal secretary to Bruce Smith, a new vice-president of the company. On or about 18 March 1987, plaintiff alleged that Smith had sexually harassed her. On 17 April 1987, plaintiff entered into a settlement agreement signed by Angell Care's president, Dennis Young, on behalf of

Angell Care. Under the terms of the agreement, plaintiff would leave the company and would not discuss the terms and contents of the agreement. Angell Care would pay plaintiff $9566.63; would not discuss the terms or contents of the agreement with plaintiff's prospective employers; and would provide her prospective employers with neutral employment references.

After leaving Angell Care, plaintiff stayed home with her children, intermittently caring for other children in her home.

During the week of 23 May 1988, plaintiff testified against Angell Group Inc., a company related to Angell Care, pursuant to a subpoena in the case of *Angell Group, Inc., et al. v. Bowling Green Health Care Center, Inc., et al.*, 86 CVS 3807, in Forsyth County Superior Court.

In approximately June or July 1990, plaintiff applied for several secretarial positions. She contacted a local attorney, Meyressa Schoonmaker, for employment, either with Schoonmaker's law practice or with the North Carolina Center for Laws Affecting Women ("NCLAW"), an organization of which Schoonmaker was the president and legal director. Plaintiff submitted an application to Schoonmaker, listing her last employer as Angell Care and giving the names of Don Angell and Stewart Swain. Schoonmaker asked a NCLAW employee, Linda Parker, to contact Angell and Swain. Parker contacted Angell. She asked him if he would rehire plaintiff. When he said he would not, Parker asked why. Parker's and Angell's accounts of his response differ. Angell testified that he said, "there was an unproven sexual harassment charge when she left," and that he "was not aware of the details." Parker's written notes of the conversation state, "Angell said . . . that [plaintiff] left under adverse (?) circumstances, and he really could not discuss the circumstances." Plaintiff was not offered either position with Schoonmaker.

In August 1990, plaintiff asked Sherrill Horton, a friend who worked for a law firm, if she knew anyone who needed a secretary. Horton said that she did not know if the firm had any openings, but one of the attorneys was unhappy with his current secretary. Plaintiff asked Horton to call Don Angell for a reference, because she wanted to know why Angell Care would not rehire her. Horton called Don Angell, indicating that she was calling him on behalf of her firm because plaintiff had listed him as a reference in applying for a job there, even though plaintiff had not actually submitted

an application. Horton testified, and Angell confirmed, that she asked if the company would rehire plaintiff; he said it would not; and he said plaintiff had accused a male employee of sexual harassment, but the charge was never proven. Horton further testified that Angell said that plaintiff left the company under adverse circumstances and that she was difficult to work with.

On 19 October 1990, plaintiff sued Angell Care and Don Angell for compensatory and punitive damages. Plaintiff alleged that Angell and Angell Care had breached the settlement contract; committed slander *per se*; maliciously interfered with her contractual rights; and blacklisted her in violation of N.C. Gen. Stat. § 14-355.

Defendants moved for summary judgment on all the claims. The motion was heard on 16 July 1992. By written order and judgment entered 23 July 1992, the court granted summary judgment for defendants on the slander, malicious interference with contractual rights, and blacklisting claims. On 21 July 1992, plaintiff filed a voluntary dismissal without prejudice of her breach of contract claim.

Plaintiff appealed the claims of slander *per se*, malicious interference with contractual rights, and blacklisting, as to both defendants.

I.

Plaintiff contends that Angell's statements to Parker and Horton were slander *per se* because they impeached her in her profession.

[1] Initially, we uphold summary judgment on the portion of the slander action that is based on Angell's statements to Horton. All the evidence indicates that the conversation between Angell and Horton took place at the request and direction of the plaintiff. A communication to the plaintiff, or to a person acting at the plaintiff's request, cannot form the basis for a libel or slander claim. *See Pressley v. Continental Can Co., Inc.*, 39 N.C. App. 467, 469, 250 S.E.2d 676, 678, *disc. rev. denied*, 297 N.C. 177, 254 S.E.2d 37 (1979) ("A publication of a libel, procured or invited by the plaintiff, is not sufficient to support an action for defamation."); *see also Taylor v. Jones Bros. Bakery, Inc.*, 234 N.C. 660, 662, 68 S.E.2d 313, 314 (1951), *overruled on other grounds*, *Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956) (A statement "invited or procured by plaintiff, or by a person acting for him, is not sufficient

to support an action for defamation."). In this case, Horton contacted Angell because plaintiff had asked her to "check out (her) references," not because Horton's employer had independently wished to contact Angell. Under these circumstances, plaintiff has no claim for defamation based on any statement made to Horton.

[2] This leaves us with the statements made to Linda Parker. A claim of slander *per se* has three essential elements:

> To establish a claim for slander *per se*, a plaintiff must prove: (1) defendant spoke base or defamatory words which tended to prejudice him in his reputation, office, trade, business or means of livelihood or hold him up to disgrace, ridicule or contempt; (2) the statement was false; and (3) the statement was published or communicated to and understood by a third person.

West v. King's Dep't Store, Inc., 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1988). *See also Andrews v. Elliot*, 109 N.C. App. 271, 426 S.E.2d 430 (1993); *Morrow v. Kings Dep't Stores, Inc.*, 57 N.C. App. 13, 290 S.E.2d 732, *disc. rev. denied*, 306 N.C. 385, 294 S.E.2d 210 (1982).

We find that plaintiff has not met the second element of this cause of action. Plaintiff never established that Angell's statements to Parker were false. Angell said that he would not rehire plaintiff; there was an unproven sexual harassment charge when she left the company; and, viewing the evidence in the best light for plaintiff, that plaintiff left the company under adverse circumstances. All the evidence suggests that the statements were in fact true. Plaintiff left the employment of defendant pursuant to a negotiated settlement after making a claim of sexual harassment which was not proven. A description of this situation as "adverse circumstances" does not seem inaccurate.

We note that defendant's statements to Parker and Horton may well have been in breach of the settlement agreement between plaintiff and defendant Angell Care, Inc. However, because plaintiff voluntarily dismissed her claim for breach of contract, issues relating to performance of that contract are not before us today.

II.

[3] Plaintiff next contends that defendant maliciously interfered with her right to enter into an employment contract with Meyressa Schoonmaker and the North Carolina Center for Laws Affecting Women. In order to state a claim for malicious interference with

contract, plaintiff must establish that the defendant's actions were malicious in the legal sense. *Murphy v. McIntyre*, 69 N.C. App. 323, 317 S.E.2d 397 (1984). To establish legal malice, a plaintiff must show that defendant interfered "with design of injury to plaintiff or gaining some advantage at his expense." *Johnson v. Gray*, 263 N.C. 507, 509, 139 S.E.2d 551, 553 (1965). Plaintiff never established that defendant intended to injure her or gain some advantage at her expense. The only evidence of malice plaintiff put forth is her belief that Angell felt ill will toward her because after she testified adversely to defendants in the *Bowling Green Health Care* case, Angell raised his voice and exhibited anger toward the other party (not toward her). Plaintiff's speculation, without any facts to support it, is clearly insufficient to meet her burden of proof. A party cannot prevail against a motion for summary judgment by relying on "conclusory allegations, unsupported by facts." *Campbell v. Board of Education of Catawba County*, 76 N.C. App. 495, 498, 333 S.E.2d 507, 510 (1985), *disc. rev. denied*, 315 N.C. 390, 338 S.E.2d 878 (1986). We affirm summary judgment for defendant on the malicious interference with contract claim.

III.

[4] Plaintiff's third claim is that defendant Angell's conversations with Parker and Horton violated N.C. Gen. Stat. § 14-355, which prohibits blacklisting employees. Under this statute, an employer may be liable if, after discharging someone from employment, it prevents or attempts to prevent that person from obtaining employment:

> If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged person from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a Class 3 misdemeanor and . . . shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person . . . from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person has applied for employment, a truthful statement of the reason for such discharge.

N.C. Gen. Stat. § 14-355 (Supp. 1993).

However, statements made by a former employer in response to a request from a prospective employer are privileged under § 14-355. For the statute to be violated, the statements to the prospective employer would have had to have been unsolicited. *Seward v. Seaboard Air Line Railway*, 159 N.C. 195, 204, 75 S.E. 34 (1912); *Goins v. Sargent*, 196 N.C. 478, 146 S.E. 131 (1929). Plaintiff admits here that Don Angell's statements came only upon inquiry from people he believed to be prospective employers of his former employee. We therefore hold that N.C. Gen. Stat. § 14-355 does not apply as a matter of law and uphold summary judgment for defendants.

Affirmed.

Judges LEWIS and MCCRODDEN concur.

RJR TECHNICAL COMPANY, AKA R.J.R. TECHNICAL COMPANY, A CORPORATION, PLAINTIFF, STATE OF NORTH CAROLINA, EX REL. WILLIAM W. COBEY, JR., SECRETARY OF THE DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, INTERVENOR-PLAINTIFF v. TERRY PRATT AND EUGENE LEE, DEFENDANTS

WILLIAM CULLEN CAPEHART, PLAINTIFF, STATE OF NORTH CAROLINA, EX REL. WILLIAM W. COBEY, JR., SECRETARY OF THE DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, INTERVENOR-PLAINTIFF v. RJR TECHNICAL COMPANY, AKA R.J.R. TECHNICAL COMPANY, A CORPORATION, DEFENDANT

No. 926SC1060

(Filed 1 February 1994)

1. Waters and Watercourses § 6 (NCI3d)— grant conveying fee simple interest in lands under navigable waters—grants void—lands held in trust for public

Grants at issue in this case were void to the extent that they purported to convey a fee simple interest in the lands submerged beneath the navigable waters of the Albemarle Sound, since lands beneath navigable waters are held in trust

by the State for the benefit of the public, and any land grant in fee embracing such submerged lands is void.

Am Jur 2d, Waters §§ 400-405.

2. **Waters and Watercourses § 6 (NCI3d)— grant from State to plaintiff's predecessor—existence of exclusive right to fish navigable waters**

The decision of the Supreme Court in *Land Co. v. Hotel*, 132 N.C. 517, that a grant by the State under the Laws of 1854-55, Ch. 21 conveyed an exclusive easement for the purpose to erect wharves compels the Court of Appeals to hold that plaintiff owns an exclusive easement in the submerged lands described in the two grants in question for the limited purposes, including fishing, for which such grants were authorized by the General Assembly.

Am Jur 2d, Waters §§ 400-405.

Appeal by the State from judgment entered 21 July 1992 by Judge W. Russell Duke, Jr., in Bertie County Superior Court. Heard in the Court of Appeals 5 October 1993.

Mary E. Ward and Pritchett, Cooke & Burch, by W. L. Cooke, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Daniel F. McLawhorn and Special Deputy Attorney General J. Allen Jernigan, for the State.

MARTIN, Judge.

These cases involve conflicting claims between plaintiff, RJR Technical Company (hereinafter RJR) and the State of North Carolina to two adjacent tracts of submerged land lying entirely beneath the navigable waters of the Albemarle Sound in Bertie County, known as the "Black Walnut Farm" water grant (containing approximately 568 acres) and the "Avoca Farm" water grant (containing approximately 620 acres). The parties agree that the lands in dispute are described in two grants from the State to William R. Capehart, issued 12 December 1892, and that RJR has the record chain of title thereto. The property was granted "together with all woods, waters, mines, minerals, Hereditaments, and appurtenances to the said land belonging or appertaining: To Hold, to the said Wm.

R. Capehart heirs and assigns, forever." The parties stipulated that RJR registered the grants as required by G.S. § 113-205(a). The State claimed title to the lands under the public trust doctrine.

The case was heard by the trial court sitting without a jury. On 21 July 1992 the trial court entered judgment holding that plaintiff is "the owner of . . . the properties described in" the grants and that the grants convey an exclusive appurtenance to the Black Walnut Farm tract and the Avoca Farm tract, both of which are owned by plaintiff, for the purpose of fishing. The State appealed.

The trial court found, in pertinent part:

> 2. The Court further finds as a fact that the grants for the two parcels of land at issue . . . convey an exclusive appurtenance for fishing.
>
> . . .
>
> 4. The Court finds that from 1891 until 1893 the State of North Carolina was authorized by Chapter 532 of the laws of 1891 to grant a fee estate in lands submerged by navigable waters for the purpose of erecting wharfs or fish houses or for fishing in said waters. The grants at issue in this provision conveyed a fee estate and right to fish in such waters.
>
> 5. The Court further finds that the grants are appurtenances to the Black Walnut Farm and the Avoca Farm, which said parcels are now owned by plaintiff, RJR, and these appurtenances run with the ownership of the two farms described in the pleadings.

The trial court concluded, *inter alia*:

> 2. That the grants at issue convey an exclusive appurtenances (sic) to the lands of the plaintiff for the purpose of fishing.
>
> . . .
>
> 4. That the grants at issue are owned by the plaintiff, RJR Technical Company a/k/a RJR Technical Company, a corporation, the plaintiff in this action.

The judgment of the court was as follows:

> THEREUPON, IT IS ORDERED, CONSIDERED AND ADJUDGED that the plaintiff, RJR Technical Company, a corporation is the owner of and entitled to the possession of the properties described in Grants Nos. 11910 and 11911, . . . that the grants convey an exclusive appurtenance to the lands owned by the plaintiff, known as the Avoca Tract and the Black Walnut Tract . . . .

[1] The State first asserts that the trial court erred when it found as fact that the grants "conveyed a fee estate" in the submerged lands and ruled that plaintiff "is the owner of" the property described in the grants. To the extent the judgment may be interpreted as holding that RJR owns a fee simple interest in the submerged lands pursuant to the grants, we must agree.

The grants were made pursuant to the Laws of 1854-1855, Ch. 21, § 2751, as amended by Chapter 532, Sess. Laws 1891, which provided as follows:

> All vacant and unappropriated lands belonging to the state, shall be subject to entry by a citizen thereof, in the manner hereinafter provided, except:
>
> (1) Lands covered by navigable waters: *Provided*, that persons owning land on any navigable water for the purpose of erecting wharves or fish-houses or fishing [in] said waters in front of their lands, may make entries of the land covered by said water, and obtain title as in other cases, but persons making such entries shall be confined to straight lines, including only the fronts of their own lands, and shall in no case extend a greater distance from the shore than one-fifth of the width of the stream, and shall in no respect obstruct or impair navigation[.]

The relevance of the 1891 amendment to the facts before us is that it expanded the purposes for which one could enter lands covered by navigable waters to include the erection of "fish-houses or fishing [in] said waters."

There is no dispute that the land in question is submerged beneath the navigable waters of the Albemarle Sound. Lands submerged beneath the navigable waters of this State are held in trust for the benefit of the public. *Land Co. v. Hotel*, 132 N.C.

517, 44 S.E. 39 (1903); *Development Co. v. Parmele*, 235 N.C. 689, 71 S.E.2d 474 (1952). Our Supreme Court has said:

> Navigable waters, then, are subject to the public trust doctrine, insofar as this Court has held that where the waters covering land are navigable in law, those lands are held in trust by the State for the benefit of the public. A land grant in fee embracing such submerged lands is void. *Land Co. v. Hotel*, 132 N.C. 517, 44 S.E. 39; *Wilson v. Forbes*, 13 N.C. (2 Dev.) 31 (1828).

State ex rel. Rohrer v. Credle, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988).

Based on the decisions in *Credle*, *Land Co.*, and *Wilson*, we hold that the grants at issue are void to the extent that they purport to convey a fee simple interest in the lands submerged beneath the navigable waters of the Albemarle Sound.

[2] Next, we must determine whether the trial court correctly concluded that the grant to William Capehart conveyed an exclusive right to fish the waters contained in the grant. The State contends that the right to an exclusive fishery, also known as a "several fishery", has never existed in the navigable waters of the State. Although the State cites numerous cases which support this contention, none address the validity of a grant made pursuant to the statute here in issue. *See*, *Bell v. Smith*, 171 N.C. 116, 87 S.E. 987 (1916); *Daniels v. Homer*, 139 N.C. 219, 51 S.E. 992 (1905); *Hettrick v. Page*, 82 N.C. 65 (1880); *Collins v. Benbury*, 25 N.C. 277 (1842). Moreover, our review of the applicable cases reveals that in the past the General Assembly has authorized the creation of exclusive fisheries. In *State ex rel. Rohrer*, 322 N.C. 522, 369 S.E.2d 825, a case involving the right to cultivate oysters in navigable waters, the Supreme Court recognized that in 1887 the General Assembly permitted the creation of an exclusive fishery when it passed Chapter 119 of the 1887 Session Laws which allowed the conveyance of perpetual franchises for the purpose of raising and cultivating shellfish.

The State also argues the right to fish in the navigable waters of the State is a right held in trust for the benefit of the public and that we should not find that the General Assembly intended to convey those rights in the absence of language clearly declaring such an intent. *Land Co.*, 132 N.C. at 534, 44 S.E. at 44. In fur-

therance of this argument, the State correctly observes that the statute authorizing the grants did not specifically state that the right of entry for purposes of fishing was an exclusive right. If this case was the first in which a grant under this statute was construed, we might be inclined to agree with the State's contentions. However, the Supreme Court, in *Land Co.*, determined that grants under the statute were exclusive in nature.

In *Land Co.*, the Court considered the nature of a grant issued by the State under the Laws of 1854-1855, Chapter 21, § 2751. This statute provided that any person owning land on any navigable water could make entries of the lands covered by such water for the purpose of erecting wharves. The land in dispute in *Land Co.* was located beneath the navigable waters of Bogue Sound and adjacent to Morehead City. The plaintiffs contended that the grant conveyed the submerged land in fee simple. After an extensive review of the authorities from other jurisdictions, the Court concluded that "the grant . . . operated to give [the plaintiffs] an *exclusive* right or easement therein as riparian owners and proprietors to erect wharves, etc.; that when they ceased to be the owners of the land . . . such easement passed as appurtenant thereto[.]" (Emphasis added.) *Land Co.*, 132 N.C. at 541, 44 S.E. at 47.

The grants at issue in the present case were authorized by the same statute which was held in *Land Co.* to have authorized the conveyance of an exclusive right or easement. The only difference between the grant in the present case and the grant in *Land Co.* arises from the 1891 amendment to the statute allowing entries for the purpose of erecting "fish-houses or for fishing [in] said waters[.]" We can discern no legally substantive difference between an exclusive right of entry for the purpose of erecting wharves and an exclusive right of entry for the purpose of erecting fish-houses or fishing.

Where the Supreme Court has addressed and resolved an issue, this Court is bound, under the doctrine of *stare decisis*, to follow the decision of the Supreme Court. *Dunn v. Pate*, 106 N.C. App. 56, 415 S.E.2d 102 (1992), *rev'd on other grounds*, 334 N.C. 115, 431 S.E.2d 178 (1993). The decision of the Supreme Court in *Land Co., supra*, that a grant by the State under the Laws of 1854-1855, Ch. 21 conveyed an exclusive easement for the purpose set forth therein, compels our holding in the present case that RJR owns

an exclusive easement in the submerged lands described in the two grants for the limited purposes, including fishing, for which such grants were authorized by the General Assembly. The judgment of the trial court so holding is affirmed.

In summary, to the extent the judgment of the superior court holds that RJR owns a fee simple interest in the submerged lands described in the grants, it must be reversed. Otherwise, the judgment below is affirmed.

Affirmed in part and reversed in part.

Judges WELLS and LEWIS concur.

NATIONWIDE MUTUAL INSURANCE COMPANY AND MARK ANTHONY PHILLIPS, PLAINTIFFS v. ERVIN I. BAER, ADMINISTRATOR OF THE ESTATE OF MARVIN D. CANNON, JR., DECEASED; CALVIN SUTTON; MARLENE WILLIAMS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JARRED LATIFF ROBINSON, DECEASED; UNIVERSAL INSURANCE COMPANY AND INTEGON GENERAL INSURANCE CORP., DEFENDANTS

No. 9312SC210

(Filed 1 February 1994)

Insurance § 598 (NCI4th)— driver without reasonable belief that he was entitled to use insured vehicle—coverage denied—no error

An automobile liability policy's exclusion from coverage of anyone who did not have a reasonable belief that he was entitled to use the covered vehicle was not contrary to the terms of N.C.G.S. § 20-179.21(b)(2), the compulsory motor vehicle liability insurance statute. Furthermore, the trial court properly found that the driver in this case did not have a reasonable belief that he was entitled to use the insured vehicle and plaintiff's policy therefore did not extend coverage to the driver when the driver had previously driven the truck in question which belonged to his employer; the employer specifically instructed the employee that he was not to drive the truck again; and it was therefore impossible for the employee

to have a reasonable belief that he was entitled to drive the truck.

Am Jur 2d, Automobile Insurance § 267.

Appeal by defendants from judgment entered 13 November 1992 by Judge W. Russell Duke, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 8 December 1993.

Russ, Worth, Cheatwood & Guthrie, by Philip H. Cheatwood, for plaintiffs-appellees.

Whitley, Coley & Wooten, by Everette L. Wooten, Jr., for defendants Calvin Sutton and Marlene Williams.

LEWIS, Judge.

The facts of this appeal arise out of a single vehicle accident in which Marvin Cannon ("Cannon") and Jarred Robinson ("Robinson") were killed. The facts leading to this accident reveal that Mark Anthony Phillips ("Phillips") was the owner of a 1976 Ford pickup truck which he used in his farming operations. Robinson, Cannon and David Holton ("Holton") were all employed by Phillips to put in tobacco. On 23 July 1990, at approximately noon, Phillips instructed Holton to take the 1976 Ford pickup truck and drive Cannon and Robinson home for lunch. En route Holton stopped at a local convenience store to buy his own lunch. As Holton came out of the store, Cannon slid behind the wheel and began slowly driving away with Robinson as a passenger. Holton then jumped in the passenger side of the truck. Defendants contend, and the trial court so found, that Cannon was operating the truck with Holton's permission. Nationwide Mutual Insurance Company ("Nationwide") claims that Holton repeatedly asked Cannon to stop the truck. Holton knew Phillips had forbidden Cannon to drive the truck. Regardless of the circumstances, Cannon drove approximately four miles before losing control of the truck and causing it to overturn, killing Cannon and Robinson. At the time of the accident, Cannon did not have a valid driver's license and he had been specifically instructed by Phillips not to drive the truck, which was known to Holton. Nationwide had in effect a liability policy issued to Phillips which covered the 1976 Ford pickup truck.

Robinson's mother, Marlene Williams, filed suit against Holton, Phillips, and Cannon's estate for wrongful death, negligent inflic-

tion of emotional distress, and negligent entrustment of a chattel. That suit is currently pending in Cumberland County. However, prior to the resolution of the Williams suit, Nationwide filed the present declaratory judgment action seeking a determination of its liability coverage, if any, for Cannon's actions. In filing its declaratory judgment action, Nationwide relied on the language of its policy which excluded from coverage anyone using the covered automobile without a reasonable expectation that he was entitled to do so.

A trial was held in Cumberland County on 9 November 1992, before the Honorable W. Russell Duke, Jr. Judge Duke concluded that Cannon was not in lawful possession of the 1976 Ford pickup truck, nor did he have a reasonable expectation that he was entitled to operate the truck. Judge Duke therefore concluded that the Nationwide policy did not extend coverage to Cannon and entered judgment in favor of Nationwide. Defendants appealed.

In interpreting any insurance policy, the most fundamental rule of construction is that the language of the policy controls. *See Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991). In addition, "when a statute is applicable to the terms of a policy of insurance, the provisions of that statute become terms of the policy to the same extent as if they were written in it, and if the terms of the policy conflict with the statute, the provisions of the statute prevail." *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 6, 430 S.E.2d 895, 898 (1993). In this case, the applicable statute is N.C.G.S. § 20-279.21(b)(2) which provides in pertinent part that an owner's liability insurance policy

> [s]hall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle . . . .

In addition, the Nationwide policy provides in Part B, Liability Coverage: "We will pay damages for bodily injury or property damage for which any **covered person** becomes legally responsible because of an auto accident." The term **covered person** is defined to include "any person using your covered auto." However, the Exclusions part of the Nationwide policy states that "we do not

provide Liability Coverage for any person . . . [u]sing a vehicle without a reasonable belief that that person is entitled to do so."

In their first assignment of error, defendants contend that Nationwide's exclusion from coverage of anyone who does not have a reasonable belief that he is entitled to use the covered auto is contrary to the terms of N.C.G.S. § 20-179.21(b)(2). In support of this argument, defendants rely on *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977), where the Supreme Court stated:

> Under the Financial Responsibility Act, all insurance policies covering loss from liability growing out of the ownership, maintenance and use of an automobile are mandatory to the extent coverage is required by G.S. § 20-279.21. The primary purpose of this compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists. The victim's rights against the insurer are not derived through the insured, as in the case of voluntary insurance. Such rights are statutory and become absolute upon the occurrence of injury or damage inflicted by the named insured, by one driving with his permission, or by one driving while in lawful possession of the named insured's car, regardless of whether or not the nature or circumstances of the injury are covered by the contractual terms of the policy.

We have considered defendants' argument but do not agree. Nationwide's exclusion requiring a covered person to have a reasonable belief that he is entitled to use the vehicle is simply another way of determining whether a person knows that he lacks the owner's permission to use the vehicle. In a case involving similar policy language, this Court stated that such language "broadens the coverage which it provides beyond those who use the covered vehicle with permission. It now covers persons who have a subjective, reasonable belief that they are entitled to use the vehicle." *Aetna Cas. & Sur. Co. v. Nationwide Mut. Ins. Co.*, 95 N.C. App. 178, 181, 381 S.E.2d 874, 875 (1989), *aff'd*, 326 N.C. 771, 392 S.E.2d 377 (1990). On appeal, the Supreme Court did not even address the issue of whether the exclusion was valid, but instead looked only to whether the driver's belief was reasonable.

As further evidence of the fact that Nationwide's exclusion is not inconsistent with the terms of N.C.G.S. § 20-279.21 we note

that in *Belasco v. Nationwide Mut. Ins. Co.*, 73 N.C. App. 413, 326 S.E.2d 109, *disc. review denied*, 313 N.C. 596, 332 S.E.2d 177 (1985), this Court held

> that a person is in lawful possession of a vehicle . . . if he is given possession of the automobile by the automobile's owner or owner's permittee under a good faith belief that giving possession of the vehicle to the third party would not be in violation of any law or contractual obligation. Applying these principles to the present case, we conclude that Hinson, having been given possession of the vehicle by one in lawful possession, with no notice of restrictions on its use, was in lawful possession.

Id. at 419, 326 S.E.2d at 113 (emphasis added). This implies not only that the owner or the owner's permittee must give possession to a third party in good faith, but also that the third party must take in good faith and without any notice of restrictions on his use. Nationwide's exclusion merely makes this good faith requirement a part of the policy and does not contravene the language of N.C.G.S. § 20-279.21(b)(2).

In this case, the trial court found that Cannon did not have a reasonable belief that he was entitled to use the 1976 Ford pickup truck and we agree. The evidence shows that Phillips had previously learned that Cannon had driven the truck without permission. As a result of this incident, Phillips specifically instructed Cannon that he was not to drive the truck again. Since this instruction was given prior to the accident, it was impossible for Cannon to have a reasonable belief that he was entitled to drive the truck. This case is distinguishable from *Aetna* because there the third party did not think he had permission to drive the owner's vehicle because he did not have a valid driver's license. The Supreme Court stated that although the permittee might feel it was wrong to drive without a valid driver's license, he might nevertheless have thought he had the owner's permission under the circumstances. *Aetna*, 326 N.C. at 776, 392 S.E.2d at 380. Therefore, the Supreme Court remanded as to the permittee's reasonable belief. In the present case, given Phillips' explicit instruction to Cannon, we cannot conceive of any set of circumstances in which it would have been reasonable for Cannon to believe he had permission to drive the truck. Accordingly, we agree with the trial court's finding

that Cannon did not have a reasonable belief that he was entitled to drive the truck.

In their second assignment of error, defendants claim that the trial court erred in finding that Cannon was not in lawful possession of the truck. In support of this argument defendants rely on *Belasco*. Therein, this Court found that a third party was in lawful possession of a vehicle even though the owner had given explicit instructions to his permittee not to loan the vehicle to anyone. In the cases relied upon by defendants, the third party never received an express instruction that he did not have permission to use the owner's vehicle. Instead, the cases cited by defendants impose liability where the permittee violated the instruction of the owner. Defendants argue that to allow coverage when the first permittee violates the owner's instructions but not when the second permittee violates those same instructions is inconsistent which the intention of the Financial Responsibility Act. We do not agree. The purpose of the Financial Responsibility Act has always been to protect innocent motorists from financially irresponsible motorists. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977). However, in protecting innocent motorists it is not fair to impose liability on an owner, through his insurance company, when that owner has done everything in his power to limit those individuals who have permission to use his vehicle. It is one thing to impose coverage when a permittee gives possession to a third party who is unaware of any restrictions, but it is an entirely different matter to impose coverage when the owner's permittee gives possession to a third party who knows that he is prohibited from using the vehicle. Such a person cannot have lawful possession and the trial court was correct in so holding.

Accordingly, the judgment of the trial court is

Affirmed.

Judges ORR and JOHN concur.

CAROLYN STANLEY AND RALPH ALLEN TRIVETTE v. JOHN MOORE AKA JOHN TYREE

No. 9225DC183

(Filed 1 February 1994)

Ejectment § 37 (NCI4th)— wrongful eviction—trespass—treble damages for unfair practice not allowed

Where plaintiff tenants' claims for wrongful eviction and trespass arose under N.C.G.S. § 42-25.6, plaintiffs were precluded from recovering treble damages and additional attorney's fees for an unfair practice under N.C.G.S. § 75-1.1 by the provision of N.C.G.S. § 42-25.9(a) expressly prohibiting treble damages in actions under the Ejectment of Residential Tenants Act.

Am Jur 2d, Landlord and Tenant §§ 323 et seq.

Appeal by plaintiffs from judgment and order entered 19 September 1991 and filed 23 September 1991 by Judge Jonathan Jones in Caldwell County District Court. Heard in the Court of Appeals 2 February 1993.

This case began on 27 February 1991 as an action grounded in wrongful eviction, trespass, and unfair trade practices. The plaintiffs sought damages for the above claims from the defendant landlord, whom they alleged constructively evicted them from a mobile home they rented.

The defendant failed to respond to the complaint, and on 4 April 1991, a motion for entry of default was made by plaintiffs' counsel. On 30 July 1991, plaintiffs' counsel moved for default judgment. A hearing was held on the issue of damages in Caldwell County District Court on 12 September 1991. The trial judge found that the plaintiffs had been damaged, pursuant to N.C. Gen. Stat. § 42-25.9, in the amount of $798.00 in actual damages. He further awarded the plaintiffs $1.00 in nominal damages and $100.00 punitive damages on the trespass claim.

Additionally, the judge found that on 4 April 1991, the court had entered an order for contempt against the defendant for his failure to comply with the court's previous orders, specifically a temporary restraining order and a preliminary injunction entered on 27 February 1991 and 13 March 1991 respectively, both of which ordered the defendant to restore the plaintiff's utilities. As part

of the contempt order entered in April, the court ordered the defendant to pay to the plaintiffs $820.00 in expenses and $1,000.00 in attorney's fees. At the September hearing, the court entered a second order for contempt for the defendant's failure to comply with the previous contempt order and ordered the defendant to pay $798.00 to the plaintiffs (or get set-off in a like amount), and pay the $1,000.00 in attorney's fees.

The court denied the claim for relief pursuant to the Unfair Trade Practices Act and denied the application for attorney's fees. Counsel for the plaintiffs moved for reconsideration of the Unfair Trade Practices Act determination and its denial of further attorney's fees. The court ruled that it would not reconsider either claim. The plaintiffs appeal the trial court's denial of these claims.

Catawba Valley Legal Services, Inc., by Martha Chapman, for plaintiff-appellants.

No brief filed for defendant-appellee.

ORR, Judge.

The plaintiffs assign as their only error before this Court the trial court's denial of their claim for damages under the North Carolina Unfair Trade Practices Act and their claim for attorney's fees pursuant to that Act as a result of their constructive eviction from their home. We find that N.C.G.S. § 42-25.9 expressly precludes treble damages as a remedy in actions arising under that Article and therefore affirm the order of the court.

The plaintiffs entered into an oral agreement to lease a mobile home owned by the defendant for $70.00 per week. This lease was entered into with the defendant's mother sometime in July 1990. At the time, the defendant was living out of state. In mid-February 1991, the defendant came to the plaintiffs' home and demanded that they move immediately. The plaintiffs called the sheriff's department who explained to the defendant that summary ejectment procedures were necessary in order to regain possession of the property. That same day, the defendant cut the water supply to the residence and removed the thermostat from the water heater.

On the following day, the defendant forced his way into the residence and demanded to know why the plaintiffs had not moved. During this encounter, he forcibly removed the breaker box from the bedroom wall, leaving exposed live wiring. The plaintiffs were

able to restore electrical service to the residence that day; but on or about 22 February, the defendant came to the home and again removed the breaker box. The plaintiffs called the electric company to restore electrical service. However, while utility workers were in the process of restoring service, the defendant returned to the residence and cut the underground electrical wiring leading to the home with a hatchet. The utility company could not restore service due to the extensive damage done to the outside lines to the residence.

The plaintiffs were left with no water or electricity, and were forced to buy bottled water and other sources of heat. Over $200.00 worth of food was spoiled due to lack of refrigeration. At the time of the above incidents, the household consisted of the plaintiffs and four minor children, including a four-month-old infant.

As plaintiffs correctly assert, it is well settled in North Carolina that in order "[t]o 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 . . . ." *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991). It is also clear that a tenant is a consumer for purposes of the Act and that the leasing of residential property is within the purview of N.C.G.S. § 75-1.1, *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977), *disc. review denied*, 294 N.C. 441, 241 S.E.2d 843 (1978), and that N.C.G.S. § 42-40(3) defines "landlord" as "any owner and any rental management company, rental agency, or any other person having the actual or apparent authority of an agent to perform the duties imposed by this Article."

In *Allen v. Simmons*, 99 N.C. App. 636, 394 S.E.2d 478 (1990), this Court stated that "[w]hether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* at 643-44, 394 S.E.2d at 483. Additionally, this Court has consistently held that "where a tenant's evidence establishes the residential rental premises were unfit for human habitation and the landlord was aware of needed repairs . . . then such evidence would support a factual finding by the jury that

the landlord committed an unfair or deceptive trade practice." *Foy v. Spinks*, 105 N.C. App. 534, 540, 414 S.E.2d 87, 90 (1992). In the case *sub judice*, there is no question that the plaintiffs have clearly established a claim meeting the above requirements.

However, under these facts, we are bound by the holding in *Dobbins v. Paul*, 71 N.C. App. 113, 321 S.E.2d 537 (1984). There, the plaintiff was wrongfully evicted by her landlord and brought claims for an accounting and refund of her security deposit, compensatory damages for her eviction and breach of the warranty of quiet enjoyment, punitive damages, treble damages for unfair trade practices, and reasonable attorney's fees. On appeal from directed verdicts in favor of the defendant landlord on all claims, our Court held that

> [u]nder our Ejectment Of Residential Tenants Act (the Act), N.C. Gen. Stat. §§ 42-25.6, -25.9, . . . defendants' exclusive remedy to regain possession of their house was by means of statutory summary ejectment proceedings pursuant to N.C. Gen. Stat. §§ 42-26 to -36.1 (1976). Plaintiff's evidence having shown that she was wrongfully evicted . . . after her lease was in effect, plaintiff's statutory remedy for damages under G.S. § 42-25.9(a) attached. . . .
>
> In that the statute expressly disallows treble or punitive damages in such cases, it is clear that the trial court correctly allowed defendants' motion for a directed verdict as to . . . such damages.

Id. at 117, 321 S.E.2d at 540-41 (footnotes omitted).

N.C. Gen. Stat. § 42-25.9(a) (1984) states:

> If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease and the lessor, landlord or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal. Damages in any action brought by a tenant under this Article shall be limited to actual damages as in an action for trespass or conversion and *shall not include punitive damages, treble damages or damages for emotional distress*.

(Emphasis added.) As the *Dobbins* court concluded, "under explicit language of the Act, plaintiff can recover only her actual damages." *Dobbins* at 118, 321 S.E.2d at 541.

While we are bound by the rule which denies a tenant recovery of punitive or treble damages as a result of her constructive eviction due to the exclusivity of the remedies under N.C.G.S. § 42-25.9(a), we note that such a result would appear inappropriate when it is clear that in North Carolina a landlord may be held liable pursuant to G.S. § 75-1.1 *et seq.*, for merely failing to maintain a rental unit in fit condition. Common sense dictates that if a landlord must make necessary repairs to a rental unit in order to avoid liability for treble damages and attorney's fees under the Unfair Trade Practices Act, *see e.g.*, *Allen*, 99 N.C. App. 636, 394 S.E.2d 478, and *Foy*, 105 N.C. App. 534, 414 S.E.2d 87, he should not be able to actively create an uninhabitable condition in the rental unit in order to force a tenant to leave, exposing himself only to actual damages incurred by the tenant under G.S. § 42-25.9(a). By engaging in intentionally tortious conduct, he could limit his liability, unless a plaintiff elects to forego the remedies of G.S. § 42-25, and brings suit specifically pursuant to Chapter 75.

In the instant case, the plaintiffs' claims for relief all arose under N.C.G.S. § 42-25.6. Consequently, as a matter of law, they were limited to the statutory remedies of G.S. § 42-25.9(a). We therefore find that the trial court correctly denied the plaintiffs' claims for treble damages and additional attorney's fees and affirm the decision of the trial court.

Affirmed.

Judges EAGLES and WYNN concur.

DONALD E. AYERS D/B/A AYERS WOOD YARD, PETITIONER v. BOARD OF ADJUSTMENT FOR THE TOWN OF ROBERSONVILLE THROUGH ITS CHAIRPERSON THELMA ROBERSON, RESPONDENT

No. 932SC123

(Filed 1 February 1994)

Municipal Corporations § 30.11 (NCI3d)— zoning—residential and agricultural classification—wood yard—not "forestry"

Petitioner's use of his property in a Residential Agricultural District for a wood yard for receiving, weighing, grading, temporarily storing and shipping cut timber does not come within the definition of "forestry," which is a permitted use in the zoning classification for petitioner's property.

Am Jur 2d, Zoning and Planning § 390.

Appeal by respondent from order entered 30 November 1992 by Judge Cy A. Grant, Jr., in Martin County Superior Court. Heard in the Court of Appeals 2 December 1993.

In January of 1992, petitioner, Donald Ayers, began operating a business known as Ayers Wood Yard on a leased two acre parcel of land located within the extraterritorial zoning jurisdiction of the Town of Robersonville. The business serves as a temporary destination for truckloads of cut timber. Upon arrival on petitioner's property, the timber is unloaded, weighed, and graded. The timber is thereafter reloaded onto trucks for shipment to other locations.

The property where petitioner operates his business is zoned RA-20 Residential Agricultural District pursuant to Article III, Section 4 of the Town of Robersonville Extraterritorial Zoning Ordinance (hereinafter "the ordinance"). The ordinance provides that the Residential Agricultural District was

> established as a district in which the principal use of the land is for low density residential and agricultural purposes. This district is intended to insure that residential development outside the corporate limits and not having access to public water service and dependent upon septic tanks for sewerage disposal will occur at a low density in order to provide a healthful environment.

Among the property uses permitted in the Residential Agricultural District are:

1. Single family dwellings
2. Two family dwellings
3. Schools, colleges, kindergartens and day care centers
4. Farming, truck, gardening and nurseries
5. Forestry
6. Kennels
7. Wayside stands for the sale of agricultural products on the same parcel where offered for sale
8. Churches
9. Home occupations
10. Single mobile homes
11. Uses and buildings customarily accessory to the above permitted uses
12. Public utility transmission lines, pipes, poles, towers
13. Small profession or announcement signs
14. Renting of one (1) room provided no external evidence of such is created.

Shortly after petitioner began operation of his business, a residential homeowner whose property adjoins petitioner's property complained to the Zoning Enforcement Officer about petitioner's use of the property. Following this complaint, the Zoning Enforcement Officer notified petitioner that his use of the property was in violation of the ordinance. Petitioner appealed this determination to respondent Board of Adjustment, contending that his use of the property is within the definition of "forestry", a use permitted by the ordinance. Following a hearing, the Board of Adjustment affirmed the decision of the Zoning Enforcement Officer. In its order, respondent interpreted the word "forestry" to mean "[t]he developing, caring for and management of forest: The management and harvesting of growing timber."

Petitioner filed a petition for a writ of certiorari in superior court seeking review of the decision of the Board of Adjustment.

After reviewing the record and hearing the arguments of counsel, the superior court entered an order finding *inter alia* that " 'forestry' includes the harvesting and transportation of timber to the first point of processing; that is, the point at which the wood is actually converted to some type of useable product." Based on this finding, the superior court concluded that petitioner's use of the subject property is "forestry", permitted under the zoning ordinance, and entered an order reversing the decision of the Board of Adjustment. The Board of Adjustment appealed.

Bowen & Batchelor, by J. Melvin Bowen and James R. Batchelor, Jr., for respondent-appellant.

Colombo, Kitchen & Johnson, by Thomas H. Johnson, Jr., for petitioner-appellee.

MARTIN, Judge.

G.S. § 160A-388(e) (Supp. 1992) provides that every decision of a municipal board of adjustment "shall be subject to review by the superior court by proceedings in the nature of certiorari." In proceedings of this nature, the superior court sits as an appellate court and may review both the sufficiency of the evidence presented to respondent and whether the record reveals an error of law. *Concrete Co. v. Board of Commissioner*, 299 N.C. 620, 265 S.E.2d 379, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

In the present case, the questions before the superior court were (1) what property uses are included within the definition of "forestry" as used in the ordinance and (2) whether petitioner's use of the subject property falls within that definition? It is undisputed that petitioner uses the subject property to receive, weigh, grade, temporarily store and ship cut timber. Thus, the only issue we must decide, is whether the superior court committed an error of law in interpreting and applying the ordinance.

In reviewing a decision of the Board of Adjustment for errors of law in the application and interpretation of a zoning ordinance, the superior court applies a *de novo* standard of review and can freely substitute its judgment for that of the board. *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 431 S.E.2d 183 (1993). Similarly, in reviewing the judgment of the superior court, this Court applies a *de novo* standard of review in determining whether an error of law exists and we may freely substitute

our judgment for that of the superior court. *Id.* Questions involving the interpretation of ordinances are questions of law. *Id.* Applying a *de novo* standard of review, we conclude that the decision of the superior court is incorrect and that the decision of respondent must be reinstated.

In determining the meaning of a zoning ordinance, we attempt to ascertain and effectuate the intent of the legislative body. *Concrete Co.*, 299 N.C. at 629, 265 S.E.2d at 385. Unless a term is defined specifically within the ordinance in which it is referenced, it should be assigned its plain and ordinary meaning. *Rice Associates v. Town of Weaverville Bd. of Adjust.*, 108 N.C. App. 346, 423 S.E.2d 519 (1992). In addition, we avoid interpretations that create absurd or illogical results. *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 344 S.E.2d 821, *disc. review denied*, 318 N.C. 417, 349 S.E.2d 598 (1986).

With these principles in mind, we first turn to the language of the ordinance at issue. The ordinance specifically provides that its purpose is to establish "a district in which the principal use of the land is for low density residential and agricultural purposes." The enumerated uses which are permitted within the district, though not exclusively residential and agricultural, are uniformly non-industrial. On the whole, the language of the ordinance, the title of the district it creates, and the uses which it permits, manifest an intent that the district be free from non-agricultural commercial operations.

Respondent's definition of the term "forestry", which limits the activities included thereunder to the development, management and harvesting of forest or growing timber, is not inconsistent with the zone's established residential and agricultural purposes. Rather, this definition of "forestry" limits timber associated activities to those which are strictly agricultural in nature. It does not include ancillary timber industry activities which are industrial in origin and which would detract from the district's residential and agricultural purpose and character.

Conversely, the expansive definition of "forestry" adopted by the superior court which includes the transportation of timber to the "point at which the wood is actually converted to some type of useable product" would permit uses which are clearly incompatible with the residential and agricultural purposes of the district. For example, under such a definition, industrial operations perform-

ing intermediate, but not final processing of timber, would not be prohibited. Likewise, rail and truck depots, larger than petitioner's, which receive, weigh, grade, store and ship cut timber would be permitted to operate in the Residential Agricultural District. Clearly, a definition which would permit such operations does not effectuate the manifest intent of the ordinance and would create an illogical result.

We are also persuaded that the meaning respondent assigned to the term "forestry" is its plain and ordinary meaning. The American Heritage Dictionary defines "forestry" as "(1) the science and art of cultivating, maintaining and developing forest, (2) the management of a forest land, and (3) a forest land." Webster's Third International Dictionary defines the term as "a science of developing, caring for and cultivating forest: The management of growing timber." Another source relied upon by respondent in arriving at its definition of "forestry" is *The Terminology of Forest Science and Technology, Practice and Products*, which defines "forestry" as "a profession embracing the science, business and art of creating, conserving and managing forest lands for the continuing use of their resources . . . ."

None of these ordinary definitions of "forestry" include the transportation of cut timber to the "point at which the wood is actually converted to some type of useable product." The only such definition of "forestry" with which respondent was provided came from the testimony of petitioner's expert witness. That an expert was required to provide this meaning to the term, belies any contention that this definition constitutes the term's plain and ordinary meaning.

Based on the foregoing analysis, we conclude that respondent's definition of "forestry" is correct because it (1) effectuates the intent of the ordinance to establish a district of residential and agricultural uses, (2) is consistent with the term's plain and ordinary meaning, and (3) avoids the illogical result of allowing intermediate timber processing operations and transportation depots in a district intended for low density residential and agricultural purposes. Therefore, we hold that the superior court erred as a matter of law by reversing the Board of Adjustment's conclusion that petitioner's business is in violation of the ordinance because it is not engaged in the development, management, harvesting, or care of growing timber.

For the foregoing reasons, the order of the superior court is reversed and this case is remanded for reinstatement of the decision of the Board of Adjustment.

Reversed.

Judges JOHNSON and McCRODDEN concur.

CHRISTINE T. HUGUELET, PLAINTIFF v. JULES G. HUGUELET, DEFENDANT

No. 9320DC254

(Filed 1 February 1994)

1. **Divorce and Separation § 119 (NCI4th)— loan to husband's sister—no showing of marital debt**

The trial court did not err by failing to classify as a marital debt a $6,000 loan obtained by defendant husband's sister on the day of separation to pay a debt incurred by a corporation owned in part by the marital estate and in part by the husband's two sisters where there was no evidence or findings that the husband now owes his sister for the amount she borrowed.

Am Jur 2d, Divorce and Separation § 879.

Propriety of consideration of, and disposition as to, third persons' property claims in divorce litigation. 63 ALR3d 373.

2. **Appeal and Error § 105 (NCI4th)— show cause order—not immediately appealable**

The trial court's order for defendant husband to show cause why sanctions should not be imposed against him with regard to a prior order to transfer to plaintiff wife an automobile in good working order was interlocutory and not immediately appealable.

Am Jur 2d, Appeal and Error § 135.

3. **Divorce and Separation §§ 135, 143 (NCI4th)— equitable distribution—valuation and classification—unequal distribution**

The evidence in an equitable distribution proceeding supported the trial court's valuation of the household furnishings,

marital home, and five lots, the trial court's classification of two lots, and the trial court's conclusion that an unequal division of the marital property would be equitable under the circumstances.

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

Appeal by defendant from order signed 2 January 1993 in Richmond County District Court by Judge Michael E. Beale. Heard in the Court of Appeals 6 January 1994.

Christine Tanner Huguelet, pro se.

Evans and Riffle Law Offices, by John B. Evans, for defendant-appellant.

GREENE, Judge.

Jules G. Huguelet (Mr. Huguelet) appeals from an order signed 2 January 1993 by Judge Michael E. Beale awarding Christine T. Huguelet (Mrs. Huguelet) an equitable distribution of marital assets.

Mr. and Mrs. Huguelet were married on 9 January 1972 and two children were born of the marriage. In October 1990, Mrs. Huguelet filed a complaint seeking divorce from bed and board, custody of their two minor children, child support, and possession of the homeplace and automobile. On 10 September 1991, she filed a second complaint asking for an absolute divorce and an order equitably dividing the marital property of the parties. An absolute divorce was entered on 28 October 1991. By Order entered 10 April 1991 and dated 19 August 1991 by Judge Donald R. Huffman, Mrs. Huguelet was given custody of the children, and Mr. Huguelet was ordered to pay $200.00 per month in child support and to convey a Fiat Spider automobile, in good working order, to off-set delinquent child support payments.

On 5 January 1993, the trial court filed an equitable distribution "order" in which the trial court made certain pertinent findings of fact:

> 4. That the parties separated on or about August 31, 1990.
>
> . . . .

> 15. That during the course of the marriage [Mr. Huguelet] went into the business as "Huguelet's Jewelry Store, Inc." by acquiring a majority of shares from his two sisters. That the business was incorporated with [Mr. Huguelet] owning 51% of the shares and with his two sisters owning 49% of the shares.
>
> . . . .
>
> 17. . . . as of the date of separation . . . Huguelet's Jewelry Store, Inc. . . . owed . . . $6,687.00 to Cornerstone Associates . . . .
>
> 18. That at the date of separation of the parties, a sister of [Mr. Huguelet] borrowed from the State Credit Union, money in the amount of $6,000.00 to pay off . . . [the] Cornerstone Associates [debt] . . . and the Court finds that this debt is a separate debt of [Mr. Huguelet].

In addition, the trial court made findings of fact showing that it considered the twelve factors listed in N.C. Gen. Stat. § 50-20(c) that a trial court must consider in deciding whether an equal division of marital property would be equitable.

Based upon these findings, the court concluded under N.C.G.S. § 50-20(c) that an equal division would not be equitable and ordered that

> [Mr. Huguelet] shall appear at the December 21, 1992 term of Richmond County District Court to determine what sanctions, if any, should be levied by the Court against him in the event the Court should determined [sic] that he had failed to comply with Judge Huffman's Order dated April 10, 1991 and signed August 19, 1991. Said sanctions to be in reference to the Fiat automobile referred to in Judge Huffman's Order.

The issues presented are whether: (I) the trial court erred in failing to classify the $6,000.00 loaned to Mr. Huguelet's sister at the date of separation as a marital debt where the loan was allegedly used to pay off a marital debt; (II) the trial court's order for Mr. Huguelet to show cause why sanctions should not be imposed against him with regard to the Fiat Spider is interlocutory and therefore not immediately appealable; and (III) the trial court's findings of fact are sufficient to support the court's valuation and classification of certain real and personal property and the court's

conclusion that an equal distribution would not be equitable under the circumstances.

I

[1] Mr. Huguelet argues that the $6,000.00 loan his sister obtained on the day of separation to pay a debt incurred before the day of separation by a corporation owned in part by the marital estate must be classified as a marital debt, and the trial court erred in classifying it as the separate debt of Mr. Huguelet. We disagree.

N.C.G.S. § 50-20 does not define "marital debt," but does define marital property as that 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 owned . . . ." N.C.G.S. § 50-20(b)(1) (Supp. 1993). Although this Court and our Supreme Court have not specifically addressed whether in order for a debt to be marital, it must be incurred before the date of separation, *Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987) implied as much by stating that debts must be classified, valued, and distributed as other assets. Furthermore, we see no rationale for treating debts differently from assets by excluding the statutory language of Section 50-20(b)(1) "before the date of separation" from the definition of a marital debt. A marital debt, therefore, is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties. *See Byrd; Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987). Additionally, any debt incurred by one or both of the spouses after the date of separation to pay off a marital debt existing on the date of separation is properly classified as a marital debt. *See Peak v. Peak*, 82 N.C. App. 700, 704, 348 S.E.2d 353, 356 (1986) (assets acquired in exchange for marital assets is considered marital property to extent of contribution even after separation). In this case, the $6,000.00 debt was incurred on the date of separation, not before the date of separation, and thus qualifies as a marital debt only if it was incurred by one or both of the spouses to pay off a marital debt. Assuming the debt paid with the $6,000.00 was a marital debt, there is no evidence or findings of fact that the $6,000.00 debt became the debt of either spouse. All the evidence and all the findings of fact reveal that the $6,000.00 debt was incurred by the sister of Mr. Huguelet. Because there are no findings and no evidence that Mr. Huguelet now owes his sister for borrowing the $6,000.00 from the State

Credit Union, the court did not err in failing to classify the loan to Mr. Huguelet's sister as a marital debt.

II

[2] Mr. Huguelet also argues that the trial court erred in issuing a show cause order against him because of "the lack of any evidence" that he failed to comply with the order to transfer the Fiat Spider in good working order. There is no right of immediate appeal from interlocutory orders unless the trial court certifies the issue or it affects a substantial right of the party. *Baker v. Rushing*, 104 N.C. App. 240, 245, 409 S.E.2d 108, 111 (1991). The appeal of this issue is interlocutory, has not been certified by the trial court, and does not affect a substantial right; therefore, we do not address this issue.

III

[3] Mr. Huguelet makes other assignments of error challenging the trial court's valuation of the household furnishings, marital home, and five lots on Rosedale Lane, the trial court's classification of two lots located on Rosedale Lane, and the trial court's conclusion that an unequal distribution of marital property in this case would be equitable under the circumstances. We have reviewed these contentions and find that the trial court's findings are supported by competent evidence in the record; therefore, the trial court did not err in its valuation or classification of that property or in its conclusion to divide the marital property unequally.

Affirmed.

Judges COZORT and WYNN concur.

ONER MACARTHUR STEFFEY AND PATRICIA STEFFEY, PLAINTIFFS v. MAZZA CONSTRUCTION GROUP, INC. AND CITY OF BURLINGTON, DEFENDANTS

No. 9215SC1281

(Filed 1 February 1994)

1. Process and Service § 69 (NCI4th)— service on city—certified mail—city manager as addressee—receipt signed by individual as agent

Defendant city was properly served with process where plaintiffs sent a copy of the summons and complaint by certified mail, return receipt requested, addressed to the city in care of the city manager, and the receipt was signed by an individual as agent for the addressee. N.C.G.S. § 1A-1, Rule 4(j)(5)(a); N.C.G.S. § 1A-1, Rule 4(j2)(2).

Am Jur 2d, Process §§ 292, 293.

2. Process and Service § 14 (NCI4th)— summons—directory paragraph—inclusion of sheriff—no fatal irregularity

A slight irregularity by the inclusion of the "Sheriff of Alamance County" in the directory paragraph of the summons was not fatal where the summons was also directed to defendant city, and the city was properly named as the defendant in the complaint and in the caption of the summons.

Am Jur 2d, Process §§ 94 et seq.

Appeal by plaintiffs from order entered 11 September 1992 by Judge J. B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 27 October 1993.

Donaldson & Horsley, P. A., by Jay A. Gervasi, Jr. and William F. Horsley, for plaintiffs-appellants.

Bailey & Dixon, by Cathleen M. Plaut and Gary S. Parsons, for defendant-appellee City of Burlington.

JOHNSON, Judge.

Plaintiffs Oner MacArthur Steffey and Patricia Steffey commenced this action in Guilford County on 28 February 1992. Plaintiffs filed a complaint which alleged liability against defendant City of Burlington (City) on grounds of breach of a nondelegable duty

to provide a safe workplace resulting in injuries to plaintiff husband. Summons was issued the same day, return receipt requested. On the face of the summons was entered:

> [To:] Sheriff of Alamance County
>
> [Name and Address of First Defendant]
>
> City of Burlington, c/o The Honorable
> William R. Baker, City Manager
> Post Office Box 1358
> Burlington, NC, 27216

The certified mail return receipt indicated that the summons and complaint were received and signed for by Carolyn Pickard, who signed in the space designated for a signature by an agent. The City responded with motions to change venue and to dismiss, pursuant to North Carolina General Statutes § 1A-1, Rules 12(b)(2), 12(b)(4) and 12(b)(5) (1990), for insufficient process, insufficient service of process, and lack of jurisdiction.

After venue was changed by consent order, the superior court judge of Alamance County granted a motion to dismiss by defendant City by order filed 11 September 1992. From this order, plaintiffs appeal to our Court.

[1] Plaintiffs argue that the trial court erred in dismissing this action as to defendant City, because defendant was properly served with sufficient process.

North Carolina General Statutes § 1A-1, Rule 4(j)(5)(a) (1990) states in pertinent part:

> (j) *Process—Manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction . . . the manner of service of process within or without the State shall be as follows: . . .
>
> (5) Counties, Cities, Towns, Villages and Other Local Public Bodies.—
>
> (a) Upon a city, town, or village by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk.

North Carolina General Statutes § 1A-1, Rule 4(j2)(2) (1990) speaks to a judgment by default on service by registered or certified mail:

> Before judgment by default may be had on service by registered or certified mail, the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. 1-75.10(4). This affidavit together with the return receipt signed by the person who received the mail if not the addressee raises a presumption that the person who received the mail and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process[.]

Plaintiffs argue that personal jurisdiction was properly exercised by mailing a copy of the summons and of the complaint, by certified mail, return receipt requested, addressed to the city manager. Further, plaintiffs argue that because an affidavit was filed with the court showing proof of such service in accordance with the requirements of North Carolina General Statutes § 1-75.10(4) (1983), this affidavit together with the return receipt signed by Carolyn Pickard, pursuant to North Carolina General Statutes § 1A-1, Rule 4(j2)(2), raises a presumption that the person who received the mail and signed the receipt was an agent of the addressee authorized to be served or to accept service of process. We agree with plaintiffs.

In the case *sub judice*, defendant argues that "the city manager was not served with the certified mail service, as mandated by [Rule 4(j)(5)(a)]. Instead, some unidentified individual apparently signed for the envelope. This is not sufficient to satisfy the specific requirement of Rule 4(j)(5)." Defendant cites *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) and *Long v. Board of Education*, 52 N.C. App. 625, 279 S.E.2d 95 (1981) to support this argument. However, a distinguishing characteristic of both *Johnson* and *Long* is that the facts therein pertained to personal service, not service by certified mail, return receipt requested, as in the instant case. In *Johnson*, 98 N.C. App. at 150, 389 S.E.2d at 851, our Court stated "[c]learly, the statute does not provide for substituted personal process on any persons other than those named in provisions (j)(5)(a)[.] . . . [T]he *delivery* of the summons to a person other than the named official was insufficient to give the court personal jurisdiction over the City." (Emphasis added.) Defendant attempts

to further distinguish the case at hand, however, as unique in that it deals with service on a municipality, and by arguing that "no agent for service of process may be appointed by the mayor or city manager. . . . The only persons who can receive service for a city are those stated in Rule 4(j)(5), and those officials cannot appoint another to accept process in their stead. . . . [T]he Rule specifically identifies an exclusive list of public officials who can be served to acquire jurisdiction over a city."

However, in *In re Annexation Ordinance*, 62 N.C. App. 588, 303 S.E.2d 380, *disc. review denied and appeal dismissed by* 309 N.C. 820, 310 S.E.2d 351 (1983), our Court considered whether the petitioners' petition for review was properly served on the City of Asheville where the petition was served by certified mail rather than registered mail, return receipt requested. Holding that the petition was properly served, our Court noted that "[t]here is no dispute that the petition was sent by certified mail addressed to the City of Asheville, in care of its City Manager (by name), and was received by the City's mail clerk, who signed the return receipt acknowledging its delivery." *Id.* at 592, 303 S.E.2d at 382. In light of *In re Annexation*, we find that defendant was properly served with sufficient process.

[2] Plaintiffs further argue that "[t]he summons was properly directed to defendant City, and there was no defect in the summons that would render process or service of process ineffective." We note that the section of the summons at issue in this appeal where the words "Sheriff of Alamance County" are typed in is typically left blank. In ruling on this matter, we consider *Wiles v. Construction Co.*, 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978), where our Supreme Court noted that "any confusion arising from the ambiguity in the directory paragraph of the summons was eliminated by the complaint and the caption of the summons[.]" Although *Wiles* considered an ambiguity as to a corporation and its registered agent, we find the reasoning used to resolve the matter in *Wiles* sound as to the discrepancy on the facts presented here. Clearly, there was no confusion herein as to the identity of the actual defendant, as evidenced by the complaint and the caption of the summons. We find that the slight irregularity of the summons in the instant case is not fatal in that the summons was properly directed to the City, and the City was properly named as the defendant in the complaint and the caption of the summons.

The decision of the trial court is reversed.

Chief Judge ARNOLD and Judge WELLS concur.

MICHAEL P. CONKLIN v. CAROLINA NARROW FABRICS COMPANY

No. 9223SC1279

(Filed 1 February 1994)

Labor and Employment § 75 (NCI4th)— retaliatory discharge— workers' compensation claim—12(b)(6) motion denied

A complaint alleging retaliatory discharge for filing a workers' compensation claim was sufficient to withstand a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where N.C.G.S. § 97-6.1 was operative at the time plaintiff filed his complaint; plaintiff's allegation that he had been discharged because he had instituted a workers' compensation claim in good faith brought his claim within the purview of N.C.G.S. § 97-6.1; the defense in N.C.G.S. § 97-6.1(c) for a discharge due to failure to meet work standards unrelated to the workers' compensation claim did not apply because plaintiff alleged that he was unable to continue his work because of his injury; the exception in N.C.G.S. § 97-6.1(e) for discharge on the basis of disability preventing employees from carrying out the duties for which they are employed applies only to permanent partial or total disability; and, while plaintiff alleged receipt of some disability payments, his complaint does not aver that he received compensation for either of those disabilities and therefore does not allege an unconditional affirmative defense.

Am Jur 2d, Workers' Compensation §§ 39 et seq.

Recovery for discharge from employment in retaliation for filing workers' compensation claim. 32 ALR4th 1221.

Appeal by plaintiff from order entered 25 September 1992 by Judge Julius A. Rousseau, Jr. in Alleghany County Superior Court. Heard in the Court of Appeals 27 October 1993.

Plaintiff Michael P. Conklin brought this suit on 25 March 1992, claiming that his former employer, defendant Carolina Nar-

row Fabrics Company, violated N.C. Gen. Stat. § 97-6.1 (1991) by discharging him without just cause and solely because he pursued workers' compensation benefits. On 21 April 1992, defendant filed a motion to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990). The trial court entered an order on 25 September 1992, dismissing the complaint. Plaintiff appeals from the order of dismissal.

George E. Francisco for plaintiff-appellant.

Petree Stockton, by Barbara E. Ruark, for defendant-appellee.

McCRODDEN, Judge.

In this appeal, we decide whether the trial court properly dismissed plaintiff's claim of retaliatory discharge when the complaint alleged a workers' compensation injury, inability to work, and dismissal on the basis of that disability. More specifically, the complaint avers that, while employed by defendant on 24 April 1991, plaintiff injured his back as he helped lift two steel beams weighing 200 pounds. He thereafter received disability and medical benefits under the Workers' Compensation Act. The complaint further alleges that on 20 August 1991, plaintiff's treating physician allowed him to return to work, but he was unable to perform the duties of his job due to the pain from his back injury. Plaintiff then contacted his boss, informing him that "he could not do the job." Defendant subsequently terminated plaintiff from his employment.

In considering a motion to dismiss for failure to state a claim, the trial court must accept as true all allegations of fact. *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 351, 416 S.E.2d 166, 168 (1992). Dismissal is generally inappropriate except in those instances where the face of the complaint discloses some insurmountable bar to recovery, such as an unconditional affirmative defense which defeats the claim asserted or facts which deny the right to any relief on the alleged claim. *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970). A trial court should not dismiss a complaint for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which he could prove in support of the claim. *Id.*

The ability of an employer to chill an employee's exercise of his or her rights under the Workers' Compensation Act through

retaliatory discharge or demotion motivated our legislature to enact N.C.G.S. § 97-6.1. *See Henderson v. Traditional Log Homes*, 70 N.C. App. 303, 305, 319 S.E.2d 290, 292, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 923 (1984). This statute, operative at the time plaintiff filed his complaint (subsequently repealed effective 1 October 1992), provides: "No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act . . . ." It does not, however, prohibit all discharges of employees who are involved in workers' compensation claims; it prohibits only a discharge made because the employee exercised his compensation rights. *Morgan v. Musselwhite*, 101 N.C. App. 390, 393, 399 S.E.2d 151, 153, *disc. review denied*, 329 N.C. 498, 407 S.E.2d 536 (1991). Plaintiff's complaint stated that "the defendant-corporation discharged the plaintiff because the plaintiff instituted, in good faith, a proceeding under the North Carolina Workers' Compensation Act and requested benefits pursuant to that Act." This allegation is sufficient to bring his claim within the purview of N.C.G.S. § 97-6.1.

Defendant, nonetheless, contends that dismissal of plaintiff's complaint was proper due to the existence of statutory defenses set out in N.C.G.S. § 97-6.1 (c) and (e). Section 97-6.1 (c) states that an "employer shall have as an affirmative defense to this section . . . [the employee's] failure to meet employer work standards not related to the Workers' Compensation Claim." Defendant may not avail itself of this provision, however, because, if the employee's failure to meet the defendant's work standards was due to the injury which was the subject of the workers' compensation claim, his failure to meet these standards was related to his workers' compensation claim. *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 352, 363 S.E.2d 215, 218, *disc. review denied*, 322 N.C. 111, 367 S.E.2d 910 (1988). Since plaintiff's complaint alleges that he was "unable to continue working at his job because of the pain resulting from his back injury," he alleges facts sufficient to defeat application of the subsection (c) defense.

N.C.G.S. § 97-6.1 (e), also argued by defendant, creates another narrow exception to the prohibition stated in subsection (a), reading:

> The failure of an employer to employ, either in employment or at the employee's previous level of employment, an employee

> who receives compensation for permanent total disability, or a permanent partial disability interfering with his ability to adequately perform work available, shall in no manner be deemed a violation of this section.

Hence, pursuant to section 97-6.1 (e), an employer may discharge an employee on the basis of the employee's disability which prevents him from carrying out the duties for which he is employed. *Johnson v. Builder's Transport, Inc.*, 79 N.C. App. 721, 723, 340 S.E.2d 515, 517 (1986). This subsection, however, applies only to employees who have received compensation for "permanent total disability" or "permanent partial disability," terms that have distinct meanings under the North Carolina Workers' Compensation Act, N.C. Gen. Stat. §§ 97-29, -31 (1991), but which are not the only types of disability for which a claimant may receive compensation. While plaintiff's complaint does allege that plaintiff received some disability payments, it does not aver that he received compensation for either type of disability required by subsection (e), and, it does not, therefore, allege an unconditional affirmative defense that would justify a Rule 12(b)(6) dismissal. In view of the foregoing, we are compelled to rule that plaintiff's complaint alleging retaliatory discharge was sufficient to withstand a Rule 12(b)(6) motion to dismiss. This ruling does not foreclose summary judgment for defendant upon a showing that it has paid compensation for permanent total disability or permanent partial disability.

Reversed.

Judges LEWIS and WYNN concur.

IRVING FINEBERG, PLAINTIFF v. STATE FARM FIRE AND CASUALTY CO., DEFENDANT

No. 9315SC164

(Filed 1 February 1994)

Insurance § 1231 (NCI4th)— fire insurance—requirement of examination under oath—heart patient

The trial court correctly granted summary judgment for defendant in an action on a fire insurance policy where plain-

tiff gave an unsworn statement to defendant's employee, plaintiff submitted a sworn statement in his proof of loss, plaintiff did not submit to an examination under oath because he had already suffered five heart attacks, and defendant denied the claim. It is clear that plaintiff failed to comply with a stated condition precedent of the policy and the Court of Appeals declined to create an exception to the mandatory nature of the condition because the enactment of a specific exception in N.C.G.S. § 58-44-50 indicated a legislative intent to limit the general proliferation of exceptions. Finally, the first recorded investigative interview did not constitute an examination under oath for purposes of compliance.

Am Jur 2d, Insurance §§ 2009 et seq.

Appeal by plaintiff from order entered 16 November 1992 by Judge Lester P. Martin in Alamance County Superior Court. Heard in the Court of Appeals 6 December 1993.

On 24 October 1991, plaintiff filed suit against defendant requesting that the court order defendant to pay pursuant to the fire insurance policy issued by defendant to plaintiff. Plaintiff alleged defendant issued a policy undertaking to indemnify and compensate plaintiff for loss due to fire, with maximum coverage set at $200,000.00, and that fire destroyed his home during the coverage period. Finally, plaintiff alleged compliance with all conditions and terms of the policy.

Defendant's answer, filed 2 January 1992, admitted denial of plaintiff's claim. By way of defense, defendant alleged that plaintiff failed to submit to an examination under oath, as required by the policy, and that this refusal barred both recovery under the policy and filing suit. Accordingly, defendant moved for summary judgment on the basis that plaintiff failed to comply with all conditions precedent by failing to submit to an examination under oath.

Defendant produced several affidavits in support of its motion. These affidavits revealed that plaintiff received several letters demanding an examination under oath yet failed to attend any of the scheduled examinations. The affidavits also revealed that Ken Davis, defendant's employee, took an unsworn statement from the plaintiff on 18 November 1988 as part of his investigation. Later, plaintiff submitted a sworn statement in his proof of loss on 19 December 1988. Mr. Davis confirmed that plaintiff never

submitted to an examination under oath, as required by the policy terms, nor did he produce the documents requested in the notice of examination sent to plaintiff.

Plaintiff also produced several affidavits in response to defendant's motion for summary judgment. In his own affidavit, plaintiff denied receiving defendant's letters requesting an examination. Plaintiff stated that he has had five heart attacks since 1975, moved to North Carolina in order to live in close proximity to Duke Hospital, and that stress causes him great anxiety and fear of another attack. Plaintiff claimed that his medical problems prevented him from submitting to an examination under oath and that he had proposed, alternatively, that he answer written questions under oath but that defendant rejected this proposal.

Plaintiff's friend submitted an affidavit stating that he believed that the investigative questioning that took place in November had been an examination under oath. David Frid, M.D., plaintiff's treating physician, stated that stress can cause a heart patient severe anxiety and fear of getting another heart attack. Dr. Frid also confirmed that plaintiff had already suffered five heart attacks and moved to live in close proximity to a hospital.

Judge Martin granted defendant's amended motion for summary judgment. From this order, plaintiff appeals.

Steven Klein for plaintiff appellant.

Yates, McLamb & Weyher, by R. Scott Brown and O. Craig Tierney, Jr., for defendant appellee.

ARNOLD, Chief Judge.

The sole question presented by plaintiff's appeal is whether the trial court erred in granting summary judgment in favor of the defendant. The trial court granted summary judgment on the basis that plaintiff failed to comply with all conditions precedent under his insurance policy in failing to submit to an examination under oath. The trial court relied in part on this Court's opinion in *Baker v. Independent Fire Insurance Company*, 103 N.C. App. 521, 405 S.E.2d 778 (1991), in making its determination. In *Baker*, the insured's case against the insurer was dismissed because the insured failed to submit to an examination under oath, as required by policy terms. This Court affirmed the dismissal, noting that plaintiff had failed to comply with a condition precedent of the policy.

Like the policy in *Baker*, defendant's policy requires the insured to submit to an examination under oath. In addition, compliance with all policy requirements is a condition precedent to bringing suit against the insurer under the policy. Compliance with a condition in a fire insurance policy, such as the examination under oath provision, has "been held to be a condition precedent to suing on a fire policy." *Baker*, 103 N.C. App. at 522, 405 S.E.2d at 778. The objective of this particular provision is "to enable the insurance company to obtain information to determine the extent of its obligation and to protect itself from false claims." *Chavis v. State Farm Fire and Casualty Co.*, 79 N.C. App. 213, 215, 338 S.E.2d 787, 789, *rev'd on other grounds*, 317 N.C. 683, 346 S.E.2d 496 (1986). Moreover, failure to comply with these conditions precedent bars recovery as well as the right to bring suit under the policy. *See* 5A John A. Appleman and Jean Appleman, Insurance Law and Practice § 3549 (1970 & Supp. 1993) (citing jurisdictions which hold that failure to submit to an examination under oath constitutes material breach and is a defense to an action on the policy).

In this case, it is clear that plaintiff has failed to comply with a stated condition precedent. Plaintiff urges this Court, however, to create an exception to the mandatory nature of this condition and apply a good cause exception like that found in N.C. Gen. Stat. § 58-44-50 (1991). G.S. § 58-44-50 excuses untimely filing of proof of loss, another condition precedent, where good cause is shown. We decline to create such an exception, believing instead that the legislature's enactment of that specific exception indicates an intent to limit the general proliferation of exceptions in this area.

We also disagree with plaintiff's contention that this case is closer to *Lee v. State Farm Fire and Casualty Company*, 70 N.C. App. 575, 320 S.E.2d 413 (1984), than *Baker*. In *Lee*, this Court reversed the trial court's summary judgment order after finding that genuine issues of fact existed regarding whether plaintiff did in fact comply with the conditions precedent of the fire insurance policy. Unlike *Lee*, it is clear plaintiff did not comply with the condition and that plaintiff only seeks relief from the mandatory nature of the condition. Furthermore, in *Lee* this Court stated that "[s]ince the insurance policy clearly requires compliance with all of its requirements in order for plaintiff to maintain this action, plaintiff's failure to comply with any one of the conditions . . . as a matter of law would be sufficient grounds for upholding the order." *Id.* at 578, 320 S.E.2d at 415.

Finally, we are not persuaded by plaintiff's arguments that the first recorded investigative interview constituted an examination under oath for purposes of compliance. *See* 5A Appleman, *supra* § 3549 (stating that an insured's recorded statements not given under oath are insufficient to meet the examination under oath requirement).

Accordingly, the order of the trial court is affirmed.

Affirmed.

Judges WELLS and EAGLES concur.

RETAIL INVESTORS, INC. v. HENZLIK INVESTMENT CO.; RONALD J. BENNETT; MICHAEL H. STAENBERG, INDIVIDUALLY AND AS TRUSTEE FOR THE MICHAEL H. STAENBERG LIVING TRUST; STEPHEN F. HUTCHINSON; ROBERT J. WATERS; C. W. ANSELL; IRVIN B. MAIZLISH, INDIVIDUALLY AND AS TRUSTEE FOR THE IRVIN B. MAIZLISH LIVING TRUST; AND FRANK O. PUSEY

No. 9326SC77

(Filed 1 February 1994)

Courts § 145 (NCI4th)— consent to jurisdiction—guaranty agreement—subject not related to North Carolina—original contemplation of parties—enforceable

The trial court did not err by denying defendants' motions to dismiss for lack of jurisdiction where plaintiff and defendants entered into a guaranty agreement concerning a shopping center in Jacksonville, Florida, which contained a consent to jurisdiction in North Carolina. The two-step inquiry into statutory authorization and minimum contacts is not necessary where the defendant consents to personal jurisdiction. Defendants do not contend that the consent was the product of fraud or unequal bargaining power and, while defendants contend that the consent was unreasonable and unfair because the transaction was wholly unrelated to North Carolina, the basis of that claim was within the original contemplation of the parties.

Am Jur 2d, Conflict of Laws § 82.

Appeal by defendants from order entered 8 December 1992 in Mecklenburg County Superior Court by Judge Robert W. Kirby. Heard in the Court of Appeals 6 January 1994.

Parker, Poe, Adams & Bernstein, by Fred T. Lowrance, Frank A. Hirsch, Jr., and Michael G. Adams, for plaintiff-appellee.

Petree Stockton, by Jackson N. Steele and B. David Carson, for defendant-appellants.

GREENE, Judge.

Henzlik Investment Co., Ronald J. Bennett, Michael H. Staenberg, Stephen F. Hutchinson, Robert J. Waters, C.W. Ansell, Irvin B. Maizlish, and Frank O. Pusey (defendants) appeal from an order filed 10 December 1992, denying their motion to dismiss for lack of personal jurisdiction Retail Investors, Inc.'s (Retail) complaint seeking enforcement of a guaranty agreement.

The facts in this case are as follows: Jacksonville Partners, a Florida general partnership, owned a commercial shopping center development (the shopping center) in Jacksonville, Florida. Retail, a Delaware corporation with its principal place of business and home office located in Myrtle Beach, South Carolina and a wholly owned subsidiary of the Waccamaw Corporation (Waccamaw), a South Carolina corporation, was one of two partners in Jacksonville Partners. St. Augustine Road Development Company (St. Augustine) was the other partner. Defendants, the individual partners in St. Augustine, consist of the following: Henzlik Investment Co., a Missouri general partnership with Donald L. Henzlik (Henzlik), a citizen and resident of Missouri, as a principal partner; Ronald J. Bennett (Bennett), Irvin B. Maizlish (Maizlish), and Michael H. Staenberg (Staenberg), all citizens and residents of Missouri; Stephen F. Hutchinson (Hutchinson), Frank O. Pusey (Pusey), and C.W. Ansell (Ansell), all citizens and residents of South Carolina; and Robert J. Waters (Waters), a citizen and resident of Pennsylvania. Jacksonville Partners, as landlord, entered into a lease with Waccamaw, as tenant, for lease of a portion of the shopping center. In connection with Waccamaw's amendment of its lease, defendants and Retail executed a guaranty agreement on 3 October 1989. Pursuant to this agreement, defendants guaranteed payment of the indebtedness owed by St. Augustine to Retail under the terms of the Amended and Restated Partnership Agreement of Jacksonville Partners. The guaranteed indebtedness includes $1,364,330.00 as a principal loan

(the Back-End Preference) plus annual payments (Annual Cash Flow Preference) as of March 31 of each year for ten years in the amount of $136,433.00 pursuant to Article 4.03 of the Jacksonville Partnership Agreement, together with any accrued interest. Paragraph 15 of the guaranty agreement contained a consent to jurisdiction clause which stated:

> This Agreement shall be deemed to be a contract made under, and for all purposes shall be construed in accordance with, the internal laws and judicial decisions of the State of North Carolina. The [defendants] and Retail agree that any dispute arising out of this Agreement shall be adjudicated in either the state or federal courts in North Carolina and in no other forum. For that purpose, the [defendants] hereby submit to the jurisdiction of the state and federal courts of North Carolina. The [defendants] also agree that both the federal and state courts in Mecklenburg County, North Carolina are a convenient forum and agree not to raise as a defense that such courts are not a convenient forum. The [defendants] further agree to accept service of process out of any of the beforementioned courts in any such dispute by registered or certified mail addressed to the [defendants].

For 1992, defendants failed to pay an obligation due under the guaranty agreement. On 11 August 1992, Retail filed a complaint seeking enforcement of the guaranty agreement with defendants, costs of the action, and attorneys' fees and expenses.

On and between 19 October 1992 and 13 November 1992, defendants filed seven separate motions to dismiss for lack of personal jurisdiction under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure and improper venue under Rule 12(b)(3) of the North Carolina Rules of Civil Procedure. The motions claimed lack of personal jurisdiction over Staenberg, Ansell, Waters, Maizlish, Bennett, Hutchinson, and Henzlik. After the hearing on defendants' motions to dismiss, at which defendants abandoned their 12(b)(3) motions to dismiss for improper venue, the trial court denied defendants' motions to dismiss for lack of personal jurisdiction by order filed 10 December 1992.

The issue presented is whether the consent to North Carolina jurisdiction provision in the guaranty agreement between Retail and defendants is unfair or unreasonable.

Although this appeal is interlocutory, defendants have an immediate right of appeal from the denial of their motion to dismiss for lack of personal jurisdiction. N.C.G.S. § 1-277(b) (1983).

The general rule requires that the trial court, as a prerequisite to exercising jurisdiction, make two basic inquiries: (1) whether any North Carolina statute authorizes the court to entertain an action against the defendant and if so, (2) whether defendant has sufficient minimum contacts with the state so that considering the action does not conflict with "traditional notions of fair play and substantial justice." *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 96, 414 S.E.2d 30, 35 (1992). A defendant may, however, consent to personal jurisdiction and in such event, the two step inquiry is unnecessary to the exercise of personal jurisdiction over the defendant. *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 701-02, 72 L. Ed. 2d 492, 501-02 (1982); *Johnston County*, 331 N.C. at 96, 414 S.E.2d at 35; *Montgomery v. Montgomery*, 110 N.C. App. 234, 237, 429 S.E.2d 438, 440 (1993).

One method of consenting to personal jurisdiction is the inclusion in a contract of a consent to jurisdiction provision. This type of provision does not violate the Due Process Clause and is valid and enforceable unless it is the product of fraud or unequal bargaining power or unless enforcement of the provision would be unfair or unreasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14, 85 L. Ed. 2d 528, 540 n.14 (1985); *see Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 146, 423 S.E.2d 780, 783 (1992) (discussing forum selection clause).

The defendants do not contend that the consent to jurisdiction provision was the product of fraud or unequal bargaining power. They do argue that the provision is unreasonable and unfair because "the transaction at issue is wholly unrelated to North Carolina and there is no substantial relationship between the parties and North Carolina in connection with the Shopping Center or the Agreement." We disagree. The parties were fully aware, at the time the contract was made, that the transaction was unrelated to North Carolina and that the parties had no substantial relationship with North Carolina. Thus, the basis of the defendants' claim of unreasonableness and unfairness was within the original contemplation of the parties and cannot now be used to support an argument that the consent to jurisdiction provision is unreasonable

or unfair. The trial court therefore did not err in denying defendants' motions to dismiss for lack of personal jurisdiction.

Affirmed.

Judges COZORT and JOHN concur.

DONALD J. BROWN, ET AL., PLAINTIFFS v. TOWN OF DAVIDSON, ET AL., DEFENDANTS

No. 9326SC228

(Filed 1 February 1994)

1. **Constitutional Law § 86 (NCI4th); Municipal Corporations § 30.22 (NCI3d)— denial of rezoning—racial discrimination not shown**

Landowners in a predominantly black neighborhood failed to forecast proof of discriminatory intent or purpose required to support their claim of racial discrimination in the denial of their petition to rezone their neighborhood from residential to commercial where the only evidence directly related to this claim was that similar petitions to rezone were allowed for white landowners on the other end of the street across a lake, especially when the areas at the other end of the street were primarily open fields before being rezoned.

Am Jur 2d, Civil Rights §§ 4, 487.

2. **Constitutional Law § 98 (NCI4th); Municipal Corporations § 30.21 (NCI3d)— rezoning hearing—prehearing statements by town commissioners—no due process violation**

Landowners who petitioned for rezoning of their neighborhood from residential to commercial were not denied due process because several of the town commissioners stated before the public hearing that they would vote against rezoning since rezoning decisions are legislative rather than quasi-judicial acts, and a predisposition by commissioners to vote in a certain way on a legislative matter does not constitute arbitrariness and capriciousness which violates due process.

Am Jur 2d, Constitutional Law §§ 806 et seq.

Appeal by plaintiffs from order entered 15 December 1992 by Judge Robert W. Kirby in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 December 1993.

This case arises from plaintiffs' attempt to have a predominantly black neighborhood in the Town of Davidson zoned from residential to commercial. A public hearing on the proposed rezoning was held before the Planning Board and the Town Commission (Commission) on 8 May 1990. At this hearing, citizens were about equally for and against allowing the change. The Planning Board held a second hearing on 29 May 1990, after which they denied the petition and recommended that the Commission and the Mayor "take Griffith Street as an immediate project for future planning." At the Commission's regular 12 June 1990 meeting, the petition was discussed, and the Commissioners unanimously voted to adopt the Planning Board's recommendation.

Plaintiffs brought this action seeking injunctive and monetary relief for violations of state and federal due process and equal protection guarantees. Defendants are the Town of Davidson, the Mayor, the Town Commission, the Planning Board, and the individual members of the Town Commission and Planning Board. Defendants moved for summary judgment on all claims, and the trial judge allowed the motion. The trial judge thereafter entered an order dismissing plaintiffs' action in its entirety. From this order plaintiffs appeal.

Sheely & Young, by Michael A. Sheely, for plaintiff appellants.

Frank B. Aycock, III for defendant appellees.

ARNOLD, Chief Judge.

[1] Plaintiffs argue that their racial discrimination claim was erroneously dismissed. We disagree.

This claim originated when two white plaintiffs petitioned to have two lots in a residential neighborhood zoned commercial so that they could build a gas station and convenience store. When local officials indicated that the petition would be denied, plaintiffs withdrew it. Later, black residents in that neighborhood joined with the white plaintiffs in a petition to rezone the entire neighborhood commercial.

The neighborhood in question lies along Griffith Street and is predominantly black. Griffith Street runs from Interstate 77 to the entrance of Davidson College and is apparently the only road into the Town of Davidson from the interstate. Most of the real estate directly off of the interstate, which was formerly open fields, was purchased by Lake Norman Company and was rezoned periodically until all of Lake Norman Company's property was zoned commercial. Lake Norman Company is white-owned. One other small tract off of the interstate was purchased by a white-owned company and rezoned commercial at its request.

This commercial zone runs along both sides of Griffith Street until it reaches Lake Davidson, where Griffith Street crosses the lake over a causeway. Plaintiffs' lots lie immediately on the other side of the causeway. The neighborhood containing plaintiffs' lots is and always has been zoned residential. Just before Griffith Street reaches Davidson College, one block is zoned business or office. This is the last block on Griffith Street according to plaintiffs' map, and it was zoned business or office in 1977. The record shows that a white person who owned property next to the business or office zone petitioned in 1977 to have his property rezoned business, but the Town denied the petition.

Plaintiffs contend their evidence that defendants allowed zoning petitions for the white petitioners at the western end of Griffith Street, while refusing to rezone their neighborhood, which is the only property on Griffith Street zoned residential, is sufficient to create a jury question on defendants' discriminatory intent. For that reason plaintiffs argue summary judgment should not have been granted.

To survive summary judgment on their racial discrimination claim plaintiffs had to forecast proof of racially discriminatory intent or purpose in denying the petition to rezone. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265, 50 L. Ed. 2d 450, 464 (1977). Disproportionate impact by itself is not enough. *Id.* at 264-65, 50 L. Ed. 2d at 464. We find plaintiffs' evidence insufficient as a matter of law to create a question of discriminatory intent or purpose. In our opinion, the decision to leave a residential area undisturbed, whether it be predominantly black or white, cannot be the basis for a racial discrimination claim when the only evidence directly related to the claim is that similar petitions to rezone were allowed for white-owned businesses on

the other end of the street, especially when, according to plaintiffs' evidence, the areas at the other end of Griffith Street were primarily open fields before being rezoned.

We do not find plaintiffs' remaining evidence on this issue persuasive or pertinent. We therefore affirm the trial judge's order dismissing the racial discrimination claim.

[2] Plaintiffs also argue that the trial court erred in dismissing their claim of due process violations. Plaintiffs argue they were denied a fair hearing before an impartial tribunal. In support of their argument, plaintiffs show that before the public hearing several of the Commissioners stated that they would vote against rezoning. Plaintiffs rely primarily on *Crump v. Board of Educ.*, 326 N.C. 603, 392 S.E.2d 579 (1990), for the proposition that the denial of a fair hearing before an impartial tribunal constitutes a due process violation. Their reliance on *Crump* is misplaced. In *Crump*, the Supreme Court dealt with an administrative board performing a quasi-judicial function. Defendants here were performing a legislative function.

Zoning and rezoning decisions are legislative acts, *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 373, 344 S.E.2d 357, 360, *disc. review denied, appeal dismissed*, 318 N.C. 417, 349 S.E.2d 600 (1986), and "[o]rdinarily, the only limitation upon this legislative authority is that it may not be exercised arbitrarily or capriciously." *Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 440 (1971). To establish that defendants violated plaintiffs' constitutional rights in a manner entitling them to relief, plaintiffs needed to show that defendants' actions were "arbitrary and capricious so as to violate their due process rights." *Sherrill*, 81 N.C. App. at 375, 344 S.E.2d at 361. Plaintiffs make no such argument, and a predisposition by some defendants to vote a certain way on a legislative matter is not sufficient to constitute a due process violation. It appears from the record that plaintiffs were provided all the process they were due, in the form of public hearings. Plaintiffs do not complain that defendants violated the statutory procedures required for decision making on general zoning questions. Because plaintiffs misperceived the role played by defendants, and therefore incorrectly based this part of their complaint on the denial of procedural protections which were not applicable, the trial judge was correct in dismissing this claim.

Our decisions on these issues render defendants' standing question irrelevant. The trial court's order is affirmed.

Affirmed.

Judges WELLS and EAGLES concur.

EARL FRANKLIN JENKINS AND WIFE, MYRTLE M. JENKINS, PLAINTIFFS-APPELLANTS v. DARRELL W. WILSON, DEFENDANT-APPELLEE

No. 9222SC1284

(Filed 1 February 1994)

Easements § 54 (NCI4th)— action asserting easement—12(b)(6) dismissal—no error

The trial court properly granted a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action claiming an easement where plaintiffs, as purchasers under a land installment contract, did not allege a record claim, did not allege or identify with particular certainty an easement previously held by the vendor, and made no allegation as to the identity of the current owner of the property.

Am Jur 2d, Easements and Licenses § 117.

Appeal by plaintiffs from order entered 30 September 1992 by Judge Thomas W. Seay, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 27 October 1993.

Morrow, Alexander, Tash, Long & Black, by Ronald B. Black, for plaintiffs-appellants.

Greeson and Grace, P. A., by Warren C. Hodges, for defendant-appellee.

JOHNSON, Judge.

Plaintiffs Earl Franklin Jenkins and Myrtle M. Jenkins are purchasing a tract of land in Davidson County through a land installment contract from the record owners of legal title, Christian Paul Tomain and Cynthia G. Tomain. Plaintiffs and their invitees

use a dirt road which crosses the land of defendant to get to Briggstown Road. Plaintiffs have no recorded right of way to use this dirt road. Defendant Darrell W. Wilson removed a drain tile from this roadway causing a portion of the road to collapse.

Plaintiffs filed a complaint and summons against defendant seeking mandatory relief in the form of road repairs, actual and punitive damages for damage to a roadway, and for an order declaring plaintiffs to possess an easement by implication in this roadway across defendant's land. On 7 August 1992, plaintiffs' motion for mandamus relief was denied by the superior court. On 10 August 1992, defendant filed an answer to the complaint, denying any wrongdoing in the use of his property, counterclaiming against plaintiffs for malicious injury to his real property, and claiming the complaint was frivolous in nature.

On 26 August 1992, defendant filed a motion to dismiss as to plaintiffs' complaint, along with a notice of motion and certificate showing service of same. On 8 September 1992, plaintiffs filed and served a reply to counterclaim. On 14 September 1992, upon defendant's motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6) and after hearing, the trial judge dismissed plaintiffs' complaint. From this order, plaintiffs appeal to our Court.

Plaintiffs argue on appeal that the trial court erred in granting defendant's motion to dismiss, and that the complaint which was filed adequately states a claim upon which relief can be granted. A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. N.C.R. Civ. P. 12(b)(6); *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). A dismissal of a complaint for failure to state a claim upon which relief can be granted is proper when the complaint on its face reveals that no law supports plaintiff's claim or that facts sufficient to make good claim are absent or when some fact disclosed in that complaint necessarily defeats plaintiff's claim. *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743 (1986). In passing on this motion, all allegations of the complaint are deemed true and the motion should not be allowed unless the complaint affirmatively shows that the plaintiff has no cause of action. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E.2d 894 (1978).

Plaintiffs argue that they have standing to establish and enforce an easement, as "the record possessors of the alleged dominant tract of an easement implied by prior unification of title.

Possession is through a land installment contract with the record owners of the property."

We note that as persons purchasing under a land installment contract, plaintiffs' claim must either be of record, or derivative of the rights of their vendor. Plaintiffs do not allege a record claim in their complaint. Further, plaintiffs do not allege or identify with particular certainty an easement previously held by their vendor. Indeed, there is no allegation as to the identity of the current owner of the property. Therefore, we find that the trial court properly dismissed plaintiffs' complaint pursuant to N.C.R. Civ. P. 12(b)(6).

The decision of the trial court is affirmed.

Chief Judge ARNOLD and Judge WELLS concur.

MIKE MEHOVIC v. KEN WILSON FORD, INC.

No. 9230SC1203

(Filed 1 February 1994)

Unfair Competition § 1 (NCI3d)— purchase of truck—representations—action in the nature of warranties—determination of unfair practices—remanded

An action arising from the sale of a truck which blew a piston 8 to 12 miles from defendant's business was remanded where plaintiff alleged in his complaint, presented evidence, and argued to the trial court that defendant's alleged representations were in the nature of warranties and the trial court's order and award of damages was premised entirely upon the court's determination that defendant's representations constituted unfair or deceptive acts or practices and did not determine if the representations were warranties which were breached. The order of the court did not resolve the material issues raised by the pleadings and the evidence.

Am Jur 2d, Fraud and Deceit §§ 6-9, 41-44, 105, 106, 109, 332, 333.

Appeal by plaintiff and defendant from order entered 8 July 1992 in Haywood County Superior Court by Judge C. Walter Allen. Heard in the Court of Appeals 21 October 1993.

Law Offices of David Gantt, by David Gantt, for plaintiff-appellee/appellant.

Ball, Barden, Contrivo & Lewis, P.A., by Stephen L. Barden, III, for defendant-appellant.

GREENE, Judge.

Ken Wilson Ford, Inc. (defendant) and Mike Mehovic (plaintiff) appeal from order entered 8 July 1992 after a non-jury trial, ordering defendant to pay plaintiff the total sum of $13,911.67 and plaintiff's attorney's fees.

The evidence reveals that on 19 March 1990, plaintiff purchased two trucks—a red 1980 Kenworth and a white 1981 Kenworth—from defendant for $12,500. Once plaintiff obtained possession of the two trucks, the 1980 truck blew a piston about eight to twelve miles from defendant's place of business. Plaintiff expended $1,487.24 on repairing the 1980 truck and within four months of the purchase expended $1,066.65 in repairs on the 1981 truck.

Plaintiff filed suit 17 January 1991, alleging that defendant had breached an express warranty, breached the implied warranty of merchantability, breached a warranty of fitness for a particular purpose, and engaged in unfair trade practices. Plaintiff presented evidence in regard to each of these claims and made arguments to the trial court in support of them.

The trial court made the following relevant findings of fact:

> 5. That [defendant] made the following representations to the Plaintiff prior to his purchase of the 1980 Kenworth and 1981 Kenworth truck:
>
> (a) That both trucks had been recently serviced and inspected;
>
> (b) That both trucks were in good condition and adequate for use in the long distance trucking business;

(c) That the Defendant guaranteed that both trucks would need no service repair or other costs for three to four months after purchase;

(d) That the smoke coming from the 1980 truck was the result of it not having been used and did not indicate any mechanical problems;

(e) That he would provide three new tires to the Plaintiff if the Plaintiff would purchase both the trucks.

. . . .

(7) [Defendant] told the Plaintiff if the trucks would not work three or four months without any problems, he would buy them back . . . .

The trial court then concluded that the "misrepresentations made by the Defendant were unfair and deceptive within the meaning of North Carolina General Statutes 75-1.1." The court then ordered defendant to pay plaintiff $7,661.67 which represented a trebling of the cost of repairing the vehicles, to pay plaintiff $6,250 upon return of the 1980 Kenworth truck, and to pay plaintiff's reasonable attorney's fees.

The dispositive issue is whether defendant's alleged representations were unfair or deceptive acts or practices within the meaning of N.C. Gen. Stat. § 75-1.1.

The plaintiff alleged in his complaint, presented evidence, and argued to the trial court that the representations allegedly made by defendant were in the nature of warranties. The trial court's order and award of damages is premised entirely upon the court's determination that defendant's representations constituted unfair or deceptive acts or practices. The trial court did not determine if these representations were warranties which were breached. If defendant's representations were in fact warranties, a breach of these warranties could constitute an unfair or deceptive act only if (1) the representations were false or concealed a material fact, (2) defendant, at the time the representations were made, knew them to be false or made them with reckless indifference as to their truth, (3) the representations were made with the intent to deceive, (4) did in fact deceive, and (5) damaged the plaintiff. *See Morris v. Bailey*, 86 N.C. App. 378, 383, 358 S.E.2d 120, 123

(1987); *Branch Bank and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. rev. denied*, 332 N.C. 482, 421 S.E.2d 350 (1992) (must show substantially aggravating circumstances attending breach of contract); *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 992 (4th Cir.) (must demonstrate deception in the formation or breach of the contract), *cert. denied*, 454 U.S. 1054, 70 L. Ed. 2d 590 (1981); *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988) (discussing elements of false representation). Thus, the order of the trial court did not resolve the material issues raised by the pleadings and the evidence. *See Wooten v. Nationwide Mutual Ins. Co.*, 60 N.C. App. 268, 270, 298 S.E.2d 727, 728, *disc. rev. denied*, 308 N.C. 392, 302 S.E.2d 258 (1983).

Accordingly, we reverse and remand to the trial court for the resolution of all the material issues raised in the first trial and the entry of a new order.

Reversed and remanded.

Judges MARTIN and JOHN concur.

IN THE MATTER OF: THE MOSES H. CONE MEMORIAL HOSPITAL (92 PTC 28) & ROGER C. COTTEN (90 PTC 485)

No. 9310PTC230

(Filed 15 February 1994)

1. Taxation § 99 (NCI4th)— county tax assessor—appeal as individual—no standing to appeal from Property Tax Commission

Respondent, the Guilford County Tax Assessor, had no standing to appeal, in either his official or his individual capacity, to the Property Tax Commission, and the Commission had no jurisdiction to hear respondent's appeal, since appeal to the Commission from a local county board of equalization and review is governed solely by N.C.G.S. § 105-290(b); that statute provides for appeal only by a property owner and conspicuously omits a right of appeal by a county or any county official; and to allow respondent to appeal in his individual

capacity a decision of the Board which he could not otherwise appeal would improperly circumvent the Legislature's intent and the Court's holding in *In re Appeal of Forsyth County*, 104 N.C. App. 635.

Am Jur 2d, State and Local Taxation §§ 782-787, 795-816, 831, 832.

2. **Taxation § 30 (NCI4th)— taxpayer as charitable hospital—stipulations sufficient to satisfy statute**

Stipulations by the parties to the effect that taxpayer was organized as a North Carolina nonstock, nonprofit hospital which was open to all citizens and which did not deny emergency treatment to patients unable to pay for their care satisfied the requirements of N.C.G.S. § 105-278.8, and the Commission erred in concluding that taxpayer failed to show by any stipulated facts that taxpayer was a charitable hospital pursuant to N.C.G.S. § 105-278.8.

Am Jur 2d, State and Local Taxation §§ 362 et seq.

3. **Taxation § 30 (NCI4th)— hospital's child care center—no competition with commercial day care centers—Commission's finding error**

The Property Tax Commission erred in finding that taxpayer's child care center competed directly with commercial day care centers and that taxpayer's center was of little or no benefit to the hospital in recruitment, since the child care center was open only to taxpayer's employees and not the public at large; by remaining open seven days a week, on holidays, and for extended hours, taxpayer's child care center met a need of its employees which could not be fulfilled by commercial day care centers; and two witnesses presented uncontradicted evidence that taxpayer's child care center enabled it to be more competitive in recruiting employees.

Am Jur 2d, State and Local Taxation §§ 362 et seq.

4. **Taxation § 30 (NCI4th)— hospital's child care center—reasonably necessary to accomplish charitable purpose—property exempt**

Taxpayer's child care center served a charitable hospital purpose as contemplated by N.C.G.S. § 105-278.8 and was thus exempt from ad valorem taxes, since the center was not operated

for the purpose of making money, but was instead located on hospital property and used to recruit and retain hospital employees; the child care center was organized to meet the specific needs of hospital employees; its hours of operation were longer and more flexible than other area commercial day care centers; and taxpayer's child care center was thus reasonably necessary to accomplish taxpayer's charitable purpose.

Am Jur 2d, State and Local Taxation §§ 362 et seq.

Appeal by taxpayer from order of the North Carolina Property Tax Commission entered 24 November 1992. Heard in the Court of Appeals 8 December 1993.

Moses H. Cone Memorial Hospital (hereinafter taxpayer) is a nonstock, nonprofit, general acute care hospital located in Greensboro, North Carolina. Taxpayer is open to all citizens of Guilford County and adjacent counties without regard to race, religion, creed or national origin. Taxpayer also does not deny emergency medical treatment to patients who cannot afford to pay.

In October 1989, taxpayer opened a child care center in a free-standing building on the hospital campus. The child care center is available only to hospital employees and is open seven days a week from 6:00 a.m. to midnight. Taxpayer subsidizes approximately $160,000 of the annual operating costs of the child care center.

In 1990, Guilford County assessed taxpayer $6,936.15 in ad valorem taxes for its child care center. Taxpayer filed an application for exemption pursuant to G.S. 105-278.8 which was denied by the Guilford County Tax Department (hereinafter Tax Department). The Guilford County Board of Equalization and Review (hereinafter the Board) reversed the decision of the tax department and determined that taxpayer's child care center was exempt from ad valorem taxation. The Guilford County Tax Assessor, Mr. Roger C. Cotten, appealed this decision to the Property Tax Commission in his individual capacity (90 PTC 485).

In 1991, taxpayer's child care center was again assessed ad valorem taxes. Taxpayer filed another application for exemption which was again denied by the Tax Department. Taxpayer appealed again to the Board of Equalization and Review. Although faced with essentially the same facts about the child care center as the

year before, the Board determined that taxpayer's child care center was not exempt from taxation. Taxpayer appealed this decision to the Property Tax Commission (92 PTC 28).

These two appeals (90 PTC 485 and 92 PTC 28 hereinafter 1990 appeal and 1991 appeal respectively) were consolidated for hearing before the Property Tax Commission on 23 June 1992. Taxpayer presented the testimony of four witnesses: 1) Ms. Cynthia Schaub, 2) Ms. Sharon Fouts, 3) Ms. Stephanie Fanjul and 4) Ms. Beverly Randolph Harrelson. Ms. Schaub is the Vice President of Human Resources at Moses H. Cone Memorial Hospital and is responsible for the hospital's recruitment and retention of health care employees. Ms. Schaub testified that taxpayer's child care center enabled the hospital to recruit employees more competitively with other area hospitals who also offered on-site child care for their employees. Ms. Schaub named several area hospitals that also had on-site day care. Ms. Schaub also testified that commercial day care centers could not accommodate the fluctuating need of hospital employees who worked rotating shifts and that there were no commercial day care centers that offered child care after 7:00 p.m.

Ms. Sharon Fouts is the director of taxpayer's child care center. Ms. Fouts testified that the child care center is able to accommodate the needs of parents who work flexible hours or need to work in the evenings. "If one week they work 6:00 a.m. to 3:00 p.m., or the next week two-thirty until twelve o'clock, we are able to accommodate those needs." Ms. Fouts testified that she did not know of any other child care facility in Greensboro that was open from 6:00 a.m. until midnight, seven days a week. Ms. Fouts testified that between 12 to 18 children used the child care center from 6:30 p.m. until midnight. Ms. Fouts also testified that the child care center had a waiting list of approximately 40 children of employees.

Ms. Stephanie Fanjul is the owner of Work Place Options, a child care consulting firm. Ms. Fanjul testified that her company did a feasibility study for Wake Medical Center's child care facility and also conducted a study at Wake Medical Center which described the results of the child care facility on productivity and employee morale. Using exhibits, Ms. Fanjul testified that Wake Medical Center's on-site child care had lowered staff turnover for child care participants, reduced their unscheduled absences and shortened maternity leaves. Ms. Fanjul also testified that other

national studies involving hospitals also showed that on-site child care significantly improved employee recruitment, retention and morale.

Ms. Harrelson is an employee of taxpayer who has a three year old child in taxpayer's child care center. Ms. Harrelson testified to the advantages of having weekend care for her child because both she and her husband often worked on weekends. Ms. Harrelson also testified that although her scheduled hours are from 8:00 a.m. to 4:30 p.m., she knows that if she has to work past dinner time, her child will be fed and cared for at the child care center. Ms. Harrelson also testified that if taxpayer's child care center were closed, she would seek employment at one of the competing area hospitals that had on-site day care.

Appellees presented no evidence.

The Property Tax Commission (hereinafter Commission) concluded that taxpayer's child care center was not exempt from taxation and denied taxpayer's exemptions for both 1990 and 1991. In its order denying the exemptions, the Commission made the following findings of fact and conclusions of law:

Findings of Fact

. . . .

7. The Moses H. Cone Memorial Hospital employs more than 3,000 employees who are eligible to place their children in the Moses H. Cone Memorial Hospital Child Care Facility.

8. The Moses H. Cone Memorial Hospital Child Care Facility is available to all employees of Moses H. Cone Memorial Hospital, strictly on a first come, first served basis. No preference at all is given to nurses or to employees with duties directly related to the provision of medical care. The Facility is equally available to cafeteria, janitorial, maintenance, and administrative personnel as to those whose duties are related directly to the provision of medical care services.

9. The Child Care Facility has a capacity of approximately 160 children (testimony of Ms. Shaub). Because some parents have more than one child in the Facility, approximately 145 to 150 employees of Moses H. Cone Memorial Hospital are served by the facility at any given time. The Facility serves

less than five percent (5%) of Hospital employees; the vast majority of Hospital's over 3,000 employees does not have a child in the Facility and derive no benefit from its operations. Approximately 20% of the 150 or so employees who do use the Facility are part-time employees (testimony of Ms. Shaub).

10. The rates charged by the Facility are comparable to those of "average" daycare centers in the Greensboro area. The services and amenities provided by the Facility, however, are clearly above average. The Facility is therefore a benefit to employees who are allowed to place a child there. Because of the first come, first served policy, however, this benefit tends to accrue to employees on the basis of seniority, without regard to their duties. Administrators, maintenance workers and cafeteria workers have the same right to place children in the Facility as do nurses on rotating shifts.

11. The Facility competes directly with commercial, for-profit providers of child care services in the Greensboro area. Because the Facility is subsidized by the Hospital, it has two great attractions for Hospital employees: (1) it is located adjacent to their place of work; and (2) it offers better facilities and services, at a lower price, than competing commercial daycare centers.

12. Commercial for-profit child care centers located in Guilford County are subject to ad valorem taxation.

13. While the provision of child care services may aid the Hospital in retaining those employees (a small minority of the total) who are able to place a child in the Facility, the Facility, despite the Hospital's assertions to the contrary, is of little or no benefit to the Hospital in recruitment because the Facility has a substantial waiting list (testimony of Ms. Fouts), and no empty spaces. The Hospital therefore cannot use the Facility as a recruitment tool. This problem is addressed Hospital Exhibit 4 (at unnumbered page 8) which deals with the experience of Wake Medical Center in this regard.

14. The property under appeal is used by the Hospital to provide an employee benefit to a small minority of the Hospital's employees. Under the Hospital's operating policies, no preference is given to employees whose duties are directly related to the provision of medical care. Instead, the waiting

list method favors long-term employees, regardless of the nature of their duties, over new hires.

15. Commercial child care for parents who work the day shift is readily available in the Greensboro area; see Hospital Exhibit 1.

Conclusions of Law

. . . .

7. The Hospital failed to establish, by the greater weight of the evidence or by any stipulated facts, that the subject property was owned by a qualifying agency as described in G.S. 105-278.7 on either 1 January 1990 or 1 January 1991. In particular, the Commission concludes as a matter of law that the facts contained in Stipulation paragraphs A and B do not support the conclusion that the Hospital was a qualifying owner under the provisions of G.S. 105-278.7(c). The Hospital did not establish that it was a charitable association or institution pursuant to G.S. 105-278.7(c)(1), or that it was one of the organizations described in G.S. 105-278(c)(2) through (c)(7).

8. The Hospital failed to establish, by the greater weight of the evidence or by any stipulated facts, that the subject property was owned by a qualifying hospital as described in G.S. 105-278.8 on either 1 January 1990 or 1 January 1991. In particular, the Commission concludes as a matter of law that the facts contained in Stipulation paragraphs A and B do not support the conclusion that the Hospital was charitable institution under the provisions of G.S. 105-278.8(a). In reaching this conclusion of law, the Commission applied the holding of the Court of Appeals in In re Chapel Hill Residential Retirement Center, 60 N.C. App. 294, 299 S.E.2d 782 (1983). In that case, the Court of Appeals considered in some detail the question of what constituted "charity" for the purposes of ad valorem tax exemption.

9. In paragraph H of the Stipulations, the parties stipulated that the subject property (consisting of land and improvements valued at $950,940) was actually and exclusively used for child care. The Commission concludes as matter of law that the subject property, actually and exclusively used to provide child care for Hospital employees, is not used for an "educational

purpose" as defined in G.S. 105-278.7(f)(1), nor is it used for a charitable purpose as defined in G.S. 105-278.7(f)(4).

10. No part of the Moses H. Cone Memorial Hospital Child Care Facility is used for a charitable hospital purpose as required by G.S. 105-278.8.

11. The subject property, actually and exclusively used to provide child care services to a small percentage of the Hospital's workers at below market rates, competes directly with commercial providers of child care services.

Taxpayer appeals.

Wilson & Iseman, by G. Gray Wilson and Urs R. Gsteiger, for taxpayer-appellant.

Guilford County Attorney's Office, by Deputy County Attorney Gregory L. Gorham and Deputy County Attorney J. Edwin Pons, for County-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Fred T. Hamlet and ToNola D. Brown, for taxpayer-appellee.

EAGLES, Judge.

Taxpayer appeals from the 24 November 1992 order of the Property Tax Commission (Commission) denying exemption to taxpayer's child care center for years 1990 and 1991. In that order, the Commission reversed the decision of the Guilford County Board of Equalization and Review (Board) granting taxpayer an exemption for its child care center in 1990 and affirmed the decision of the Board denying the exemption in 1991. After careful review, we conclude that the Commission had no authority to reverse the Board's 1990 decision because that appeal was not properly before the Commission. We also conclude that the Commission erred in denying the exemption for 1991. Accordingly, we vacate the Commission's order reversing the 1990 decision of the Board and reinstate the Board's 1990 order granting taxpayer an exemption for its child care center for the year 1990. We also reverse the Commission's order affirming the Board's 1991 decision denying the exemption to the child care center.

I.

We first set out the scope of appellate review for cases coming from the Property Tax Commission. G.S. 105-345.2 provides that:

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

. . . .

(2) In excess of statutory authority or jurisdiction of the Commission; or

. . . .

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

This standard of review is known as the "whole record" test. The whole record test is not "a tool of judicial intrusion." *Rainbow Springs Partnership v. County of Macon*, 79 N.C. App. 335, 341, 339 S.E.2d 681, 685 (1986) (*quoting In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)). It does not allow a reviewing court to substitute its own judgment in place of the Commission's judgment even when there are two reasonably conflicting views. *Id.* at 341, 339 S.E.2d at 684. Rather, the whole record test merely allows a reviewing court to determine whether the Commission's decision has a rational basis in the evidence. *Id.* at 341, 339 S.E.2d at 685. Under the whole record test, the reviewing court must determine whether the Commission's decision is supported by substantial evidence. *Id.* " 'Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *Rainbow Springs Partnership v. County of Macon*, 79 N.C. App. 335, 341, 339 S.E.2d 681, 685 (1986) (quoting *Thompson v. Wake County Board of Education*, 292 N.C. 406, 414,

233 S.E.2d 538, 544 (1977)). In determining whether the evidence is substantial, the reviewing court must

> take into account whatever in the record fairly detracts from the weight of the [Commission's] evidence. . . . [T]he court may not consider the evidence which in and of itself justifies the [Commission's] decision without [also] taking into account the contradictory evidence or other evidence from which conflicting inferences could be drawn.

Rainbow Springs Partnership v. County of Macon, 79 N.C. App. 335, 341, 339 S.E.2d 681, 685 (1986) (quoting *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). If the court finds substantial evidence to support the Commission's decision, the Commission's decision may not be overturned. *Id.* at 343, 339 S.E.2d at 686.

II.

[1] We begin with the 1990 appeal brought by respondent Roger C. Cotten. Respondent is also the Guilford County Tax Assessor. When the Board granted taxpayer an exemption for its child care center in 1990, respondent appealed to the Commission. The Commission reversed the decision of the Board and denied taxpayer an exemption for 1990. Taxpayer contends that respondent had no standing to appeal the decision of the Board and that the Commission had no jurisdiction to hear respondent's purported appeal. We agree.

The right of appeal to the Commission from a local county board of equalization and review is governed solely by G.S. 105-290(b). *In re Appeal of Forsyth County*, 104 N.C. App. 635, 410 S.E.2d 533 (1991). G.S. 105-290(b) provides that "Any property owner of the county may except to an order of the county board of equalization and review or the board of county commissioners concerning the listing, appraisal, or assessment of property and appeal the order to the Property Tax Commission." In *In re Appeal of Forsyth County*, 104 N.C. App. 635, 410 S.E.2d 533 (1991), this court held that G.S. 105-290(b) "conspicuously omits a right of appeal to the Commission by a county or any county official on behalf of a county." *Id.* at 637, 410 S.E.2d at 534.

Although respondent here is also the Guilford County Tax Assessor, respondent argues that he did not file his appeal on behalf of the county or in his official capacity as Guilford County

Tax Assessor. Instead, respondent argues that he filed his appeal individually and in his own behalf as a property owner of Guilford County. Accordingly, respondent contends that as a property owner in Guilford County, he is entitled to appeal under G.S. 105-290(b). We disagree.

In *Forsyth County*, this court stated that when the legislature repealed former G.S. 105-324(b), which had previously allowed "a member of the board of county commissioners or board of equalization and review" to appeal to the Commission, the legislature clearly intended to restrict the class of persons who could appeal to the Commission. *In re Appeal of Forsyth County*, 104 N.C. App. 635, 637, 410 S.E.2d 533, 534 (1991). We then held that a county or a county official acting on behalf of a county could not appeal to the Commission under G.S. 105-290(b). *Id.*

Here, respondent is attempting to appeal in his individual capacity a decision of the Board that he could not appeal in his official capacity as Tax Assessor. We do not think that the legislature, in restricting the county's right to appeal under G.S. 105-290(b), intended for county officials to circumvent G.S. 105-290(b) by filing appeals in their individual capacities. Allowing respondent here to appeal in his individual capacity a decision of the Board he could not otherwise appeal would eviscerate the legislature's intent and this court's holding in *Forsyth County*. Accordingly, we hold that respondent had no standing to appeal to the Commission and that the Commission had no jurisdiction to hear respondent's appeal. G.S. 105-345.2(b)(2); *cf. In re Appeal of Forsyth County*, 104 N.C. App. 635, 410 S.E.2d 533 (1991). Since the Commission had no jurisdiction to hear respondent's appeal, we vacate the Commission's order reversing the Board's 1990 decision and reinstate the Board's 1990 decision granting taxpayer an exemption for 1990.

III.

We now address the merits of the 1991 appeal. Taxpayer contends that the Commission erred by denying taxpayer an exemption for its child care center in 1991.

A.

[2] Taxpayer first contends that the Commission erred in concluding that taxpayer was not a charitable hospital pursuant to G.S. 105-278.8. The Commission in its conclusions of law concluded that "The Hospital [taxpayer] failed to establish, by the greater

weight of the evidence or by any stipulated facts, that the subject property was owned by a qualifying hospital as described in G.S. 105-278.8." G.S. 105-278.8 provides that:

> (a) Real and personal property held for or owned by a hospital organized and operated as a nonstock, nonprofit, charitable institution (without profit to members or their successors) shall be exempted from taxation if actually and exclusively used for charitable hospital purposes.
>
> . . . .
>
> (c) Within the meaning of this section, a charitable hospital purpose is a hospital purpose that has humane and philanthropic objectives; it is a hospital activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. However, the fact that a qualifying hospital charges patients who are able to pay for services rendered does not defeat the exemption granted by this section.

At the hearing before the Commission, the parties stipulated to the following facts:

> A. The Moses H. Cone Memorial Hospital [taxpayer] is organized as a North Carolina nonstock, nonprofit hospital and is licensed as a general acute care hospital by the North Carolina Department of Human Resources.
>
> B. The Moses H. Cone Memorial Hospital [taxpayer] operates the Moses H. Cone Memorial Hospital and Women's Hospital of Greensboro and they are open to all citizens of Guilford and adjacent counties without regard to race, religion, creed, or national origin. They do not deny emergency treatment to patients on the basis of their immediate need [sic] to pay for their care.

We conclude that these stipulations of fact satisfy the requirements of G.S. 105-278.8 and that the Commission made an error of law in concluding that taxpayer failed to show by any stipulated facts that taxpayer is a charitable hospital pursuant to G.S. 105-278.8.

B.

[3] Taxpayer further contends that the Commission erred in finding that taxpayer's child care center "competes directly with com-

mercial, for-profit providers of child care services in the Greensboro area" and that taxpayer's child care facility "is of little or no benefit to the hospital in recruitment." Under the whole record test, the Commission's findings of fact must stand if they are supported by competent, material and substantial evidence in view of the entire record. G.S. 105-345.2(b)(5). Taxpayer contends that these findings are unsupported by the record. We agree.

We can find no evidence in the record that taxpayer's child care center competes directly with other area commercial day care centers. We conclude that there is no direct commercial competition between taxpayer's child care center and other area commercial day care centers for two reasons.

First, in order for there to be direct commercial competition, taxpayer's child care center must compete directly with other commercial day care centers for patrons from the general public. All of the evidence before the Commission, however, showed that taxpayer's child care center was open only to hospital employees. Ms. Cynthia Schaub, taxpayer's Vice President of Human Resources, stated twice on cross examination that taxpayer's child care center was open only to hospital employees. The Commission presented no contrary evidence and we find no evidence in the record that taxpayer's child care center was open to anyone other than hospital employees.

Second, taxpayer's child care center meets a need of its employees that could not be fulfilled by the other commercial day care centers. Taxpayer's child care center is open seven days a week, and on holidays from 6:00 a.m. to 12:00 midnight to accommodate the needs of its employees. Ms. Schaub testified that taxpayer's child care center was needed because there were no commercial day care centers open after 7:00 p.m. and that commercial day care centers could not accommodate hospital employees who worked rotating shifts. Ms. Sharon Fouts, the director of taxpayer's child care center, testified that taxpayer's child care center accommodated the needs of hospital employees who worked rotating shifts and that she did not know of any other child care facility in Greensboro open until 12:00 midnight. Ms. Beverly Harrelson, an employee of taxpayer who has a three year old son in taxpayer's child care center, testified that at her previous day care, she would have had to make arrangements with her sister or her mother to pick up her son if she had to stay past 6:00 p.m. for an emergency

at the hospital. Ms. Harrelson also testified that the child care center's weekend hours allowed her to work weekends at the hospital. Appellees again presented no evidence to dispute this testimony. For these reasons, we conclude that the Commission's finding that taxpayer's child care center competes with other area commercial day care centers is unsupported by substantial evidence in view of the entire record.

Likewise, we also conclude that the Commission's finding that taxpayer's child care center "is of little or no benefit to the hospital in recruitment" is also unsupported by substantial evidence in the record. Ms. Schaub, as Vice President of Human Resources, is responsible for the recruitment of hospital employees. Ms. Schaub testified that taxpayer's child care center enabled the hospital to be more competitive in recruiting employees with other area hospitals who also offered on-site child care for their employees. Ms. Stephanie Fanjul, the owner of a child care consulting firm, testified that other national studies showed that on-site child care significantly improved employee recruitment, retention and morale. Since appellees presented no contrary evidence, we conclude that taxpayer's child care center aided the hospital in the recruitment and retention of hospital employees.

C.

[4] Finally, taxpayer contends that the Commission erred in concluding that "No part of the Moses H. Cone Memorial Hospital Child Care Facility is used for a charitable hospital purpose as required by G.S. 105-278.8." We agree that the Commission erred.

Under G.S. 105-278.8, real property owned by a charitable hospital is exempt from taxation only if it is "actually and exclusively used for charitable hospital purposes." G.S. 105-278.8. Generally, statutes exempting specific property from taxation are construed strictly against exemption and in favor of taxation when there is room for construction. *Wake County v. Ingle*, 273 N.C. 343, 346, 160 S.E.2d 62, 64 (1968). The Commission argues that taxpayer's child care center does not fall within a strict construction of a charitable hospital purpose pursuant to G.S. 105-278.8. However, notwithstanding the Commission's reliance on its strict construction of the statute, we have evaluated the statute in the context of the whole record and conclude that the child care center serves a charitable hospital purpose as contemplated by G.S. 105-278.8.

The Commission relies on the North Carolina Supreme Court's holding in *Rockingham County v. Elon College*, 219 N.C. 342, 13 S.E.2d 618 (1941), as authority for its position that taxpayer's child care center is not "actually and exclusively used" for charitable hospital purposes. We find *Rockingham* readily distinguishable.

In *Rockingham*, the taxpayer, Elon College, was an exempt educational institution. There the taxpayer was assessed ad valorem taxes for an office building which it owned and leased to members of the public who operated private businesses. The taxpayer used the rental income generated from the property exclusively for educational purposes. The North Carolina Supreme Court concluded that the taxpayer's building was not entitled to exemption because it was used for commercial purposes. In concluding that taxpayer's building was used for commercial purposes, the *Rockingham* Court made the following observations:

> The defendant [taxpayer] purchased the property in question as an investment, from which it hopes to derive an income. It is held for profit or gain, *i.e.*, for the purpose of making money. It is in a business district and devoted to rental purposes. If it did not yield an income the defendant [taxpayer] would have no use for it.

Id. at 347, 13 S.E.2d at 622. The test under *Rockingham* then is whether the subject property is used for commercial purposes or held for profit or gain.

Here, taxpayer's child care center is not operated for the purpose of making money. Rather, taxpayer's child care center is used to aid in the recruitment and retention of hospital employees. Ms. Schaub testified that taxpayer made no profit from its child care center and that taxpayer subsidized approximately $160,000 of the child care center's annual operating expenses. Ms. Schaub testified that despite this loss, the child care center enabled the hospital to be more competitive in recruiting employees with other area hospitals who also offered on-site child care. Also, unlike the taxpayer's office building in *Rockingham*, taxpayer's child care center is not located in a business district but on the hospital campus.

The Commission argues that *Rockingham* is analogous to our situation here because of its finding that taxpayer's child care center "competes directly with commercial, for-profit providers of child care services in the Greensboro area." As we have already

discussed, this finding, to the extent that it entails direct commercial competition, is unsupported by substantial evidence in the record. We reiterate that taxpayer's child care center is not engaged in commercial competition with other area child care centers nor is it held by the taxpayer for the purpose of making money. Accordingly, *Rockingham* does not control here.

The question of whether any of the purposes for which taxpayer's child care center is held is a charitable hospital purpose within the meaning of G.S. 105-278.8 is one of first impression in this State. Taxpayer urges us to adopt the reasonably necessary standard applied by the Illinois Appellate Court in *Memorial Child Care v. Department of Revenue*, 604 N.E.2d 530 (Ill. App. Ct. 1992), and the Nebraska Supreme Court in *Immanuel, Inc. v. Board of Equalization of Douglas County*, 384 N.W.2d 266 (Neb. 1986). We find *Memorial Child Care* to be particularly analogous to the facts at issue here.

In *Memorial Child Care v. Department of Revenue*, 604 N.E.2d 530 (Ill. App. Ct. 1992), the Illinois Appellate Court held that appellee's child care center was exempt from taxation because the child care center was reasonably necessary to accomplish the efficient administration of the hospital. Property may qualify for a charitable exemption in Illinois if the property is used exclusively for charitable purposes. Under Illinois case law, property falls within this exemption if the use of the property is reasonably necessary to accomplish the charitable purpose of the institution. *Id.* In determining whether appellee's child care center was reasonably necessary to accomplish the efficient administration of the hospital, the Illinois Appellate Court noted the following facts:

> In the instant case, Child Care [appellee] operated a child-care center for the employees at Memorial Medical Center. The record indicates that Springfield had a shortage of child-care facilities, and that the employees of Memorial Medical Center had difficulty finding child-care available which met their needs and fit the hospital scheduling requirements. Child Care's facility was specifically organized to provide a flexible child-care program for the employees of Memorial Medical Center. The hours of operation of the facility are from 5:30 a.m. to midnight, seven days a week, including holidays. Child Care offers variable services for employees, such as a daily rate for part-time employees because department schedules often include work

> on weekends. Child Care's hours of operation were specifically structured for Memorial Medical Center employees and are more flexible and of longer duration than those of commercial day-care centers. Child Care was created specifically as a not-for-profit corporation to alleviate the difficulty Memorial Medical Center experienced in hiring and maintaining employment of professional employees with young children.

Id. at 535. The court went on to hold that appellee's child care center was used for a purpose "reasonably necessary to accomplish the efficient administration of Memorial Medical Center as a tax-exempt charitable hospital." *Id.* The court also stated that the fact that the Medical Center functioned for years without a child care center did not alone mean that a child care center for hospital employees was not essential to the hospital's operation. Accordingly, the court held that appellee was entitled to exemption from property taxes.

The Commission, however, urges us to adopt the reasoning of the Minnesota Supreme Court in *Chisago Health Services v. Commissioner of Revenue*, 462 N.W.2d 386 (Minn. 1990). In *Chisago*, the Minnesota Supreme Court took a more restrictive view of the reasonably necessary test. There, the Minnesota Supreme Court affirmed the decision of the Minnesota Tax Court holding that two hospital auxiliary outpatient medical facilities were not reasonably necessary for the hospital to accomplish its charitable purpose. The Court stated that the reasonably necessary test measures the degree to which the auxiliary facilities and the public hospital are functionally interdependent. In affirming the decision of the Tax Court, the Court rejected the appellant's argument that the outpatient facilities were reasonably necessary to operate the hospital in a "financially sound manner."

We find the reasoning of *Memorial Child Care v. Department of Revenue*, 604 N.E.2d 530 (Ill. App. Ct. 1992), persuasive. Accordingly, we adopt the "reasonably necessary" test as laid out in *Memorial Child Care*. We now apply the reasoning of *Memorial Child Care* to the facts at issue here.

Like the child care center in *Memorial Child Care*, taxpayer's child care center here is organized to meet the specific needs of hospital employees. Taxpayer's child care center is open seven days a week, including holidays, from 6:00 a.m. to 12:00 midnight. It accommodates the needs of employees who work rotating shifts

or late night hours. Its hours of operation are longer and more flexible than other area commercial day care centers. Finally, taxpayer's child care center aids taxpayer in the recruitment and retention of hospital employees. Accordingly, we conclude that on these facts, taxpayer's child care center is reasonably necessary to accomplish taxpayer's charitable purpose. For the reasons stated, we hold that taxpayer's child care center is "actually and exclusively used" for a charitable hospital purpose as required by G.S. 105-278.8 and accordingly, that taxpayer is entitled to an exemption from ad valorem taxes for its child care center.

IV.

In sum, we vacate the Commission's order regarding the 1990 appeal and reinstate the Board's 1990 order granting taxpayer an exemption from ad valorem taxes for its child care center for the year 1990. We also reverse the Commission's order regarding the 1991 appeal and hold that taxpayer is entitled to an exemption from ad valorem taxes for its child care center under G.S. 105-278.8.

Vacated in part, reversed in part.

Chief Judge ARNOLD and Judge WELLS concur.

PHYLLIS WAGONER v. ELKIN CITY SCHOOLS' BOARD OF EDUCATION, BRUCE MORTON, DONALD T. LASSITER, AND CHARLIE PARSONS

No. 9317SC241

(Filed 15 February 1994)

1. Discovery and Depositions § 7 (NCI4th)— wrongful discharge of teacher alleged—discovery request for personnel and student records—failure to show relevancy and necessity—request properly denied

The trial court did not err in denying plaintiff's motion to compel discovery in her action for intentional infliction of emotional distress, constructive wrongful discharge, malicious interference with contract, and punitive damages, since plaintiff failed to meet her burden of proving that her requests for information as to whether the teacher who replaced her

had had a relationship with a high school student during his previous employment, the complete student records at her school, and school personnel records related to information both relevant and necessary to her claims.

Am Jur 2d, Depositions and Discovery §§ 21 et seq.

2. **Evidence and Witnesses § 2152 (NCI4th)— expert witness—affidavit consisting of legal conclusions**

The trial court did not err in sustaining defendants' objection to an expert witness's affidavit where the entire affidavit consisted of legal conclusions.

Am Jur 2d, Expert and Opinion Evidence §§ 136 et seq.

3. **Intentional Infliction of Mental Distress § 2 (NCI4th)— intentional infliction of emotional distress—principal's treatment of teacher—summary judgment for defendants proper**

The trial court did not err in granting defendants' motion for summary judgment on plaintiff's claim for intentional infliction of emotional distress, since evidence that defendants told plaintiff to throw away her health and physical education materials because she would never need them again, removed her from her health and physical education teaching position to the job of ISS coordinator, placed her away from other faculty members in a small room with great humidity and high temperatures, returned a student who had pushed plaintiff to her classroom, stared for "minutes at a time" at plaintiff while she taught, assigned her after school and Saturday work hours, asked her to accompany students on a skiing trip for a good evaluation, told her she had the worst job in school, and denied her the opportunity to attend workshops in her area may well have insulted plaintiff or caused her to suffer indignities, but such actions did not amount to conduct which was atrocious and utterly intolerable in a civilized community.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4 et seq., 17.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress. 52 ALR4th 853.

4. **Contracts § 180 (NCI4th)— malicious interference—action by teacher against board and superintendent—parties to contract**

Plaintiff teacher could not maintain an action against defendant board of education or defendant superintendent of schools for malicious interference with contract since the board and the superintendent were parties to the contract.

Am Jur 2d, Interference §§ 39-48.

5. **Contracts § 190 (NCI4th)— malicious interference—motive of principals proper—failure of plaintiff to make prima facie case**

Because plaintiff teacher admitted on the face of her complaint that defendant principals, by virtue of their positions at her school, had a proper motive for their actions of placing plaintiff in the position of ISS coordinator, plaintiff failed to show that she could make out a *prima facie* case of malicious interference with contract.

Am Jur 2d, Interference §§ 49-48.

6. **Labor and Employment § 68 (NCI4th)— career teacher—no employee at will—tort of wrongful discharge inapplicable**

Plaintiff teacher's claim based on the tort of wrongful discharge was correctly dismissed by the trial court, since that tort arises only in the context of employees at will, and plaintiff, as a career teacher under N.C.G.S. § 115C-325(c), was not an employee at will.

Am Jur 2d, Master and Servant §§ 60-70.

Appeal by plaintiff from judgment entered 30 June 1992 in Surry County Superior Court by Judge James M. Long. Heard in the Court of Appeals 6 January 1994.

Kennedy, Kennedy, Kennedy & Kennedy, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellant.

Tharrington, Smith & Hargrove, by Ann L. Majestic, Alexis C. Pearce, and Jaye P. Meyer, for defendant-appellees.

GREENE, Judge.

Phyllis Wagoner (plaintiff) appeals from the trial court's granting of Elkin City Schools' Board of Education, Bruce Morton, Donald T. Lassiter, and Charlie Parsons' (defendants) motion for summary

judgment in this action for intentional infliction of emotional distress, constructive wrongful discharge, malicious interference with contract, and punitive damages. Plaintiff also appeals from the trial court's order denying her motion to compel discovery and from the trial court's sustaining of defendants' objection to the affidavit of Dr. Melvin F. Gadson (Dr. Gadson).

The evidence, viewed in the light most favorable to plaintiff, reveals that the Elkin City Schools' Board of Education (the Board) hired plaintiff in 1974, and David Thrift, then principal of Elkin High School (EHS), informed her she was being hired to teach health and physical education, the only areas she was certified to teach. The probationary contract between the Board and plaintiff for the 1976-1977 school year and the career contract between the Board and plaintiff for the 1977-1978 school year state plaintiff is "[t]entatively assigned to Elkin High School." Plaintiff signed no other employment contract after signing the 1977 career contract. In 1974, plaintiff began teaching physical education and health.

In August 1985, Bruce Morton (Morton), EHS principal from the fall of 1985 until the summer of 1990, asked in front of the entire faculty, "Which one of you is Phyllis Wagoner?" and did not ask for anyone else. Morton visited the gym while she was teaching and stared at her for "minutes at a time," did not show up for scheduled evaluations of plaintiff, told her once "if I were grading you today, I would give you an F," switched her from a physical education teacher to an ISS coordinator, told her she could "throw all of [her] health and physical education materials away because [she] would never need them again," placed her office in a small room in the girls' locker room with a temperature of 90 to 100 degrees without providing a phone in that room, denied her the opportunity to attend workshops in her area, assigned different working hours than the other teachers, told her that her job was the worst job in the school, told her she would receive a good evaluation if she went on a school skiing trip, filled out an evaluation without a formal observation and claimed that plaintiff had agreed to an interview type observation when she had not, and returned a student that had pushed plaintiff to her classroom.

Plaintiff complained to the Board and Donald Lassiter (Lassiter), superintendent of Elkin City Schools, about her position and working hours as ISS coordinator; however, Lassiter and the Board upheld Morton's assignment of duties and the hours under the

Senate Bill 2 plan. After she informed the Board and the new principal, Charlie Parsons (Parsons), that she would work the regular hours, Lassiter suspended plaintiff without pay pending termination for alleged insubordination. After plaintiff appealed this suspension to a Professional Review Committee under N.C. Gen. Stat. § 115C-325, which determined on 23 October 1990 that plaintiff was wrongfully suspended, Lassiter reinstated her. After returning to EHS in November 1990, Parsons placed plaintiff back in the ISS program. On 30 November 1990, she resigned, citing that her work environment from 1989 through November 1990 was intolerable and unbearable, and she had been given "nothing to do" since her return. As a result of these events, plaintiff has suffered severe emotional distress, has been on medication for depression and anxiety, and has been diagnosed by her psychiatrist as having a major psychiatric disorder.

During discovery, plaintiff deposed Tony Duncan (Duncan), the teacher who was placed in plaintiff's position of physical education and health teacher, on 20 February 1992, but Duncan refused to answer questions regarding his relationship with a female high school student at his place of employment before coming to EHS. In written discovery, plaintiff sought personnel records of nine EHS teachers and certain student records. Plaintiff moved to compel discovery of such information on 28 February 1992, which motion was denied by the trial court on 2 April 1992.

Sam Tesh, Assistant Principal at EHS from 1983-87, James W. Halsey, Director of Personnel for the Board from 1985-87, Ralph Clingerman, a teacher at EHS, and Laura C. Overbey stated that Morton had told them he was under pressure from the Board to get rid of plaintiff. Morton stated that as principal of EHS, he had the responsibility of making teaching assignments and evaluating each teacher, and switched Duncan and plaintiff because he became "concerned that she was not doing an effective job of teaching the basic skills of various sports to the students" and because switching the responsibilities between Mr. Duncan and [plaintiff] would improve the overall school program."

Plaintiff tendered into evidence at the summary judgment hearing, the affidavit of Dr. Gadson. He stated in his affidavit that in his opinion, (1) defendants' treatment of plaintiff was an "extreme departure from the normal operation of a public school program," and that she was forced to work under "extreme and outrageous"

conditions; (2) replacing plaintiff with Duncan was a "wrongful interference with her contract because it was motivated not by a legitimate educational purpose, but was rather due to a malicious and calculated design to drive her out of the Elkin school system"; (3) because defendants' conduct was "so far outside the bounds of human decency and normal standards for the operations of a public school," plaintiff would have been expected to resign; and (4) defendants violated North Carolina's public policy by placing Duncan in plaintiff's position because they knew of his immoral conduct. After defendants objected to the trial court's consideration of Dr. Gadson's affidavit on the grounds that the affidavit "purported to offer expert opinions regarding issues of law," the trial court sustained the objection and ruled those portions offering opinion testimony inadmissible. Defendants then objected to the affidavit on the grounds that Dr. Gadson was not qualified to be an expert in the subject areas in which his affidavit purports to offer expert opinions. The trial court sustained the objection and ruled the affidavit inadmissible.

Based on the evidence presented at the summary judgment hearing, the trial court, on 30 June 1992, granted defendants' motion for summary judgment as to each of plaintiff's claims and dismissed her action.

The issues presented are whether the trial court erred in (I) denying plaintiff's motion to compel discovery; (II) sustaining defendants' objection to consideration of Dr. Gadson's affidavit; and (III) granting defendants' summary judgment motion on plaintiff's claims for intentional infliction of emotional distress, malicious interference with contract, constructive wrongful discharge, and punitive damages.

I

[1] Plaintiff argues that the trial court erred in denying her motion to compel discovery. Plaintiff wished to retake Duncan's deposition for the "purpose of having him answer questions about those matters which he failed to do" in his deposition on 20 February 1992. Those matters concern the alleged involvement between Duncan and a female student at the high school where Duncan was employed before accepting employment at EHS. Plaintiff also wished, under her Second Request for Production of Documents, for defendants to supply plaintiff "the complete student record,

including report cards, discipline records, etc." of all students in the ISS program and EHS during 1989-90 and 1990-91 school years.

Under the rules governing discovery, a party may obtain discovery concerning any unprivileged matter as long as relevant to the pending action and reasonably calculated to lead to the discovery of admissible evidence. N.C.G.S. § 1A-1, Rule 26(b) (1990). If defendant fails to respond or specifically object to a request within forty-five days, or such other time the court states otherwise, Rule 34, the serving party, upon reasonable notice, may move to compel discovery under N.C. Gen. Stat. § 1A-1, Rule 37(a) (1990). Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion. *In re Estate of Tucci*, 104 N.C. App. 142, 152, 408 S.E.2d 859, 865-66 (1991), *disc. rev. improvidently allowed*, 331 N.C. 749, 417 S.E.2d 236 (1992).

Plaintiff has failed to meet her burden of proving that her requests relate to information both relevant and necessary to her claims. Whether or not Duncan had a relationship with a high school student during his previous employment, the complete student records at EHS, and school personnel records are irrelevant to whether defendants intentionally inflicted emotional distress on plaintiff, constructively and wrongfully discharged her, or maliciously interfered with her contract. The trial court did not therefore abuse its discretion in denying her motion to compel discovery.

II

[2] Plaintiff argues that the trial court erred in sustaining defendants' objection to Dr. Gadson's affidavit. We disagree. Whether a witness is competent to testify as an expert is within the sound discretion of the trial judge. *State ex rel. Utilities Comm'n v. General Telephone Co.*, 281 N.C. 318, 373, 189 S.E.2d 705, 740 (1972). Furthermore, expert testimony which suggests whether legal conclusions should be drawn or whether legal standards are satisfied is inadmissible. *See Hajmm Co. v. House of Raeford Farms*, 328 N.C. 578, 587, 403 S.E.2d 483, 489 (1991). In this case, Dr. Gadson's entire affidavit consists of legal conclusions; therefore, the trial court did not err in sustaining defendants' objection to Dr. Gadson's affidavit.

III

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

[3] In an action for intentional infliction of emotional distress, the essential elements are "1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress." *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (quoting *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981)). Whether or not conduct constitutes extreme and outrageous behavior is initially a question of law for the court. *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985). To meet the essential element of extreme and outrageous conduct, the conduct must go beyond all possible bounds of decency, and "be regarded as atrocious, and utterly intolerable in a civilized community. The liability clearly does not extend to mere insults, indignities, threats, ..." *Daniel v. Carolina Sunrock Corp.*, 110 N.C. App. 376, 383, 430 S.E.2d 306, 310, *rev'd in part*, 335 N.C. 233, 436 S.E.2d 835 (1993).

Viewing the evidence in the light most favorable to plaintiff, *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (all inferences drawn in favor of non-movant in deciding motion for summary judgment), defendants' conduct of telling her to throw away her health and physical education materials because she would never need them again, removing her from her health and physical education teaching position to the job of ISS coordinator, placing her away from other faculty members in a small room with great humidity and high temperatures, returning a student that pushed plaintiff to her classroom, staring for "minutes at a time" at plaintiff while she taught, assigning her after school and Saturday work hours, asking her to accompany students on a skiing trip for a good evaluation, telling her she had the worst job in school, denying her the opportunity to attend workshops in her area, and asking "[w]hich one of you is Phyllis Wagoner" in front of the entire faculty may very well have "insulted" plaintiff or caused her to suffer "indignities"; however, we do not regard this conduct "as atrocious, and utterly intolerable in a civilized community." Even assuming that removing plaintiff from her teaching position and placing her in the job of ISS coordinator was not allowed under her contract with the Board or under N.C. Gen. Stat. § 115C, an issue we need not decide, her

removal and placement in the ISS position does not constitute extreme and outrageous conduct. Therefore, because plaintiff cannot forecast evidence of extreme and outrageous conduct, the trial court did not err in granting defendants' motion for summary judgment as to that cause of action. *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342 (once summary judgment movant meets burden, burden is on non-movant to show she can make out prima facie case at trial).

MALICIOUS INTERFERENCE WITH CONTRACT

[4] There are five essential elements for an action for malicious interference with contract: (1) a valid contract existed between plaintiff and a third person, (2) defendant knew of such contract, (3) defendant intentionally induced the third person not to perform his or her contract with plaintiff, (4) defendant had no justification for his or her actions, and (5) plaintiff suffered damage as a result. *McLaughlin v. Barclays American Corp.*, 95 N.C. App. 301, 308, 382 S.E.2d 836, 841, *cert. denied*, 325 N.C. 546, 385 S.E.2d 498 (1989); *Uzzell v. Integon Life Ins. Corp.*, 78 N.C. App. 458, 463, 337 S.E.2d 639, 643 (1985), *cert. denied*, 317 N.C. 341, 346 S.E.2d 149 (1986). We initially note that plaintiff cannot maintain an action against the Board or Lassiter for malicious interference of contract because the Board and Lassiter, as superintendent of the Board, are parties to the contract. *See Smith v. Ford Motor Co.*, 289 N.C. 71, 87, 221 S.E.2d 282, 292 (1976); *Elmore v. Atlantic Coast Line R.R. Co.*, 191 N.C. 182, 187, 131 S.E. 633, 636 (1926). Therefore, the trial court did not err in granting summary judgment for the Board or Lassiter on plaintiff's claim for malicious interference of contract.

[5] Because Morton and Parsons are not parties to the contract between plaintiff and the Board, they may be liable for malicious interference with the contract if they have in fact interfered with the contract and the interference has no relation whatever "to that legitimate business interest which is the source of the defendant's non-outsider status." *Smith*, 289 N.C. at 87, 221 S.E.2d at 292. Therefore, if the actions of Morton and Parsons have a basis related to their legitimate business interest in the contract between plaintiff and the Board, even though there may have also been some reasons for their actions unrelated to their legitimate business interest, plaintiff's action for malicious interference with contract cannot be sustained. Plaintiff, in her complaint, admits that Morton

and Parsons had an interest in her performance at EHS under her contract with the Board by alleging that Morton "was an agent, servant, employee and Principal of Defendant Board" and that Parsons "was and is an agent, servant, employee and Principal of Defendant Board." In their roles as principals at EHS, Morton and Parsons had a legitimate business interest in plaintiff's performance under her contract with the Board because they were responsible for overseeing, observing, and evaluating the faculty at EHS, and for assigning duties to the teachers. Because plaintiff admits on the face of her complaint that Morton and Parsons, by virtue of their positions as principals of EHS, had a proper motive for their actions of placing plaintiff in the position of ISS coordinator, plaintiff has failed to show that she can make out a prima facie case of malicious interference of contract at trial. *See Privette v. University of North Carolina*, 96 N.C. App. 124, 385 S.E.2d 185 (1989) (complaint admits defendants had proper motive by alleging they were directors of "Center" and Center's "Lab" thereby showing they had interest in insuring proper work procedures and legitimate professional interest in plaintiff's performance at Center); *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985) (complaint must admit of no other motive for interference other than malice). Thus, the trial court did not err in granting defendants' motion for summary judgment as to plaintiff's claim for malicious interference of contract.

CONSTRUCTIVE WRONGFUL DISCHARGE

[6] For her third cause of action, plaintiff alleges in tort that she was wrongfully "constructively discharged by Defendants in violation of public policy." Assuming that plaintiff was wrongfully constructively discharged, she is nonetheless not entitled to assert the tort of wrongful discharge because the tort of wrongful discharge arises only in the context of employees at will. *See Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989); *Sides*, 74 N.C. App. 331, 328 S.E.2d 818. Breach of contract is the proper claim for a wrongfully discharged employee who is employed for a definite term or an employee subject to discharge only for "just cause." *Elmore*, 191 N.C. at 188, 131 S.E. at 636. Plaintiff is not an employee at will because she had attained the status of a career teacher under N.C. Gen. Stat. § 115C-325(c) (Supp. 1993) and could not be dismissed or demoted except for reasons specified in Section

115C-325(e)(1). Therefore, plaintiff's claim based on the tort of wrongful discharge was correctly dismissed by the trial court.

PUNITIVE DAMAGES

Because we hold that the trial court did not err in granting summary judgment for defendants on each of plaintiff's three causes of action, plaintiff cannot make out a prima facie case for punitive damages because she cannot make out a prima facie case for the underlying torts. *See Jones v. Gwynne*, 312 N.C. 393, 405, 323 S.E.2d 9, 16 (1984). Accordingly, the trial court did not err in dismissing plaintiff's action, including her claim for punitive damages.

Affirmed.

Judges COZORT and JOHN concur.

LINDA R. SHARP v. D. KEITH TEAGUE AND D. KEITH TEAGUE, P.A.

No. 931SC36

(Filed 15 February 1994)

1. Limitations, Repose, and Laches § 26 (NCI4th)— legal malpractice—continuous representation doctrine—insufficiency of complaint

Under the "continuous representation" doctrine with respect to legal malpractice, the statute of limitations and the statute of repose do not accrue until the earlier of either the date the attorney ceases serving the client in a professional capacity with regard to the matters which are the basis of the malpractice action or the date the client becomes aware or should become aware of the negligent act. It remains an open question as to whether North Carolina recognizes the "continuous representation" doctrine, but, even if it does, plaintiff's complaint was insufficient to allege that defendants continued through 3 July 1989, the date defendants withdrew as counsel, to represent plaintiff with regard to her domestic relations claims which were the basis of the malpractice action; the court could not equate the date of the attorney's withdrawal of record with the date the attorney ceased representing the

client with regard to the matters which were the basis of the malpractice action; the doctrine of continuing representation did not apply; and the statutes of limitations and repose accrued on the date of the last act of the defendants giving rise to the cause of action.

Am Jur 2d, Attorneys at Law §§ 197 et seq.

2. **Fraud, Deceit, and Misrepresentation § 24 (NCI4th)— complaint not sufficiently particular—fraud claims properly dismissed**

Plaintiff's complaint did not meet the requirements of particularity with regard to fraud or constructive fraud and presented nothing more than conclusory statements with regard to these claims; therefore, the claims denominated fraud and breach of fiduciary duty were nothing more than claims for negligence and were properly dismissed. N.C.G.S. § 1A-1, Rule 9(b).

Am Jur 2d, Fraud and Deceit §§ 423 et seq.

Appeal by plaintiff from judgment entered 24 September 1992 in Dare County Superior Court by Judge Hollis M. Owens, Jr. Heard in the Court of Appeals 18 November 1993.

Carol M. Schiller for plaintiff-appellant.

Baker, Jenkins, Jones & Daly, P.A., by Ronald G. Baker and Kevin N. Lewis, for defendant-appellees.

GREENE, Judge.

Linda R. Sharp (plaintiff) appeals from a Rule 12(b)(6) dismissal of her complaint.

The complaint, filed on 9 June 1992 and amended on 17 June 1992, alleges in pertinent part that on 22 June 1984 plaintiff employed D. Keith Teague and D. Keith Teague, P.A. (defendants) to represent her in all matters arising from her separation and divorce from her former husband, "including but not limited to child support, child custody, alimony *pendente lite*, permanent alimony, equitable distribution, attorney fees, potential tort claims against Susan Willis Johnson (Sharp) and all other matters necessary to protect her legal entitlements under Chapter 50 of the North Carolina General Statutes." Defendants, who had agreed to represent plain-

tiff and accepted payments from her until 3 July 1989, withdrew as counsel of record for plaintiff on that date. Plaintiff subsequently employed new legal counsel in 1989.

Plaintiff asserts four theories under which she claims an entitlement to recovery: negligence, breach of contract, fraud, and breach of fiduciary duty. Plaintiff claims that defendants were negligent in several respects in that they: (1) failed to file an alienation of affection action against Susan Willis Johnson (Sharp); (2) failed to advise plaintiff of the statute of limitations on filing an alienation of affection claim; (3) did not, prior to 2 June 1988, take appropriate action to "prevent dissipation and disappearance of Plaintiff's interest in the marital property"; (4) advised plaintiff "that she would not qualify for alimony *pendente lite* and permanent alimony" and advised her to sign a consent decree on 7 November 1984 waiving those rights; (5) advised plaintiff to sign the 7 November 1984 consent decree in which defendants were to be paid $1,000 in attorney fees and defendants "subsequently billed for attorney fees in excess of $4,000"; (6) advised plaintiff to sign the 7 November 1984 consent decree in which plaintiff "waived the right to share in the estate and life estate of [her former husband] upon his death [when] the majority of the marital property was titled in the name of [her former husband]"; and (7) waived plaintiff's right to discovery in a consent decree dated 2 June 1988, thus permitting "opposing counsel to suppress evidence that would legally have been required to be revealed."

On the fraud claim, plaintiff, incorporating the previous allegation regarding defendants' alleged negligent conduct, further alleges that she "has relied to her detriment on the misrepresentation, misinformation, erroneous legal counsel and advice given to her by the Defendants during the course of their representation of her" and that she has suffered "economic[,] . . . emotional and mental" damages as a proximate result of defendants' misrepresentations. On the breach of fiduciary duty claim, plaintiff alleges that defendants' actions as set forth in the negligence claim also "constitute a breach of Defendants' fiduciary duty owed to the plaintiff."

Defendants moved to dismiss the complaint, pursuant to Rule 12(b)(6), and the trial court, on 24 September 1992, allowed defendants' motion and dismissed the complaint.

The issues presented are whether (I) all claims arising out of an attorney-client relationship are governed by the same statute of limitations; and (II) the trial court erred by dismissing plaintiff's complaint pursuant to Rule 12(b)(6) for failure to state a claim.

I

Defendants argue that because all the actions plaintiff contends caused her damage are in the nature of legal malpractice, the relevant statute of limitation is set by N.C. Gen. Stat. § 1-15(c). This is so, defendants contend, without regard to whether the claim is based on negligence, contract, fraud, or breach of fiduciary duty. The plaintiff argues that N.C. Gen. Stat. § 1-15(c) governs only claims based on negligence and that the claims based on contract, fraud, and breach of fiduciary duty are governed by N.C. Gen. Stat. § 1-52.

Neither party is entirely correct. The appropriate statute of limitations depends "upon the theory of the wrong or the nature of the injury." 2 Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 18.3, at 69 (3d ed. 1989) [hereinafter *Legal Malpractice*]. Because claims "arising out of the performance of or failure to perform professional services" based on negligence or breach of contract are in the nature of "malpractice" claims, they are governed by N.C. Gen. Stat. § 1-15(c). N.C.G.S. § 1-15(c) (1983) (governs "malpractice" claims "arising out of the performance of or failure to perform professional services"); *Webster v. Powell*, 98 N.C. App. 432, 440, 391 S.E.2d 204, 208 (1990), *aff'd*, 328 N.C. 88, 399 S.E.2d 113 (1991). Fraud by an attorney, however, is not within the scope of "professional services" as that term is used in N.C. Gen. Stat. § 1-15(c), and thus cannot be "malpractice" within the meaning of that statute. *Legal Malpractice* § 18.8, at 92; *see Watts v. Cumberland County Hosp. Sys., Inc.*, 317 N.C. 110, 343 S.E.2d 879 (1986) (recognizing claims based on fraud and breach of fiduciary duty even though claim based on negligence had been dismissed as being untimely). "If the claim is for fraud, which includes a deliberate breach of a fiduciary obligation, the courts have generally applied the jurisdiction's fraud statute of limitations." *Legal Malpractice* § 18.4, at 71.

II

Negligence and Breach of Contract

[1] N.C. Gen. Stat. § 1-15(c), which establishes a four-year statute of repose and a three-year statute of limitations, provides 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. 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: . . .

N.C.G.S. § 1-15(c) (1983). The statute creates a statute of limitations and a statute of repose, both of which accrue on the date of the "last act of the defendant giving rise to the cause of action." *Stallings v. Gunter*, 99 N.C. App. 710, 714, 394 S.E.2d 212, 215, *disc. rev. denied,* 327 N.C. 638, 399 S.E.2d 125 (1990).

This Court, however, has recognized within the context of medical malpractice an exception to the rule that "the action accrues at the time of the defendant's negligence." *Ballenger v. Crowell*, 38 N.C. App. 50, 58, 247 S.E.2d 287, 293 (1978). In this context, the "action accrues at the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action." *Stallings*, 99 N.C. App. at 714, 394 S.E.2d at 215. Under this "continuing course of treatment" doctrine the cause of action for medical malpractice accrues at "the earlier

of (1) the termination of [the physician's] treatment of the plaintiff or (2) the time at which the plaintiff knew or should have known of his injury." *Hensell v. Winslow*, 106 N.C. App. 285, 290, 416 S.E.2d 426, 430, *disc. rev. denied*, 332 N.C. 344, 421 S.E.2d 148 (1992). Under this doctrine, it "is not necessary . . . that the treatment rendered subsequent to the negligent act itself be negligent, if the physician continued to treat the patient for the . . . condition created by the original act of negligence." *Stallings*, 99 N.C. App. at 714-15, 394 S.E.2d at 215.

Plaintiff argues that these same principles utilized in the context of medical malpractice should apply to legal malpractice. Other jurisdictions applying the "continuing course of treatment" doctrine in the context of medical malpractice generally apply what is known as the "continuous representation" doctrine in the context of legal malpractice. *Legal Malpractice* § 18.12, at 116; *see e.g.*, *MacLellan v. Throckmorton*, 367 S.E.2d 720 (Va. 1988). Under this doctrine, the statute of limitations and the statute of repose do not accrue until the earlier of either the date the attorney ceases serving the client in a professional capacity with regard to the matters which are the basis of the malpractice action or the date the client becomes aware or should become aware of the negligent act. It is argued by those who support this doctrine that it permits a client who is unaware of her attorney's negligence to remain in the attorney-client relationship without fear of her malpractice claim being time barred and provides the attorney an opportunity to correct his error.

It remains an open question in North Carolina as to whether we recognize the "continuous representation" doctrine. We have not either specifically adopted or rejected it. In 1984, this Court, in *Shelton v. Fairley*, 72 N.C. App. 1, 9, 323 S.E.2d 410, 416 (1984), *disc. rev. denied*, 313 N.C. 509, 329 S.E.2d 394 (1985), stated that a case cited by the plaintiff in that case provided "no authority" for the contention that "the statute of limitations against a defendant in a fiduciary relationship does not begin to run until termination of the relationship." *See also Small v. Britt*, 64 N.C. App. 533, 535, 307 S.E.2d 771, 773 (1983) (cause of action against attorneys based upon alleged negligent representation in death penalty prosecution accrued on date of entry of guilty verdict where no act of negligence was alleged after that date even though attorneys continued representation through sentencing); *Thorpe v. DeMent*, 69 N.C. App. 355, 359, 317 S.E.2d 692, 695, *aff'd*, 312 N.C. 488,

322 S.E.2d 777 (1984) (legal malpractice action accrued on last day attorney could have filed wrongful death claim with estate even though attorney continued to represent plaintiff for some twelve more months). More recently, the majority of a panel of this Court held that the statute of limitations in a legal malpractice action did not accrue until the date the attorney-client relationship was terminated. *Southeastern Hosp. Supply Corp. v. Clifton & Singer*, 110 N.C. App. 652, 654, 430 S.E.2d 470, 471 (1993). We do note however, that the majority of the panel construed the complaint in *Southeastern Hospital Supply* as alleging that the attorney's negligent representation continued until termination of the attorney-client relationship. Also, recently this Court in a legal malpractice action based on the negligent drafting of a will held that the statute of limitations and the statute of repose did not accrue until the date of the death of the testator, which occurred some thirteen years after the alleged negligent act of drafting the will. *Hargett v. Holland*, 111 N.C. App. 200, 205, 431 S.E.2d 784, 786, *disc. rev. allowed*, 335 N.C. 238, 439 S.E.2d 147 (1993); *see Sunbow Indus., Inc. v. London*, 58 N.C. App. 751, 753, 294 S.E.2d 409, 410 (1981) (legal malpractice action did not accrue on the date attorney failed to file financing statement but accrued on the day the debtor filed for bankruptcy), *disc. rev. denied*, 307 N.C. 272, 299 S.E.2d 219 (1982).

Assuming without deciding that North Carolina does recognize the "continuous representation" doctrine, the complaint is insufficient to allege that defendants continued, through 3 July 1989, to represent plaintiff with regard to her domestic relations claims which are the basis of this malpractice action. The complaint only alleges that defendants withdrew as counsel of record on 3 July 1989. The allegations do not reveal when the attorney ceased representing the plaintiff with regard to the matters which are the basis of this malpractice action. This is an important distinction. An attorney who has entered an appearance in any civil action cannot withdraw of record except on order of the court. Rule 16, General Rules of Practice for the Superior and District Courts (1993). "As between the attorney and his client, the relationship may, in good faith, be dissolved at any time." *High Point Bank and Trust Co. v. Morgan-Schultheiss, Inc.*, 33 N.C. App. 406, 414, 235 S.E.2d 693, 698, *disc. rev. denied*, 293 N.C. 258, 237 S.E.2d 535 (1977), *cert. denied*, 439 U.S. 958, 58 L. Ed. 2d 350 (1978). Thus as between the attorney and the client, the relationship may in some instances terminate prior to the date the attorney withdraws

of record. We cannot, therefore, equate the date of the attorney's withdrawal of record with the date the attorney ceased representing the client with regard to the matters which are the basis of the malpractice action. Therefore, the doctrine of continuing representation does not apply and the statutes of limitations and repose accrued on the date of the "last act of the defendant[s] giving rise to the cause of action."

In this case, plaintiff alleges defendants were negligent in advising her to sign a consent decree on 7 November 1984 which waived her right to alimony and her right to inherit from her former husband in the event he were to die before the parties divorced. The plaintiff also claims some negligent conduct with respect to the 7 November 1984 decree as it related to attorney fees. Even assuming plaintiff sustained injuries from these alleged negligent acts which were "not readily apparent," plaintiff's claims based on these alleged acts of negligence are barred because they must have been filed on or before 8 November 1988 or within four years of the alleged negligent acts.

The plaintiff further alleges that defendants were negligent in failing to obtain discovery "from 1985 to December 13, 1988." Again assuming that injuries to plaintiff for the alleged negligent acts between 1985 and 7 June 1988 were "not readily apparent," plaintiff's claim based on these alleged acts of negligence is barred because it was not filed on or before 8 June 1992 or within four years of the alleged negligent acts. The claim based on the alleged negligent acts occurring between 8 June 1988 and 13 December 1988 are barred for a different reason. After plaintiff employed new counsel "in 1989," she should have discovered the negligence of defendants with regard to the discovery. Because plaintiff should have discovered defendants' negligence within two years of its occurrence, the statute of repose does not apply and plaintiff was therefore required to file this claim within three years of the date of the occurrence of defendants' negligence—on or before 14 December 1991. N.C.G.S. § 1-15(c) (1983).

The plaintiff also alleges that defendants were negligent in failing to file an alienation of affection claim against Susan Willis Johnson. Because plaintiff employed defendants on 22 June 1984 to seek alimony from her former husband, an equitable distribution of the marital property, and to file an action against Susan Willis Johnson for alienation of affection, plaintiff's claim for alienation

of affection necessarily accrued sometime prior to 22 June 1984. *See* 41 Am. Jur. 2d, *Husband and Wife* § 481 (1968) (alienation of affection claim accrues at the time of the loss of affection). Because the tort of alienation of affection has a three-year statute of limitations, N.C.G.S. § 1-52(5), that claim was therefore required to have been filed no later than 23 June 1987. Accordingly, if defendants were negligent in not filing such a claim, and assuming that injury to plaintiff was "not readily apparent," plaintiff's claim on this basis is barred because it was not filed on or before 23 June 1991 or within four years of the alleged negligent act.

Plaintiff finally alleges that defendants, prior to the 2 June 1988 consent decree, permitted the dissipation of marital assets. Again, if defendants were negligent in this respect and even assuming that plaintiff sustained injuries that were not "readily apparent," this claim is barred because it was not filed on or before 3 June 1992 or within four years of the alleged negligent act.

Accordingly, the trial court was correct in dismissing plaintiff's claims based on negligence and breach of contract.

Fraud and Breach of Fiduciary Duty

[2] Material facts and circumstances constituting fraud must be plead in a complaint with particularity. N.C.G.S. § 1A-1, Rule 9(b) (1990); *Moore v. Wachovia Bank and Trust Co.*, 30 N.C. App. 390, 391, 226 S.E.2d 833, 835 (1976). "Mere generalities and conclusory allegations of fraud will not suffice." *Moore*, 30 N.C. App. at 391, 226 S.E.2d at 835. This is so for both fraud and constructive fraud. *See Watts*, 317 N.C. at 116-17, 343 S.E.2d at 884. Constructive fraud rests upon the presumption arising from a breach of a fiduciary obligation. *Moore*, 30 N.C. App. at 392, 226 S.E.2d at 835. The complaint in this case does not meet the requirements of particularity with regard to fraud or constructive fraud and presents nothing more than conclusory statements with regard to these claims. The claims as alleged are nothing more than claims for negligence. *See Childers v. Hayes*, 77 N.C. App. 792, 795, 336 S.E.2d 146, 148 (1985) (breach of fiduciary duty claim treated as one for negligence), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 892 (1986). Accordingly, the claims denominated fraud and breach of fiduciary duty were properly dismissed.

Affirmed.

Judges MARTIN and JOHN concur.

KENNETH W. LONG AND ROBERT C. HOWE, PLAINTIFFS-APPELLANTS v. VERTICAL TECHNOLOGIES, INC., A NORTH CAROLINA CORPORATION, AND MELLON BANK, N.A., A NATIONAL BANKING ASSOCIATION, DEFENDANTS-APPELLEES

No. 9220SC1110

(Filed 15 February 1994)

1. **Libel and Slander §§ 43, 44 (NCI4th)— slander—plaintiffs' misuse of company resources—statements protected by qualified privilege—statements not actionable per se**

The trial court did not err in allowing defendants' motion for partial summary judgment on plaintiffs' complaint for slander and defamation since the statements in question were made during a staff meeting regarding plaintiffs' termination of employment; one plaintiff acknowledged that the statements were made in good faith and without malice; the statements thus were not actionable by reason of qualified privilege; and though the statements may have related to plaintiffs' not doing business in the best interests of defendant or their misuse of company resources, the statements nevertheless were not actionable per se as it was not shown that they were false, touched plaintiffs in their trade or occupation, and contained an imputation necessarily hurtful in its effect on plaintiffs' business.

Am Jur 2d, Libel and Slander § 444.

2. **Labor and Employment § 68 (NCI4th)— no wrongful termination of employment—sufficiency of evidence**

The trial court did not err in failing to find that plaintiffs were wrongfully terminated where the evidence tended to show that plaintiffs sold their computer software company, VTI, to defendants; plaintiffs entered into employment agreements with VTI; plaintiffs subsequently formed two new companies while working for VTI; they did not disclose to defendants all of their activities with regard to use of VTI property to further the affairs of their company, including use of VTI employees, facilities, computers, computer programs, telephone number and address; and plaintiffs still had a fiduciary duty of loyalty and fair dealing as long as they were employees of VTI.

Am Jur 2d, Master and Servant §§ 60-70.

3. Labor and Employment § 39 (NCI4th)— breach of loyalty and fiduciary obligations by employees—damages—sufficiency of evidence

The trial court did not err in finding that defendant was entitled to recover from plaintiffs approximately $70,000 representing the fair value of services plaintiffs caused defendant to provide to plaintiffs' company which they operated on the side, since the evidence showed that plaintiffs caused defendant's employees to spend 753 hours of work time on the development of plaintiffs' side company's products, and defendant presented evidence that the hourly rate for the work was $93.

Am Jur 2d, Master and Servant §§ 2, 14.

Appeal by plaintiffs from judgment entered 23 July 1992 by Judge Melzer A. Morgan, Jr. in Union County Superior Court. Heard in the Court of Appeals 5 October 1993.

Koy E. Dawkins, P. A., for plaintiffs-appellants.

Robinson, Bradshaw & Hinson, P. A., by A. Ward McKeithen, for defendants-appellees.

JOHNSON, Judge.

Plaintiff Kenneth W. Long (Long) formed a corporation, Vertical Technology, Inc. (VTI) in 1984. VTI operated under the name of Backroom Systems Group, developing and selling computer programs to be used with small computers or PC's in the financial industry. Plaintiff Robert C. Howe (Howe) was Senior Vice President and Operations Manager for VTI. In September 1988, VTI was purchased by defendant Mellon Bank (Mellon) and both Long and Howe entered into employment agreements with VTI for a term of three years; the agreements were identical except as to salary and bonus compensation. In 1990, Mellon began putting VTI's employees, including Long and Howe, on the Mellon payroll. This caused conflicts between Long, Howe and the Mellon officers. In the summer of 1990, Long and Howe were informed they were going to be terminated because of these conflicts, but compensated until the end of their respective employment agreements. Long and Howe then formed two new companies, Financial Systems Group, Inc. (FSG) and Protocorp, Inc., which they planned to operate after their termination. However, the Mellon officer who had decided

to terminate Long and Howe left before the termination was put into effect, and Long and Howe were not terminated that summer.

In August of 1990, the Mellon officer in charge of VTI, Allan Woods (Woods) met with Long and began discussing a buy-back or repurchase of VTI by Long and Howe. During the exchange of offers and negotiations, Long wrote Woods a letter in which he disclosed the formation of the two new companies; discussed alternatives for the survival of VTI, including the repurchase from Mellon Bank; and stated "I feel very awkward at this point proposing any sort of business case from a Mellon manager point of view. The only alternative I feel I am left with is to approach you as one business man to another looking for a deal that will be mutually beneficial."

One of the new companies formed by Long and Howe, FSG, was operated by Terry Nelson (Nelson), a former VTI sales representative. In October 1990, Nelson sent out solicitation letters introducing FSG, identifying himself as a former VTI employee, and identifying Long and Howe as president and senior vice president of VTI and as "other principals" of FSG. This letter went to a number of VTI and Mellon customers.

In January 1991, a force of Mellon officers and employees including the newly elected President of VTI, James Luisi, took over the operation of VTI and terminated Long and Howe. Long and Howe were informed they were terminated "for cause" and would be compensated only for January 1991. Long and Howe both filed an action against VTI and Mellon alleging wrongful termination, slander and defamation. VTI and Mellon countered alleging breach of loyalty and fiduciary obligations and claiming damages for Long and Howe using VTI facilities and personnel in connection with FSG projects. A motion for summary judgment was filed by defendants on the issues of slander and defamation, and the trial court granted defendants partial summary judgment. Plaintiffs' claim for wrongful termination and defendants' counterclaims were tried before the trial court without a jury in Union County Superior Court. The trial judge held for defendants and entered judgment against plaintiffs. From the judgment entered, plaintiffs appeal.

[1] The first issue presented for review is whether the trial court erred in allowing defendants' motion for partial summary judgment on plaintiffs' complaint, count II slander and defamation.

Summary judgment is a device whereby judgment is rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law." N.C.R. Civ. P. 56(c). "Thus a defending party is entitled to summary judgment if he can show that claimant cannot prove the existence of an essential element of his claim, . . . or cannot surmount an affirmative defense which would bar the claim." *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981) (citation omitted). "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986) (citation omitted). The issue before us then is whether the evidence taken in a light most favorable to plaintiffs was sufficient to establish any genuine issue of material fact. We hold as a matter of law, it was not.

Plaintiffs contend that James Luisi, the newly elected President of VTI, slandered or defamed plaintiffs by making demeaning and prejudicial statements to third parties. The statements in question, "insinuated that Long and Howe were not handling business correctly and . . . doing something 'shady'." Defendants however, argue that the statements are qualifiedly privileged.

> Slander is commonly defined as "the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood." . . . Slander, . . . may be actionable *per se* or only *per quod*. That is, the false remarks in themselves (*per se*) may form the basis of an action for damage, in which case both malice and damage are, as a matter of law, presumed; or the false utterance may be such as to sustain an action only when causing some special damage (*per quod*), in which case both the malice and the special damage must be alleged and proved. (Citations omitted.)

Beane v. Weiman Co., Inc., 5 N.C. App. 276, 277, 168 S.E.2d 236, 237 (1969). However, even if it is determined that a statement is slanderous, the law recognizes certain communications as privileged. Privilege does not destroy the actionable character of a defamatory communication, but is available only by way of defense.

> A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he

> has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.

Troxler v. Charter Mandala Center, Inc., 89 N.C. App. 268, 272, 365 S.E.2d 665, 668, *disc. review denied*, 322 N.C. 838, 371 S.E.2d 284 (1988) (citations omitted). The essential elements for the qualified privilege to exist are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion and publication in a proper manner and the proper parties only. *Stewart v. Check Corp.*, 279 N.C. 278, 182 S.E.2d 410 (1971). Additionally, a qualified privilege may be lost by proof of actual malice on the part of the defendant. *Id.*

The depositions of Enroth, and Fortson, employees of VTI to whom the alleged statements were made, show that the statements in question were made during a VTI staff meeting regarding the termination of Long and Howe. Additionally, Long acknowledged that the statements were made in good faith and without malice. Thus, the alleged statements are not actionable by reason of qualified privilege and the lack of evidence to support that the statements were not made in good faith and with malice.

Alternatively, plaintiffs allege the statements made by defendants' agent were slanderous per se because they were uttered about plaintiffs' business or professional relationship.

There are several categories of slander which are actionable per se: (1) statements which charge plaintiff with a crime or an offense of moral turpitude; (2) statements which impeach his/her trade or profession; (3) statements which impute to him/her a loathsome disease. *Williams v. Freight Lines, Inc. and Willard v. Freight Lines, Inc.*, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

The alleged statements in question, are slander per se only if they come under the second category listed above, i.e., statements which impeach one's trade or profession. In order to come within this category of slander, the false statement must do more than merely injure a person in his business. The false statement " '(1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business.' " *Tallent v. Blake*, 57 N.C. App. 249, 253, 291 S.E.2d 336, 339 (1982) (citations omitted). Moreover, in order to be ac-

tionable, the defamatory statement must be false. The truth of a statement is a complete defense. *Parker v. Edwards*, 222 N.C. 75, 21 S.E.2d 876 (1942).

From the depositions presented, it appears that the alleged slanderous comments were related to Long and Howe not doing business in the best interest of VTI and their misuse of VTI resources. We do not find that these statements meet the test set out in *Tallent*. Nor do we find that the statements are false. We therefore find the trial court correctly granted defendants partial summary judgment as to the slander and defamation claims.

[2] Plaintiffs argue next that the trial court erred in failing to find (1) that the relationship of Long and Howe to the newly formed companies was sufficiently disclosed to Mellon and that a new relationship existed between Long, Howe and Mellon after the letter dated 24 August 1990 and (2) that plaintiffs were wrongfully terminated.

This argument relates to the findings of fact and conclusions of law made by the trial judge. The standard for review as to findings of fact made by a trial judge is the same standard used to evaluate a jury trial; the findings of fact are conclusive if supported by competent evidence. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). Where trial is by judge and not by jury, the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. *Id.*

Long and Howe argue that Long wrote a letter to Mellon in which he disclosed their formation of two new companies; discussed the alternatives for the survival of VTI, including the repurchase from Mellon; and stated "I feel very awkward at this point proposing any sort of business case from a Mellon manager point of view. The only alternative I feel I am left with is to approach you as one business man to another looking for a deal that will be mutually beneficial." With that letter Long and Howe argue a new relationship existed because they began an exchange of offers and negotiations for Long and Howe to buy back VTI from Mellon. Plaintiffs also argue that this letter sufficiently disclosed to Mellon the formation and activities of the two new companies.

However, we note that: (1) the letter did not sufficiently disclose all of the activities of Long and Howe in regard to their use of VTI property to further FSG affairs and (2) Long and Howe still had a fiduciary duty of loyalty and fair dealing as long as they were employees of VTI. In essence, no new relationship was formed as argued by plaintiffs.

Additionally, Long and Howe admitted in their depositions that they did not disclose many of their activities to Mellon. They also acknowledged that they: (1) caused VTI resources, including employees, facilities, computers and computer programs to be used to develop the computer software products of FSG and to advance the business of FSG; (2) caused and allowed persons employed by and working for FSG and not employees of VTI to have offices at VTI and to have use of VTI computers and programs to develop FSG products; (3) used the VTI address and telephone number on promotional materials and products of FSG and maintained and stored FSG records and files on VTI's computer system; and (4) themselves actively worked for and promoted FSG's product and development and business during normal business hours.

> Manifestly, when a servant becomes engaged in a business which necessarily renders him a competitor and rival of his master, no matter how much or how little time and attention he devotes to it, he has an interest against his duty. It would be monstrous to hold that the master is bound to retain the servant in his employment after he has thus voluntarily put himself in an attitude hostile to his master's interests. (Citations omitted.)

In re Burris, 263 N.C. 793, 795, 140 S.E.2d 408, 410 (1965). Additionally, where an employee deliberately acquires an interest adverse to his employer, he is disloyal, and his discharge is justified. *Id.* The law as well as the evidence is thus clear. The trial court properly concluded that the activities of Long and Howe constituted: (1) a material breach of their express contractual duties under the agreements to perform their services in good faith and in the best interests of VTI; (2) a material breach of their fiduciary duty of good faith, fair dealing and loyalty to VTI; and (3) actions for which they should have been discharged.

Next, plaintiffs contend and argue that defendants acted in bad faith by failing to inform them of concerns regarding conflicts of interest or a breach of fiduciary duties, even though it was

considered a serious threat to plaintiffs' continued employment and sale of VTI to them. However, we find that there is sufficient evidence to support the trial court's finding that defendant Mellon engaged in good faith discussions with plaintiffs regarding the possible purchase of VTI. Additionally, we find that there is sufficient evidence to support defendant Mellon's decision to continue to employ plaintiffs until they were able to form an honest belief that plaintiffs were no longer loyal or performing in good faith.

[3] Plaintiffs finally argue that the trial court erred in finding that VTI was entitled to recover from Long and Howe the sum of $70,029.00 representing the fair value of services plaintiffs caused VTI to provide to FSG. We disagree.

The evidence shows that Long and Howe caused VTI employees to spend 753 hours of VTI work time on the development of FSG products. VTI presented evidence that the hourly rate for the work was $93.00. The evidence supports the trial court's finding that VTI is entitled to $70,029.00. Therefore, we find the conclusion of the trial court, that Long and Howe were jointly and severally liable to VTI for the fair value of the services they caused VTI to provide FSG, and that the fair value of such services is $70,029.00 is fully supported by the evidence.

The decision of the trial court is affirmed.

Judges COZORT and McCRODDEN concur.

STATE OF NORTH CAROLINA, PLAINTIFF-APPELLEE v. WILBUR HARRY JACOB, JR., DEFENDANT-APPELLANT

No. 9221SC1311

(Filed 15 February 1994)

1. Evidence and Witnesses § 372 (NCI4th)— rape of daughter— earlier rape of another daughter—admissibility to show plan or scheme

In a prosecution of defendant for first-degree statutory rape of his daughter, the trial court did not err in denying defendant's motion to suppress evidence of defendant's molesta-

tion of another daughter several years earlier, since the daughter's testimony was sufficiently similar to that recounted by the victim concerning the manner of abuse to show a common plan or scheme, and remoteness in time did not make the daughter's testimony inadmissible because it was due to defendant's having almost no access to the daughters of his first marriage following his divorce.

Am Jur 2d, Evidence § 126.

2. Constitutional Law § 367 (NCI4th)— consecutive life terms— no cruel or unusual punishment

The trial court did not err in sentencing defendant to consecutive terms of life imprisonment, since imposition of consecutive terms, standing alone, does not constitute cruel or unusual punishment.

Am Jur 2d, Criminal Law §§ 625 et seq.

Appeal by defendant from judgments entered 23 July 1992, by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 28 September 1993.

Attorney General Michael F. Easley, by Special Deputy Attorney General Henry T. Rosser, for the State.

Wilson, DeGraw & Johnson, by Thomas A. Fagerli, for defendant appellant.

COZORT, Judge.

Defendant Wilbur Harry Jacob, Jr., was convicted of two counts of first-degree statutory rape. Defendant appeals the judgments entered 23 July 1992, contending (1) the trial court erred in denying defendant's motion in limine to suppress the introduction of evidence of the molestation of one of defendant's other daughters; and (2) the trial court erred in sentencing defendant to consecutive terms of life imprisonment. We conclude defendant received a fair trial free from prejudicial error.

At trial the State's evidence included testimony by defendant's daughter, "A.J.," who testified to three acts of sexual intercourse between her and her father when she was ten years old. A.J. testified that on each occasion, her father came into her room, forced her to pull down her pants and lie face down on the bed,

and raped her. A.J. did not come forth with accusations that defendant had sexual intercourse with her until her older stepsister, B.L., revealed that B.L. had been sexually molested by defendant when she was nine years old. When the accusations by B.L. came to light, A.J.'s mother confronted A.J., who admitted that defendant had sexually molested her.

Dr. Michael Lawless, an expert in pediatrics, testified that he examined A.J., and, in his opinion, she had been sexually molested. Dr. Lawless based his opinion not only on his physical examination, but also on A.J.'s story, "what she said, how she told it," and because the injury pattern was "consistent with sexual molestation."

B.L. testified that she was the victim's stepsister. B.L., who was twenty-two years old at the time of trial, testified that she experienced flashbacks to when her father abused her as a young girl. B.L. testified that her dreams triggered memories of her father coming into her bedroom, putting her face down on the bed, and then "when I got up to use the bathroom it would burn." She testified that the only statement she remembered him making was that "when I started my period he'd have to stop." As a result, B.L. told her mother that she had started her menstrual period when she was nine years old, when in actuality, she began menstruating at age eleven.

Toni Southern testified that she was defendant's daughter and B.L.'s younger sister. Ms. Southern testified that during visits with their father when the girls were nine or ten years old, he would climb into bed with them. Ms. Southern stated that on one such occasion, "I was against the wall and I had my leg over [B.L.'s] and once he got in the bed he pushed my leg off of hers and whenever—that's all that I remember but whenever he left the room, she was crying and then after we had got up there was blood on the sheets."

Defendant testified denying all allegations of sexual abuse.

[1] Defendant first contends the trial court erred in denying defendant's motion in limine to suppress the evidence of molestation of defendant's daughter B.L. Specifically, defendant objected to the introduction of evidence of prior bad acts pursuant to N.C.R. Evid. 404(b), alleging the events were too remote in time to the acts which were the subject of this prosecution. Defendant also alleges that, even if the testimony was admissible under Rule 404,

its probative value was outweighed by its prejudicial effect, in violation of N.C.R. Evid. 403.

N.C. Gen. Stat. § 8C-1, Rule 404(b) permits evidence of other crimes, wrongs or acts to be introduced to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident. North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges. *State v. McCarty*, 326 N.C. 782, 785, 392 S.E.2d 359, 361 (1990). Evidence of other similar sexual offenses may be admitted to show a common scheme or plan to molest children. *See, i.e., State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986); *State v. Goforth*, 59 N.C. App. 504, 297 S.E.2d 128 (1982), *rev'd on other grounds*, 307 N.C. 699, 307 S.E.2d 162 (1983).

In the present case, pursuant to *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), prior to admitting the evidence, the trial court conducted a voir dire of B.L. to determine the admissibility of her testimony. The trial court subsequently made the following findings of fact:

> (1) [B.L.] is the daughter of the defendant by his previous wife Vicky Hilton.
>
> (2) [B.L.] was living in the same home as the defendant during her prepubescent years.
>
> (3) During the time that [B.L.] was living in the home, the defendant was an adult male in a position of authority.
>
> (4) There came a time at night when the defendant came into the bedroom where [B.L.] was situated. He put her on her stomach, pushed the leg of Toni Southern off of [B.L.] and thereafter took such liberties with her person that blood was observable on the sheets when she got up and that she burned when she urinated after such contact.
>
> (5) The defendant came by night into the bedroom clad only in his underwear.
>
> (6) The defendant told [B.L.] he would have to stop when she started her period.
>
> (7) The defendant's words and deeds were such that [B.L.] was afraid and had dreams as a result.

(8) This type of activity took place on more than one occasion.

(9) Approximately one year ago in July, [B.L.] disclosed to her mother Vicky Hilton, then divorced from the defendant, that "daddy had molested her when she was young several times."

(10) These assaults by the defendant took place when [B.L.] was nine or ten years old but she was not menstruating at the time.

(11) [B.L.'s] sister Toni Southern was in the bedroom when the defendant entered on one occasion and recalls the defendant pushing her leg off of [B.L.]. She observed [B.L.] crying after the defendant had been there and observed blood on the sheets when [B.L.] got up although the defendant did not touch her (Toni Southern) at that time.

(12) At the time he assaulted [B.L.] and at the time he assaulted [A.J.], the defendant harbored a common plan and scheme to molest his minor prepubescent daughters by way of initiation and instruction in sexual intercourse and to take sexual advantage of them as a result.

(13) The defendant confirmed his on-going plan to molest his minor prepubescent daughters and his unnatural disposition toward them in a conversation with Alma Shore when he stated to her "when my daughters get old enough to know about love, he was going to be the one to teach them."

(14) This on-going plan and scheme to molest his minor prepubescent daughters and his unnatural disposition toward them existed at the time he assaulted [B.L.] and thereafter carried over and continued unabated and undiminished during the interval of time between the last assaultive episode against [B.L.] and the start of the first of the assaultive behavior against [A.J.].

Based on the foregoing findings, the trial court concluded that the evidence was admissible to show a common plan or scheme by defendant to molest his prepubescent daughters and to disclose the defendant's unnatural lust on his part toward his daughters, which remained unabated and undiluted by the passage of time. The trial court further concluded that the ongoing plan or scheme

transcended the time between the last assaultive episode against B.L. and the time of the first assaultive behavior toward the victim, since the plan was for defendant to be the first individual to initiate sexual intercourse with his daughters whenever, in his eyes, they came of age.

In *McCarty*, a case with facts similar to the case at bar, our Supreme Court found no error where the victim's twenty-two-year-old stepsister testified that the defendant father had molested her from the time she was nine years old until she was 18. The Court determined that the testimony was admissible to show a scheme or plan by defendant to molest his stepdaughter and daughter. *McCarty*, 326 N.C. at 785, 392 S.E.2d at 361. In order to be admissible, evidence of prior sexual misconduct admitted to show a common plan or scheme must be sufficiently similar in nature and not too remote in time. *State v. Davis*, 101 N.C. App. 12, 19, 398 S.E.2d 645, 649 (1990), *disc. review denied*, 328 N.C. 574, 403 S.E.2d 516 (1991). As in *McCarty*, B.L.'s testimony was admissible to show a common plan or scheme to sexually molest his young daughters.

First, B.L.'s testimony in the case below was sufficiently similar to the testimony recounted by A.J. concerning the manner of abuse. Both daughters testified that defendant had forcible sexual intercourse with them after placing them face down on the bed. The acts occurred when each girl was nine or ten years old. Neither reported the abuse during that time because defendant said he would hurt them and they would be in trouble.

Defendant does not deny that the manner of abuse was sufficiently similar; rather, defendant's main contention is that the incidents of abuse were too remote in time to be admissible. Defendant claims the holding in *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988), *disc. review denied*, 328 N.C. 95, 402 S.E.2d 423 (1991), governs the present case and bars the evidence from being admitted due to remoteness in time. The Court in *Jones* determined that remoteness in time affected the admissibility of the evidence. *Id.* at 589-90, 369 S.E.2d at 825. In *Jones*, the acts had been committed seven years prior to the onset of the conduct for which Jones was convicted. The trial court failed to make specific findings indicating the significance of the remoteness factor, and the omission was found to be error. Because the trial court made the requisite findings in the present case, we find *Jones* to be distinguishable.

The facts below are more comparable to a recent case in this Court, *State v. Matheson*, 110 N.C. App. 577, 430 S.E.2d 429 (1993). We held in *Matheson* that, in a prosecution for second degree rape against the defendant father, testimony by another stepdaughter concerning earlier rapes was admissible under N.C.R. Evid. 404(b), since the acts testified to were similar to the conduct toward the victim. The Court found the evidence relevant to show a common plan or scheme on the part of defendant to sexually assault his stepdaughters. Despite the fact that the rape of the other stepdaughter had occurred ten years earlier, the acts were not so remote in time to deem the evidence inadmissible. The Court explained:

> While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

Matheson, 110 N.C. App. at 583, 430 S.E.2d at 432 (quoting *State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) (citations omitted)).

The remoteness factor must be examined carefully to determine whether the plan or scheme of molestation was interrupted or ceased due to underlying circumstances, and then resumed in a continual fashion. For example, in *State v. Davis*, this Court determined that a ten-and-one-half-year period between the defendant's prior sexual misconduct and the crime for which he was tried was not so remote in time as to render the evidence inadmissible, since the defendant had been in prison for the majority of that time. *Davis*, 101 N.C. App. at 20, 398 S.E.2d at 650.

Here, the remoteness in time was due to defendant's having almost no access to the daughters of his first marriage following his divorce. Defendant divorced Vicky Hilton in 1975, and he seldom had contact with B.L. and Toni Southern thereafter. In July of 1975 defendant married A.J.'s mother. A.J. was not born until 16 April 1979, and did not reach a prepubescent age until several years later. One of the State's witnesses testified the defendant told her that when his daughters "got old enough to know about love," that "he was going to be the one to teach them." As in

Davis, we find that circumstances prevented the defendant from carrying out his plan to sexually molest his daughters for an extended period of time, however, once the opportunity presented itself, defendant resumed the sexual abuse. Accordingly, we conclude that the remoteness in time in the present case does not make B.L.'s testimony regarding defendant's prior sexual abuse inadmissible.

Furthermore, the evidence was not violative of N.C.R. Evid. 403. Although the evidence was harmful to defendant's case, its probative value outweighed the possibility of unfair prejudice. We conclude the trial court did not err in admitting the evidence pursuant to Rules 404(b) and 403.

[2] Defendant next alleges that the trial court erred in sentencing defendant to consecutive terms of life imprisonment. Defendant claims the imposition of consecutive life sentences constituted an abuse of discretion and cruel and unusual punishment. Defendant's argument is unpersuasive. Pursuant to N.C. Gen. Stat. § 15A-1354(a) (1988), a trial court has express authority to impose a sentence consecutive to any other sentence imposed at the same time. And, "[t]he imposition of consecutive sentences, standing alone, does not constitute cruel or unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). We find no abuse of discretion or constitutional violation in the sentencing.

No error.

Judges JOHNSON and McCRODDEN concur.

KEITH MARCELLETTE EDWARDS, PLAINTIFF-APPELLEE v. PAUL HARDIN, IN HIS PERSONAL AND OFFICIAL CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL (UNC-CH), BEN TUCHI, IN HIS PERSONAL AND OFFICIAL CAPACITY AS VICE CHANCELLOR OF THE UNC-CH, CHARLES ANTLE, IN HIS PERSONAL AND OFFICIAL CAPACITY AS ASSOCIATE VICE CHANCELLOR OF THE UNC-CH, DAN BURLESON, IN HIS PERSONAL AND OFFICIAL CAPACITY AS DIRECTOR OF EMPLOYEE RELATIONS, ROBERT SHERMAN, IN HIS PERSONAL AND OFFICIAL CAPACITY AS DIRECTOR OF PUBLIC SAFETY AT UNC-CH, CHARLES MAUER, IN HIS PERSONAL AND OFFICIAL CAPACITY AS CHIEF OF POLICE AT THE UNC-CH, AND JOHN DEVITTO, IN HIS PERSONAL AND OFFICIAL CAPACITY AS DIRECTOR OF PUBLIC SAFETY AT THE UNC-CH, DEFENDANTS-APPELLANTS

No. 9215SC1316

(Filed 15 February 1994)

Trial § 456 (NCI4th)— jury issues stated in the disjunctive— defendants deprived of right to unanimous and unambiguous verdict

The trial court erred in submitting to the jury an issue as to whether each defendant had deprived plaintiff "of any of her rights under the First or Fourteenth Amendments to the United States Constitution by" committing the particular acts alleged as to each, since submitting the issues to the jury in the disjunctive deprived each defendant of his right to a unanimous and unambiguous verdict.

Am Jur 2d, Trial §§ 732 et seq.

Appeal by defendants from judgment entered 15 July 1992 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 15 November 1993.

Plaintiff began to work for the University of North Carolina at Chapel Hill (UNC-CH) Public Safety Department in May 1974 as a Police Officer I. She remained the only black female officer employed by the UNC-CH Public Safety Department (the Department) until January 1990. Defendant Robert Sherman served as director of public safety at UNC-CH from 1980 until November 1989. Defendant Charles Mauer joined the Department in 1965, became major in charge (later known as chief), and left the Department in 1990. Defendant John DeVitto served as acting director of the Department from 13 November 1989 through 31 January 1991.

In 1979, based on a series of alleged discriminatory practices, plaintiff wrote a letter to the University's president. The President

responded by recommending that plaintiff use the campus grievance procedure, which involved a three step process. Step I grievances were heard by the immediate supervisor or department head. A grieving employee could appeal a Step I decision to Step II, where the UNC-CH Employee Relations Office would investigate and make a decision based on the grievance. A dissatisfied grieving employee thereafter could appeal that decision to Step III, where a panel of university employees would hear evidence and make a recommendation for ultimate decision by the chancellor. Finally, if the petitioner was still not satisfied, she had the right to appeal outside the University. Over the next decade, plaintiff followed the President's advice, and encouraged other officers to raise their criticisms in the same manner.

Using the internal grievance process, plaintiff alleged that several of her department superiors began a "retaliatory campaign" to label plaintiff as a troublesome employee and to isolate her from her fellow officers. Among the specific acts of retaliation alleged by plaintiff were: a 1987 department reorganization in which she and fourteen other officers had not been allowed to apply for new positions; the failure to hire other black females until 1990, thereby isolating plaintiff; the removal of plaintiff from an interview panel; a defendant's instruction to plaintiff that she pin her hair up in accordance with the Department's procedures manual while failing to require a white female officer to do the same; and the failure to promote plaintiff to a Crime Prevention Officer (CPO) position, and instead promoting a white male officer with less experience. Plaintiff contended that the retaliation against her for protesting acts of discrimination at the University continued until she filed a civil lawsuit, which has ultimately led to this appeal.

After several years of filing internal grievances with UNC-CH, plaintiff brought suit against the defendants Sherman, Mauer and DeVitto, and four other officials of the University, alleging several claims for relief, including violations of plaintiff's constitutional rights. All claims against defendants in their official capacity were dismissed, and all claims except the constitutional claim were also dismissed. The case went to trial at the 22 June 1992 civil session. At the close of plaintiff's evidence, the trial court granted defendants' motion for a directed verdict as to defendants Hardin, Tuchi, Antle and Burleson. The jury found that plaintiff was deprived of her constitutional rights and assessed compensatory and punitive

damages against the remaining defendants. These defendants appeal from the judgment entered.

Alan McSurely for plaintiff-appellee.

Attorney General Michael F. Easley, by David M. Parker, Assistant Attorney General, for defendant-appellants.

ARNOLD, Chief Judge.

Defendants offer four assignments of error on appeal. They contend that the trial court erred by submitting the issues to the jury in the disjunctive, thereby depriving each defendant of his right to a unanimous and unambiguous verdict. Over the objections of defendants, the verdict sheet submitted to the jury asked whether each defendant had deprived plaintiff "of any of her rights under the First *or* Fourteenth Amendments to the United States Constitution by" committing the particular acts alleged as to each. Defendants argue that because of the ambiguity of the manner in which the issues were phrased, defendants have been deprived of their right to a unanimous verdict. We agree.

"A verdict is a unanimous decision of the jury returned to the court and it is a substantial right of which neither party can be deprived." *Holstein v. Oil Co.*, 36 N.C. App. 258, 260, 243 S.E.2d 397, 398 (1978). "[W]hile a verdict is not a judgment, it is the basis on which a judgment may or may not be entered. Hence a verdict should be certain and import a definite meaning free from ambiguity." *Gibson v. Insurance Co.*, 232 N.C. 712, 716, 62 S.E.2d 320, 322 (1950) (citations omitted). "A verdict, whether upon one or many issues, should be certain and determinative of the controversy." *Edge v. Feldspar Corp.*, 212 N.C. 246, 247, 193 S.E. 2, 3 (1937).

In the recent case of *Foy v. Spinks*, 105 N.C. App. 534, 414 S.E.2d 87 (1992), this Court held as reversible error the submission of the following landlord-tenant issue phrased in the alternative:

> 3. Did plaintiffs fail to maintain the house rented by defendant in compliance with the Winston-Salem Housing Code or fail to make all repairs necessary to put and keep the house in fit and habitable condition?
>
> ANSWER: Yes

Id. at 538, 414 S.E.2d at 88. Relying on our Supreme Court's decisions in *Edge* and *Gibson*, this Court reversed because "the phrasing of this issue prevented the jury from establishing either of the alternative propositions with certainty or definiteness," thereby necessitating a new trial. *Id.* at 539, 414 S.E.2d at 89. " 'It is misleading to embody in one issue two propositions as to which the jury might give different responses.' " *Edge*, 212 N.C. at 247, 193 S.E.2d at 2 (quoting *Emery v. R.R.*, 102 N.C. 209, 9 S.E. 139 (1889)).

Similar to the trial courts in *Foy*, *Edge* and *Gibson*, the trial court in the case at bar submitted two propositions, the First Amendment and the Fourteenth Amendment Equal Protection Clause, to the jury in the alternative. The ambiguity of the manner in which the instructions were set forth and the uncertainty of the verdict rendered are indisputable. For example, in deciding whether Defendant Mauer deprived plaintiff "of any of her rights under the First or Fourteenth Amendments to the United States Constitution by . . . [o]rdering the plaintiff to pin up her hair and not requiring white female officers to do the same thing," some jurors may have determined that Defendant Mauer violated plaintiff's First Amendment right to free speech, while others determined that her Fourteenth Amendment right to equal protection was violated. Some jurors may have determined that both rights were violated. The trial court underscored the alternative nature of the issues submitted by instructing the jury,

> Ms. Edwards claims that the defendants in this case have deprived her of two of her constitutional rights: One, her right to freedom of speech under the First Amendment; and two, her right to equal protection under the Fourteenth Amendment.
>
> . . . .
>
> . . . [Y]ou should go down through those items listed . . . and if you find by the greater weight of the evidence that the [defendants] did the particular thing under consideration, and this was done as retaliation for protected free speech *or* that it was done in violation of the equal protection clause, . . . then you would answer the item yes.

Plaintiff contends that because the jury instructions at issue adequately informed the jury of relevant considerations and provided a basis in law for its verdict, the instruction phrased in the

alternative was not erroneous. She relies on *Griffin v. United States*, 502 U.S. ---, 116 L. Ed. 2d 371 (1991), *reh'g denied*, --- U.S. ---, 117 L. Ed. 2d 484 (1992), which raised the issue of whether a general jury verdict on a multiple-object conspiracy charge must be set aside where the evidence is insufficient to support a conviction as to one of the objects. The two objects of the conspiracy were: (1) impairing the efforts of the IRS to ascertain income taxes, and (2) impairing the efforts of the DEA to ascertain forfeitable assets. The evidence presented at trial did not connect the defendant to the DEA object, but the trial court nevertheless instructed that the jury could return a guilty verdict against the defendant if it found her to have participated in *either* one of the two objects of the conspiracy. The jury returned a general verdict of guilty against defendant. The *Griffin* Court upheld the general verdict stating that "it would generally be preferable for the court to give an instruction removing [the inadequate theory] from the jury's consideration." *Id.* at ---, 116 L. Ed. 2d at 383. The Court further stated, however, that "[t]he refusal to do so . . . does not provide an independent basis for reversing an otherwise valid conviction." *Id.* Plaintiff relied on the following language in *Griffin* for her contention that the general verdict in this case should likewise be upheld:

> It was settled law in England before the Declaration of Independence, and in this country long afterwards, that a general verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action.

Id. at ---, 116 L. Ed. 2d at 376. Plaintiff asserts that because the jury's verdict was legally supportable on at least one of the submitted grounds, either First or Fourteenth Amendment, the verdict should stand.

We think *Griffin* is distinguishable. *Griffin* involved one offense—conspiracy—that was supported by two objects. The mere fact that one of those objects was submitted despite it being unsupported by the evidence did not render the general verdict reversible. Because the other object was legally sufficient to support the conspiracy charge, there is no reason to think that the jury could not analyze the evidence in the face of a factually inadequate theory and still find the defendant guilty of the remaining object.

In the case at bar, however, two possible, and two very different violations with different elements of proof were submitted to the jury, rather than only one offense. Plaintiff nevertheless contends that only one action, deprivation of her constitutional rights, arising from one source, the United States Constitution, was at issue. We disagree. Although the First and Fourteenth Amendments arise from the same source, and a remedy is provided by one source, 42 U.S.C. § 1983, for the violations of those substantive rights, the right to free speech and the right to equal protection are not so similarly related as to constitute one action, as plaintiff contends. *See Ward v. City of San Jose*, 967 F.2d 280 (9th Cir. 1991) (stating that ordinarily, where the jury found section 1983 liability without distinguishing between the Fourth and Fourteenth Amendment theories, circuit court would be required to reverse the verdict and order a new trial). Therefore, based on the ambiguity of the issues as phrased, and the uncertainty of the verdict as rendered, we remand for a new trial.

The remaining assignments of error concerning whether the trial court erred by (1) submitting issues not raised by the pleadings, (2) denying defendants' motions for directed verdict, judgment notwithstanding the verdict, and new trial, and (3) declining to give a requested instruction, may or may not arise at the retrial; therefore, we do not consider it necessary to address these issues in this opinion.

New Trial.

Judges WELLS and JOHNSON concur.

ANN JONES GILBERT, WIDOW OF HUGHES L. GILBERT, JR., DECEASED, EMPLOYEE, PLAINTIFF v. ENTENMANN'S, INC., EMPLOYER, AND HARTFORD ACCIDENT AND INDEMNITY CORPORATION, CARRIER, DEFENDANTS

No. 9210IC1348

(Filed 15 February 1994)

1. **Master and Servant § 56 (NCI3d)— workers' compensation—presumption of compensability—inapplicability where employee died from subarachnoid hemorrhage**

The presumption of compensability as set forth in *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, was inapplicable in this case since that presumption applies only where there is no evidence that decedent died other than by a compensable cause, while in this case the evidence indicated that decedent died from a subarachnoid hemorrhage.

Am Jur 2d, Workers' Compensation §§ 572, 573.

2. **Master and Servant § 56 (NCI3d)— workers' compensation—no causal relation between employment and injury—competent evidence to support finding**

There was competent evidence in the record to support the Industrial Commission's finding that the physical exertion required to move a heavy desk did not cause deceased employee's ruptured aneurysm.

Am Jur 2d, Workers' Compensation §§ 251, 252.

3. **Master and Servant § 94 (NCI3d)— workers' compensation—deputy commissioner's opinion adopted by full Commission—no error**

There was no merit to plaintiff's contention that it was insufficient for the full Industrial Commission merely to adopt the deputy commissioner's opinion and award without clarifying whether the fatal subarachnoid hemorrhage was caused by the minor rupture decedent suffered when moving a desk for his employer since the full Commission, in reviewing the deputy commissioner's award, has the authority to determine the case from the written transcript of the hearing before the deputy commissioner and the record before it.

Am Jur 2d, Workers' Compensation §§ 708, 709.

Appeal by plaintiff from opinion and award filed 14 October 1992 by the Industrial Commission. Heard in the Court of Appeals 17 November 1993.

Young Moore Henderson & Alvis, P.A., by David M. Duke and Carolyn Sprinthall Knaut, for plaintiff-appellant.

Cranfill Sumner & Hartzog, by Kari Lynn Russwurm, for defendant-appellee Entenmann's, Inc.

WYNN, Judge.

Plaintiff Ann Jones Gilbert seeks workers' compensation benefits for the death of her husband, Hughes L. Gilbert, Jr. Mr. Gilbert was employed with defendant Entenmann's, Inc. as a bakery distributor supervisor and his duties required him to perform such marketing and advertising functions as attending trade shows and setting up retail displays.

On 11 August 1989, pursuant to defendant's instructions, plaintiff and decedent drove to Kernersville, North Carolina to move a large desk which weighed between 250 and 300 pounds. Another employee had agreed to help decedent, but decedent arrived early and began to unload the desk alone. Decedent lifted the desk onto a hand truck and was rolling it towards defendant's office when he suddenly dropped the hand truck and clasped the back of his head in pain. His face turned pale and he began to perspire heavily. This pain was later diagnosed as a sentinel headache which is associated with a minor leakage of blood from an aneurysm in the brain. An aneurysm is a congenital defect which weakens the arterial wall of a blood vessel. An aneurysm ruptures when the arterial wall is not strong enough to withstand the forces generated by internal blood pressure.

Plaintiff and decedent then drove to Winston-Salem to pick up supplies he had to deliver to a trade show in Charlotte. During the drive, decedent complained of constant headaches. When the couple returned home, decedent began complaining of a pain in the back of his head, a stiff neck, and nausea. He did not eat well and began going to bed earlier than usual.

These complaints continued until 16 August 1989, when decedent went to Lenoir, North Carolina for a meeting at Merita Bakery. While working at the bakery, decedent collapsed and was found lying unconscious on the floor. No one witnessed his collapse. He

never fully regained consciousness, although he was able to give some medical history upon his admission to the hospital.

Decedent was examined by Dr. David M. Jones, who suspected he had suffered a subarachnoid hemorrhage, a bleeding into the fluid-filled spaces which surround the brain. Dr. Jones inserted a drain into one of these spaces to relieve excess pressure inside the head. Decedent's condition was stabilized, but early in the morning of 17 August 1989 he fatally suffered a sudden catastrophic hemorrhage which Dr. Jones diagnosed as a "massive re-bleeding episode around the brain stem."

Plaintiff then filed this action for death benefits before the Industrial Commission. The deputy commissioner received deposition testimony from three medical experts, Dr. Jones, Dr. Arthur E. Davis, Jr., a clinical pathologist, and Dr. Steven Mitchell Freedman, a neurologist, and then made the following findings of fact:

> 10. The physical effort in moving the desk did not cause the leakage from decedent's aneurysm. This finding of causation is based on the opinion of Dr. David Jones, a neurosurgeon. On the issue of causation, there was considerable disagreement, both from the testifying physicians and the medical literature. The undersigned finds significant weight in the opinion of Dr. Jones because: (1) He was the treating physician with first-hand knowledge of decedent's condition, (2) Dr. Jones' opinion is supported by Dr. Arthur Davis, a clinical pathologist, and (3) The medical literature supports, as well as disagrees, with Dr. Jones' opinion.
>
> . . .
>
> 18. The cause of decedent's death was a subarachnoid hemorrhage. The subarachnoid layer is the space between the arachnoid layer and the PIA [layer]. In this space is spinal fluid which cushions the brain. A hemorrhage into this space increases intra-cranial pressure and destroys the brain.
>
> 19. The primary factual question in the present case is as follows: Did the physical exertion of moving a desk on 11 August 1989 cause a subsequent rupture of decedent's aneurysm on 16 August 1989 and the early morning hours of 17 August 1989? Dr. Jones and Dr. Davis were of the opinion that there was no correlation between decedent's moving the desk and the rupture of his aneurysm. Dr. Freedman was asked if it

> is "inevitable" that a massive hemorrhage would follow the leakage of an aneurysm, and he could not say that this was "inevitable." However, Dr. Freedman did find "that there is an excellent chance that further bleeding is likely to occur." Dr. Freedman also found the leakage of 11 August 1989 and the later ruptures were "related." Considering the tentative opinions of Dr. Freedman, in light of the opinions of Dr. Jones and Dr. Davis, the undersigned finds that there is insufficient evidence in the record from which the undersigned can infer there was a correlation between the decedent's efforts at moving the desk on 11 August 1989 and the subsequent ruptures of his aneurysm on 16 and 17 August 1989.

The deputy commissioner then concluded the subarachnoid hemorrhages decedent suffered on 16 and 17 August 1989 were not the result of an injury by accident and that plaintiff was not entitled to death benefits under the Workers' Compensation Act. Plaintiff appealed to the full Commission which reviewed the record, concluded there was no adequate ground for amending the award, and adopted the deputy commissioner's opinion and award as its own. From this decision, plaintiff appeals.

I.

[1] Plaintiff first assigns error to the Commission's application of *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 368 S.E.2d 582 (1988) to the facts of this case. Plaintiff argues that *Pickrell* entitles her to a presumption that decedent's death was work-related and therefore compensable and that the Commission erred by concluding that the *Pickrell* holding was not applicable. We disagree.

"In order for a claimant to recover workers' compensation benefits for death, he must prove that death resulted from an injury (1) by accident; (2) arising out of his employment; and (3) in the course of the employment." *Pickrell*, 322 N.C. at 366, 368 S.E.2d at 583; *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977); N.C. Gen. Stat. § 97-2(6), (10) (1991). The burden is on the claimant to prove each of these elements. *O'Mary v. Land Clearing Corp.*, 261 N.C. 508, 135 S.E.2d 193 (1964); *Henry v. A. C. Lawrence Leather Co.*, 231 N.C. 477, 57 S.E.2d 760 (1950). The death must result from an "accident," which implies the result was produced by a fortuitous cause. *Jackson v. North Carolina State Highway Comm'n*, 272 N.C. 697, 158 S.E.2d 865 (1965).

In *Pickrell v. Motor Convoy, Inc.* the decedent, a tractor-trailer driver, was found dead behind a van he had been assigned to load and transport. *Pickrell*, 322 N.C. at 364, 368 S.E.2d at 583. There was no medical evidence as to the cause of death. *Id.* at 365, 368 S.E.2d at 583. The deputy commissioner found that there was sufficient evidence to raise the inference that the decedent slipped while standing on the van's bumper but then denied compensation, concluding that the death was not proven to be the proximate result of the accident. *Id.* at 366, 368 S.E.2d at 583, n.1. The Supreme Court reversed, holding that "[i]n cases . . . where the circumstances bearing on work-relatedness are unknown and the death occurs within the course of employment, claimants should be able to rely on a presumption that death was work-related, and therefore compensable, whether the medical reason for death is known or unknown." *Id.* at 370, 368 S.E.2d at 586. This presumption of compensability is applicable, however, only where there is no evidence that decedent died other than by a compensable cause. *Strickland v. Central Service Motor Co.*, 94 N.C. App. 79, 379 S.E.2d 645, *disc. rev. denied*, 325 N.C. 276, 384 S.E.2d 530 (1989).

In the instant case, however, the evidence indicates that decedent died from a subarachnoid hemorrhage, which is not a compensable cause. *See Strickland*, 94 N.C. App. at 84, 379 S.E.2d at 648 (ruptured anterior aneurysm is not a compensable cause). Therefore, the presumption of compensability under *Pickrell* is not applicable and the Commission did not err by not applying it. This assignment of error is overruled.

II.

[2] Plaintiff next argues that the Commission failed to make crucial findings of fact concerning whether lifting the heavy desk caused decedent unusual stress and exertion and whether this exertion increased the likelihood of an aneurysm rupture. We disagree.

When reviewing appeals from the Industrial Commission, this Court's inquiry is limited to two questions of law: "(1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the Commission's findings of fact justify its legal conclusions and decision." *Sanderson v. Northeast Constr. Co.*, 77 N.C. App. 117, 120, 334 S.E.2d 392, 394 (1985); *see Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981); *Watkins v. City of Asheville*, 99 N.C. App. 302, 392

S.E.2d 754, *disc. rev. denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). The Commission's findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981). The Commission is also the sole judge of the credibility of a witness and the weight to be given to his testimony. *Gosney v. Golden Belt Mfg.*, 89 N.C. App. 670, 366 S.E.2d 873, *disc. rev. denied*, 322 N.C. 835, 371 S.E.2d 276 (1988). Contradictions in the evidence go to its weight and the Commission may consider any such inconsistencies in weighing the testimony of an expert and comparing it to the testimony of other experts. *Harrell v. J.P. Stevens & Co., Inc.*, 54 N.C. App. 582, 284 S.E.2d 343 (1981), *disc. rev. denied*, 305 N.C. 152, 289 S.E.2d 379 (1982). The Commission's findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980).

In the instant case, the central question was whether the strain of lifting the desk caused decedent to suffer a sentinel headache which later developed into the subarachnoid hemorrhage which killed him. Dr. Freedman testified that, in his opinion, there was a causal link between lifting the desk and decedent's subsequent ruptured aneurysm. Dr. Jones and Dr. Davis testified, however, that there is no clear correlation between physical exertion and a ruptured aneurysm. Dr. Jones testified:

> In my opinion it is certainly conceivable that at the time of moving the desk Mr. Gilbert may have had the onset of a sentinel headache, which generally represents a minor leak preceding a larger subarachnoid hemorrhage. However, with the question to the relationship between his having the sentinel headache or minor leak being related to his moving the desk, my opinion is that is not necessarily related at all.

Dr. Davis testified that his opinion was "that there was no relationship between the exertion and the spontaneous occurrence of the hemorrhage within the central nervous system."

Dr. Davis also dismissed the medical literature used by Dr. Freedman as old anecdotal literature which tended to relate a catastrophic vascular event to some prior physical activity and stated that now such events are thought to occur spontaneously. While there is no consensus on what causes a subarachnoid hemor-

rhage, there is competent evidence in the record to support the Commission's finding that moving the desk did not cause decedent's ruptured aneurysm. This assignment of error is overruled.

III.

[3] Plaintiff next assigns error to the full Commission's adoption of the deputy commissioner's opinion and award. Plaintiff argues it is not sufficient for the full Commission merely to adopt the deputy commissioner's opinion and award without clarifying whether the fatal subarachnoid hemorrhage was caused by the minor rupture decedent suffered when moving the desk. We disagree.

For the reasons already discussed, we have found competent evidence in the record to support the deputy commissioner's conclusion that he could not infer a correlation between decedent moving the desk on 11 August and subsequently suffering a fatal subarachnoid hemorrhage on 16 August 1989. Plaintiff argues, however, that the full Commission's adoption of the deputy commissioner's opinion and award prejudiced plaintiff by failing to provide adequate review of her case. This issue was addressed by this Court in *Crump v. Independence Nissan*, 112 N.C. App. 587, 436 S.E.2d 589 (1993), in which this Court held that the full Commission, in reviewing the deputy commissioner's award, has the authority "to determine the case from the written transcript of the hearing before the deputy commissioner and the record before it." *Crump*, 112 N.C. App. at 589, 436 S.E.2d at 592. Therefore we conclude the full Commission's review did not prejudice plaintiff. This assignment of error is overruled.

We have examined plaintiff's remaining assignment of error and find it to be without merit. For the foregoing reasons the opinion and award of the Industrial Commission is

Affirmed.

Judges LEWIS and McCRODDEN concur.

W. A. CHAPPELL AND WIFE, MARGARET W. CHAPPELL, PLAINTIFF-APPELLANTS v. JACK A. DONNELLY AND WIFE, DOROTHY D. DONNELLY, DEFENDANT-APPELLEES

No. 929SC808

(Filed 15 February 1994)

1. **Quieting Title § 17 (NCI4th)— complaint to quiet title—no processioning proceeding**

The trial court properly treated plaintiffs' complaint as one seeking to quiet title under N.C.G.S. § 41-10 instead of one in a processioning proceeding under N.C.G.S. § 38-1, since the complaint questioned the boundary lines set out in defendants' deed, sought the quieting of plaintiffs' title to the contested strip of land, and requested plaintiffs be declared fee simple owners of the disputed area, while defendants asserted ownership of the tract in question by reason of adverse possession under color of title.

Am Jur 2d, Quieting Title and Determination of Adverse Claims §§ 73 et seq.

2. **Quieting Title § 27 (NCI4th)— deeds in evidence—no on-the-ground location—directed verdict for defendants proper**

The trial court properly granted defendants' motion for directed verdict in an action to quiet title where plaintiffs offered the deeds in their record title to establish ownership but failed to tender any evidence indicating the on-the-ground location of the disputed boundary lines referenced in those deeds, and plaintiffs thus failed to prove an essential element of their case.

Am Jur 2d, Quieting Title and Determination of Adverse Claims §§ 78 et seq.

Appeal by plaintiffs from judgment filed 29 June 1992 by Judge Dexter Brooks in Granville County Superior Court. Heard in the Court of Appeals 15 June 1993.

John H. Pike for plaintiff-appellants.

Edmundson & Burnette, by R. Gene Edmundson and J. Thomas Burnette, for defendant-appellees.

JOHN, Judge.

In this action, plaintiffs seek to establish the boundary lines between two contiguous parcels of land owned respectively by plaintiffs and defendants. They contend the court below erred by granting defendants' motion at trial for a directed verdict. We disagree.

The pleadings and evidence before the trial court tend to show plaintiffs and defendants are the record owners of two adjacent plots of land located in Granville County. According to the parties' respective deeds, plaintiffs' tract contains 73.41 acres, while defendants' measures 1.571 acres. As the result of a controversy regarding the proper boundary between the two tracts, plaintiffs filed a complaint pursuant to N.C.G.S. § 38-1 (1984). They alleged defendants were in wrongful possession of an approximately 22′ by 332′ strip of plaintiffs' land, and further contested the accuracy of certain boundary lines described in defendants' deed. Defendants answered, (1) admitting determination of the proper boundary lines was at issue; (2) denying wrongful possession; and (3) counterclaiming for ownership by adverse possession of the disputed strip.

At trial on 16 March 1992, plaintiffs offered evidence that they and their predecessors in interest had been vested with title to the 73.41 acre tract for more than 30 years and that the parties derived title from a common source. Plaintiffs also produced two registered land surveyors who testified concerning surveys made of the disputed property. At the close of plaintiffs' evidence, the trial court granted defendants' motion for a directed verdict. Defendants thereafter took a voluntary dismissal as to their counterclaim.

I.

[1] Initially, we note plaintiffs commenced this matter under N.C.G.S. § 38-1 (1984), "Special proceeding to establish [boundaries]." Where the *only* issue to be determined is the location of a dividing line between two parcels of land, the appropriate action is a processioning proceeding as provided by G.S. § 38-1. *Cobb v. Spurlin*, 73 N.C. App. 560, 562, 327 S.E.2d 244, 246 (1985). Ordinarily, such a proceeding is tried before the Clerk of Superior Court of the county wherein the property lies, G.S. § 38-3(a); *Strickland v. Kornegay*, 240 N.C. 758, 760, 83 S.E.2d 903, 904 (1954), however, the Clerk's authority is purely statutory in nature. *Pruden v. Keemer*, 262 N.C. 212, 216, 136 S.E.2d 604, 607 (1964). In the event *title*

to the land is put in issue, the Clerk may not hear the case, but must transfer it to the Superior Court where it becomes, in effect, an action to quiet title pursuant to N.C.G.S. § 41-10 (1984). *Cobb*, 73 N.C. App. at 562, 327 S.E.2d at 246; *see also* John C. Cooke, *Litigation of Boundary and Title Disputes*, NORTH CAROLINA BOUNDARY LAW AND ADJOINING LANDOWNER DISPUTES 407-39 (James B. McLaughlin, Jr. *et al.* 1989) (discussion of relationship between G.S. § 38-1 and G.S. § 41-10 and description of procedures applicable under each).

In the case *sub judice*, plaintiffs' complaint: (1) questioned the boundary lines set out in defendants' deed; (2) sought the quieting of plaintiffs' title to the contested strip of land; and (3) requested plaintiffs be declared owners, in fee simple, of the disputed area. Furthermore, defendants asserted ownership of the tract in question by reason of adverse possession under color of title. These allegations placed in issue title to the portion of land in controversy. Accordingly, the trial court acted properly in treating plaintiff's complaint as one seeking to quiet title under G.S. § 41-10. *See Lane v. Lane*, 255 N.C. 444, 449, 121 S.E.2d 893, 897-98 (1961).

II.

Plaintiffs' sole contention is that the trial court erred by granting defendants' motion for a directed verdict—thereby dismissing plaintiffs' claim. Were this a processioning proceeding under N.C.G.S. § 38-1 (1984), plaintiffs' argument might be persuasive as a directed verdict is ordinarily improper in such a proceeding. *Beal v. Dellinger*, 38 N.C. App. 732, 734, 248 S.E.2d 775, 776 (1978). However, as previously discussed, the trial court properly treated this action as one to quiet title under N.C.G.S. § 41-10 (1984). Accordingly, a directed verdict was appropriate if, as a matter of law, the evidence was insufficient to take the case to the jury. *Felts v. Liberty Emergency Service*, 97 N.C. App. 381, 382, 388 S.E.2d 619, 620 (1990). When a court considers the propriety of a directed verdict motion, "plaintiffs are entitled to the benefit of every reasonable inference which may be legitimately drawn from the evidence, and all evidentiary conflicts must be resolved in favor of the plaintiffs." *Mecimore v. Cothren*, 109 N.C. App. 650, 653, 428 S.E.2d 470, 472, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). However, a directed verdict should be entered if the evidence, so considered,

fails to show the existence of each element required to establish the cause of action pursued by the plaintiffs. *Id.*

In an action to quiet title under G.S. § 41-10, plaintiffs bear the burden of proving valid title in themselves. *Heath v. Turner*, 309 N.C. 483, 488, 308 S.E.2d 244, 247 (1983). This may be accomplished by either (1) reliance on the Real Property Marketable Title Act, *or* (2) utilization of traditional methods of proving title. *Heath*, 309 N.C. at 488, 308 S.E.2d at 247; *Poore v. Swan Quarter Farms, Inc.*, 94 N.C. App. 530, 533, 380 S.E.2d 577, 578, *modified*, 95 N.C. App. 449, 382 S.E.2d 835 (1989), *disc. review denied*, 326 N.C. 50, 389 S.E.2d 93-94 (1990). The latter are set out in the oft-cited case of *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889), and include adverse possession and the "common source of title" doctrine. *Id.* at 115, 10 S.E. at 142-43.

Regardless of the method utilized to prove title, plaintiffs, in order to present a *prima facie* case, must also show that the disputed tract lies within the boundaries of their property. *See Cutts v. Casey*, 271 N.C. 165, 167, 155 S.E.2d 519, 521 (1967); *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E.2d 562, 563 (1959). Plaintiffs thus bear the burden of establishing the on-the-ground location of the boundary lines which they claim. *Virginia Electric and Power Co. v. Tillet*, 80 N.C. App. 383, 391, 343 S.E.2d 188, 194, *disc. review denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). If they introduce deeds into evidence as proof of title, they must "locate the land by fitting the description in the deeds to the earth's surface." *Andrews v. Bruton*, 242 N.C. 93, 96, 86 S.E.2d 786, 788 (1955). Moreover, if plaintiffs seek to establish title by means of adverse possession (without color of title), they are "required to establish the known and visible lines and boundaries of the land actually occupied for the statutory period." *Id.*

A.

As previously discussed, *prima facie* evidence of title may be established by reliance upon either (1) the Real Property Marketable Title Act or (2) traditional methods of proving title. *Heath v. Turner*, 309 N.C. 483, 488, 308 S.E.2d 244, 247 (1983). From our review of the case *sub judice*, it appears plaintiffs elected the "common source of title" doctrine. In order to make a *prima facie* showing of title under this approach, plaintiffs were required to connect both themselves and defendants with a common source of title and then show in themselves a better title from that source.

Poore v. Swan Quarter, 94 N.C. App. at 533, 380 S.E.2d at 578. However, because plaintiffs have otherwise failed to establish a *prima facie* case, we need not examine the adequacy of their effort to establish record title to the disputed property.

B.

[2] Because defendants contested plaintiffs' alleged title to the land in controversy, plaintiffs (in addition to establishing *prima facie* evidence of record title) were also required to demonstrate the disputed strip lay within the boundaries provided in their record title by showing the on-the-ground location of those boundaries. *Virginia Electric*, 80 N.C. App. at 391, 343 S.E.2d at 194. This aspect of plaintiffs' proof is also known as "putting the land on the ground." As our Supreme Court has observed, this is a factual question: "[w]hat are the boundaries is a matter of law to be determined by the court from the description set out in the conveyance. Where those boundaries may be located on the ground is a factual question to be resolved by the jury." *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E.2d 562, 563 (1959). When, as here, plaintiffs rely upon their deeds as proof of title, evidence of the on-the-ground location of boundaries set out in the deeds is ordinarily presented by a surveyor who has surveyed plaintiffs' property using descriptions contained in plaintiffs' deeds. Such evidence is required since "[a]s to the *identity* of the land . . . a deed seldom, if ever, proves itself." *Seawell v. Boone's Mill Fishing Club, Inc.*, 249 N.C. 402, 405, 106 S.E.2d 486, 488 (1959) (emphasis added). N.C.G.S. § 8-39 (1986) provides for the use of parol evidence to identify the location of the land described in the deed. However, this evidence cannot enlarge the scope of the descriptive words because "[t]he purpose of parol evidence is to fit the description to the property, not to create a description." *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 300, 144 S.E.2d 59, 61 (1965).

In the case *sub judice*, plaintiffs offered the deeds in their record title to establish ownership, but failed to tender any evidence indicating the on-the-ground location of the *disputed* boundary lines referenced in those deeds. Instead, plaintiffs' evidence focused upon the boundary lines contained in *defendants' chain of title* in an attempt to show error in the metes-and-bounds description in one of those deeds. Registered Surveyor Grimes, a witness for plaintiffs, stated he conducted a survey of plaintiffs' property. However, our review of the record reveals he never testified *where* plaintiffs'

relevant boundary lines were located. On cross-examination, he *did* speak to several lines contained in plaintiffs' deeds, but those lines were not controverted. No other evidence was produced indicating the location of plaintiffs' contested boundary lines. As plaintiffs failed to prove an essential element of their case, the trial court properly granted defendants' motion for a directed verdict. *See Mecimore v. Cothren*, 109 N.C. App. 650, 653, 428 S.E.2d 470, 472, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993).

We note further that testimony concerning the boundary lines was presented primarily with reference to plaintiffs' Exhibit #1, a map prepared by Surveyor Grimes. This survey map was not properly made a part of the appellate record, but instead was included only in the appendix to plaintiffs' brief. This is a violation of our Appellate Rules, specifically Rules 9(a)(1)(j) and (d)(1). *See District Board v. Blue Ridge Plating Co.*, 110 N.C. App. 386, 391, 430 S.E.2d 282, 286-87 (1993) ("a party's appendix is not deemed part of the record"); *see also Watts v. Cumberland County Hosp. System, Inc.*, 75 N.C. App. 1, 21-22, 330 S.E.2d 242, 255-56 (1985), *reversed in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). While non-compliance with the Appellate Rules renders an appeal susceptible to dismissal, we have nevertheless considered the merits of the parties' arguments because it is evident (from the record which is properly before us) that plaintiffs failed to fit the description in their deeds to the earth's surface. Additionally, as our decision does not have the effect of adjudicating title to the disputed property, *see Virginia Electric*, 80 N.C. App. at 388-89, 343 S.E.2d at 192-93 and *Allen v. Conservative Hunting Club*, 14 N.C. App. 697, 703, 189 S.E.2d 532, 535 (1972), our analysis may assist in the event of further litigation between the parties.

Affirmed.

Judges JOHNSON and WYNN concur.

DONALD ROYCE HARTMAN, PLAINTIFF-APPELLANT v. WALKERTOWN SHOPPING CENTER, INC., DEFENDANT-APPELLEE

No. 9321SC120

(Filed 15 February 1994)

Negligence § 65 (NCI4th)— depressed water meter in shopping center parking lot—meter located within easement—duty of shopping center to warn—actual knowledge of condition by shopping center

In an action to recover for personal injuries sustained by plaintiff when he stepped into a depressed water meter cover in an area at defendant's parking lot which was part of an easement granted by defendant's shopping center to the local sanitary district for installation and maintenance of water lines, the trial court erred in granting summary judgment for defendant shopping center, since the shopping center had an affirmative duty to exercise ordinary care to maintain the premises in a safe condition and a duty to warn invitees of hidden dangers or unsafe conditions which were discoverable through reasonable inspection and supervision. Moreover, defendant shopping center had actual notice of the unsafe condition in this case and therefore it could be said that defendant tolerated or acquiesced in the dangerous condition.

Am Jur 2d, Premises Liability §§ 480 et seq.

Liability of owner or operator of shopping center to patrons for injuries from defects or conditions in sidewalks, walks, or pedestrian passageways. 95 ALR2d 1341.

Liability of owner or operator of parking lot for personal injuries allegedly resulting from condition of premises. 38 ALR3d 10.

Appeal by plaintiff from order entered 6 October 1992 by Judge Robert M. Burroughs in Forsyth County Superior Court. Heard in the Court of Appeals 2 December 1993.

Danny T. Ferguson and L. Jayne Stowers for plaintiff-appellant.

Womble Carlyle Sandridge and Rice, by Allan R. Gitter and Lawrence Pierce Egerton, for defendant-appellee.

JOHNSON, Judge.

The facts underlying this appeal are as follows: During the evening of 23 February 1990, plaintiff Donald Royce Hartman went to defendant Walkertown Shopping Center (hereafter, defendant shopping center) to rent a video from Showtime Video, a tenant of defendant shopping center. Upon leaving Showtime Video, plaintiff crossed the sidewalk in front of the Showtime Video storefront. While stepping off the sidewalk onto the parking lot blacktop, plaintiff stepped into a depressed water meter cover in the parking lot. Plaintiff testified that the water meter cover appeared to be "sunken" and was some four to six inches below the level of the parking lot. The depressed water meter cover is within an easement which was granted by defendant shopping center to the Walkertown Sanitary District in 1971 "for the installation and maintenance of . . . water lines. [Defendant shopping center granted Walkertown Sanitary District] a ten (10) foot permanent and perpetual easement to install and maintain underground water lines and water meters upon the property owned by [defendant shopping center][.]"

The area where the water meter cover is located along with the rest of the entire strip fronting the shops is used as an approach to the tenant stores by invitees. The water meter cover was located between two parking spaces in front of the sidewalk to the storefronts. Plaintiff alleged that defendant shopping center should have known of the dangerous condition of the sunken water meter cover and that there were no warning signs or devices to warn plaintiff of the dangerous condition. Further, plaintiff alleged that the area where the injury occurred was not sufficiently lighted for plaintiff to have seen a dark hole in the parking lot blacktop. Plaintiff suffered personal injuries as a result of this fall.

Plaintiff filed a complaint in this action on 19 February 1992, seeking damages resulting from the negligence of defendant shopping center, Dale Ward (doing business as Showtime Video), and the Town of Walkertown, Inc. Defendant shopping center filed an answer denying negligence and filed a motion for summary judgment. On 5 October 1992, the trial court granted defendant shopping center's motion for summary judgment. From this order, plaintiff has appealed to our Court.

We first address *sua sponte* whether this interlocutory appeal is properly before our Court. In determining whether we may hear plaintiff's appeal, we note that the trial court's summary judgment

order is interlocutory because it does not determine the entire controversy between all of the parties. *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "An interlocutory order is generally not appealable." *Taylor v. Brinkman*, 108 N.C. App. 767, 769, 425 S.E.2d 429, 431, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 30 (1993). There are two methods by which an interlocutory order may be appealed; one of these is "if there has been a final disposition as to one or more but fewer than all of the claims or parties in a case, the trial judge may certify that there is no just reason to delay appeal." *Id.*; North Carolina General Statutes § 1A-1, Rule 54(b) (1990). The second method when an interlocutory order not immediately appealable may be appealed is pursuant to North Carolina General Statutes § 1-277 (1983) and North Carolina General Statutes § 7A-27(d) (1989). "The most common reason for permitting immediate appeal of an interlocutory order under these statutes is the prejudice of a substantial right of the appellant if appeal is delayed." *Taylor*, 108 N.C. App. at 770, 425 S.E.2d at 431.

"[T]he right to avoid the possibility of two trials *on the same issues* can be . . . a substantial right." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (citation omitted) (emphasis retained). "A judgment which creates the possibility of inconsistent verdicts on the same issue—in the event an appeal eventually is successful—has been held to affect a substantial right." *DeHaven v. Hoskins*, 95 N.C. App. 397, 399, 382 S.E.2d 856, 858, *disc. review denied*, 325 N.C. 705, 388 S.E.2d 452 (1989).

We note that identical factual claims are present in plaintiff's claims against defendant shopping center as well as against defendants Dale Ward, doing business as Showtime Video, and the Town of Walkertown, Inc. We further note that the trial court's summary judgment in favor of defendant Dale Ward was not appealed. However, because our dismissal of this appeal as interlocutory could still result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right is prejudiced. Therefore, defendant shopping center's motion for summary judgment which was granted by the trial court is immediately appealable by plaintiff.

We now turn to plaintiff's lone assignment of error, that the trial court erred in granting defendant's summary judgment motion. Summary judgment is granted when the movant has estab-

lished the nonexistence of any genuine issue of fact. This showing must be made in the light most favorable to the nonmoving party and such nonmoving party should be accorded all favorable inferences that may be deduced from the showing. *Moye v. Gas Co.*, 40 N.C. App. 310, 252 S.E.2d 837, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979). Plaintiff argues that the issue before our Court is whether defendant shopping center, the landowner-inviter, "breached its duty of ordinary care to Plaintiff, an invitee, when Plaintiff was injured on a portion of Defendant's paved parking lot in which an easement had been granted for furnishing water to Defendant's Shopping Center, where the easement area was part of the approach to Defendant's tenant shops used by invitees, was insufficiently lighted to reveal the danger, and the dangerous conditions which caused the injuries were known to both the landowner-inviter and the easement holder[.]"

Defendant argues that *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593, an attractive nuisance case, is controlling on the facts in the instant appeal. In *Green*, a five year old trespassing child was injured when she touched an exposed electrified portion of a ground-level transformer. The plaintiff parents brought suit against the owner of the transformer, Duke Power, contending Duke Power was negligent because the transformer was unlocked. Duke Power brought in as third party defendants the local Housing Authority, which had granted Duke Power an easement, and the lessee of the property, Henry Thomas Eanes. The trial court granted motions for summary judgment by the Housing Authority and Eanes, and Duke Power appealed. Our Supreme Court affirmed the trial court's granting of summary judgment for the third party defendants Housing Authority and Eanes. The Court noted that the injured party in *Green* was a trespassing child and as such, stated the rules governing liability:

> It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we think sound in principle and humane policy. We have no disposition to deny it or to place unreasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation or license or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity,

> or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous condition which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether under all of the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury.

Green, 305 N.C. at 609, 290 S.E.2d at 597, quoting *Briscoe v. Lighting and Power Co.*, 148 N.C. 396, 411, 62 S.E. 600, 606 (1908). When arguing to the Court, Duke Power cited "several cases which have held landowners liable under the attractive nuisance doctrine for injuries to children resulting from dangerous conditions on the landowner's property, known to the owner but which he neither created nor maintained." *Id.* The Court distinguished these cases, stating that "while the defendants therein did not create or maintain the dangerous conditions on their land, *they 'knowingly suffered [the dangerous conditions] to continue.'*" *Id.* (Emphasis added.) The Court further stated, *Id.* at 610, 290 S.E.2d at 598, that "the dispositive issue in [*Green*] is not whether Housing Authority and Eanes knew of the dangerous condition of the transformer, but whether they can be said to have 'suffered it to continue,' i.e., tolerated or acquiesced in it. We think not." (Citations omitted.) The Court opined that

> neither the owner nor the occupier of the property on which the transformer was located had the right to deny access to the transformer or to remedy the dangerous condition of the device. The transformer was the sole property of appellant Duke Power. It was placed on the premises pursuant to a valid easement the terms of which granted to Duke "the right, privilege and easement . . . to construct, maintain and operate [thereon] . . . transformers . . . together with the right at all times to enter said premises . . ." Any interference or tampering with Duke's transformer would clearly encroach upon the rights granted to Duke by the easement. Likewise, locking or fencing the transformer would impair Duke's access to it and would be inconsistent with the terms of the easement. It was not reasonably practical for the owner of the realty, Housing Authority, or the occupier, Eanes, to prevent access to the transformer or to render it harmless.

Id. at 611, 290 S.E.2d at 598. The Court then went on to state:

> [T]he general rule [is] that "[i]t is not only the right but the duty of the owner of an easement to keep it in repair; the owner of the servient tenement is under no duty to maintain or repair it, in the absence of an agreement therefor." Another rule follows from the first; viz. "If the character of the easement is such that a failure to keep it in repair will result in injury to the servient estate or to third persons, the owner of the easement will be liable in damages for the injury so caused."
>
> . . . . .
>
> Duke Power Company had the *sole* duty to keep safe the transformer which was Duke's sole property. Duke had expressly bound itself to "maintain [the transformer] . . . in a proper manner" in the instrument granting to Duke the easement and pursuant to which the transformer had been erected. We are of the opinion that the knowledge of third party defendants is irrelevant to the question of their liability where, as here, the third party defendants had no control over the transformer.

Id. at 611-12, 290 S.E.2d at 598 (emphasis retained) (citations omitted).

The dispositive question in this appeal, then, is whether the facts in the present case are distinguishable from *Green*. Because we believe the facts of the instant case are distinguishable from *Green*, we reverse the trial court's granting of summary judgment in favor of defendant shopping center.

It is well-settled that the standard of care owed by an owner of land to one who comes onto the land depends on the status of the injured party. *Hoots v. Pryor*, 106 N.C. App. 397, 417 S.E.2d 269, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992). In the case *sub judice*, the status of the injured party was that of an invitee. "An invitee is one who goes upon the premises of another in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself." *Id.*, 106 N.C. App. at 406, 417 S.E.2d at 275. "A shopping center owner has a duty to exercise ordinary care to maintain the premises in a safe condition and to warn the invitee of hidden dangers or unsafe conditions, discoverable by the owner through reasonable inspection and supervision." *Stoltz v. Burton*, 69 N.C. App. 231, 234, 316 S.E.2d 646, 647 (1984).

Notwithstanding the rules referenced earlier in this opinion, i.e., that it is the duty of the owner of an easement to keep the easement in repair, and that the owner of the easement will be liable in damages for injuries caused to third persons, we find that defendant shopping center had an affirmative duty to exercise ordinary care to maintain the premises in a safe condition and a duty to warn invitees of hidden dangers or unsafe conditions which were discoverable through reasonable inspection and supervision. We further note that not only might defendant shopping center herein have discovered the unsafe condition, the depressed water meter cover, through reasonable inspection and supervision, but that defendant shopping center was actually *on notice* of this unsafe condition. An affidavit by an employee of defendant shopping center's insurance company indicates that a similar injury to a different invitee occurred when the invitee stepped in the same water meter hole a month earlier. Because of defendant shopping center's duty to its invitees, and under the forecast of evidence of this case, it can be said that defendant shopping center "suffered" the dangerous condition to continue,"i.e., tolerated or acquiesced in it."

For these reasons, we reverse the trial court's decision granting summary judgment in favor of defendant shopping center.

Reversed.

Judges MARTIN and McCRODDEN concur.

DORIS PEEL MYRICK v. SELENA ROSE PEEDEN

No. 9218SC966

(Filed 15 February 1994)

Automobiles and Other Vehicles § 637 (NCI4th)— intersection accident—no evidence of contributory negligence—denial of directed verdict error

The trial court erred in submitting the issue of plaintiff's contributory negligence to the jury where the evidence tended to show that plaintiff entered an intersection when she had the green light, and she was going between 40 and 45 m.p.h.

in a 45 m.p.h. zone; plaintiff's failure to look left or right as she entered the intersection did not create an issue of contributory negligence because defendant never established that such failure constituted the proximate cause of the accident; and no evidence was presented tending to show that plaintiff could have avoided the accident even had she seen defendant's automobile as it approached.

Am Jur 2d, Automobiles and Highway Traffic § 422.

Appeal by plaintiff from judgment entered 10 March 1992 by Judge Judson D. DeRamus, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 14 September 1993.

Weinstein & Sturges, P.A., by Thomas D. Myrick, for plaintiff appellant.

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

COZORT, Judge.

Plaintiff appeals a jury verdict finding that she was not entitled to recover for injuries sustained in an automobile accident due to her own contributory negligence. Plaintiff claims the issue of contributory negligence was improperly submitted to the jury; we agree. We reverse and remand for a new trial.

Plaintiff Doris Peel Myrick filed this action against defendant Selena Rose Peeden to recover damages for personal injuries she sustained arising out of an automobile accident which occurred 15 June 1989, in Greensboro, North Carolina. Plaintiff's evidence at trial tended to show that, at approximately 3:30 p.m., plaintiff was traveling on Wendover Avenue in the outermost eastbound lane. Plaintiff, a real estate agent, was in the process of showing property to a customer and the customer's son, both of whom were passengers in plaintiff's vehicle.

Plaintiff testified that as she approached the intersection of Wendover Avenue and Norwalk Street, she was traveling between 40 and 45 miles per hour. Plaintiff stated, "The light was green, and there was no doubt in my mind about that." At the intersection, Wendover Avenue has three eastbound and three westbound lanes, while Norwalk Street has two northbound and two southbound lanes. The speed limit on Wendover Avenue was 45 miles per

hour; the speed limit for Norwalk Street traffic was 35 miles per hour. The day was overcast, but the pavement was dry. Plaintiff testified:

> As I was heading down Wendover, and as I approached Norwalk, I was probably going close to the speed limit, between 40 and 45, and suddenly, just very suddenly, this car came out, and it was so fast, I had no time to react, or to hit my brake or anything. She was just there.

Ms. Patsy Jean Mortimer, one of the passengers riding in plaintiff's vehicle, and Mr. Melvin Gaither, Sr., the driver of the automobile traveling directly behind plaintiff's car, both testified that the stoplight was green for plaintiff as plaintiff approached the intersection. Officer Michael W. Roberts of the Greensboro Police Department testified:

> [Defendant] stated that she just didn't notice that the light had turned red. She said that she thought the light was green, and she . . . just proceeded through the intersection. There were no skid marks or anything . . . on anyone's part where anyone tried to stop, as if they had seen . . . something was about to happen, or there was some danger there.

Defendant presented no evidence. The jury returned a verdict finding that defendant's negligence caused plaintiff's injuries, but that plaintiff was contributorily negligent and not entitled to recover damages. Plaintiff moved for judgment notwithstanding the verdict which the trial court denied. Plaintiff subsequently made a motion for a new trial. The motion was denied on 7 April 1992.

Plaintiff's sole complaint on appeal is that the trial court erred in submitting the issue of contributory negligence to the jury and in denying defendant's post-verdict motions based on such alleged error. The trial court explained to the jury that defendant contended the plaintiff was contributorily negligent in failing to maintain a reasonable lookout and failing to maintain and keep proper control of her vehicle. The trial court's charge to the jury contained, in part, the following instruction regarding contributory negligence:

> Members of the Jury, in this case, the defendant contends and the plaintiff denies that the plaintiff was negligent in one or more of the following ways. Number one, that the defendant contends the plaintiff failed to maintain a reasonable lookout, and number two, the defendant contends the plaintiff failed

> to maintain and keep proper control of her vehicle. I have already explained what those contentions of negligence are in more detail in connection with the first issue. Members of the Jury, the same explanation of what constitutes failure to maintain a reasonable lookout and failure to keep a vehicle under proper control would also apply here.
>
> The defendant further contends and the plaintiff denies that any such negligence was a proximate cause of and contributed to the plaintiff's own injury. Members of the Jury, I instruct you that contributory negligence is not to be presumed from the mere fact of injury to the plaintiff.
>
> Finally, Members of the Jury, as to this second issue on which the defendant, Selena Rose Peeden, has the burden of proof, if you find by the greater weight of the evidence that at the time of the collision, the plaintiff, Doris Peel Myrick, was negligent in any one or more of the two ways contended . . . and that such negligence was a proximate cause of and contributed to plaintiff's own injury, then, it would be your duty to answer this second issue "yes" in favor of the defendant[.] On the other hand, if, considering all of the evidence, you fail to find such negligence, or fail to find such proximate cause, then, it would be your duty to answer this second issue "no" in favor of the plaintiff[.]

Under the circumstances, we conclude the trial court erred in failing to grant plaintiff's motion for a directed verdict against the defendant as to contributory negligence and in submitting that issue to the jury.

Where more than a scintilla of evidence for supporting each element of the nonmovant's case is present, a motion for a directed verdict should be denied. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986). "In the case of an affirmative defense, such as contributory negligence, a motion for directed verdict is properly granted against the defendant where the defendant fails to present more than a scintilla of evidence in support of each element of his [or her] defense." *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991). "[I]n order for the defendants to have survived plaintiff's motion for directed verdict, it was incumbent upon them to present more than a scintilla of evidence that the plaintiff was contributorily negligent." *Id.* at 465, 400 S.E.2d at 93.

Defendant cites *Currin v. Williams*, 248 N.C. 32, 102 S.E.2d 455 (1958), to support her argument that the issue of contributory negligence was an issue for the jury. In *Currin*, the plaintiff and defendant were involved in an automobile accident when defendant disregarded a red traffic signal light and proceeded into the intersection where plaintiff was traveling. The plaintiff testified that he did not see defendant's vehicle until he was hit. He additionally stated that he did not look left nor right, but was looking forward when the collision occurred. The plaintiff stated, "At the speed I was going *I could have stopped my car in ten feet. If I had seen the man coming I could have.* I did not see him coming. I was looking down the road, but my cross-view would have given me some distance." *Id.* at 35, 102 S.E.2d at 457 (emphasis added). The *Currin* Court explained:

> [T]he mere fact that plaintiff failed to look [left or right] is insufficient to establish that plaintiff was contributorily negligent as a matter of law. Whether such failure to look was a proximate cause of the collision depended upon whether, if he had looked, what he would or should have seen was sufficient to put him on notice, at a time when plaintiff could by the exercise of due care have avoided the collision, that defendant would not stop in obedience to the red light. Defendant was chargeable with notice of what he would have seen had he exercised due care to keep a proper lookout.

Id. at 36, 102 S.E.2d at 458 (citations omitted). The Court then held:

> Under the evidence here presented, we cannot say that the only reasonable inference or conclusion that may be drawn therefrom is that defendant was operating his car in such manner as to put plaintiff on notice, at a time when plaintiff could by the exercise of due care have avoided the collision, that defendant would not stop in obedience to the red light. We conclude that it was proper to submit the issue of contributory negligence to the jury.

Id. at 37, 102 S.E.2d at 459.

We find *Currin* distinguishable from the case at bar. The plaintiff in *Currin* stated he could have stopped had he seen the car coming. In the case below, there was no evidence that plaintiff could have stopped in time to possibly avoid a collision with defend-

ant. In fact, plaintiff's testimony, as well as evidence of the lack of any skid marks at the scene, indicates that plaintiff had no time to react.

This case is more comparable to *Snead v. Holloman*, in which

> defendants produced no evidence that the plaintiff failed to keep a proper lookout or that he could have avoided the accident. Nor did the defendants produce any evidence tending to show that the accident did not occur exactly as the plaintiff alleged. Instead, defendants rely solely on evidence presented during the plaintiff's case-in-chief which they contend establishes contributory negligence on the part of the plaintiff.

Snead, 101 N.C. App. at 465, 400 S.E.2d at 93. This Court in *Snead* upheld the trial court's order directing a verdict against the defendant on the issue of contributory negligence. In holding that the trial court was correct in not submitting the issue of contributory negligence to the jury, we stated:

> Evidence which merely raises conjecture on the issue of contributory negligence is insufficient to go to the jury. *Tharpe v. Brewer*, 7 N.C. App. 432, 172 S.E.2d 919 (1970). In our opinion, the evidence of the plaintiff's failure to apply his brakes immediately prior to the accident, standing alone, did not create an issue of fact regarding contributory negligence which was sufficient to go to the jury.
>
> Based upon plaintiff's evidence, which went uncontradicted by the defendants, we hold that reasonable minds could not have differed on the issue of plaintiff's contributory negligence. *See Spears v. Service Distributing Co.*, 23 N.C. App. 445, 209 S.E.2d 382, *cert. denied*, 286 N.C. 337, 211 S.E.2d 214 (1974). We conclude, therefore, that the trial judge properly granted the plaintiff's motion for a directed verdict.

Id. at 466, 400 S.E.2d at 93.

As in *Snead*, plaintiff's evidence here went unchallenged. Plaintiff's failure to look left or right as she entered the intersection did not create an issue of contributory negligence because defendant never established that such failure constituted the proximate cause of the accident. No evidence was presented tending to show that plaintiff could have avoided the accident, even had she seen

the automobile as it approached. We hold that reasonable minds could not have differed on the issue. The trial court therefore erred in denying plaintiff's motion for a directed verdict against defendant as to plaintiff's contributory negligence. Accordingly, we remand the case for a new trial.

New trial.

Judges JOHNSON and McCRODDEN concur.

STATE OF NORTH CAROLINA v. TERRY LEE EVANS

No. 9316SC602

(Filed 15 February 1994)

1. Criminal Law § 1144 (NCI4th)— killing of police officer—two aggravating factors found—no error

Where a police detective was killed because he was disrupting the drug trade in an area and because he was going to be involved in the prosecutions of some of the drug group members, the trial judge did not improperly use the same evidence to support more than one aggravating factor by finding as aggravating factors for second-degree murder, conspiracy and assault: (1) that the offenses were committed to hinder the lawful exercise of a governmental function or the enforcement of laws, and (2) that the offenses were committed against a law enforcement officer because of the exercise of his official duties. N.C.G.S. § 1340.4(a)(1)(d), (e).

Am Jur 2d, Criminal Law §§ 598, 599.

2. Criminal Law § 1143 (NCI4th)— guilty plea—aggravating factor—stiffer sentence—failure to charge with different crime—no right of defendant to complain

Where defendant pled guilty to conspiracy to commit murder and was convicted, the trial judge properly considered and in fact was required to consider as an aggravating factor that the offense was committed against a law enforcement officer because of the exercise of his official duties. Defendant could not complain that he was charged with conspiracy to

commit murder, which carried a lesser sentence, instead of conspiracy to murder a law enforcement officer, which carried a higher sentence, and that the State then was able to have an even stiffer sentence imposed by submitting as an aggravating factor that the offense was committed against a law enforcement officer, since defendant, represented by counsel, fully understood the nature and elements of the charges against him, as well as the maximum sentence possible on those charges, and defendant then pled guilty to all the charges.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgments and commitments entered 17 December 1992 by Judge B. Craig Ellis in Hoke County Superior Court. Heard in the Court of Appeals 5 January 1994.

Attorney General Michael F. Easley, by Senior Deputy Attorney General William N. Farrell, Jr., for the State.

W. Philip McRae for defendant.

LEWIS, Judge.

On 17 December 1992 defendant pled guilty to second-degree murder, conspiracy to commit murder, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a firearm into occupied property. After hearing the evidence and the arguments of counsel, the trial judge found aggravating and mitigating factors and concluded that the aggravating factors outweighed the mitigating factors. He then enhanced the presumptive sentence for each offense and sentenced defendant to terms of imprisonment totalling 100 years. Defendant contends that the trial judge erred in his findings regarding the aggravating factors. The two aggravating factors at issue are: (1) that the offenses were committed to hinder the lawful exercise of a governmental function or the enforcement of laws and (2) that the offenses were committed against a law enforcement officer because of the exercise of his official duties. *See* N.C.G.S. § 15A-1340.4(a)(1)(d)-(e) (1988).

The evidence tended to show the following facts. On the evening of 4 April 1991, Southern Pines Police Detective Charles Harris responded to a call at the Holiday Town Apartment Complex, an area known for its drug activity. During a search of the area, Detective Harris came upon co-defendant Bernice McDougald, who

was entering an apartment, and advised him that if he had any drugs he had better flush them because he (Detective Harris) was going to get a search warrant for the apartment. McDougald followed the detective's advice only to later find out that the police were not going to search the apartment. During the previous several months, Detective Harris' efforts in the area had disrupted the workings of the drug trade, in which McDougald, defendant, and others were involved. Furthermore, Detective Harris was a potential witness in pending drug prosecutions against some of the members of the group. McDougald told Leroy Medley, another co-defendant, that some of the members of the group had been staking out Detective Harris' residence for three days. McDougald then told the group that they might as well go ahead and kill Detective Harris, for if they did not, they would all be going to jail in the near future.

After the police left the complex, McDougald, defendant, and six others, armed with three rifles and a pistol, piled into a car and drove to Detective Harris' house. When they arrived, one of the men rang the doorbell and ran, and shots were fired into the house as Detective Harris opened the door. Detective Harris was shot six times and died as a result of the wounds. His wife, who was sitting in the den, was shot in the hand.

[1] Defendant's first argument is that the same evidence was used to prove two aggravating factors: 1) that the offenses were 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), and 2) that the offenses were committed against a law enforcement officer because of the exercise of his official duties, N.C.G.S. § 15A-1340.4(a)(1)(e). Defendant is correct that the same item of evidence may not be used to prove more than one factor in aggravation. N.C.G.S. § 15A-1340.4(a)(1). However, this Court addressed the same argument as applied to the same two aggravating factors in *State v. Brown*, 67 N.C. App. 223, 313 S.E.2d 183, *appeal dismissed and disc. review denied*, 311 N.C. 764, 321 S.E.2d 147 (1984). In that case, the defendant conspired to kill a detective and a witness for the State, both of whom were playing key roles in the defendant's assault prosecution. *Id.* at 236, 313 S.E.2d at 192. The trial judge found that the offenses were committed to disrupt or hinder the enforcement of the law and that the intended victims were a fire department investigator and a State's witness against the defendant, both among the class protected by section 1340.4(a)(1)(e).

Id. The purpose of section 1340.4(a)(1)(e) is "to penalize a defendant who chooses to commit an offense against this class of people: law enforcement officer, fireman, judge, prosecutor, juror, or witness against the defendant while performing his official duties." *Id.* The Court in *Brown* concluded that the trial judge's findings were proper: "The defendant cannot be allowed to benefit by having only one aggravating factor charged against him instead of two simply because the method in which he chose to disrupt the enforcement of the law included killing two members of this statutorily protected class." *Id.* at 237, 313 S.E.2d at 192. In the instant case, Detective Harris was killed because he was disrupting the drug trade and because he was going to be involved in the prosecutions of some of the group members. We find *Brown* to be squarely on point and, therefore, conclude that the trial judge's finding of the two aggravating factors in the present case was not error.

[2] Defendant's second argument is that the trial judge erred by finding as an aggravating factor that the offenses were committed against a law enforcement officer because of the exercise of his official duties. Defendant contends that the State could have charged him with conspiracy to murder a law enforcement officer because of the exercise of his official duties, N.C.G.S. § 14-18.1(b), but chose instead to charge him with conspiracy to commit murder, N.C.G.S. § 14-18.1(a), and then to submit as an aggravating factor that the offense was committed against a law enforcement officer because of the exercise of his official duties. Defendant contends that this finding in aggravation constitutes reversible error because "it allows the prosecutor and court to aggravate a criminal offense by use of an element which could have formed the basis for an upgrade of the offense charged." Defendant further argues that this manipulation unfairly allows the judge to increase a defendant's sentence, and is contrary to the intent of the legislature.

In *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983), our Supreme Court addressed this issue. In that case, the defendant was charged with first-degree murder and subsequently pled guilty to second-degree murder. The trial judge found as a non-statutory aggravating factor that the defendant acted with premeditation and deliberation. The Supreme Court held that since premeditation and deliberation were not elements of second-degree murder, the trial judge's finding of the non-statutory aggravating factor of premeditation and deliberation was proper. *Id.* at 375, 298 S.E.2d at 677. As to statutory aggravating and mitigating factors, the

Court stated: "In fact, unless a sentence has been agreed to during plea bargaining, a sentencing judge is *required* to consider the statutory list of aggravating and mitigating factors during sentencing, of which many items concern circumstances that may surround the offense." *Id.* at 377, 298 S.E.2d at 678.

We find the analysis in *Melton* to be apposite to the facts of the instant case. Here, defendant pled guilty to conspiracy to commit murder and was convicted. Conspiracy to commit murder does not have as an element that the intended victim be a law enforcement officer. Thus, the trial judge properly considered, and, in fact, was required to consider, as an aggravating factor that the offense was committed against a law enforcement officer because of the exercise of his official duties. Defendant argues, nevertheless, that the prosecutor was, in effect, allowed to "manipulate the court system in order to create a 'less is more' outcome," in violation of the "spirit and intent of the Fair Sentencing Act." However, the record reveals that defendant, represented by counsel, fully understood the nature and the elements of the charges against him, as well as the maximum sentence possible on those charges. Defendant then pled guilty to all the charges. Thus, defendant entered his pleas of guilty freely, voluntarily and understandingly, as an active participant in the process. Defendant will not now be heard to complain that the court system was unfairly manipulated to his detriment.

Accordingly, we find no error.

No error.

Judges ORR and JOHN concur.

SUTTON WOODWORKING MACHINE COMPANY, PLAINTIFF v. DKLS, INC. (FORMERLY BUSS AUTOMATION, INC.), DAMSMITH CORPORATION, AND U.S. NATURAL RESOURCES, INC., DEFENDANTS

No. 9318SC295

(Filed 15 February 1994)

Fraudulent Conveyances § 39 (NCI3d)— bulk transfer—exempt status—transferor required to be in default

A sale of a corporation's inventory and equipment was not exempt from the notice to creditors requirement of the bulk transfer laws because all of the proceeds were remitted to a bank which held a security interest in the corporation's assets where the transferor was not in default on the bank obligation, since a common requirement for N.C.G.S. § 25-6-102(3) to exempt a transfer from the bulk transfer laws is that the transferor must be in default.

Am Jur 2d, Fraudulent Conveyances §§ 267-270.

Appeal by plaintiff from judgment entered 31 December 1992 by Judge Lester P. Martin, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 13 January 1994.

Prior to this lawsuit, defendant DKLS Inc. was a corporation engaged in manufacturing and selling computerized wood handling equipment. It was one of several subsidiaries owned by defendant Damsmith Corporation (Damsmith), a holding company. Damsmith had no employees and no function other than to purchase various subsidiaries and acquire funds from a lender by using the subsidiaries' combined assets as collateral. NCNB National Bank (NCNB) regularly advanced money to Damsmith to cover expenses incurred by the subsidiaries. This arrangement was treated as one loan, and although Damsmith was the only obligor on the loan, NCNB was granted a security interest in all of the subsidiaries' assets, including DKLS's.

In February 1991, defendant U.S. Natural Resources purchased a major part of DKLS's inventory, after which DKLS ceased doing business. Plaintiff was one of DKLS's creditors at the time. Plaintiff brought this action to have the sale of DKLS's assets declared ineffective, claiming that no notice of the sale was given to creditors as required by Chapter 25, Article 6 of the General Statutes govern-

ing bulk transfers. Defendants moved for summary judgment, arguing that this transaction was exempt from the notice requirement. The trial judge decided in favor of defendants and entered judgment accordingly. From this judgment plaintiff appeals.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Mack Sperling, for plaintiff appellant.

Staton, Perkinson, Doster, Post, Silverman and Adcock, by Ronald L. Perkinson and Diane W. Stevens, for defendant appellees.

ARNOLD, Chief Judge.

This dispute concerns the applicability of the bulk transfer provisions in Article 6 of the Uniform Commercial Code. A bulk transfer is "any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory . . . of an enterprise subject to [Article 6]." N.C. Gen. Stat. § 25-6-102(1) (1986). A transfer of a substantial part of an enterprise's equipment is also a bulk transfer if the equipment is sold in connection with a bulk transfer of inventory. G.S. § 25-6-102(2). A business is subject to Article 6 if its principal business is the sale of merchandise from stock. This includes businesses that manufacture what they sell. G.S. § 25-6-102(3).

A bulk transfer subject to Article 6 must be conducted according to the requirements of that article, which imposes certain obligations on the transferee and transferor. The transferee must demand, and the transferor must provide, a list of the transferor's creditors and any persons who are known to assert claims against the transferor. G.S. § 25-6-104(1)-(2). The transferee must preserve the list and make it available to any of the transferor's creditors. The parties must also prepare a schedule of the property transferred. G.S. § 25-6-104(1). In addition, the transferee must give notice of the sale to creditors at least ten days before the transferee takes possession of or pays for the goods. G.S. § 25-6-105. A bulk transfer is ineffective against the transferor's creditors unless the parties involved in the transfer observe each of these requirements. G.S. § 25-6-104 to -105.

There are, however, certain exemptions from Article 6. At issue here is the exemption in G.S. § 25-6-103(3) which provides that "[t]ransfers in settlement or realization of a lien or other

security interest" are not subject to Article 6. The parties do not dispute that DKLS was an enterprise subject to Article 6, or that the sale of inventory and equipment constituted a bulk transfer. The question is whether or not this transfer was exempt from the Article 6 notice requirement because all of the proceeds were remitted to NCNB, which held a security interest in all of DKLS's assets.

Plaintiff argues that 25-6-103(3) does not exempt this transfer because there was no default on the NCNB obligation. We agree. The consensus appears to be that under the Uniform Commercial Code default is a prerequisite for settlement or realization of a security interest:

> Transfers in settlement refer to a secured party's election to accept collateral in discharge of a secured obligation under 9-505. Transfers in realization refer to transfers by a secured party in foreclosure of a security interest under 9-504. In order for a transfer to be exempt under 6-103(3), there must be evidence of a default by the debtor. For without default, there can be neither a settlement nor a realization.

James J. White & Robert S. Summers, Uniform Commercial Code § 20-2 (3d ed. 1988) (footnotes omitted).

In the few cases that have addressed this issue, a common requirement for exemption by § 6-103(3) is that the transferor must be in default. *See Stone's Pharmacy Inc. v. Pharmacy Accounting Management Inc.*, 812 F.2d 1063 (8th Cir. 1987). *See also Hixson v. Pride of Texas Distrib. Co.*, 683 S.W.2d 173 (Tex. Ct. App. 1985) and *Starman v. John Wolfe, Inc.*, 490 S.W.2d 377 (Mo. Ct. App. 1973). We agree with the reasoning in these cases, and we therefore hold that the transferor in a bulk transfer must be in default before G.S. § 25-6-103(3) will exempt the transfer from the requirements of Article 6.

The trial court's order dismissing plaintiff's claim is

Reversed.

Judges WYNN and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 FEBRUARY 1994

BAYNARD v. H-HAMRICK & HAYES AUTO SALES No. 9210IC1244	Ind. Comm. (932379) (935684) (935685)	Affirmed
BEANE v. ALEXANDER No. 9225SC1177	Caldwell (90CVS581)	Reversed & Remanded
BEAUCHAMP v. GUIN No. 9222SC1314	Davie (91CVS187)	Affirmed
BRADLEY v. FERGUSON No. 9230DC1292	Haywood (90CVD311)	Reversed & Remanded
BRADSHAW v. EASTERN AIRLINES No. 9310IC178	Ind. Comm. (753400)	Affirmed
BRIGHT v. MODERN GLOBE, INC. No. 9323SC185	Wilkes (91CVS1964)	Affirmed
GUM v. GUM No. 9228DC1082	Buncombe (87CVD3782)	Affirmed
IN RE ADOPTION OF P.E.P. No. 9215SC798	Orange (88SP153)	Dismissed
IN RE ROSCOE No. 9320DC78	Union (91J007) (91J008) (91J009) (91J010)	Affirmed
LAMPE v. CLARK No. 9221DC1081	Forsyth (85CVD3561)	Affirmed in part, reversed in part & remanded
LANCASTER v. G&M MASONRY, INC. No. 9210IC1029	Ind. Comm. (021373)	Affirmed
LIBERTY MUTUAL INS. CO. v. McKEOWN No. 9226SC1329	Mecklenburg (91CVS15833)	Affirmed
MARION v. MARION No. 9217DC988	Surry (89CVD503) (90CVD193)	Affirmed

RABANO v. CENTRAL CAROLINA ISUZU No. 9213DC1282	Bladen (90CVD08)	Affirmed
STATE v. ARROWOOD No. 9329SC51	McDowell (89CRS4029) (89CRS4030) (89CRS4044) (89CRS4048) (89CRS4049) (89CRS4050) (89CRS4051) (89CRS4052) (89CRS4053) (89CRS4054) (89CRS4055) (89CRS4056) (89CRS4057) (89CRS4058) (89CRS4059) (89CRS4060) (89CRS4062) (89CRS4067) (89CRS4068) (89CRS4070)	No Error
STATE v. BELMONT No. 9310SC461	Wake (90CRS55084) (90CRS55085)	No Error
STATE v. BRITT No. 9213DC676	Columbus (80J92)	Reversed
STATE v. BROWN No. 925SC1098	New Hanover (91CRS24640)	No Error
STATE v. GARNER No. 9212SC796	Cumberland (88CRS39653)	No Error
STATE v. HENDERSON No. 933SC440	Craven (91CRS11455) (91CRS11501)	Affirmed
STATE v. MEDLEY No. 9316SC456	Hoke (91CRS1441) (91CRS3255)	No Error
STATE v. ORRINGER No. 9310SC432	Wake (90CRS90447) (90CRS90448)	No Error
STATE v. PATE No. 9326SC428	Mecklenburg (90CRS83905)	Reversed

STATE v. REED No. 938SC401	Lenoir (92CRS6639) (Reed) (92CRS6640) (Reed) (92CRS6637) (Koonce) (92CRS6638) (Koonce)	No Error
STATE v. SIDBERRY No. 915SC1026	New Hanover (89CRS9141)	Reversed & Remanded
STATE v. TURNER No. 9315SC54	Alamance (91CRS1781) (91CRS1782)	No Error
STATE v. WOODARD No. 938SC493	Wayne (91CRS12112)	No Error
STATE FARM FIRE & CASUALTY CO. v. BROOKS No. 9323SC327	Yadkin (91CVS324)	Reversed
TSENG FU LIN v. CITY OF GOLDSBORO No. 928SC926	Wayne (91CVS2631)	Affirmed
VICKERY v. ADDISON TRUSS & BLDG. SUPPLY No. 9229SC1207	Rutherford (90CVS32)	No Error

FILED 15 FEBRUARY 1994

BALTER v. GENERAL ELECTRIC CO. No. 9210SC1006	Wake (91CVS13347)	Affirmed in part, reversed in part & remanded
CHESTER v. OAKLEY No. 9325SC338	Catawba (92CVS851)	Affirmed
DINKINS v. JOHNSON No. 9311DC848	Lee (92CVD950)	Affirmed
FLEET FACTORS CORP. v. PITCHERSKY No. 9318SC398	Guilford (91CVS3484)	Dismissed
FREEMAN v. WILLAMETTE INDUSTRIES, INC. No. 9211SC1009	Lee (91CVS249)	Affirmed

GORDON v. WALKOWIAK No. 9218DC95	Guilford (89CVD3935)	Affirmed
GREEN v. CALLICUTT No. 9226SC1227	Mecklenburg (90CVS10609)	New Trial
H & C UTILITIES, INC. v. CITY OF SALISBURY No. 9219SC1133	Rowan (90CVS829)	No Error
HARRISON v. HONEYCUTT No. 9329DC168	McDowell (92CVD266)	Affirmed
HARTMAN-PERKINS & ASSOCIATES v. CENTURA BANK No. 925SC1140	New Hanover (91CVS3905)	Affirmed
MARTIN v. CONTINENTAL INS. CO. No. 938SC215	Lenoir (91CVS1254)	Dismissed
MERRITT, GUARDIAN FOR JOHNSON No. 9221SC1157	Forsyth (91SP978)	Affirmed
MOYOCK SUPERMARKET, INC. v. RICHFOOD, INC. No. 931SC115	Currituck (91CVS60)	Dismissed
PEDDLE v. PEDDLE No. 9321DC766	Forsyth (90CVD3091)	Affirmed
POLK BROTHERS CONST. CO. v. BEPCO, INC. No. 9221DC1112	Forsyth (92CVD2551)	Affirmed
RUTLEDGE v. STROH COS. No. 9310IC151	Ind. Comm. (827300)	Affirmed
SOUTHERN NATIONAL BANK OF N.C. v. AMARIGLIO No. 9310SC613	Wake (90CVS3636)	No Error
STATE v. AUTWELL No. 9318SC857	Guilford (92CRS74241) (92CRS74242)	No Error
STATE v. BEASLEY No. 9312SC909	Cumberland (92CRS14869)	No Error
STATE v. BURRUS No. 9322SC810	Alexander (92CRS2577) (92CRS2578) (92CRS2579)	No Error

STATE v. COGDELL No. 933SC468	Pitt (92CRS19485) (92CRS19486)	Affirmed
STATE v. CREASON No. 9319SC310	Rowan (90CRS11949) (90CRS5558)	No Error
STATE v. DAVIS No. 9324SC770	Watauga (90CRS4656)	Affirmed
STATE v. DIXON No. 933SC701	Pitt (92CRS2982) (92CRS2983)	No Error
STATE v. FALLS No. 9326SC745	Mecklenburg (92CRS47103)	No Error
STATE v. FISHER No. 939SC834	Vance (92CRS4768) (92CRS4769)	No Error
STATE v. JACOBS No. 9316SC616	Robeson (92CRS1124) (92CRS1125)	No Error
STATE v. JONES No. 938SC856	Lenoir (92CRS10688)	No Error
STATE v. LEGRAND No. 9312SC656	Cumberland (92CRS13988)	No Error
STATE v. MELVIN No. 933SC260	Pitt (92CRS5708) (92CRS5710)	No Error
STATE v. MOORE No. 9117SC1302	Rockingham (90CRS8487) (90CRS8488)	No Error
STATE v. MOXLEY No. 9321SC808	Forsyth (92CRS34852)	No Error
STATE v. PALMER No. 9325SC883	Caldwell (92CRS8847)	Affirmed
STATE v. PIERPOINT No. 9324SC275	Madison (91CRS1795)	No Error
STATE v. THOMAS No. 9321SC631	Forsyth (92CRS32662)	No Error
STATE v. WATSON No. 922SC490	Beaufort (91CRS2216) (91CRS2217)	No Error

STATE v. WOODBERRY No. 9322SC799	Alexander (92CRS2580) (92CRS2581) (92CRS2582)	No Error
TORAIN v. McCULLOCK No. 9315SC691	Orange (90CVS1512)	Affirmed
WHITFORD v. GASKILL No. 923SC1031	Carteret (90CVS910)	Dismissed

HURLEY v. MILLER

[113 N.C. App. 658 (1994)]

ROBERT L. HURLEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BARBARA POOLE HURLEY, DECEASED, PLAINTIFFS v. KEVIN WAYNE MILLER, AND HARVEY LEE SMITH, JR. AND WIFE, KELLY BOGER SMITH, D/B/A HLS TRUCKING, AND HLS TRUCKING, INC., DEFENDANTS

No. 9219SC1289

(Filed 1 March 1994)

1. Automobiles and Other Vehicles § 738 (NCI4th)— violation of safety statute—instruction not required—no negligence per se

In an action for wrongful death arising out of an automobile accident, the trial court did not err by failing to instruct the jury that defendant violated N.C.G.S. § 20-150 by crossing the center line at a crest or curve and was negligent *per se* where the evidence tended to show that defendant crested a hill to discover decedent partially on the highway and partially on the shoulder checking her mail; defendant, who was driving a multi-ton truck, realized that he could not stop in time to avoid a collision; defendant therefore drove into the left lane to avoid decedent's vehicle; decedent then made an immediate left turn toward her driveway into the path of defendant's truck; and defendant struck decedent's vehicle. From the evidence presented at trial, a jury could reasonably conclude that defendant took reasonable action in light of the uncontroverted evidence of decedent's initial act of obstructing the road.

Am Jur 2d, Automobiles and Highway Traffic §§ 1112 et seq.

2. Automobiles and Other Vehicles § 716 (NCI4th)— car stopped on highway—overtaking truck—failure to blow horn—last clear chance—failure to instruct error

The trial court erred in failing to submit an instruction on the issue of last clear chance where a jury could reasonably find that in the time it took defendant to apply the truck's brakes and steer to the left, he had both the time and opportunity to avoid the collision with decedent's car which was partially in his lane of travel by blowing the truck's horn, thereby providing an adequate warning to decedent prior to her decision to move her vehicle from the mailbox on the right side of the road toward the left side of the road where her home was located.

Am Jur 2d, Automobiles and Highway Traffic § 1118.

Judge COZORT concurring in part and dissenting in part.

Appeal by plaintiffs from judgment signed 25 June 1992 by Judge James C. Davis in Cabarrus County Superior Court. Heard in the Court of Appeals 28 October 1993.

On 11 March 1991, plaintiffs filed a complaint alleging *inter alia* negligence against defendants seeking recovery for damages arising from the death of Barbara P. Hurley (hereinafter "decedent"). A jury trial was held on 9 June 1992. In a "Pretrial Memorandum" dated 8 June 1992, the parties stipulated *inter alia* to the following facts which are pertinent to this appeal:

(a) That this action arises out of a motor vehicle collision which occurred on March 13, 1989 at approximately 2:30 p.m.

(b) That the collision occurred on R.P. 2444 which is a public street or highway located in Cabarrus County, North Carolina.

(c) That the vehicles involved in the collision, the owners of those vehicles and the operators of those vehicles were as follows:

(i) 1983 Toyota passenger vehicle bearing license plate number BSJ-7986, NC, and V.I.N. JT2AE72C5D2030426, was owned by plaintiff Robert Lee Hurley and operated by the decedent, Barbara Poole Hurley.

(ii) 1983 Ford 3-Ton truck bearing license plate number BK-1269, N.C., and V.I.N. 1FDYU80U6DVA38880, was owned by defendant Kelly Boger Smith and operated by the defendant Kevin Wayne Miller.

(d) That, at the time of the collision, the decedent, Barbara Poole Hurley was operating said vehicle as the agent of Plaintiff Robert Lee Hurley, in accordance with the "family purpose" doctrine.

(e) That, at the time of the collision, the defendant Kevin Wayne Miller was operating said vehicle as the agent of defendant Kelly Boger Smith, the owner of said vehicle, in accordance with G.S. 20-71.1 and as the agent of Harvey Lee Smith, Jr., in the normal course and scope of defendant Miller's employ-

ment with Harvey Lee Smith, Jr. who was doing business as HLS Trucking.

(f) That, as a proximate result of the collision between said vehicles, Barbara Poole Hurley sustained injuries which instantly caused her death.

(g) That Barbara Poole Hurley died on March 13, 1989, instantaneously after the collision.

There are other pertinent facts regarding the accident. Prior to the accident both defendant Miller and decedent were travelling south on R.P. 2444, a two lane road having one lane for southbound traffic and one lane for northbound traffic. The road where the accident occurred is described by the parties differently. Plaintiffs state in their appellate brief that "the portion of the roadway leading up to the point of collision was somewhat obscured by an upward grade or crest in the highway and a curve to the right. This area of the highway was marked with double yellow lines and was designated as a no-passing zone." Defendants state in their brief that "[b]ecause the road, immediately after the crest of the hill, turns to the right and goes down the hill, a vehicle travelling south on Rural Paved Road 2444 experiences a blind spot, eliminating the driver's ability to see beyond the crest of the hill and down the road ahead of him. There are no signs warning a driver travelling south that there is a blind spot beyond the hill crest." The investigating officer testified that "[a]pproximately a quarter of a mile prior to the accident scene—the whole road is extremely curvy and hilly. In this one particular place there's a gradual grade going up and you just don't see anything beyond the hill crest because it starts to go down and immediately turn to the right." Defendant Miller testified that he had travelled the road on a few prior occasions but that during those occasions he had not experienced the blind spot beyond the crest. He further testified that "I never encountered another vehicle parked on the other side of it [the crest of the hill]." Defendant Miller testified that a driver cannot see the area around the curve until the driver gets to the crest of the hill.

Defendant Miller testified that the accident occurred in a rural area where there are "mainly residences out there and woods." The posted speed limit was 55 m.p.h. There are no posted traffic signs warning drivers to reduce their speed as they approach the curve. Defendant Miller testified that his truck was traveling en-

tirely in the southbound (right-hand) lane of travel at a speed of between 50 and 55 m.p.h. Defendant Miller testified that he first observed decedent's car, which was approximately 40-50 yards (120-150 feet) away, when he reached the crest of the hill. At that time decedent's car "was parked half on, half off the [southbound lane or right-hand side of the] road at her mailbox" facing south. Defendant Miller testified that he had never encountered any vehicle at that mailbox before. The investigating officer testified that the distance from the crest of the hill to the mailbox was approximately 90 to 130 feet. The driveway to decedent's residence (on the east side of the road) was located directly across from the mailbox (which was on the west side of the road). Defendant Miller testified that when he initially saw decedent he was entirely in the southbound (right-hand) lane of travel. Defendant Miller testified that he "knew" he would hit decedent's car if he did not move into the left (northbound) lane because "I applied the brakes first off and knew—I seen [sic] right then I couldn't stop. From that point I made my decision to bear left."

Defendant Miller proceeded to travel southbound partially in the northbound (left-hand) lane. As defendant Miller approached from behind, decedent turned immediately left towards the driveway of her residence, which was located on the east side of the road. Defendant Miller testified that decedent did not activate her left turn signal. Defendant Miller testified that prior to the moment of impact "[w]hen she started her turn, I cut [the truck's wheels] back to the right and I mean when she started her turn, I lost sight, that's how close we were. . . . The only thing I remember is seeing her start to turn left or turning left and from that point on, I couldn't see her." When asked "[h]ow soon after she [decedent] turned her vehicle in front of yours was it until this accident happened?," defendant Miller responded "[l]ike that; split second." Defendant Miller stated that at the moment of impact the truck was in the northbound (left-hand) lane and that "it was somewhere around straddling the yellow line or maybe a little bit beyond." In response to the question, "if Mrs. Hurley had not moved her car after you came over the crest of this hill and moved your truck into the left-hand lane, would there have been a collision?," defendant Miller answered "no." Defendant Miller further testified that as "[f]ar as I know she [decedent] didn't" know that the truck was coming from behind her. He testified that he did not blow the truck's horn at any time.

Pursuant to G.S. 1A-1, Rule 51(b), plaintiffs filed a written request for jury instructions, which included *inter alia* a request for the submission of an instruction on the issue of last clear chance. Following the presentation of evidence, the trial court submitted to the jury the issues of negligence and contributory negligence based on the North Carolina Pattern Jury Instructions. The trial court denied plaintiffs' request for an instruction on last clear chance.

In its verdict, the jury found that plaintiffs were injured by the negligence of defendants and that the decedent by her own negligence contributed to plaintiffs' injury. Plaintiffs made a motion for new trial pursuant to G.S. 1A-1, Rule 59, on the grounds that the trial court did not submit the issue of last clear chance. The trial court denied the motion. Plaintiffs appeal.

Wallace and Whitley, by Michael Doran, for plaintiff-appellants.

Wishart, Norris, Henninger & Pittman, PA, by Kenneth R. Raynor and June K. Allison, for defendant-appellees.

EAGLES, Judge.

Plaintiffs bring forward two assignments of error. Plaintiffs assign error to the trial court's instructions regarding defendant's negligence and decedent's contributory negligence and assign error to the trial court's refusal to charge the jury on the issue of last clear chance as requested by plaintiffs pursuant to G.S. 1A-1, Rule 51(b). After a careful consideration of the briefs, record, and transcript, we: (1) find no error as to the trial court's instructions on the issues of negligence and contributory negligence, and; (2) remand for a new trial based on the trial court's failure to instruct the jury on the issue of last clear chance.

I.

In *Millis Construction Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 509-10, 358 S.E.2d 566, 568 (1987), this Court stated:

> It is the duty of the trial judge without any special requests to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence. *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 192 S.E.2d 1 (1972). When a party appropriately tenders a written request for a special instruction which is correct in itself and supported by the evidence, the failure of the trial judge to give the instruction,

at least in substance, constitutes reversible error. *Bass v. Hocutt*, 221 N.C. 218, 19 S.E.2d 871 (1942); *Faeber v. E.C.T. Corp.*, *supra.*

Regarding the burden placed upon appellant when error is assigned to an error in the trial court's charge to the jury, this Court, in *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 380, 291 S.E.2d 897, 901-02, *aff'd*, 307 N.C. 267, 297 S.E.2d 397 (1982), has stated:

> When an error in the judge's charge is asserted by the appellant as a basis for reversal of the verdict below, the burden is on that party not merely to demonstrate that the court's instructions were in error, but also to demonstrate that when the judge's instructions are considered in their entirety, as opposed to in fragments, the error was prejudicial to the appealing party's chance of success and amounted to the denial of a substantial right. Otherwise, reversal or a new trial is unwarranted. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E.2d 488 (1967); *Burgess v. Construction Co.*, 264 N.C. 82, 140 S.E.2d 766 (1965).

We proceed with an examination of plaintiffs' assignments of error.

II.

Plaintiffs argue that "[t]he trial court committed reversible error in failing to properly instruct the jury on the issues of Mrs. Hurley's contributory negligence and defendant Miller's negligence." We disagree.

[1] Regarding the instruction on defendant's negligence, plaintiffs argue that the trial court erred by failing to instruct the jury that defendant violated G.S. 20-150 and was negligent *per se*. G.S. 20-150 (entitled "Limitations on privilege of overtaking and passing") provides:

> (a) The driver of a vehicle shall not drive to the left side of the center of a highway, in overtaking and passing another vehicle proceeding in the same direction, unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety.

(b) The driver of a vehicle shall not overtake and pass another vehicle proceeding in the same direction upon the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed within a distance of 500 feet.

(c) The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any railway grade crossing nor at any intersection of highway unless permitted so to do by a traffic or police officer. For the purposes of this section the words "intersection of highway" shall be defined and limited to intersections designated and marked by the Department of Transportation by appropriate signs, and street intersections in cities and towns.

(d) The driver of a vehicle shall not drive to the left side of the centerline of a highway upon the crest of a grade or upon a curve in the highway where such centerline has been placed upon such highway by the Department of Transportation, and is visible.

(e) The driver of a vehicle shall not overtake and pass another on any portion of the highway which is marked by signs, markers or markings placed by the Department of Transportation stating or clearly indicating that passing should not be attempted.

(f) The foregoing limitations shall not apply upon a one-way street nor to the driver of a vehicle turning left in or from an alley, private road, or driveway.

Regarding the issue of contributory negligence, plaintiffs, relying on *Walker v. Bakeries Co.*, 234 N.C. 440, 67 S.E.2d 459 (1951), argue that they "requested that the jury be instructed that 'Mrs Hurley . . . is not required to anticipate that the overtaking motorist, defendant Miller, will attempt to pass in violation of the statute.' " (Alteration in original.) Specifically, plaintiffs' requested instruction stated as follows:

Although G.S. 20-150(d) is designed primarily to prevent collision between an overtaking automobile and a vehicle coming from the opposite direction, its provisions are germane to litigation between an overtaking motorist, such as Mr. Miller, and Barbara Hurley, the driver of an overtaken vehicle, when, as here, the collision occurred while the defendant Miller at-

> tempted to pass Barbara Hurley upon a marked curve. In this regard, Mrs. Hurley, the driver of the overtaken vehicle, is not required to anticipate that the overtaking motorist, defendant Miller, will attempt to pass in violation of the statute.

We find *Walker*, the case cited by plaintiffs, readily distinguishable. Plaintiffs quote *Walker* for the proposition that "when attempting to turn left across a lane of travel which is in a no passing zone, the overtaken motorist 'is certainly not required in such case to anticipate that the latter will attempt to pass in violation of the statute.' [*Id.* at 443,] 67 S.E.2d at 461." However, in *Walker*, there was no initial act of negligence on the part of the plaintiff; whereas here, decedent's initial act of negligence occurred when she parked her car halfway, instead of entirely, on the shoulder of the road, thus deliberately preventing the free flow of traffic apparently for the sake of convenience given the proximity of her car to the mailbox. (Plaintiffs state in their brief that "[i]f she [decedent] were negligent, in any way, her negligence arose from being stationary on the highway for reasons apparently unrelated to traffic flow.") Decedent's initial act of negligence justified the shift of defendant's vehicle to the left of the center line in this no passing zone. *See* G.S. 20-146(a) ("Upon all [highways] of sufficient width a vehicle shall be driven upon the right half of the highway except as follows: . . . (2) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard."). Given that defendant Miller was driving a multi-ton truck and apparently did not have an opportunity to stop if he had remained in the southbound (right-hand) lane of travel, we conclude on this record that defendant Miller had to enter the northbound (left-hand) lane of travel in his attempt to avoid the collision. Concomitantly, because of her initial act of negligence, decedent had the duty to check for vehicles approaching from behind her when she made the sudden and immediate turn to the left, which the uncontroverted evidence shows was made without activation of her vehicle's left turn signal. *See generally*, *Saunders v. Warren*, 267 N.C. 735, 737-38, 149 S.E.2d 19, 20-21 (1966) (" 'So the driver of the stopped vehicle must take such precautions as would reasonably be calculated to prevent injury, whether by the use of lights, flags, guards, or other practical means, and failing to give such warning may con-

stitute negligence' "). We note that this factual situation involving defendant Miller's decision to attempt to pass decedent's vehicle (the obstruction) is clearly distinguishable from a factual situation in which no obstruction exists and in which a defendant voluntarily passes a plaintiff's vehicle due to mere impatience or inadvertence in clear contravention of a statute.

Furthermore, the factual situation presented here is inappropriate for the application of negligence *per se*. Regarding the doctrine of negligence *per se*, our Supreme Court has stated:

> It is the generally accepted view that the violation of a statute enacted for the safety and protection of the public constitutes negligence *per se*, i. e., negligence as a matter of law. The statute prescribes the standard, and the standard fixed by the statute is absolute. The common law rule of ordinary care does not apply—proof of the breach of the statute is proof of negligence. The violator is liable if injury or damage results, irrespective of how careful or prudent he has been in other respects. No person is at liberty to adopt other methods and precautions which in his opinion are equally or more efficacious to avoid injury. But causal connection between the violation and the injury or damage sustained must be shown; that is to say, proximate cause must be established. In short, where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those for whose protection or benefit it was imposed for any injuries or damage of the character which the statute or ordinance was designed to prevent, and which was proximately produced by such neglect, *provided the injured party is free from contributory negligence. Aldridge v. Hasty*, 240 N.C. 353, 82 S.E.2d 3[3]1; 38 Am. Jur., Negligence, § 158, pp. 827-829; 65 C.J.S., Negligence, § 19, pp. 418-420.

Cowan v. Transfer Co. and Carr v. Transfer Co., 262 N.C. 550, 554, 138 S.E.2d 228, 231 (1964) (emphasis added). *See also Brower v. Robert Chappell & Assoc. Inc.*, 74 N.C. App. 317, 320, 328 S.E.2d 45, 47, *disc. review denied*, 314 N.C. 537, 335 S.E.2d 313 (1985) ("It is well-established precedent in this State that contributory negligence on the part of the plaintiff is available as a defense in an action which charges the defendant with the violation of a statute or negligence *per se*."). We find support for the

distinguishability of *Walker* from the facts presented here by the writings of Professors Prosser and Keeton:

> The legislature, within its constitutional powers, may see fit to place the burden of injuries "upon those who can measurably control their causes, instead of upon those who are in the main helpless in that regard." In such a case the defendant may become liable on the mere basis of his violation of the statute. No excuse is recognized, and neither reasonable ignorance nor all proper care will avoid liability. Such a statute falls properly under the head of strict liability, rather than any basis of negligence—although the courts not infrequently continue, out of habit, to speak of the violation as "negligence per se."
>
> . . . .
>
> These statutes are, however, the exception, and in the aggregate they make up only a very small percentage of the total safety legislation. Normally no such interpretation will be placed upon a statute, and no such conclusion reached, unless the court finds that it was clearly the purpose of the legislature. In the ordinary case, all that is required is reasonable diligence to obey the statute, and it frequently has been recognized that a violation of the law may be reasonable, and may be excused. . . .
>
> . . . . [A] valid excuse is that of emergency, as where one drives on the left because the right is blocked. . . .

W. P. Keeton, Ed., *Prosser and Keeton on Torts*, at 227-28 (5th ed. 1984) (footnotes omitted) (hereinafter "Prosser"). *See also* Restatement (Second) of Torts § 288A (1965). As our Supreme Court expressly stated in *Walker*:

> Although the statute is *designed primarily to prevent collision between an overtaking automobile and a vehicle coming from the opposite direction*, its provisions are germane to litigation between an overtaking motorist and the driver of an overtaken vehicle if there is evidence to the effect that the underlying accident was occasioned by an unsuccessful effort on the part of the former to pass the latter upon a marked curve. The driver of the overtaken vehicle is certainly not required in such case to anticipate that the latter will attempt to pass in violation of the statute.

Walker at 443, 67 S.E.2d at 461 (emphasis added). This is not simply a case where "the underlying accident was occasioned by an unsuccessful effort on the part of the [defendant] to pass the [decedent] upon a marked curve," *id.*; rather, from the evidence presented at trial a jury could reasonably conclude that defendant took reasonable action in light of the uncontroverted evidence of decedent's initial act of negligence. We note that were it not for decedent's initial act of obstructing the road, then the statute would be "germane," *id.*, to the facts presented here. *See, e.g.*, Prosser at 229, n.88 ("The emergency must of course be such that there is no reasonable opportunity to obey the statute. *See Murray v. O & A Express, Inc.*, Tex. 1982, 630 S.W.2d 633 (truck breakdown insufficient emergency to excuse failure to activate blinkers)"). This assignment of error fails.

III.

[2] Plaintiffs argue that "[t]he trial court erroneously failed to submit the issue of last clear chance to the jury when the defendants' negligent failure to exercise the last clear chance to avoid injury to [decedent] arose from the evidence presented at trial." We agree.

The doctrine of last clear chance would allow plaintiffs to recover despite any contributory negligence by decedent if defendant Miller, in the exercise of reasonable care and prudence, had the last clear chance to avoid the accident and failed to do so. *Hales v. Thompson*, 111 N.C. App. 350, 355, 432 S.E.2d 388, 392 (1993); *Williams v. Odell*, 90 N.C. App. 699, 703, 370 S.E.2d 62, 65, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 557 (1988). The essential elements of the last clear chance doctrine have been set forth in several North Carolina cases. This Court has enumerated the following five prerequisites for application of the doctrine:

> (1) Plaintiff, by his own negligence, placed himself in a position of peril from which he could not escape; (2) defendant saw, or by the exercise of reasonable care should have seen and understood, the perilous position of plaintiff; (3) defendant had the time and the means to avoid the accident if defendant had seen or discovered plaintiff's perilous position; (4) the defendant failed or refused to use every reasonable means at his command to avoid impending injury to plaintiff; and (5) plaintiff was injured as a result of defendant's failure or refusal to avoid impending injury.

Williams v. Lee Brick and Tile, 88 N.C. App. 725, 728, 364 S.E.2d 720, 721 (1988) (*citing Pegram v. Pinehurst Airline, Inc.*, 79 N.C. App. 738, 740, 340 S.E.2d 763, 765 (1986); *Wray v. Hughes*, 44 N.C. App. 678, 262 S.E.2d 307, *disc. review denied*, 300 N.C. 203, 269 S.E.2d 628 (1980)). It is well established that the last clear chance does not mean a last possible chance. *Williams*, 88 N.C. App. at 729, 364 S.E.2d at 722; *Grant v. Greene*, 11 N.C. App. 537, 181 S.E.2d 770 (1971); *Battle v. Chavis*, 266 N.C. 778, 147 S.E.2d 387 (1966). In distinguishing between the two, our Supreme Court has stated:

> [T]he fundamental difference between a "last clear chance" and a "last possible chance," is that defendant must have "*the time and the means* to avoid the injury to the plaintiff by the exercise of reasonable care after she discovered or should have discovered plaintiff's perilous position." *Watson* [v. *White*], 309 N.C. [498] at 505-06, 308 S.E.2d [268] at 273 [1983] (emphasis added). The reasonableness of a defendant's opportunity to avoid doing injury must be determined on the particular facts of each case. *See Exum v. Boyles*, 272 N.C. [567] at 575, 158 S.E.2d [845] at 852 [1968].

VanCamp v. Burgner, 328 N.C. 495, 499, 402 S.E.2d 375, 377, *rehr'g denied*, 329 N.C. 277, 407 S.E.2d 854 (1991) (emphasis in original). *See also Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 448, 35 S.E.2d 337, 340 (1945) (doctrine of last clear chance is "invoked only in the event it is made to appear that there was an appreciable interval of time between plaintiff's negligence and his injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of plaintiff's prior negligence"); *Mathis v. Marlow*, 261 N.C. 636, 639, 135 S.E.2d 633, 635 (1964). In order to be entitled to the submission of a jury instruction on the issue of last clear chance, plaintiffs must meet the burden of providing substantial evidence which, when viewed in the light most favorable to plaintiffs, will support a reasonable inference that each of the five essential elements of last clear chance exists. *Hales*, 111 N.C. App. at 355, 432 S.E.2d at 392. Defendant Miller testified that he knew of decedent's position of peril immediately upon seeing decedent's vehicle by the mailbox:

> Q: And as soon as you saw her [decedent's] car on the roadway, you knew you might hit her if you didn't get in the left lane; is that correct?

A: I knew I would hit her.

Q: From that point, the first time you saw her?

A: Well, no, not the first point. I applied the brakes first off and knew—I seen [sic] right then I couldn't stop. From that point I made my decision to bear left.

Q: So you definitely knew you didn't have time to stop as you saw her?

A: Yes.

Q: As far as trying to stop, why would you even try to stop unless you thought you were going to hit her?

A: It's just natural instinct, you hit your brakes something [sic] that close to you.

Q: If you didn't hit your brakes you'd hit her, right?

A: I'd have hit her anyway.

Q: That's from the time you first saw her?

A: Yeah.

Q: You didn't blow your horn as your first instinct did you?

A: No, sir.

Q: Didn't blow your horn at all?

A: No, sir.

. . . .

Q: And that's at the crest of the hill when you can first see her?

A: Yes.

. . . .

Q: When did you first see her car start to turn from her mailbox to the left?

A: When I was veering left.

Q: When you first saw her car was it moving?

A: No.

Q: So her car started moving after you came over the crest of that hill?

A: That's correct.

Q: Mr. Miller, had her car not moved would you have struck her car?

A: No.

Q: And why is that?

A: Because I had got over far enough to avoid hitting her.

. . . .

Q: Mr. Miller, if Mrs. Hurley had not moved her car after you came over the crest of this hill and moved your truck into the left-hand lane, would there have been a collision?

A: No.

Defendants argue that "the doctrine of last clear chance did not apply to the case at hand because the evidence could not support an inference that defendant Miller had the time or means to avoid the collision after the Hurley [decedent's] vehicle came into his path of travel." We disagree. The evidence showed, through defendant Miller's own testimony, that when defendant Miller initially saw decedent's vehicle defendant Miller's truck was approximately 120 to 150 feet from decedent's vehicle and that defendant Miller had time to "mash" the truck's brakes "to the floor." Under the last clear chance doctrine, a defendant must use "every reasonable means" to avoid injury to the plaintiff. *Williams*, 88 N.C. App. at 728, 364 S.E.2d at 721; *Hales*, 111 N.C. App. at 356-57, 432 S.E.2d at 392-93. Here, we conclude that defendant Miller failed to do so. Defendant Miller failed to blow the horn *at any time after* initially seeing that decedent's vehicle was resting in a perilous position by the mailbox in the direct path of the multi-ton truck which he was driving. *See Lowe v. Futrell*, 271 N.C. 550, 553, 157 S.E.2d 92, 95 (1967) ("The common law imposes upon [a motorist] the duty to use reasonable care to avoid injury to other persons upon the highway and, for that purpose, to blow his horn if, under like circumstances and conditions, a reasonably prudent driver would have done so"). Furthermore, defendant Miller's testimony discloses that he knew of decedent's presence in the automobile and that he failed to blow the horn *after* realizing that the brakes would

not stop the truck in time to prevent a potential collision with decedent's vehicle at the mailbox. From this evidence, it is clear that defendant Miller appreciated the danger to decedent as he testified that he shifted to the left lane to avoid the collision. While defendant Miller's immediate veering to the left temporarily took the truck out of the direct path of decedent's vehicle at the mailbox, it provided decedent with no warning of the truck's presence in the blind curve area. *See Earle v. Wyrick*, 286 N.C. 175, 178, 209 S.E.2d 469, 471 (1974) (holding that plaintiff's estate was entitled to a last clear chance instruction where defendant stated that she saw decedent "only a split second before the impact" and where "[a]ll the evidence indicate[d] the defendant failed to sound the horn"); *Vernon v. Crist*, 291 N.C. 646, 655, 231 S.E.2d 591, 596-97 (1977) (holding that plaintiff was entitled to a last clear chance jury instruction based upon defendant's knowledge of plaintiff's presence and defendant's failure to warn plaintiff). Viewing this evidence in the light most favorable to plaintiffs, we conclude that a jury could reasonably find that in the time it took defendant Miller to apply the truck's brakes and steer to the left, he had both the time and opportunity to avoid the collision by blowing the truck's horn, thereby providing an adequate warning to decedent prior to her decision to move her vehicle from the mailbox and towards the northbound (left-hand) lane towards the direction of her residential driveway. Indeed, had defendant Miller blown the horn, decedent may never have moved her vehicle from the mailbox location. Accordingly, we hold that the trial court erred by failing to submit an instruction on the issue of last clear chance. Finally, we note that in "borderline cases" involving "issues of due care and reasonableness of actions under the circumstances . . . fairness and judicial economy suggest that courts should decide in favor of submitting issues to the jury." *Radford v. Norris*, 74 N.C. App. 87, 88-89, 327 S.E.2d 620, 621-22, *disc. review denied*, 314 N.C. 117, 332 S.E.2d 483 (1985) (*citing Cunningham v. Brown*, 62 N.C. App. 239, 302 S.E.2d 822, *disc. review denied*, 308 N.C. 675, 304 S.E.2d 754 (1983)). *See e.g., Reber v. Booth*, 335 N.C. 170, 435 S.E.2d 769 (1993) (per curiam).

IV.

For the reasons stated, we find no error as to the trial court's instructions regarding the issues of negligence and contributory negligence. We remand for a new trial in which the issue of last clear chance shall be submitted to the jury.

New trial.

Judge ORR concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT concurring in part and dissenting in part.

I concur with the majority's conclusion that the trial court did not err in its instructions on negligence and contributory negligence. I disagree, however, with the majority's conclusion that the trial court should have instructed on last clear chance.

I find the record devoid of any evidence that the defendant had the last clear chance to avoid the accident. The evidence showed that the decedent stopped her car "half on, half off" the southbound lane of travel. Defendant Miller, who was driving in the southbound lane within the posted speed limit, realized that he could not stop before hitting decedent's car and steered his truck to the left far enough to avoid hitting decedent's car. As defendant Miller's truck approached decedent's car, the decedent, without giving a left turn signal, turned left into the path of defendant Miller's truck a "split second" before defendant Miller's truck reached decedent's car. Miller swerved back to the right; however, there was not enough time to avoid the collision.

I find no evidence that defendant Miller had the means to avoid the collision after the decedent started her left turn into the path of defendant Miller's truck. This lack of evidence of time to avoid the collision distinguishes this case from *VanCamp v. Burgner*, 328 N.C. 495, 402 S.E.2d 375 (1991), and the trial court correctly refused to submit last clear chance to the jury.

I vote no error.

STATE OF NORTH CAROLINA v. DEVON EL BALLEW

No. 9327SC518

(Filed 1 March 1994)

1. Criminal Law § 544 (NCI4th)— improper question by prosecution—judge's prompt remedial measures—new trial not required

In a prosecution of defendant for first-degree rape and sexual activity by a substitute parent where defendant's victims were his stepdaughters, the prosecutor's question asked of defendant's natural daughter as to whether her father had done anything to her did not require a mistrial, since the trial judge sustained defendant's objection, instructed the jury not to take any inference from the question or partial question, excused the jury, and admonished the prosecutor to refrain from the particular line of questioning.

Am Jur 2d, Trial §§ 39 et seq.

2. Evidence and Witnesses § 3106 (NCI4th)— victims' statements—additional facts included—statements admissible for corroboration

Statements by two rape victims were admissible as corroborative evidence even though they included additional facts not testified to by the victims, since the victims testified that the three charged incidents were not the only incidents of sexual abuse; they specifically referred to other months when sexual assaults for which defendant was not charged occurred; and the victims' statements, as read into evidence by the detective who took them, tended to strengthen and add credibility to the trial testimony of the victims.

Am Jur 2d, Witnesses §§ 632 et seq.

3. Arrest and Bail § 159 (NCI4th)— bond revoked after second day of trial—right to confer with counsel unaffected

Defendant was not prejudiced by the trial court's revocation of his bond after the second day of trial, although defendant contended that he was precluded from assisting his attorney in preparing for the final day of trial, since nothing prevented counsel from conferring all night with defendant in jail, and, upon request of defense counsel, the trial judge

granted a recess for as long as defendant needed on the third day of trial so defendant and his attorney could confer.

Am Jur 2d, Bail and Recognizance §§ 27, 28.

4. **Trial § 482 (NCI4th)— jury dispersed—right to poll jury waived**

Where the verdicts were returned and recorded, the judge thanked the jurors for their service, the judge told them they could have a seat in the courtroom or return to the jury assembly room, the judge told the jurors that they could discuss the case with anyone, and the jurors all left the courtroom, the jury had "dispersed" within the meaning of N.C.G.S. § 15A-1238, and, because the jury dispersed before defendant requested that the jury be polled, defendant waived his right to poll the jury.

Am Jur 2d, Trial § 1768.

5. **Rape and Allied Offenses § 82 (NCI4th)— first-degree rape—sexual activity by substitute parent—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for first-degree rape and sexual activity by a substitute parent where the two victims testified in detail as to the charged offenses, and their testimony was corroborated by the statements they made to a police detective; a social worker testified that the girls told her of several instances of sexual abuse by defendant; and one of the doctors who examined the girls testified that the girls told him of the instances of sexual abuse and testified that his examinations of the girls were consistent with those of girls who had had sexual intercourse, including that one girl had a sexually transmitted disease.

Am Jur 2d, Rape §§ 88 et seq.

6. **Criminal Law §§ 1062, 1431 (NCI4th)— consecutive life sentences plus fifteen years to run consecutively—one aggravating factor—sentence proper—sentence unaffected by discovery of handcuff key on defendant**

Where defendant was convicted of two counts of first-degree rape and one count of sexual activity by a substitute parent, and the trial court found that the only factor in aggravation was that defendant had prior convictions for similar sexual assaults punishable by more than sixty days confine-

ment and that there were no mitigating factors, the trial court did not err in sentencing defendant to consecutive sentences of life imprisonment for each rape conviction and fifteen years for the sexual activity by a substitute parent conviction; moreover, the record clearly showed that defendant's sentence was not affected by the discovery of a handcuff key on defendant's person shortly after the jury announced its verdict.

Am Jur 2d, Criminal Law §§ 552 et seq., 598.

Judge JOHNSON dissenting.

Appeal by defendant from judgments and commitments entered 3 February 1993 by Judge Claude S. Sitton in Gaston County Superior Court. Heard in the Court of Appeals 11 January 1994.

Attorney General Michael F. Easley, by Assistant Attorney General K. D. Sturgis, for the State.

Carpenter & James, by Reid C. James, for defendant-appellant.

LEWIS, Judge.

On 3 February 1993, defendant was convicted, after a jury trial, of two counts of first-degree rape and one count of sexual activity by a substitute parent. He received a sentence of life imprisonment for each of the rape convictions and a sentence of fifteen years imprisonment for the sexual activity by a substitute parent conviction, all sentences to run consecutively. From these judgments and commitments defendant appeals.

Defendant's convictions arose out of the following facts. The victims, C. and L., were twelve and thirteen years old, respectively, when their mother married defendant in May of 1991. The victims and their mother then moved in with defendant and defendant's fifteen year-old son. Over the next seven months, defendant repeatedly engaged in sexual intercourse with each of the two girls. The three instances charged occurred as follows. On 25 October 1991, C.'s mother and sister were Christmas shopping, while defendant and C. were home alone. The two went to the back bedroom where defendant asked C. if she wanted to engage in sex. Upon her refusal defendant forced her to have sexual intercourse with him.

On 5 November 1991, L. did not go to school because she had poison ivy. Defendant was the only other person at home.

Defendant entered L.'s bedroom twice and asked her if she wanted to have sex with him. L. responded both times that she did not. Defendant then engaged in sexual intercourse with her against her will.

On the afternoon of 31 December 1991, C. and defendant were again home alone. Defendant called C. to the back bedroom where he asked her several times if she would engage in sexual intercourse with him, and each time, C. told him no. Defendant then forced her to engage in sexual intercourse with him. They then heard C.'s mother return from the store. Defendant told C. to pull up her pants and her underwear, and the two of them went into the kitchen where defendant told C.'s mother that she had forgotten to buy several items. When C.'s mother left the house, defendant again forced C. to have sex with him.

A week later, on 6 January 1992, C. first told her mother about the incidents. The girls' mother and their aunt then reported the matter to the police. Subsequently, the girls were seen by social workers and physicians. Gynecological exams of the girls were consistent with exams of girls who had had sexual intercourse, and C. tested positive for a sexually transmitted disease.

At trial, after the two girls testified, the State called defendant's natural daughter, A., to the stand. The State sought to elicit testimony regarding sexual contact between defendant and A. After a few preliminary questions, the following exchange which is the subject of defendant's first assignment of error, took place:

Prosecutor: At the time you were twelve or thirteen years of age were you subjected to any—

Defense Counsel: (Interrupting)—Objection.

The Court: Sustained.

Prosecutor: What, if anything—

The Court: (Interrupting)—Members of the jury, do not take any inference from the question or partial question that was asked by the district attorney in your jury deliberations.

Prosecutor: What, if anything, did your father do to you—

Defense Counsel: (Interrupting)—Objection.

Prosecutor: (Continuing)—while you were living in the home—

The Court: (Interrupting)—Sustained. Members of the jury, let me ask you to step to the jury room. Do not discuss the case.

During the *voir dire* that followed, the judge ruled that the questions of the prosecutor were improper, and he again sustained defendant's objections. The judge then admonished the prosecutor to refrain from the improper line of questioning. Defendant moved for a mistrial, and the judge denied the motion. When the jury returned, the judge instructed:

> Members of the jury, the Court instructs you that evidence does not come from a question that is asked, and I instruct you that the last question that was asked you should not take any inference from the question that was asked in any form or fashion in your jury deliberations. So do not take any inference therefrom in regard to these matters. . . .

[1] Defendant argues that the prosecutor's question planted in the minds of the jurors the inference that defendant sexually abused his natural daughter, and that this improper question warranted a mistrial.

"A mistrial is appropriate only for serious improprieties which render impossible a fair and impartial verdict under the law." *State v. Chapman*, 294 N.C. 407, 417-18, 241 S.E.2d 667, 674 (1978). Further, the trial judge's ruling on a motion for mistrial is not reviewable unless there is a showing of gross abuse of discretion. *State v. Elliott*, 64 N.C. App. 525, 527, 307 S.E.2d 844, 845 (1983).

In *State v. Self*, 280 N.C. 665, 187 S.E.2d 93 (1972), the defendant made a motion for mistrial under similar circumstances, and the motion was denied. The Supreme Court held that

> the [trial] court's prompt action in sustaining defendant's objection to the question and in excusing the jury and instructing the solicitor not to ask further questions along that line, coupled with the court's specific instruction to the jury not to consider the question but to strike it from their mind, was sufficient to remove any possibility of error.

Id. at 671, 187 S.E.2d at 97.

In the instant case, the trial judge sustained defendant's objection, instructed the jury not to take any inference from the question or partial question, excused the jury, and admonished the prosecutor to refrain from the particular line of questioning. Accordingly, we find no gross abuse of discretion in the trial judge's denial of defendant's motion for a mistrial. The trial judge could hardly have been more timely or correct in his reaction.

Defendant further argues that the trial judge's second cautionary instruction was error, as it drew particular attention to the prosecutor's improper question. However, before the judge gave the second instruction, and while the jury was still out of the courtroom, the judge twice informed counsel that he would give a second cautionary instruction, and defense counsel did not object. Likewise, when the judge gave the instruction, defense counsel did not object. Thus, defendant has failed to preserve the issue for appellate review. N.C.R. App. P. 10(b).

[2] As his third assignment of error, defendant argues that the trial court erred in denying his motion for a mistrial made after the court allowed the State to introduce into evidence statements of the two victims. Defendant contends that the statements were inadmissible because they did not corroborate the earlier testimony of the girls.

Prior consistent statements of a witness are admissible if they corroborate the testimony of the witness. *State v. Ramey*, 318 N.C. 457, 468, 349 S.E.2d 566, 573 (1986). To be corroborative, the prior statement of the witness need not relate to specific facts testified to by the witness at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. *Id.* at 469, 349 S.E.2d at 573. Furthermore, a prior statement that contains new or additional information not referred to in the witness' trial testimony may be admitted if the prior statement tends to add weight or credibility to the trial testimony. *Id.* at 469, 349 S.E.2d at 573-74.

The corroborative evidence about which defendant complains was in the form of the victims' statements to a police detective, which were read into evidence by the detective. These statements included accounts of several incidents of sexual abuse, while the victims' trial testimony centered only on the three incidents charged. Defendant argues that the statements read by the detective were not admissible as corroborative evidence because they went beyond

the testimony of the victims at trial. However, the victims, in their trial testimony, stated that the three charged incidents were not the only incidents of sexual abuse. Furthermore, they specifically referred to other months when sexual assaults for which defendant was not charged occurred. The victims' statements to the detective, as read into evidence by the detective, tended to strengthen and add credibility to the trial testimony of the victims. Thus, the statements were admissible as corroborative evidence even though they included additional facts not testified to by the victims. *Ramey*, 318 N.C. at 470, 349 S.E.2d at 574.

[3] As his fourth assignment of error, defendant argues that the trial court abused its discretion in revoking his bond after the second day of trial, thereby precluding him from assisting his attorney in preparing for the final day of trial. Even if the trial court abused its discretion, we find that defendant has failed to show that he was prejudiced. Defendant argues that his incarceration after the second day of his three-day trial prejudicially affected his ability to confer with his attorney. However, as the trial judge noted, the jail was located in the courthouse, the defendant was in the jail all night, and defense counsel had all night and up until court began the next morning to confer with defendant. Further, the judge, upon the request of defense counsel, granted a recess for "as long as you need" on the third day of trial so that defendant and his attorney could confer. Accordingly, we find that defendant has shown no prejudice, and we overrule this assignment of error. *See State v. Jefferson*, 68 N.C. App. 725, 315 S.E.2d 744, *disc. review denied and appeal dismissed*, 311 N.C. 766, 321 S.E.2d 151 (1984).

[4] Defendant next argues that the trial court erred by denying his request to poll the jury. The record reveals that after the judge read the verdict forms aloud, the verdicts were recorded, and the judge thanked the jury for its service. He then stated:

> You may, if you choose to, step down and have a seat in the courtroom or else I would ask you to return briefly to the jury assembly room, whichever you may choose to do so. If you desire to discuss the case with anyone, it would up [sic] to you. You are not compelled to but you are at liberty to depending on what your choice may be. You may step down and have a seat in the courtroom or I would ask that you go back briefly to the jury assembly room.

After all of the jury members had left the courtroom, the judge asked if there was anything for the record. Defense counsel then requested that the jury be polled, and the judge, noting that all twelve jurors had left the courtroom, denied the request.

N.C.G.S. § 15A-1238 provides in pertinent part: "Upon the motion of any party made after a verdict has been returned and *before the jury has dispersed*, the jury must be polled." N.C.G.S. § 15A-1238 (1988) (emphasis added). In *State v. Black*, 328 N.C. 191, 198, 400 S.E.2d 398, 402 (1991), our Supreme Court explained that the rationale behind requiring that the polling of the jury be before dispersal is "to ensure that nothing extraneous to the jury's deliberations can cause any of the jurors to change their minds." Such extraneous influences may consist of things the juror sees or hears, or may merely be the juror's own weighing of the evidence and the law independently and in the absence of the rest of the jury. *Id.* at 198, 400 S.E.2d at 402-03.

In the present case, the jurors were told that they could remain in the courtroom or return to the jury assembly room, and all chose the latter. They were also told that they could discuss the case with anyone if they so desired. Upon leaving the jury box, the jurors became susceptible to any number of extraneous influences. Therefore, we conclude that the jury had "dispersed" within the meaning of N.C.G.S. § 15A-1238. And, because the jury dispersed before defendant requested that the jury be polled, defendant waived his right to poll the jury. *Black*, 328 N.C. at 198, 400 S.E.2d at 403. Accordingly, this assignment of error is overruled.

[5] Defendant's sixth assignment of error is that the trial judge erred in denying defendant's motions to dismiss made at the close of the State's evidence and at the close of all of the evidence. In a motion to dismiss, the question is whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, so as to warrant submission of the charge to the jury. *State v. Thomas*, 65 N.C. App. 539, 541, 309 S.E.2d 564, 566 (1983). We must view the evidence in the light most favorable to the State and afford the State every reasonable inference that may arise from the evidence. *Id.* at 542, 309 S.E.2d at 566. There must be substantial evidence to support a finding that an offense has been committed and that the defendant committed it. *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925, *aff'd*, 301 N.C. 374,

271 S.E.2d 277 (1980). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

In the present case, the two victims testified in detail as to the charged offenses, and their testimony was corroborated by the statements they made to a police detective. Further, a social worker testified that the girls told her of several instances of sexual abuse by defendant. Finally, one of the doctors who examined the girls testified that the girls told him of the instances of sexual abuse. He also testified that his examinations of the girls were consistent with those of girls who had had sexual intercourse and that one of the girls tested positive for a trichomonas organism, which is a sexually transmitted organism. The defendant offered no evidence. We find that there was sufficient evidence to support a verdict of guilty on the offenses charged and that defendant's motions to dismiss were properly denied.

[6] By defendant's seventh assignment of error he argues that the sentence of the trial court was excessive based upon the evidence presented and was improperly influenced by the discovery of a handcuff key found on the defendant's person shortly after the verdict was rendered.

The task of this Court on appellate review is to determine whether the trial judge abused his discretion in imposing a sentence greater than the presumptive sentence. *State v. Harris*, 111 N.C. App. 58, 70, 431 S.E.2d 792, 800 (1993). The test used to determine whether there has been an abuse of discretion is the rational basis test. *Id.* This grants the trial judge great discretion in finding factors in aggravation and mitigation, as well as in sentencing. *Id.* The trial judge also has the discretion to impose multiple sentences to run consecutively or concurrently. *Id.* at 71, 431 S.E.2d at 800. When a sentence is supported by the evidence introduced at trial, it will not be disturbed on appeal. *Id.*

In the present case, defendant was convicted of two counts of first-degree rape and one count of sexual activity by a substitute parent. First-degree rape is a class B felony which carries a mandatory life sentence. Sexual activity by a substitute parent is a class G felony carrying a presumptive sentence of four and one-half years and a maximum sentence of fifteen years. The judge found that the only factor in aggravation was that defendant had prior convictions for offenses punishable by more than sixty days

confinement. The judge found no factors in mitigation. Defendant was sentenced to life imprisonment for each rape conviction and fifteen years for the sexual activity by a substitute parent conviction, the sentences to run consecutively. The record reveals that defendant's prior convictions were for similar sexual assaults in Georgia. We find that the trial judge did not abuse his discretion in sentencing defendant.

We find no merit in defendant's contention that the sentence was improperly influenced by the discovery of a handcuff key on the defendant's person shortly after the jury announced its verdict. When the key was brought to the judge's attention, he ordered that defendant be placed in leg irons because defendant was a security risk. The judge also ordered that an attachment be made to the judgment advising the Department of Correction that defendant had possessed a handcuff key and that the court considered him a security risk. When defense counsel brought up the issue of the handcuff key at the sentencing hearing, the trial judge stated:

> Well I am not going to punish him by any stretch of the imagination about that key. That's not before this court. The only thing, I had him brought into court at this time due to the fact that it was found, in leg irons. That's the only thing I have taken into consideration and will take into consideration. I will not be imposing any sentence based on the fact that he may have had or did have a handcuff key on him when he was taken downstairs.

Thus, the record clearly shows that defendant's sentence was not affected by the presence of the handcuff key. Accordingly, we find no error in defendant's sentencing.

During cross examination of C., the State's first witness, defendant moved to sequester the witnesses for the State. Defendant assigns error to the judge's denial of this motion.

A motion to sequester is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Batts*, 93 N.C. App. 404, 410, 378 S.E.2d 211, 214 (1989). In the present case, defendant has failed to show any abuse of discretion. Accordingly, this assignment of error is overruled.

For the foregoing reasons, we find that defendant's trial and sentencing were free from prejudicial error.

No error.

Judge Eagles concurs.

Judge Johnson dissents.

Judge JOHNSON dissenting.

I respectfully dissent. I believe the colloquy described herein during the State's direct examination of defendant's natural daughter resulted in "substantial and irreparable prejudice" to defendant's case, and a mistrial should have been declared. *See* North Carolina General Statutes § 15A-1061 (1988). I believe the nature of these partial questions which the prosecutor asked were of such a prejudicial nature that they rose to the level of inadmissible evidence.

Our Supreme Court has stated:

> "In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the Court has held to the opinion that a subsequent withdrawal did not cure the error. . . ." *S. v. Strickland*, 229 N.C. 201, 207, 49 S.E.2d 469, 473; *S. v. Green*, 251 N.C. 40, 46, 110 S.E.2d 609, 613, and cases cited. . . . Whether the prejudicial effect of such incompetent statements should be deemed cured by such instructions depends upon the nature of the evidence and the circumstances of the particular case.

State v. Aycoth, 270 N.C. 270, 272-73, 154 S.E.2d 59, 60-61 (1967). *See also State v. Hunt*, 287 N.C. 360, 215 S.E.2d 40 (1975).

In the instant case, the first two witnesses for the State were the alleged victims; these were the only witnesses testifying with personal knowledge of the alleged rapes. The next witnesses for the State were the pediatrician who examined the children, the alleged victims' mother (who was formerly married to defendant) and defendant's sister-in-law. Defendant was living with his sister-in-law and her husband (his brother) at the time of trial, and had done so since the reporting of the alleged incidents. Defendant's sister-in-law testified, when asked about her reaction after

the alleged victims' mother came to her and told her about the allegations,

> [t]o begin with, I didn't believe the allegations. I told Debbie [the victims' mother] when we left there, I said, ". . . I have a lot of mixed emotions right now about what you have told me." I didn't feel like the children were in danger and neither did I feel that Debbie was in danger.
>
> Q. Why is that?
>
> A. Sir?
>
> Q. Why is that?
>
> A. Devon had lived in my home for a long time. He is not a person to be violent; he is not a person to even raise his voice; and he is certainly not a threat to anybody. He is very protective; he was protective of those children and of Mrs. Ballew, his wife, just like he is protective of me as his sister-in-law. Devon was raised and brought up to respect women.

The next witness for the State was defendant's natural daughter. The State had not given notice that it intended to call defendant's natural daughter as a witness, nor had the State provided defendant's counsel with any statements that the witness had provided. After introductory questions establishing the witness as defendant's twenty-two year old natural daughter, the following testimony in the presence of the jury resulted:

> Q. [Prosecutor:] At the time you were twelve or thirteen years of age were you subjected to any—
>
> > MR. JAMES [defense counsel]: (Interrupting)—OBJECTION.
> >
> > THE COURT: SUSTAINED.
>
> Q. [Prosecutor:] What, if anything—
>
> > THE COURT: (Interrupting)—Members of the jury, do not take any inference from the question or partial question that was asked by the district attorney in your jury deliberations.
>
> Q. [Prosecutor:] What, if anything, did your father do to you—
>
> > MR. JAMES [defense counsel]: (Interrupting)—OBJECTION.

Q. [Prosecutor:] (Continuing)—while you were living in the home—

THE COURT: (Interrupting)—SUSTAINED. Members of the jury, let me ask you to step to the jury room. Do not discuss the case.

After a *voir dire* hearing, the trial court properly ruled this evidence inadmissible. The prosecutor asked no further questions of defendant's natural daughter and she was dismissed from the stand.

I believe the intent of the prosecutor to place this improper evidence before the jury was accomplished. The partial questions certainly intimated that the witness, defendant's daughter, as a twelve or thirteen year old young girl, as were the alleged victims in the case *sub judice*, was subject to something her "father [did] to her," i.e., sexual abuse. I acknowledge that the court, while the partial questions were being asked, promptly gave the jury instructions to not take any inference from the partial questions, excused the jury and admonished the prosecutor, and then repeated curative instructions upon the return of the jury. However, I believe that this testimony as heard by the jury was so prejudicial that it could not be cured. As a result, defendant was irreparably prejudiced.

I vote to reverse and award defendant a new trial.

STATE OF NORTH CAROLINA v. MARY ANN BARNES WILLIAMS

No. 9310SC59

(Filed 1 March 1994)

Automobiles and Other Vehicles §§ 776, 834 (NCI4th)— seat belt violation—inadmissibility of evidence—driving while impaired charge properly dismissed

Evidence of a motorist's violation of the seat belt law may not be used as justification for the highway stop of his vehicle in the event the officer discovers the existence of criminal activity in the course of the stop; therefore, the trial court correctly construed the provisions of N.C.G.S. § 20-135.2A(d)

so as to require the dismissal of a driving while impaired charge against defendant who was initially stopped for a seat belt violation.

Am Jur 2d, Automobiles and Highway Traffic §§ 357-367, 392.

Judge MARTIN concurring.

Judge LEWIS dissenting.

Appeal by the State from judgment entered 18 March 1992 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 5 October 1993.

On 18 January 1991 at approximately 1:00 a.m., defendant was stopped by Trooper A.W. Johnson of the North Carolina State Highway Patrol on New Hope Church Road in Wake County for failing to wear her seat belt. Defendant was charged with driving while impaired and failing to wear her seat belt.

Both of the cases came on for trial on 27 January 1992. Upon motion of defendant, District Court Judge James R. Fullwood severed the offenses. Defendant then pled responsible to the seat belt infraction. At the same time, the trial court heard defendant's pre-trial motion to suppress all of the evidence relating to the offense of driving while impaired. The State stipulated that the only basis for the stop of defendant's vehicle was that she was not wearing her seat belt. The court then ruled that the evidence of defendant's failure to wear her seat belt was not admissible in the DWI trial, and dismissed the charge of DWI for lack of evidence.

The State appealed the dismissal of the DWI as well as the district court's order severing the two hearings to the superior court. On 18 March 1992, the superior court affirmed the orders of the district court. The State appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

DeMent, Askew, Gammon & Mueller, by Richard T. Gammon, for defendant-appellee.

WELLS, Judge.

I. Motion To Suppress

In ruling upon defendant's motion to suppress, the district court entered the following order:

CONCLUSIONS OF LAW

> 1. The evidence of the failure of the Defendant to use her seat belt is not admissible in any other criminal or civil action except one based on a violation of this section pursuant to North Carolina General Statute Section 20-135.2A(d).
>
> 2. That failure to sever the two offenses would result in an unfair determination of the Defendant's guilt or innocence pursuant to North Carolina General Statute Section 15A-927(b)(1).
>
> THEREFORE, based upon the foregoing, the Court ORDERS, ADJUDGES AND DECREES that the offenses of Driving While Impaired and Failure to Use Seat Belt shall be severed in order to promote a fair determination of the Defendant's guilt or innocence of each offense.

On 18 March 1992, the superior court entered its order affirming the judgment of the district court.

In this case of apparent first impression before our appellate courts, we must determine whether the trial court correctly construed the provisions of G.S. § 20-135.2A(d) so as to require the dismissal of the driving while impaired charge against defendant. For the reasons which follow, we answer that question in the affirmative.

In 1985, the United States Department of Transportation promulgated a directive requiring that all American-made cars be equipped with automatic crash protection devices unless states accounting for at least two-thirds of the nation's population passed mandatory seat belt usage laws, *see* Comment, Seat Belt Law, 64 N.C. Law Rev. 1127 (1986). In response to that directive, our General Assembly enacted such a law (Seat Belt Use Mandatory), codified in G.S. § 20-135.2A. Subsection (d) of the statute provided:

> (d) Failure to wear a seat safety belt in violation of this section shall not constitute negligence in any action for the recovery of damages arising out of the operation, ownership, or

maintenance of a motor vehicle, nor shall anything in this act change any existing law, rule or procedure pertaining to any such civil action.

This was an apparent codification of our Supreme Court's rejection of the so-called common law "seat belt defense" in *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65 (1968).

The N.C.L.R. Comment we have cited above was sharply critical of the General Assembly for failing to use the enactment of our mandatory seat belt usage law to overturn *Miller* so as to allow the use of the "seat belt defense" as a factor in mitigation of damages (of injured motorists who failed to buckle-up). Nevertheless, when the General Assembly next considered the question, it enacted Chapter 623 of the 1987 Session Laws as follows:

> AN ACT TO MAKE THE EVIDENCE OF THE USAGE OF SEAT BELTS INADMISSIBLE IN CRIMINAL OR CIVIL PROCEEDINGS
>
> *The General Assembly of North Carolina enacts:*
>
> **Section 1.** G.S. 20-135.2A(d) is rewritten to read:
>
> '(d) Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section.'
>
> **Section 2.** This act is effective upon ratification.
>
> In the General Assembly read three times and ratified this 16th day of July 1987.

Thus, not only did the General Assembly retain the exclusion of the seat belt defense in civil cases, but expanded the act so as to exclude evidence of the failure to have a fastened seat belt in place in other criminal proceedings.

In *United States v. Cartledge*, 742 F.Supp. 291 (M.D.N.C. 10 Aug. 1990), *reversed on other grounds*, 928 F.2d 93 (4th Cir. 1991), defendant was charged with possession of a firearm by a felon. His motion to suppress was based on the fact that the highway stop of his automobile was for a seat belt violation under North Carolina law. Judge Erwin, writing for the Court, interpreted G.S. § 20-135.2A(d) in this way: [It is] "apparent from the language of this section that North Carolina created an evidentiary privilege for violation of this statute such that evidence of failure to use

a seat belt could not be used for any purpose except prosecution under this statute." (Emphasis supplied.)

Our research has disclosed that during the 1993 Session of the General Assembly, three bills were introduced proposing amendments to G.S. § 20-135.2A(d).

Senate Bill 731 was as follows:

A BILL TO BE ENTITLED

AN ACT TO ALLOW EVIDENCE OF A LACK OF SEAT BELT USAGE TO BE ADMITTED IN A CRIMINAL OR CIVIL PROCEEDING.

The General Assembly of North Carolina enacts:

Section 1. G.S. 20-135.2A(d) reads as rewritten:

'(d) Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section or as justification for the stop of a vehicle or detention of a vehicle operator and passengers.'

Section 2. This act is effective upon ratification and shall apply to any trial, action, or proceeding held on or after that date.

House Bill 697 was as follows:

A BILL TO BE ENTITLED

AN ACT TO MAKE THE FAILURE TO WEAR A SEAT BELT ADMISSIBLE IN CRIMINAL TRIALS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 20-135.2A(d) reads as rewritten:

'(d) Evidence of failure to wear a seat belt shall not be admissible in any civil trial, action, or proceeding.'

Section 2. This act becomes effective December 1, 1993, and applies to violations cited and offenses occurring on or after that date.

House Bill 728 was as follows:

A BILL TO BE ENTITLED

AN ACT TO MAKE THE WEARING OF SEAT BELTS ADMISSIBLE IN CRIMINAL PROCEEDINGS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 20-135.2A(d) reads as rewritten:

'(d) Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section or as justification for the stop of a vehicle or detention of a vehicle operator and passengers.'

Section 2. This act is effective upon ratification and shall apply to any trial, action, or proceeding held on or after that date.

None of the bills were enacted.

With this legislative background and history in mind, we are persuaded that the trial court's ruling in this case was the only one that could be made. The language of the statute is clear and unambiguous, and leaves us no basis for any construction other than that given by the trial court.

The State urgently contends that such a construction effects an absurd result, which the Legislature could not have intended. We cannot agree. We recognize the State's concern, it being obvious that not only may the offense of impaired driving go unprosecuted in some cases, but that evidence of other serious crimes might also be excluded where the initial stop of a motor vehicle was for a seat belt violation. A recent decision of this Court illustrates the problem. In *State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990), the defendant driver, initially stopped for a seat belt violation, was found to be transporting a significant amount of cocaine. His motion to suppress that evidence, which did not raise or present the statutory exclusion, was denied, and this Court upheld the conviction.

Nevertheless, we must recognize in this case that the Legislature has written a clear rule which our courts cannot violate.

II. Severance

The State also contends that the trial court erred in allowing defendant's motion to sever the trial of her seat belt infraction from her driving while impaired charge. For the reasons we have stated above, this ruling was obviously correct.

The judgment below is

Affirmed.

Judge LEWIS dissents in a separate opinion.

Judge MARTIN concurs in a separate opinion.

Judge MARTIN concurring.

I am reluctantly convinced to concur. The question is whether evidence of a motorist's violation of the "seat belt law" may be used as justification for the highway stop of his vehicle in the event the officer discovers the existence of criminal activity in the course of the stop. The issue has been squarely presented to the General Assembly, which, as Judge Wells points out, has thus far expressly declined to permit use of evidence of a violation of the "seat belt law" for any purpose other than prosecution for failure to use a seat belt. Although I agree with the Attorney General that G.S. § 20-135.2A(d), as currently written, may actually frustrate and undermine legitimate law enforcement efforts, and, as applied in the present case, produce an arguably absurd result, where the terms of the statute are clear, it is our duty to apply it as written, irrespective of any opinion we may have as to its wisdom. *Peele v. Finch*, 284 N.C. 375, 200 S.E.2d 635 (1973). I share Judge Lewis' optimism that the General Assembly will soon reexamine the issue and permit evidence of a violation of G.S. § 20-135.2A to be admitted for the purpose of showing that a law enforcement officer had justification to stop a vehicle.

Judge LEWIS dissenting.

I respectfully dissent.

I am not unmindful of the majority's assertion that the legislative history of N.C.G.S. 20-135.2A infers a clear intent to create a very peculiar infraction relative to not "buckling up." "An infraction

is an unlawful act that is not a crime." N.C.G.S. § 20-135.2A(e) (1993). No court costs may be assessed and, indeed, nothing but a fine may be imposed. The majority reads the language of the statute to require exclusion of evidence of an infraction so as to prohibit a hearing on any connected misdemeanor or felony, as occurred in this case. This would create the unacceptable result of having a legislatively-created prohibition against prosecution of a possible felony or misdemeanor.

Since the beginning, North Carolina courts have recognized the superiority of the Constitution over conflicting legislation. In *Bayard v. Singleton*, 1 N.C. 5 (1787), the Court discussed a statute decreeing that upon presentation of a deed from a superintendent commissioner of confiscated estates, a judge must dismiss any action brought for the recovery of that real property. This statute was passed in the aftermath of the Revolution, by which time the State had confiscated the property of those loyal to the crown and then sold the property or at least deeded it to other persons. The plaintiff brought an action to recover such property and the defendant moved to dismiss according to the statute, which required the courts, in all cases where the defendant made an affidavit that he held the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit or motion. The Constitution at that time provided that all citizens had a right to a trial by jury regarding real property rights. The Court, in decreeing that such a statute could not stand, made the following observation:

> That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

Id. at 7.

In 1215 a reluctant King John made a promise to his rebellious barons: "To no one will we sell, to no one will we deny or delay right or justice." J. Orth, *The North Carolina State Constitution: A Reference Guide* 54 (1993). This provision of the *Magna Carta* was incorporated into section 18 of the North Carolina Constitution in very similar language: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. "[E]very person for an injury done him in his lands, goods, person . . ." indicates to me a clear intent by the framers of our Constitution to see that victims in the criminal law would have open access to remedy by due course of law with right and justice administered without denial. The necessity of having disputes settled in court rather than in the streets is a most basic tenet of our cherished rule by law. Put in context with the seat belt infraction at issue in the case at hand, exclusion of evidence, which would send the defendant in this case home free of the charge of driving under the influence, while leaving unresolved the question as to whether or not such a misdemeanor had been committed, would clearly lead to the conclusion that, had the other violation been murder, rape or kidnapping instead of driving under the influence, then justice would have been most assuredly denied and the victims of such a crime would not have had remedy by due course of law.

I do not know nor does the record reflect why the legislature created such a loophole or why they failed to plug it in succeeding sessions. However, I am so convinced that the legislature will recognize and correct this very dangerous oversight that I believe this dissent will soon become relevant only as to this particular case.

A well-established rule is that a statute will be interpreted to avoid absurd and bizarre consequences. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980). Similarly, our courts will not adopt an interpretation that results in palpable injustice where the statute is susceptible to another interpretation which is consistent with the intention of the statute, because there is a presumption that the legislature acted with reason and common sense and did not intend untoward results. *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office*, 294 N.C. 60, 241 S.E.2d 324 (1978). When the literal interpretation of a statute contravenes the manifest purpose of the statute, the reason and

purpose of the law will be given effect and the strict letter of the statute will be disregarded. *North Carolina Baptist Hosps., Inc. v. Mitchell*, 323 N.C. 528, 533, 374 S.E.2d 844, 847 (1988).

My research reveals that this is a case of first impression in this State. However, at least two federal courts have had an opportunity to construe the provisions of section 20-135.2A(d). In *United States v. Cartledge*, 928 F.2d 93 (4th Cir. 1991), the Fourth Circuit held that section 20-135.2A(d) could not be used as a shield by the defendant so as to defeat the interests of the federal government in enforcing its criminal statutes. Furthermore, the Seventh Circuit, per Judge Posner, applying North Carolina law in a conflict of laws case, said in dicta that a literal interpretation of section 20-135.2A(d) would be incorrect. *Barron v. Ford Motor Co. of Canada Ltd.*, 965 F.2d 195, 198 (7th Cir.), *cert. denied*, --- U.S. ---, 121 L. Ed. 2d 541 (1992). As an example, the Seventh Circuit reasoned that if an irate motorist ripped off his seat belt and strangled the driver, a literal interpretation of the statute would preclude the prosecution from introducing the seat belt as the murder weapon because to do so would show that the defendant was not wearing his seat belt, an obviously absurd result. In support of its conclusion that a literal interpretation of section 20-135.2A(d) would be incorrect, the Seventh Circuit relied on *State v. Brewer*, 328 N.C. 515, 402 S.E.2d 380 (1991), where the Supreme Court, in a murder prosecution of a woman who abandoned her car containing her disabled child on the railroad tracks, allowed the introduction of evidence that the child knew how to release her seat belt.

The fact that two federal courts have declined to apply a literal interpretation of section 20-135.2A(d) is at least some evidence that this statute is not as unambiguous as defendant would have us believe. I consider also this Court's prior decision in *State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990). In *Morocco*, a State trooper stopped the defendant for a seat belt violation. After engaging defendant in conversation, the officer became suspicious and asked permission to search the defendant's car and permission was granted. During his search the trooper found cocaine and arrested defendant for trafficking. Although the specific issue presented by this case was not at issue in *Morocco*, this Court held that in deciding whether a traffic stop was pretextual it would look to what a reasonable officer would do, rather than what the officer could have done. *Id.* at 427, 393 S.E.2d at 548. Concluding that the trooper's stop was not pretextual, the Court

then examined the voluntariness of defendant's consent and did not even consider whether the evidence of the seat belt violation was admissible to establish the trooper's probable cause for stopping defendant in the first place. Had defendant's argument been applied in *Morocco* then this Court would have been required to dismiss the cocaine charge and convict the defendant only on the seat belt offense. This would clearly be an absurd result.

It is the public policy of this State to enforce the seat belt law. However, it is also the public policy of this State to seize illegal drugs, to prevent murders and kidnappings, and to get drunk drivers off the road. If defendant's construction of section 20-135.2A(d) is carried to its logical conclusion, then a police officer who observes an individual violating the seat belt law and pulls him over, discovering then that the driver is intoxicated and has a bloody corpse in the back seat, could not use evidence of the seat belt violation as probable cause to stop the automobile, rendering both investigation and prosecution for murder impossible.

I find that a literal interpretation of section 20-135.2A(d) reaches an absurd result which the legislature could not have intended. I look to the spirit of the statute, which was to encourage people to wear their seat belts, and to the history of the statute which shows that section 20-135.2A(d) was originally designed only to reject the "seat belt defense." Defendant's interpretation distorts both the spirit and the history of this statute and could even encourage drunken motorists to drive without a seat belt in the hope that if caught they may escape through this legislatively-created loophole. Surely, this is not what the General Assembly intended. I do not believe they intended for section 20-135.2A(d) to be read so broadly as to preclude evidence of additional criminal activity when the seat belt violation is only a step in the evidentiary chain which establishes the officer's probable cause to make further arrests.

The trial judge in *Bayard v. Singleton* refused to suspend the right of jury trial in the face of bad legislation, and certainly would have allowed the evidence of the stop in this case in an effort not to deny or delay "right and justice."

As to the State's objection to defendant's motion to sever, I find that this is an issue directed to the discretion of the trial court. *State v. Carson*, 320 N.C. 328, 357 S.E.2d 662 (1987).

I would reverse as to dismissing the charge of driving while impaired and remand the issue for trial.

JIMMY M. VARNER, PLAINTIFF-APPELLANT v. JOE J. BRYAN, V. CHARLES BULLOCK, AND GREG C. JONES, DEFENDANTS-APPELLEES

No. 9210SC1199

(Filed 1 March 1994)

1. **Contracts § 181 (NCI4th)— tortious interference with contract—no legal malice shown—summary judgment proper**

The trial court properly entered summary judgment for defendant town council members on plaintiff town manager's claim for tortious interference with contract, since defendants would be liable only upon a showing that defendants acted with legal malice in terminating plaintiff's employment, and, even if plaintiff was terminated by defendants for personal or political reasons, as his evidence tended to show, such termination was neither a wrongful act nor one in excess of defendants' authority and therefore not legally malicious.

Am Jur 2d, Interference §§ 39-48.

2. **Libel and Slander § 17 (NCI4th)— allegedly defamatory statements about town manager—status as public official**

Plaintiff town manager was a public official for purposes of the review of allegedly defamatory statements made after his termination by defendant town council members.

Am Jur 2d, Libel and Slander §§ 130-134.

3. **Libel and Slander § 41 (NCI4th)— town manager's claim of defamation against city council—ill will—knowledge of falsity of statements—insufficient evidence of malice**

The trial court properly entered summary judgment for defendant town council members on plaintiff town manager's claim for defamation, since plaintiff's forecast of evidence of personal animosity and ill will toward him by defendants was not sufficient to permit a finding of actual malice by clear and convincing evidence, and since there was insufficient evidence that defendants knew or failed to ascertain from

readily available information the falsity of their statements about possible misuse of public funds to make unauthorized contributions to plaintiff's 401(k) retirement plan.

Am Jur 2d, Libel and Slander § 444.

Appeal by plaintiff from order entered 27 July 1992 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 21 October 1993.

Plaintiff, the former Town Manager of Knightdale, N.C., brought this action seeking damages for defamation, intentional infliction of emotional distress, and tortious interference with contract, against defendants who, at all times pertinent to this appeal, were members of the Knightdale Town Council. The record reflects that plaintiff was hired by the Council on 27 March 1989; the terms of his employment included an annual salary of $36,400.00, an annual five percent contribution to a 401(k) retirement plan, and other benefits. At the time plaintiff was hired, all town employees received a 401(k) contribution equal to five percent of their annualized salary.

In June of 1990, the Council adopted the town's annual budget for 1990-1991. As a part of the budget, the Council reduced the 401(k) contributions for all town employees except police department employees from five percent to one percent. According to plaintiff, he sought a clarification from Mayor Billy Wilder and Town Attorney Joseph Howell that the reduction in 401(k) contributions did not apply to his position, and received assurances that the reduction did not apply to him. Defendants, however, were unaware of those assurances.

Following passage of the budget, Elaine Holmquist, town finance director, acted to put into effect the 401(k) contribution reduction affected by the new budget. Ms. Holmquist understood that contributions to plaintiff's retirement plan were to be reduced along with all other 401(k) contributions. Plaintiff informed Ms. Holmquist that the contribution to his retirement plan was supposed to remain at five percent and Ms. Holmquist confirmed this fact with "someone in authority." However, Ms. Holmquist did not discuss the matter with any of the defendants. Contributions were made to plaintiff's 401(k) account at five percent, even though the town budget funded this expense at only one percent.

Sometime during 1990, the three defendants became dissatisfied with plaintiff's performance as manager and, after discussions among themselves and with others, decided to seek his resignation or terminate his employment. Plaintiff's evidence tended to show that defendants' dissatisfaction with his performance was personal in nature, having to do with plaintiff's opinion that defendants Bullock and Bryan were violating certain town ordinances in connection with their businesses, or was politically motivated; defendants' evidence tended to show that they considered plaintiff's job performance to be inadequate. On 4 December 1990, during an executive session of the Council, defendants informed plaintiff that they were dissatisfied with his job performance and requested his resignation. On the following day, the Council met in open session and voted to terminate plaintiff's employment by a vote of 3-2, with each defendant voting in favor of termination. Plaintiff's discharge generated a large amount of publicity in the local media and among the town's citizens, much of which was in opposition to plaintiff's termination. In response, defendants made certain statements to the media and to citizens about their reasons for voting to terminate plaintiff, to the effect that plaintiff had been terminated for unsatisfactory job performance.

In March 1991, approximately four months after plaintiff's discharge, finance director Holmquist prepared a memorandum seeking revisions to the town's 1990-1991 budget. Included in the revisions was a request for funds sufficient to contribute to plaintiff's retirement plan at the rate of five percent. This request was necessary because the funds which had been appropriated the previous June for payment of plaintiff's retirement contributions were nearly depleted due to the fact that the town had contributed to his plan at a rate of five percent while budgeting that expense at only one percent.

Defendant Bryan first learned of the five percent contributions to plaintiff's plan by virtue of this memorandum. At the next regular Council meeting, on 13 March 1991, defendant Bryan made the following motion which plaintiff alleges was defamatory:

> Mr. Mayor, in order to protect our citizens and maintain their public trust and confidence, I motion to direct the town attorney to investigate this situation and determine if there was a misappropriation of public funds or other wrongdoing

> involved. Further, for the town attorney to report his findings and recommendations at the April town board meeting.

Plaintiff also alleged that defendants made additional statements suggesting that plaintiff had misappropriated public funds, and that some of these statements were publicized in newspaper reports. Plaintiff alleged that the statements were false and damaged him in his "reputation, office, profession, and means of livelihood." He also alleged that by their conduct, defendants had intentionally interfered with his employment contract with the Town of Knightdale and had intentionally inflicted emotional distress upon him.

The trial court granted defendants' motion for summary judgment on all claims. Plaintiff appealed.

Womble, Carlyle, Sandridge & Rice, by G. Eugene Boyce and Susan S. McFarlane, for plaintiff-appellant.

Michael B. Brough & Associates, by Michael B. Brough and Jan S. Simmons, for defendant-appellees.

MARTIN, Judge.

The record on appeal contains six assignments of error, all of which are related to the entry of summary judgment dismissing plaintiff's claims. Initially, we note that plaintiff has not brought forward in his brief any reason or argument in support of his assignment of error relating to the dismissal of his claim for intentional infliction of emotional distress and has, therefore, abandoned the assignment of error. N.C. R. App. P., Rule 28(b)(5). Therefore, we will consider only those assignments of error relating to the entry of summary judgment dismissing plaintiff's claims for tortious interference with contract and defamation. For the reasons stated herein, we affirm the judgment of the trial court.

G.S. § 1A-1, Rule 56(c) provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The party moving for summary judgment has the burden of establishing a lack of any triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). In *Collingwood v. G.E. Real*

Estate Equities, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989), the Supreme Court characterized this burden as follows:

> The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. [Citations omitted.] By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.

See also, Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974). With these rules in mind, we review the record below to determine whether the trial court properly granted defendants' motion for summary judgment.

I. Tortious Interference With Contract

[1] We first consider plaintiff's claim for tortious interference with contract. In order to establish a claim for tortious interference with contract, plaintiff was required to forecast evidence of the following elements:

> First, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. Second, that the outsider had knowledge of the plaintiff's contract with the third person. Third, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. Fourth, that in so doing the outsider acted without justification. Fifth, that the outsider's act caused the plaintiff actual damages.

Childress v. Abeles, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954) (citations omitted).

The trial court's order of summary judgment was based in part on its conclusion that defendants were not outsiders to the contract with the Town of Knightdale. The court reasoned that defendants, as members of the Town Council, hired plaintiff and therefore were not outsiders to the contract against whom an action for interference with contract could be brought. However, in this State, one who is not an outsider to the contract may be liable

for interfering therewith if he acted maliciously. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976); *You v. Roe*, 97 N.C. App. 1, 387 S.E.2d 188 (1990); *Murphy v. McIntyre*, 69 N.C. App. 323, 317 S.E.2d 387 (1984). It is not enough, however, to show that a defendant acted with actual malice; the plaintiff must forecast evidence that the defendant acted with legal malice. *Id.* A person acts with legal malice if he does a wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties. *Murphy*, at 328-29, 317 S.E.2d at 401. The plaintiff's evidence must show that the defendant acted without any legal justification for his action. *Childress*, 240 N.C. 667, 84 S.E.2d 176.

> Indeed, actual malice and freedom from liability for this tort may coexist. If the outsider has a sufficient lawful reason for inducing the breach of contract, he is exempt from liability for so doing, no matter how malicious in actuality his conduct may be. A "malicious motive makes a bad act worse, but it cannot make that wrong which, in its own essence, is lawful."

Id. at 675, 84 S.E.2d at 182, *quoting Bruton v. Smith*, 225 N.C. 584, 36 S.E.2d 9 (1945).

We agree with defendants that plaintiff did not forecast evidence tending to show that defendants acted with legal malice when terminating plaintiff's employment. As plaintiff concedes, a town manager serves at the pleasure of the town council and it is within the scope of a town council member's duties, and therefore within defendants' authority, to discharge a town manager. Even if plaintiff was terminated by defendants for personal or political reasons, as his evidence tends to show, such termination was neither a wrongful act nor one in excess of defendants' authority and therefore not legally malicious. *You*, 97 N.C. App. 1, 387 S.E.2d 188. In the absence of any forecast of evidence demonstrating that defendants acted with legal malice, defendants' motion for summary judgment on plaintiff's claim for tortious interference with contract was properly granted.

II. Defamation

[2] We next consider the sufficiency of plaintiff's evidentiary forecast regarding his claim for defamation. "In actions for defamation, the nature or status of the parties involved is a significant factor in determining the applicable legal standards." *Proffitt v.*

Greensboro News & Record, 91 N.C. App. 218, 221, 371 S.E.2d 292, 293 (1988). Where the plaintiff is a "public official" and the allegedly defamatory statement concerns his official conduct, he must prove that the statement was "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 11 L.Ed.2d 686, 706 (1964). The rule requiring "public officials" to prove actual malice is based on First Amendment principles and reflects the Court's consideration of our national commitment to robust and wide-open debate of public issues. *Id.*, at 270, 11 L.Ed.2d at 701. Thus, we must first consider whether plaintiff was a "public official" at the time the allegedly defamatory statements were made.

During oral argument, plaintiff's counsel acknowledged that plaintiff was a "public official" while he was employed as Town Manager, but contended that plaintiff's "public official" status ceased when his employment as Town Manager was terminated. Defendants argued that for purposes of this defamation action, plaintiff's termination has little significance regarding his status as a "public official." We agree with defendants.

In *Rosenblatt v. Baer*, 383 U.S. 75, 15 L.Ed.2d 597 (1966), the plaintiff, formerly a county supervisor, brought suit against the defendant, a local newspaper columnist, alleging that a certain article written by the defendant was libelous. The article at issue was published after the plaintiff's employment by the county had been terminated. The Court stated that there could be no serious contention that the plaintiff's termination had any decisional significance, reasoning that although the plaintiff was no longer employed as a public official, his performance in that capacity continued to be the subject of broad public interest and debate. *Id.*, at 87, 15 L.Ed.2d at 606.

Undoubtedly, a public official's job performance will often continue to be the subject of important public debate and discussion long after the termination of his employment in a public office. *Rosenblatt's* extension of "public official" status beyond the duration of an official's employment is consistent with the *New York Times* policy favoring robust and open debate of public issues. Thus, we hold that plaintiff was a "public official" for purposes of our review of the allegedly defamatory statements made after his termination as Town Manager.

[3] When a defamation action brought by a "public official" is at the summary judgment stage, the appropriate question for the trial judge is whether the evidence presented is sufficient to allow a jury to find that actual malice had been shown with convincing clarity. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 91 L.Ed.2d 202, 217 (1986); *Proffitt, supra.* Plaintiff contends that he satisfied his burden of forecasting actual malice by offering clear and convincing evidence that defendants knew the statements were false, or acted with reckless disregard as to their truth or falsity. We disagree.

Plaintiff first argues that his evidentiary burden was satisfied by evidence that hostility existed between himself and defendants as a result of "previous run-ins" due to plaintiff's assertions that defendants Bullock and Bryan were in non-compliance with various town ordinances. In support of this contention, plaintiff directs us to the decision of this Court in *You v. Roe, supra.* In *You*, citing *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962), we held that actual malice may be proven by evidence of ill-will or personal hostility on the part of the defendant. However, the plaintiffs in *Ponder* and *You*, unlike plaintiff in the present case, were not "public officials" who were required to prove "actual malice" under the *New York Times* standard, i.e., that the statement was published with actual knowledge of its falsity or with reckless disregard of whether or not it was false. Moreover, the decisions in *Rosenblatt, supra*, and *Masson v. New Yorker Magazine, Inc.*, 501 U.S. ---, 115 L.Ed.2d 447 (1991), make it clear that evidence of personal hostility does not constitute evidence of "actual malice" under the standard set forth in *New York Times Co. v. Sullivan.*

In *Rosenblatt*, the Court considered and found erroneous a jury charge which defined "malice" as including " 'ill will, evil motive, intention to injure . . . .' " *Rosenblatt*, at 84, 15 L.Ed.2d at 604. Likewise, in *Masson*, at ---, 115 L.Ed.2d at 468, the Court stated that "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." Plaintiff's forecast of evidence of personal animosity and ill will toward him by defendants was not sufficient to permit a finding of "actual malice" by clear and convincing evidence so as to preclude entry of summary judgment in favor of defendants.

Plaintiff next argues that he produced a sufficient forecast of evidence of "actual malice" by presenting evidence that defendants called for an investigation with respect to an alleged misappropriation of public funds due to the increased contributions to plaintiff's retirement account after they knew, or had reason to know, that the implication of wrongdoing was false. Plaintiff argues that at the time the allegations were made defendants had been put on notice that the five percent 401(k) contributions to plaintiff's account were proper because Ms. Holmquist had informed them that the payments had been approved by "someone in authority", either the mayor or the town attorney. We disagree.

Assuming, without deciding, that "actual malice" under the *New York Times* standard may be shown by evidence that a defendant published a defamatory statement after receiving notice of its falsity, plaintiff's forecast of evidence in the present case does not present a genuine issue of fact as to whether defendants did so. The evidence showed that contributions to the town employees' 401(k) retirement plans are controlled by the town budget as approved by the Town Council, which did not authorize a five percent contribution to plaintiff's retirement plan. Plaintiff acknowledges that none of the defendants were party to, or had knowledge of, the discussions between himself, the mayor, the town attorney, or Ms. Holmquist regarding the applicability to plaintiff of the reduction in contributions as passed in the budget. Moreover, there is no indication in the record, and plaintiff does not argue, that either the mayor or the town attorney had authority to unilaterally approve expenditures not provided for in the budget. Therefore, evidence that defendants were informed, at a later meeting when the budget revisions were brought before the Council for approval, that the mayor or town attorney had approved plaintiff's instruction to Ms. Holmquist to contribute to his 401(k) account in an amount in excess of that authorized by the previously adopted budget does not constitute evidence that defendants had noticed that their subsequent statements were false.

We also reject plaintiff's contention that "actual malice" may be shown by evidence that defendants failed to avail themselves of available means for ascertaining the falsity of the statements. In *New York Times*, the plaintiff presented evidence that the defendant could have ascertained the falsity of the statements at issue by consulting its own previous news articles. In its discussion of this evidence, the Court stated:

> The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement . . . . We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

New York Times Co., at 287-288, 11 L.Ed.2d at 710-711. Likewise, in *St. Amant v. Thompson*, 390 U.S. 727, 730, 20 L.Ed.2d 262, 266-267 (1968), the Court held that evidence that the defendant failed to verify the veracity of his statements with persons who might have known the true facts fell short of proving the defendant's reckless disregard for the accuracy of his statements. Thus, to the extent the plaintiff's evidence may show that defendants made statements about his 401(k) contributions without utilizing readily available means for verifying the veracity of their statements, such evidence was insufficient to allow a finding by clear and convincing evidence that defendants acted with "actual malice" so as to preclude summary judgment in their favor.

In summary, we hold that defendants have shown through discovery that plaintiff cannot produce evidence to support an essential element of his claim for defamation, i.e., that any defamatory statements which defendants may have made were made with actual malice. Because we base this holding upon the constitutional grounds that a public figure cannot recover damages for defamation relating to his official conduct in the absence of proof of actual malice, as set forth in *New York Times Co. v. Sullivan, supra,* we need not decide the additional questions presented by the briefs, i.e., whether the statements were defamatory, and, if so, defamatory *per se* or were susceptible of more than one interpretation, one of which was defamatory, *see Renwick v. News and Observer,* 310 N.C. 312, 312 S.E.2d 405, *cert. denied,* 269 U.S. 858, 83 L.Ed.2d 121 (1984); whether the statements were absolutely privileged as made by defendants in the performance of legislative duties, *see Ramsey v. Cheek,* 109 N.C. 270, 13 S.E. 775 (1891); or whether the statements fell within the range of constitutionally protected statements of opinion relating to matters of public concern which were not probably false, *see Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L.Ed.2d 1 (1990).

Affirmed.

Judges GREENE and JOHN concur.

DALTON MORAN SHOOK INC., ARCHITECTURE, PLAINTIFF v. PITT DEVELOPMENT COMPANY, A MISSOURI GENERAL PARTNERSHIP; LEO EISENBERG COMPANY; LEO EISENBERG & CO., INC.; WILLIAM F. HILL, AS SUBSTITUTE TRUSTEE FOR WACHOVIA BANK OF NORTH CAROLINA, N.A.; RONALD J. BENNETT, INDIVIDUALLY; STEPHEN F. HUTCHINSON, INDIVIDUALLY; IRVIN B. MAIZLISH, AS TRUSTEE OF THE IRVIN B. MAIZLISH LIVING TRUST; ROBERT J. WATERS, INDIVIDUALLY; C. W. ANSELL, INDIVIDUALLY; DEMPSEY J. HYDRICK, JR., INDIVIDUALLY; FRANK O. PUSEY, INDIVIDUALLY; PAUL ANSELL, INDIVIDUALLY; BARBARA C. BURNS, INDIVIDUALLY; GERALD W. SCURRY, INDIVIDUALLY; WACHOVIA BANK OF NORTH CAROLINA, N.A.; McDONALD'S CORPORATION; WAL-MART PROPERTIES, INC.; R & M PROPERTIES, INC.; TOYS "R" US, INC.; WINN-DIXIE, RALEIGH, INC.; THE CATO CORPORATION; DEFENDANTS

No. 923SC1272

(Filed 1 March 1994)

1. Appeal and Error § 122 (NCI4th)— summary judgment for one defendant—substantial right—immediate appeal

Summary judgment in favor of one defendant in an action to enforce a lien for architectural and engineering services for construction of a shopping center affected a substantial right and was immediately appealable by plaintiff where the issues are identical with respect to each defendant because plaintiff performed its services pursuant to a single contract with the original owner, and a successful enforcement of the lien will require an apportionment among the several defendants. N.C.G.S. §§ 1-277 and 7A-27(d).

Am Jur 2d, Appeal and Error § 104.

2. Mortgages and Deeds of Trust § 5 (NCI4th)— materialman's lien—deed of trust securing purchase price and construction—priority

Under the doctrine of instantaneous seisin, a deed of trust securing the purchase price of property as well as construction or development loans is superior to a previously existing

materialman's lien only to the extent that the deed of trust secures the purchase price of the property.

Am Jur 2d, Mechanics' Liens §§ 269, 271; Mortgages § 348.

Priority as between mechanic's lien and purchase-money mortgage. 73 ALR2d 1407.

Priority between mechanics' liens and advances made under previously executed mortgage. 80 ALR2d 179.

3. **Mortgages and Deeds of Trust § 5 (NCI4th)— lien for architectural and engineering services—deed of trust securing purchase price and construction—genuine issue as to amount for construction**

The trial court erred by entering summary judgment for defendant lender in plaintiff's action to enforce a lien for architectural and engineering services for construction of a shopping center where the lender's deed of trust secured not only the purchase price of the land but also obligatory advancements for development and construction of the shopping center, and a genuine issue of fact existed as to the extent to which the deed of trust secured amounts in addition to the purchase price of the land.

Am Jur 2d, Mechanics' Liens §§ 269, 271; Mortgages § 348.

Priority as between mechanic's lien and purchase-money mortgage. 73 ALR2d 1407.

Priority between mechanics' liens and advances made under previously executed mortgage. 80 ALR2d 179.

Appeal by plaintiff from order entered 31 August 1992 by Judge Napoleon B. Barefoot in Pitt County Superior Court. Heard in the Court of Appeals 26 October 1993.

Plaintiff brought this action for breach of contract and to enforce a materialman's lien. Plaintiff alleged that on 4 October 1988, it contracted with defendants Leo Eisenberg Company and Pitt Development Company to provide architectural and engineering services related to the development of a tract of land located in Greenville, North Carolina for use as a shopping center. The property was purchased by Pitt Development Company on 28 December 1988. Pitt Development Company executed a promissory note payable

to Wachovia Bank and Trust Company in the principal sum of $7,718,800.00 secured by a deed of trust on the property. Wachovia disbursed $4,323,251.83 to Pitt for the purchase of the property. The deed of trust also secured additional obligatory advancements to Pitt, which advancements, when added to the amount disbursed for purchase of the property, totaled $7,718,800.00. The deed and the deed of trust securing the note were recorded simultaneously on 28 December 1988.

Between 28 December 1988 and 16 July 1991, four parcels of the property were conveyed by Pitt to Wal-Mart Properties, Inc., R & M Properties, Inc., Toys "R" Us, Inc., and McDonald's Corporation, and these parcels were released by Wachovia from the deed of trust. Pitt thereafter defaulted on the note. At Wachovia's instruction, defendant William F. Hill, the substitute trustee under the deed of trust, instituted foreclosure proceedings on the remaining property on 16 July 1991.

On 4 September 1991, plaintiff filed a claim of lien, pursuant to G.S. Chapter 44A, Article 2, Part 1, against the property which Wachovia was attempting to foreclose, as well as the parcels which had been conveyed to Wal-Mart, R & M Properties, Toys "R" Us, and McDonald's (hereinafter referred to as the other defendants). Plaintiff asserted, in its claim of lien, that 4 October 1988 was the date upon which plaintiff had first furnished architectural and engineering services to the property, that plaintiff had continued to furnish such services until 30 June 1991, and that plaintiff was owed $126,381.78 plus interest for its work. Thereafter, the property subject to the deed of trust was foreclosed and Wachovia, the last and highest bidder at the foreclosure sale, purchased the property for $2,970,000.00.

On 21 November 1991, plaintiff brought this action to enforce its claim of lien against all property included in the original deed of trust. The trial court granted motions by Wachovia and the substitute trustee Hill, for summary judgment and plaintiff appealed.

Browning, Hill & Hilburn, by W. Gregory Duke, for plaintiff-appellant.

Ward and Smith, P.A., by Ryal W. Tayloe and Patricia C. Soraghan, for defendant-appellees.

MARTIN, Judge.

I.

[1] Defendants have moved to dismiss plaintiff's appeal on the grounds that it is from an interlocutory order and is premature. Where an order of summary judgment disposes of fewer than all claims between all parties the order is interlocutory and, ordinarily, is not immediately appealable. *Love v. Moore*, 305 N.C. 575, 578, 291 S.E.2d 141, 144 (1982); *Veazy v. Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). The trial court's summary judgment in this case is an interlocutory order because it only disposed of plaintiff's claims against defendants Wachovia and Hill and did not dispose of plaintiff's claims against the other defendants.

There are, however, two instances in which an interlocutory order may be appealed. First, a trial judge may enter a final judgment as to one or more but fewer than all of the claims or parties in a case, which is immediately appealable even though the litigation is not complete as to all claims or all parties, if the trial judge makes an express finding that there is no just reason for delay. N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990); *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979); *Brown v. Brown*, 77 N.C. App. 206, 334 S.E.2d 506 (1985), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 878 (1986). In this case, the trial court made no such finding, so no appeal is available under Rule 54(b). Second, an interlocutory order not appealable under Rule 54(b) may nevertheless be appealed pursuant to G.S. § 1-277 and G.S. § 7A-27(d) which permit an appeal of an interlocutory order which (1) affects a substantial right, or (2) in effect determines the action and prevents a judgment from which appeal might be taken, or (3) discontinues the action, or (4) grants or refuses a new trial. An appeal of an interlocutory order is permitted under the "substantial right" exception of the two statutes when the interlocutory ruling deprives the appellant of a substantial right which may be lost or prejudiced if not reviewed prior to final judgment. *Faircloth v. Beard*, 320 N.C. 505, 358 S.E.2d 512 (1987).

Our Supreme Court has held that the right to avoid the possibility of two trials on the same issues can be a substantial right so as to warrant an immediate appeal under G.S. § 1-277 and G.S. § 7A-27(d). *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982). Plaintiff contends that its claims against Wachovia and

Hill involve issues of fact common to its claims against the other defendants and that if this appeal is dismissed, separate trials will be required to determine the identical issues. We agree.

Generally, a party supplying materials or labor, including professional design or surveying services, pursuant to a contract with the owner of real property for the making of improvements thereon, may obtain a lien on the property so improved to secure payment of debts for the materials furnished, labor done or professional services rendered. N.C. Gen. Stat. § 44A-8. To perfect such a lien, the lien must be filed in the county where the property is located within 120 days from the last furnishing of labor, services or materials. N.C. Gen. Stat. § 44A-12. An action to enforce the lien must be instituted within 180 days of the last furnishing of materials or labor. N.C. Gen. Stat. § 44A-13. The priority of a materialman's lien is determined according to the date of the first furnishing of labor, etc., at the site of the improvement. N.C. Gen. Stat. § 44A-10.

Thus, to enforce its lien against the several defendants, plaintiff must establish with regard to each, that it: (1) furnished architectural and engineering services pursuant to a contract with the property owner for which it has not been fully compensated, (2) filed its lien within 120 days of the last furnishing of such services, and (3) filed its action to enforce the lien within 180 days of the last furnishing of such services. The foregoing issues are identical with respect to each defendant because plaintiff performed its services pursuant to a single contract with Pitt.

In addition, should plaintiff successfully enforce its lien against more than one defendant, the lien must be apportioned among the several defendants. In *Dail Plumbing v. Roger Baker & Assoc.*, 64 N.C. App. 682, 308 S.E.2d 452 (1983), *disc. review denied*, 310 N.C. 152, 311 S.E.2d 296 (1984), the plaintiff contracted with the owner of a multi-unit office condominium project to provide plumbing equipment, materials and labor for construction of the project. The owner did not pay the plaintiff the entire amount due. The owner then sold one of the condominium units. The plaintiff filed a lien and a suit to enforce the lien. The owner filed bankruptcy and the plaintiff sought to enforce the lien for the full balance owed against the single unit which had been sold. We held that where the separate units were owned by different parties, the plaintiff's "blanket lien" should be apportioned among the units based upon the proportionate share of labor and materials furnished

to each unit, and its proportionate part of labor and materials furnished to the common area, under the contract that is the subject of the lien. *Id.; see also, Chadbourn v. Williams*, 71 N.C. 444 (1874); 68 A.L.R.3d 1300, 1303.

In the present case, plaintiff furnished architectural and engineering services for the entire shopping center project. Which of these services are attributable to an individual defendant's property and which are attributable to common areas are issues common to plaintiff's claims against each defendant which should be determined in a single proceeding. Thus, dismissal of the present appeal might prejudice plaintiff's right to avoid separate trials involving the identical issues. Therefore, defendants' motion to dismiss plaintiff's appeal is denied.

II.

We now consider the propriety of summary judgment in favor of defendants Wachovia and Hill. Those defendants asserted, as a defense to plaintiff's suit to enforce its lien against that portion of the property conveyed to Wachovia by the foreclosure deed, that the doctrine of instantaneous seisin operated to subordinate plaintiff's lien to Wachovia's deed of trust.

The doctrine of instantaneous seisin is a legal fiction which provides that when a deed and a purchase money deed of trust are executed, delivered, and recorded as part of the same transaction, the title conveyed by the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to all others. *Supply Co. v. Rivenbark*, 231 N.C. 213, 56 S.E.2d 431 (1949); *Carolina Builders Corp. v. Howard-Veasey Homes*, 72 N.C. App. 224, 324 S.E.2d 626, *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985).

> The principle has been uniformly upheld here that a deed and a mortgage to the vendor for the purchase price, executed at the same time, are regarded as one transaction. The title does not rest in the vendee but merely passes through his hands, and during such instantaneous passage no lien against the vendee can attach to the title superior to the right of the holder of the purchase money mortgage.

Supply Co., at 214, 56 S.E.2d at 432. Therefore, the doctrine would subordinate a previously existing materialman's lien to the lien of the purchase money deed of trust. *Carolina Builders Corp.*, at

232, 324 S.E.2d at 631. The doctrine also applies where a third party loans the purchase price and takes a deed of trust to a trustee to secure the amount so loaned. *Supply Co.*, at 214, 56 S.E.2d at 432. However, the doctrine does not apply where the deed and the deed of trust are not simultaneously recorded, *Pegram-West, Inc. v. Homes, Inc.*, 12 N.C. App. 519, 184 S.E.2d 65 (1971), or where the holder of the deed of trust indicates an intent to forfeit the doctrine's protection, as by intentionally allowing a construction loan deed of trust to be recorded prior to his purchase money deed of trust. *Carolina Builders Corp.*, at 232-233, 324 S.E.2d at 632.

In the present case, Pitt Development executed a note and deed of trust in favor of defendant Wachovia and the documents were simultaneously recorded. The deed of trust secures not only the purchase price of the property, but also certain additional obligatory advancements. Plaintiff argues that if the doctrine is applicable where the deed of trust securing the purchase price also secures additional advancements for development or construction purposes, a materialman's lien should be subordinated to the deed of trust only to the extent that it secures the purchase price. We agree.

The application of the doctrine of instantaneous seisin has always been limited to purchase money transactions. *Id.* at 233, 324 S.E.2d at 632. Extending the priority afforded by the doctrine to deeds of trust which secure amounts in addition to the purchase price does not comport with the policy supporting the doctrine.

> The policy supporting the doctrine is that a vendor who parts with property and supplies the purchase price does so on the basis of having a first priority security interest in the property. The vendor who advances purchase money relies on the assurance that he or she will be able to foreclose on the land if the purchase price is not repaid. It is thus equitable and just that the vendor have a first priority security interest and be protected from the possibility of losing both the land and the money in the transaction.

Carolina Builders Corp., at 232, 324 S.E.2d at 631.

Ordinarily, a construction loan deed of trust recorded subsequent to the first visible commencement of construction would not have had priority over plaintiff's materialman's lien. *Conner Co.*

v. Spanish Inns, 294 N.C. 661, 242 S.E.2d 785 (1978). Thus, to grant Wachovia priority as to sums it advanced for construction or development purposes simply because those sums are secured by the same deed of trust that secures the purchase money loan, would provide Wachovia with priority it could not otherwise obtain. As discussed above, the purpose of the doctrine is to give first priority to the purchase money lender and prevent the possibility that he will lose the money loaned *and* the land. This purpose is not effectuated where the lender is seeking to secure obligatory advances for costs associated with project development and construction.

In addition, restricting the doctrine's protection to the "purchase money" portion of a transaction is consistent with the trend in the law toward expanding the protection afforded to materialmen. *Carolina Builders Corp.*, at 233-234, 324 S.E.2d at 632. Moreover, construction lenders, who have the resources and bargaining power to require the vendee to obtain lien waivers from suppliers of materials and services, do not need the protection afforded by the doctrine. *Id.* at 234, 324 S.E.2d at 632.

[2] Thus, we hold that under the doctrine of instantaneous seisin, a deed of trust securing the purchase price of property as well as construction or development loans, is superior to a previously existing materialman's lien, but only to the extent that the deed of trust secures the purchase price of the property.

[3] We must now apply our holding to the facts of the present case. To be entitled to summary judgment, a party has the burden of showing, based on pleadings, depositions, answers, admissions, and affidavits, that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The evidence must be viewed in the light most favorable to the non-movant. *Clark v. Brown*, 99 N.C. App. 255, 259-60, 393 S.E.2d 134, 136, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). The movant may meet its summary judgment burden by showing either (1) an essential element of the non-movant's claim is nonexistent, or (2) the non-movant cannot produce evidence to support an essential element of his claim. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980).

On the record before us, there appears to be a genuine issue as to the extent to which the deed of trust executed by Pitt in favor of Wachovia secured amounts additional to the property's

purchase price. It is undisputed that Wachovia agreed to loan Pitt an amount not to exceed $7,718,800.00, and that on 28 December 1988, it disbursed to Pitt $4,323,251.83, the purchase price of the shopping center property. The purchase price, as well as any additional advancements that were made, were secured by the deed of trust. Under the terms of the loan agreement, Wachovia agreed to release from the deed of trust the parcel to be sold to Wal-Mart, as well as four other parcels, upon receipt by Wachovia of payments on the loan principal in amounts greater than or equal to the proceeds Pitt received from the sale of those parcels.

The record shows that Pitt conveyed portions of the original tract to Wal-Mart, R & M Properties, Toys "R" Us and McDonald's, and that Wachovia released these parcels from the deed of trust. Based on the terms of the loan agreement, Wachovia's release of these parcels from the deed of trust was predicated upon its receipt from Pitt of principal payments greater than or equal to the proceeds Pitt received from the sale of the parcels.

The deeds from Pitt to Wal-Mart, R & M Properties, Toys "R" Us and McDonald's carried state excise tax stamps totalling $2,754.50. At the time these conveyances were made, 8 February 1989, 6 December 1989, 18 May 1990, and 11 June 1991, G.S. § 105-228.30 (amended 1992) imposed a state excise tax on real property conveyances at the rate of .50¢ per $500 of the consideration or value of the interest or property conveyed. Viewed in the light most favorable to plaintiff, this evidence supports an inference that Pitt received a total of $2,754,500.00 from the sale of parcels to Wal-Mart, R & M Properties, Toys "R" Us and McDonald's and that it paid this amount to Wachovia so that Wachovia would release the properties from the deed of trust. Thus, there is some evidence that Pitt repaid Wachovia $2,754,500.00 of the original purchase price loan of $4,323,251.83, leaving a balance due of approximately $1,568,751.00.

The record further shows that the property which remained subject to the deed of trust was sold at the foreclosure sale for $2,970,000.00. The total of this amount and the amount Pitt paid Wachovia ($2,754,500.00) is $5,724,500, some $1,401,249.00 greater than the $4,323,251.00 Wachovia originally loaned Pitt for its purchase of the shopping center property. Nevertheless, the Final Report and Account of Foreclosure Sale indicates that the sale price left a deficit of $1,188,102.74.

Based on the foregoing evidence and the inferences which may be drawn therefrom, we are persuaded that there exists a genuine issue of fact as to the extent to which Wachovia's deed of trust secured amounts additional to the purchase price of the shopping center property. To the extent that the deed of trust secured non-purchase money sums, it was subordinate to plaintiff's previously existing materialman's lien and summary judgment was improper. Therefore, the judgment below is reversed.

Reversed.

Judges GREENE and JOHN concur.

SAVE OUR RIVERS, INC. AND JOHNNY R. WALKER, MARY E. WALKER, HELEN C. BAYLEY, GEORGE C. LANERI, ELIZABETH C. LANERI, PAT THOMPSON, DOUG THOMPSON, MORRIS BRYSON, JANICE McCLURE, ALENE MUNGER, KIM THOMPSON, EUNICE QUEEN, JOHN NORTHERN, JOYCE NORTHERN, NELLIE CARPENTER, CHRISTINE WEBB, BUTCH DEAL, W. M. MOSES, JAMES STEPHEN RABY, PEARL MOSES, BETA TILSON, HALLIE STILES, JACK McEACHIN, CLAIRE McEACHIN, JOSEPH J. JOHNSON, RUTH C. JOHNSON, ROBERT WATERS, JAMES BOWSER, PAUL E. GEER, FLORENCE GEER, CAROLINE RONEY, DANNY McDOWELL, VIRGIL L. WATKINS, ROSALIE K. WATKINS, RANDY KUSHIN, ROBERT J. WILLIAMS AND MARY EDWARDS, PETITIONERS v. TOWN OF HIGHLANDS, N.C. DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, DIVISION OF ENVIRONMENTAL MANAGEMENT, AND WILLIAM W. COBEY, JR., SECRETARY, RESPONDENTS

No. 9330SC382

(Filed 1 March 1994)

1. Administrative Law and Procedure § 77 (NCI4th)— denial of remand to take additional evidence—additional evidence cumulative

The trial court did not err in denying petitioners' petition for remand to the Division of Environmental Management for the taking of additional evidence pursuant to N.C.G.S. § 150B-49, since there was competent evidence in the record to support findings that the proposed new evidence was cumulative and

not materially different from that considered by the administrative agency when the decisions were made.

Am Jur 2d, Administrative Law § 381.

2. **Administrative Law and Procedure § 55 (NCI4th); Environmental Protection, Regulation, and Conservation § 71 (NCI4th)— modification of NPDES permit—right of petitioners to judicial review—specificity required of petition**

Petitioners were entitled to judicial review of DEHNR's decision to modify respondent city's wastewater treatment plant discharge permit, since petitioners were aggrieved parties in that they were residents of the county who used the river in question for recreational, religious, and other purposes and owned land adjoining the river; the decision making process of holding a public hearing, receiving public comments, and conducting water quality modeling constituted a "contested case"; DEHNR's decision to modify the city's permit was a "final decision" in a contested case; petitioners had exhausted their only available administrative remedy by participating in the agency's decision making process; petitioners' petition for judicial review sufficiently identified the exceptions petitioners had to the agency decision; petitioners were obviously challenging the agency's failure to perform an environmental assessment before modifying the city's permit because the agency determined the modification was a "minor construction activity"; and petitioners were not required to allege in their petition the particular reason under N.C.G.S. § 150B-51(b) which was the basis for reversing or modifying the agency decision. N.C.G.S. § 150B-43.

Am Jur 2d, Administrative Law §§ 575, 576; Pollution Control §§ 153 et seq., 499.

Appeal by petitioners from order entered 4 December 1992 in Macon County Superior Court by Judge Robert D. Lewis. Heard in the Court of Appeals 2 February 1994.

Roberts Stevens & Cogburn, P.A., by William Clarke, for petitioner-appellants.

John C. Hunter for respondent-appellee Town of Highlands.

Attorney General Michael F. Easley, by Special Deputy Attorney General Kathryn Jones Cooper, for respondent-appellees N.C. Department of Environment, Health and Natural Resources, Division of Environmental Management, and Jonathan B. Howes, Secretary.

GREENE, Judge.

Save Our Rivers, Inc. (SORI), Johnny R. Walker, Mary E. Walker, Helen C. Bayley, George G. Laneri, Elizabeth C. Laneri, Pat Thompson, Doug Thompson, Morris Bryson, Janice McClure, Alene Munger, Kim Thompson, Eunice Queen, John Northern, Joyce Northern, Nellie Carpenter, Christine Webb, Butch Deal, W.M. Moses, James Stephen Raby, Pearl Moses, Beta Tilson, Hallie Stiles, Jack McEachin, Claire McEachin, Joseph J. Johnson, Ruth C. Johnson, Robert Waters, James Bowser, Paul E. Geer, Florence Geer, Caroline Roney, Danny McDowell, Virgil L. Watkins, Rosalie K. Watkins, Randy Kushin, Robert J. Williams, and Mary Edwards (petitioners) appeal, after petitioning for judicial review in Macon County Superior Court of a permit modification issued by the Division of Environmental Management (DEM), a division of the N.C. Department of Environment, Health, and Natural Resources (DEHNR), to the Town of Highlands (Highlands), from a 4 December 1992 order concluding that "[p]etitioners' request . . . that an environmental impact statement or an environmental assessment of the 1991 Permit Modification be required is beyond the scope of review set forth in this Court's Order dated, 16 July 1992, and G.S. 150B-49." Petitioners also appeal from the denial of their alternative request in the petition to remand to the DEM because petitioners failed to meet "the criteria for remand in accordance with G.S. 150B-49" which allows the introduction of new evidence.

On 26 January 1986, Highlands received, at its request, a modification of its existing National Pollutant Discharge Elimination System (NPDES) Permit No. NC0021407, increasing the capacity of the town's existing wastewater treatment plant from .248 million gallons per day (MGD) to .500 MGD and permitting discharge at the Mill Creek site already allowed in the existing permit and at an additional point in the Cullasaja River below Lake Sequoyah Dam. Highlands' permit, allowing the requested limits of .500 MGD to be discharged into Mill Creek and the Cullasaja River from the existing wastewater treatment plant, was renewed in 1988. In October 1990, Highlands applied to the DEM to modify its permit

to reflect that Highlands could begin to discharge .500 MGD at the same point on the Cullasaja River below Lake Sequoyah Dam from a new facility to be located at the Cullasaja River discharge point, rather than from the existing facility at Mill Creek.

Despite considerable opposition to the permit modification exhibited at a 31 January 1991 public hearing, through a petition signed by 4,088 Macon County citizens, and through objections by the North Carolina Wildlife Resources Commission, the U.S. Fish and Wildlife Service, U.S. Senator Terry Sanford, and Lacy Thornburg (Thornburg), then Attorney General of North Carolina, DEM issued the permit modification on 3 April 1991 without any evaluation of potential adverse impacts on the environment of the Cullasaja River and Macon County and without any evaluation of alternative methods of wastewater treatment. DEM conducted "full water quality modeling to assure that the permitted discharge would not contravene applicable State water quality standards or otherwise have an adverse effect on the receiving stream" and determined that the permit modification represented a "minor construction activity" which falls under the minimum criteria rules of the Environmental Management Commission set out at N.C. Admin. Code tit. XV, subch. 1C § .0504(3)(a) (February 1990) such that DEM was not required to prepare environmental documents under the North Carolina Environmental Policy Act (NCEPA) or DEM's own regulations.

On 1 May 1991, petitioners filed a petition for contested case hearing with the Office of Administrative Hearings (OAH) challenging the permit modification's validity on the grounds that the permit modification was not minor, but authorized a new surface treatment facility with a 500,000 gpd discharge capacity and that the NCEPA and DEM's regulations required preparation of an environmental assessment to evaluate the potential adverse impact on the Cullasaja River. On 30 August 1991, DEHNR and Highlands moved to dismiss for lack of subject matter jurisdiction which was denied by Senior Administrative Law Judge Beecher R. Gray on 23 September 1991. On 1 October 1991, DEHNR and Highlands petitioned Wake County Superior Court for a writ of certiorari and writ of supersedeas. After a hearing on 3 February 1992, Judge Narley L. Cashwell issued an order that the superior court has exclusive jurisdiction over judicial review of petitioners' challenge to the NPDES permit issued to Highlands and therefore ordered OAH to dismiss petitioners' action for lack of subject matter jurisdic-

tion. SORI appealed that decision to this Court which affirmed the superior court's dismissal. *Town of Highlands v. Save Our Rivers, Inc.*, 111 N.C. App. 458, 434 S.E.2d 252 (1993) (unpublished opinion).

On 27 February 1992, petitioners filed a petition with Macon County Superior Court for judicial review of the permit modification pursuant to Article 4 of Chapter 150B. In their petition, petitioners stated that "the Permit Modification was issued by the . . . DEM of DEHNR on April 3, 1991, without any evaluation of potential adverse impacts on the environment of the Cullasaja River and Macon County and without any evaluation of alternative methods of wastewater treatment" and that they "bring this action now to protect and preserve their right to have the substantive issues herein reviewed by the Superior Court." In addition, petitioners attached their petition for contested case filed with OAH and the entire record of proceedings in OAH to their petition for judicial review. In the record of the OAH proceedings, there is a memorandum to Dr. George Everett from Brenda J. Smith (Smith) summarizing the public meeting held 31 January 1990 about the permit modification. Smith stated that "[r]equests for an Environmental Assessment were also made . . .," and that "[s]pecifically, it was felt that an EIS is required because . . . the new wastewater treatment facility exceeds a stated threshold of 'less than 500,000 [gpd]' for a 'new surface discharge facility'," and the "discharge to the Cullasaja River meets an exception to the minimum criteria as stated in .0503(3) because the 'cumulative' effects of the discharge have not properly been considered by the Division." Also in the record of the OAH proceedings is a letter dated 18 April 1991, from Thornburg to James S. Lofton, Secretary of the North Carolina Department of Administration. Thornburg stated "[s]pecifically, I am requesting that you conduct a reconsideration of the April 3, 1991 decision by Dr. George Everett, Director of the Division of Environmental Management, that no environmental review document would be prepared for the modification of NPDES Permit No. 0021407."

On 27 and 31 March 1992, DEHNR and Highlands filed motions to dismiss the petition as untimely. On 16 July 1992, Judge Robert D. Lewis entered an order concluding that "the conflicts in the law . . . provide good cause for the Superior Court to accept this 'untimely petition' "; however, because "[p]etitioners failed to allege any [of their] substantial rights [were] prejudice[d] in accordance

with G.S. 150B-51," the trial court allowed petitioners' petition only to determine whether they should be allowed to present new evidence pursuant to N.C. Gen. Stat. § 150B-49.

Petitioners submitted two reports (the Maas report and the McLarney report) that conclude the potential exists for an adverse environmental impact resulting from the permit modification. Highlands, DEHNR, and the DEM presented the affidavit of J. Trevor Clements (Clements), Assistant Chief of the DEM, Water Quality Section, who stated that he supervised the DEM's water quality wasteland allocation studies relating to the Cullasaja River, including the computer modeling. He concluded that "there is very little difference between the DEM's water quality data and modeling assumptions and Dr. Maas' data," and that "[u]sing the Maas data did not produce any difference in the effluent limitations which resulted from the application of the computer model." Highlands, DEHNR, and the DEM also presented the affidavit of Trish Finn MacPherson (MacPherson), an Environmental Biology Supervisor employed by the DEM, Water Quality Section. She stated that "[t]here is very little difference between the results of Dr. McLarney's study and the two studies conducted by the DEM in December, 1990 and October, 1991."

The issues presented are whether (I) the trial court erred in concluding that the reports tendered by petitioners did not constitute new non-cumulative evidence material to the issues that could not reasonably have been presented at the administrative hearing so that the taking of additional evidence on remand under N.C. Gen. Stat. § 150B-49 is not warranted; and (II) petitioners' petition is sufficiently specific to obtain judicial review under N.C. Gen. Stat. § 150B-43 where petitioners did not specifically state in their petition what exceptions are taken to the agency decision or how their substantial rights are prejudiced by any errors of the agency decision under N.C. Gen. Stat. § 150B-51.

I

[1] N.C. Gen. Stat. § 150B-49 provides:

> [a]n aggrieved person who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been

> presented at the administrative hearing, the court may remand the case so that additional evidence can be taken. If an administrative law judge did not make a recommended decision in the case, the court shall remand the case to the agency that conducted the administrative hearing . . . .

N.C.G.S. § 150B-49 (1991). Because, under Section 150B-49, the trial judge sits as factfinder to determine whether the "new" evidence proffered by the moving party is "material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing," "his findings of fact are binding [on appeal] if they are supported by any competent evidence in the record . . . ." *Williamson v. Savage*, 104 N.C. App. 188, 193, 408 S.E.2d 754, 757 (1991) (*quoting R. L. Coleman & Co. v. City of Asheville*, 98 N.C. App. 648, 651, 392 S.E.2d 107, 108-09, *disc. rev. denied*, 327 N.C. 432, 395 S.E.2d 689 (1990)). In this case, there is competent evidence in the record, the affidavits of MacPherson and Clements, to support the findings that "the proposed evidence is cumulative and not materially different from that considered by the administrative agency when the decisions were made." Therefore, the trial court did not err in denying petitioners' petition for remand to the DEM for the taking of additional evidence pursuant to N.C. Gen. Stat. § 150B-49.

II

[2] Although petitioners are not entitled for a remand to the DEM for the taking of additional evidence, they are entitled to judicial review. Our Court recently clarified the procedure third parties are to follow when challenging an agency decision. Third parties do not have the right to a contested case hearing to challenge an administrative decision concerning an NPDES permit, *Citizens for Clean Industry, Inc. v. Lofton*, 109 N.C. App. 229, 234, 427 S.E.2d 120, 123 (1993); however, pursuant to Section 143-215.5 of Article 21 which states that "Article 4 of Chapter 150B of the General Statutes governs judicial review of a final decision of the Secretary or of an order of the Commission under this Article . . . ," they are entitled to judicial review under N.C. Gen. Stat. § 150B-43. N.C.G.S. § 143-215.5 (Supp. 1992); *see Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 112 N.C. App. 566, 436 S.E.2d 594 (1993) (third parties entitled to judicial review of DEHNR's decision to grant air quality permit).

Section 150B-43 provides that

> [a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute . . . .

N.C.G.S. § 150B-43 (1991). Petitioners qualify as aggrieved persons because SORI is a non-profit corporation composed of residents of Macon County, North Carolina, who use the Cullasaja River for recreational, religious, and other purposes, and the individual petitioners own land adjoining the Cullasaja River below Highlands. *See* N.C.G.S. § 150B-2(6) (1991) (aggrieved person is any person directly or indirectly affected substantially in his person, property, or employment by administrative decision); *Empire*, 112 N.C. App. at 571, 436 S.E.2d at 598. DEHNR's decision to modify Highlands' permit is a "final decision" because Highlands did not challenge DEHNR's decision within 30 days after DEHNR notified Highlands of the permitting decision so it became "final and . . . not subject to review" under N.C. Gen. Stat. § 143-215.1(e) (1993). *See Empire*, 112 N.C. App. at 572, 436 S.E.2d at 598. Furthermore, the decision making process of holding a public hearing, receiving public comments, and conducting water quality modeling constitutes a "contested case," N.C.G.S. § 150B-2(2) (1991); *see Empire*, 112 N.C. App. at 572, 436 S.E.2d at 598, and petitioners have exhausted their only available administrative remedy by participating in the agency's decision making process.

Highlands, DEHNR, and the DEM contend, however, that despite petitioners' ability to fulfill the requirements for judicial review under Section 150B-43, they are not entitled to such review because their petition did not "explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks" under N.C. Gen. Stat. § 150B-46 (1991). We disagree.

Section 150B-46 does require that a party aggrieved by a final agency decision "specifically set out . . . [the exceptions to the agency decision] in the party's petition for judicial review." *O.S. Steel Erectors v. Brooks*, 84 N.C. App. 630, 632, 353 S.E.2d 869, 871 (1987). "There is no requirement to note exceptions on the agency decision itself." *Id.* These requirements, however, are to

be given a liberal construction in order to effectuate and preserve a third party's right to judicial review of an administrative decision under Section 150B-43. *See Brooks*, 84 N.C. App. at 632, 353 S.E.2d at 872 (statements in petition that petitioner "excepts to each of the . . . findings of fact and conclusions of law" made by agency sufficient for superior court review of whole record under 150A-51(5)); *Vann v. North Carolina State Bar*, 79 N.C. App. 173, 339 S.E.2d 97 (1986) (liberally construing Section 150A-46, predecessor to Section 150B-46 and containing similar language); *James v. Board of Educ.*, 15 N.C. App. 531, 190 S.E.2d 224, *appeal dismissed*, 282 N.C. 672, 194 S.E.2d 151 (1972) (liberally construing Section 143-310 to preserve and effectuate primary purpose of statute which is to confer right to review).

In this case, petitioners' petition for judicial review, which includes the attached record of the OAH proceedings, sufficiently identifies the exceptions petitioners have to the agency decision. In reviewing the attached record, petitioners are obviously challenging the agency's failure to perform an environmental assessment before modifying Highlands' permit because the agency determined the modification was a "minor construction activity." Therefore, the trial court erred in allowing petitioners' petition only for the purposes set forth in Section 150B-49 rather than reviewing the agency's decision under Section 150B-51.

DEHNR, DEM, and Highlands also argue that in order to be entitled to judicial review, petitioners must allege in their petition "that the agency's final decision may have prejudiced [their] substantial rights in that the agency's findings, inferences, conclusions, or decisions are defective because of one of the six reasons stated under G.S. 150B-51." We reject this argument because although the party alleging error has the burden of making such a showing at trial, *Pamlico Tar River Found. v. Coastal Resources Comm'n*, 103 N.C. App. 24, 28, 404 S.E.2d 167, 170 (1991), nothing in Sections 150B-43, 150B-46, or 150B-51 require that the party, in order to obtain judicial review pursuant to Section 150B-43, must allege in its petition the particular reason under Section 150B-51(b) which is the basis for reversing or modifying the agency decision.

We therefore remand to the trial court for judicial review, pursuant to Sections 150B-43 and 150B-51, of the agency's finding that the permit modification represented a "minor construction

activity" so that an environmental assessment was unnecessary. At this hearing, petitioners have "the burden of showing that the agency's final decision may have prejudiced . . . [their] substantial rights in that the agency's findings, inferences, conclusions, or decisions are defective because of one of the six reasons stated under N.C.G.S. § 150B-51." *Pamlico*, 103 N.C. App. at 28, 404 S.E.2d at 170.

Affirmed in part, reversed in part, and remanded.

Judges COZORT and ORR concur.

NANCY BISHOP v. HARRY H. BISHOP, SR.

No. 9329DC288

(Filed 1 March 1994)

1. Divorce and Separation § 142 (NCI4th)— defined benefit pension plan—method of valuation

The Court of Appeals adopts the following method for evaluating defined benefit pension plans: (1) the trial court must calculate the amount of monthly pension payment the employee, assuming he retired on the date of separation, will be entitled to receive at the later of the earliest retirement age or the date of separation; (2) the trial court must determine the employee-spouse's life expectancy as of the date of separation and use this figure to ascertain the probable number of months the employee-spouse will receive benefits under the plan; (3) the trial court, using an acceptable discount rate, must determine the then-present value of the pension as of the later of the date of separation or the earliest retirement date; (4) the trial court must discount the then-present value to the value as of the date of the separation; and (5) the trial court must reduce the present value to account for contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan, and this calculation rests within the sound discretion of the trial court.

Am Jur 2d, Divorce and Separation §§ 948, 949.

2. Divorce and Separation § 142 (NCI4th)— defined benefit pension plan—method of valuation

In an equitable distribution of defendant husband's defined benefit pension, the trial court (1) correctly assumed that defendant ceased working for DuPont on the date of separation, (2) did not consider, as it must, any projected "gains or losses" on the portion of the pension which was vested as of the date of separation, but no evidence was presented on this issue, (3) and erred in valuing the pension on the basis that defendant would not begin drawing his pension until age 65, since the computations of the value of the pension must be made based on age 50 which was the earliest retirement date.

Am Jur 2d, Divorce and Separation §§ 948, 949.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

3. Divorce and Separation § 142 (NCI4th)— military retirement pay for disability—separate property classification proper

Evidence supported the trial court's finding that military retirement pay was for a military service related disability, and this finding supported the conclusion that the military income was not marital property.

Am Jur 2d, Divorce and Separation § 909.

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

Appeal by plaintiff from order entered 20 August 1992 in Transylvania County District Court by Judge Robert S. Cilley. Heard in the Court of Appeals 12 January 1994.

Averette & Barton, by Donald H. Barton, for plaintiff-appellant.

Law Office of Paul B. Welch, III, by Paul B. Welch, III, and Susan Fosmire Reid, and Jack H. Potts, for defendant-appellee.

GREENE, Judge.

Nancy Bishop (plaintiff) appeals from the entry of an order of equitable distribution.

Prior to the hearing on equitable distribution in this case, plaintiff and Harry H. Bishop, Sr. (defendant), resolved many of the equitable distribution issues by consent. At the hearing, the trial court was asked to classify, value, and distribute three assets: defendant's military retirement, defendant's DuPont retirement, and defendant's DuPont incentive plan. The trial court concluded that the DuPont retirement plan was a marital asset and that the military retirement was defendant's separate property. The trial court further concluded that an equal division of the marital property was equitable and entered the following order:

> 2. The Defendant's DuPont retirement account shall be and remain the property of the defendant.
>
> 3. The Defendant is ordered to pay to the Plaintiff the sum of $7,785 not later than the closing date on the sale of the marital home, or not later than January 20, 1993, whichever date arrives first. That sum shall bear interest at the legal rate from the date of the filing of this Order to the date of payment.

In support of the conclusions and the order, the trial court entered the following relevant findings of fact:

> 1. The parties . . . separated on December 26, 1990 . . . .
>
> 2. Defendant is a white male who was 48 years old on DOS [date of separation] . . . . The valuations given below require that an estimate be made of Defendant's lifespan after DOS, and for that purpose, the Court has made use of the 1991 Statistical Abstract of the U.S., 1991 edition, which indicates the average remaining lifespan for a 48 year old white American male to be thirty years. Acknowledging that different tables give different figures, from 27 years (N.C. General Statutes) to 34 years (I.R.S. tables), the Court prefers the Statistical Abstract tables because they give more reliable figures when the race and gender are known.
>
> 3. In addition to needing an estimate of Defendant's lifespan, the valuations given below require an interest rate. Although the rate for multi-year certificates of deposit on DOS was 7.6%, the trend in rates at that time was downward. For that reason, the Court finds the figure of 7.5% to be appropriate for the calculations used in arriving at the valuations given below.

> 4. Defendant was a member of the U.S. Air Force for 141 months, of which 108 were during the parties' marriage. He receives a monthly check from the U.S. Government, purporting to be for service-related disability. The amount of the check was $464 on the DOS; it has since been raised somewhat, but using the $464 figure, and the life span and interest rate noted above, the Court finds that the DOS value of Defendant's military disability income was $66,360. The Court calculated this value using the "Present Worth of 1 Per Period" column in the financial tables in the AmJur Desk Book.
>
> 5. Defendant is employed by DuPont. He began work there during the parties' marriage. . . .
>
> 6. DuPont maintains a defined benefit retirement plan, in which Defendant was fully vested on DOS[.] In valuing this asset, the Court has assumed:
>
> (a) That Defendant ceased working for DuPont on DOS, without penalty.
>
> (b) That Defendant begins drawing his pension at age 65 (in August, 2007), which is the earliest date on which he can do so without suffering a substantial reduction in monthly payments.
>
> Granting these two assumptions, Defendant's pension from DuPont will be $477 per month, beginning in August, 2007. The Court has used that figure and date, combined with the lifespan and interest rate mentioned above, and (again using the AmJur financial tables) has calculated the value of the right to receive $477 per month for thirteen years, which is $47,445. The Court has then calculated the value on DOS of the right to receive $47,445 in August of 2007. That latter value, $13,724, is the value of Defendant's pension on DOS. The Court notes that if instead of assumption (a), it is assumed that Defendant continued to work for DuPont to age 65, then his retirement income would be $958 per month, and the value of that pension on DOS would be $27,563, instead of the figure found above.

Evidence in the record shows that the DuPont pension plan is "entirely noncontributory on the part of employees and no identifiable contributions by DuPont are made on behalf of individual employees or allocated to, or set aside for any specific individual. Plan benefits are payable only in the form of a life annuity, general-

ly for the life of the employee." On the date of separation, 26 December 1990, defendant's DuPont pension was vested. If defendant had terminated his employment with DuPont on 26 December 1990, he would have been entitled to a life-time monthly pension payment of $477 at age sixty-five or beginning in August 2007. Under the DuPont plan defendant was entitled to "retire and receive a reduced pension . . . as early as 30 July 1992 or at age 50." Had defendant terminated his employment on 26 December 1990 and elected early retirement at age fifty he would have received a life-time monthly pension payment of $120. There was also evidence that defendant, a member of the United States Air Force for 141 months, was receiving from the Defense Finance and Accounting Service a $481 monthly retirement check "based on Service related disability retirement."

The issues presented are whether (I) the DuPont pension was correctly valued, and (II) the defendant's military income is marital property.

I

In North Carolina, pursuant to N.C. Gen. Stat. § 50-20, pensions, retirement benefits, and other deferred compensation rights (hereinafter referred to as pensions), must, like other assets, be classified and valued. If the pension is classified as marital property it must be distributed between the parties to the marriage. N.C.G.S. § 50-20(a) (Supp. 1993). If the pension is classified as separate property it must be considered as a distributional factor in distributing the marital property. N.C.G.S. § 50-20(c)(5) (Supp. 1993).

Classification

A "vested" pension "acquired by either spouse . . . during the course of the marriage and before the date of the separation" is marital property. N.C.G.S. § 50-20(b) (Supp. 1993). A formula known as the coverture fraction is used to determine the portion of the employee-spouse's pension which was acquired during the marriage. N.C.G.S. § 50-20(b)(3); 3 William M. Troyan et al., *Valuation & Distribution of Marital Property* § 45.06[5] (1987) (hereinafter *Troyan*). The numerator of the coverture fraction represents the total number of years of marriage, up to the date of separation, which occurred "simultaneously with the employment which earned the vested pension." N.C.G.S. § 50-20(b)(3) (Supp. 1993). The

denominator represents the total years of employment during which the pension accrued. *Troyan* § 45.06[5]. A pension which is not vested on the date of separation is classified as the separate property of the employee-spouse. N.C.G.S. § 50-20(b)(2).

Valuation

The method for valuing a pension depends on whether the pension is a defined benefit plan or a defined contribution plan. These are the two most common of the funded pension programs. *Troyan* § 45.06. A defined contribution plan is a pension "plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 26 U.S.C.A. § 414(i) (Supp. 1993). A defined benefit plan is defined by the Internal Revenue Code as "any plan which is not a defined contribution plan." 26 U.S.C.A. § 414(j). The benefit under such a plan is generally determined "without reference to contributions and is based on factors such as years of service and compensation received." *Seifert v. Seifert*, 82 N.C. App. 329, 333, 346 S.E.2d 504, 506 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).

Valuing a defined contribution plan merely requires determining the value of the employee-spouse's account in existence on the date of separation. *Troyan* § 45.06[3]. Valuing a defined benefit plan on the other hand is "fraught with uncertainties." Lawrence J. Golden, *Equitable Distribution of Property* § 7.13, at 228 (1983) (hereinafter *Golden*).

> First, whether benefits are received at all is contingent on the employee serving the requisite number of years with the employer and on the plan being solvent. The total amount of such benefits will depend on how long the employee survives after retirement. Further . . . future dollars must be translated into present value.

Id. Nonetheless, methods for valuing defined benefit plans have been developed by accountants and actuaries and accepted by the courts. *See Troyan* § 45.23; *Golden* § 7.13; Barth H. Goldberg, *Valuation of Divorce Assets* § 9.5 (1984). Having reviewed these methods and the methods presently utilized by some of our district court judges, *see* Clarence E. Horton, Jr., *Principles of Valuation*

in North Carolina Equitable Distribution Actions, Institute of Government, Special Series No. 10 (April 1993 Rev.), and believing that consistency in valuation methods is important, we adopt the following method for evaluating defined benefit pension plans.

[1] First, the trial court must calculate the amount of monthly pension payment the employee, assuming he retired on the date of separation, will be entitled to receive at the later of the earliest retirement age or the date of separation. This calculation must be made as of the date of separation and "shall not include contributions, years of service or compensation which may accrue after the date of separation." N.C.G.S. § 50-20(b)(3). The calculation will however, include "gains and losses on the prorated portion of the benefit vested at the date of separation." *Id.* Second, the trial court must determine the employee-spouse's life expectancy as of the date of separation and use this figure to ascertain the probable number of months the employee-spouse will receive benefits under the plan. Third, the trial court, using an acceptable discount rate, must determine the then-present value of the pension as of the later of the date of separation or the earliest retirement date. Fourth, the trial court must discount the then-present value to the value as of the date of separation. In other words, determine the value as of the date of separation of the sum to be paid at the later of the date of separation or the earliest retirement date. This calculation requires mortality and interest discounting. *See Troyan* § 45.23. The mortality and interest tables of the Pension Benefit Guaranty Corporation, a corporation within the United States Department of Labor, are well suited for this purpose. *Id.* Finally, the trial court must reduce the present value to account for contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan. This calculation cannot be made with reference to any table or chart and rests within the sound discretion of the trial court.

Distribution

In the absence of an agreement of the parties, there are two methods for dividing retirement benefits: (1) award the pension to the employee-spouse and award other marital property of offsetting value to the other spouse, N.C. Gen. Stat. § 50-20(b)(3)d, or (2) divide the pension benefits if and when paid, N.C. Gen. Stat. § 50-20(b)(3)c. The first method is known as the present value method, *Seifert*, 319 N.C. at 371, 354 S.E.2d at 508; *Workman v. Workman*,

106 N.C. App. 562, 568, 418 S.E.2d 269, 273 (1992), or the immediate offset method, *Troyan* § 45.21[1], while the second method is known as the fixed percentage method, *Seifert*, 319 N.C. at 370, 354 S.E.2d at 509, or the deferred distribution method, *Troyan* § 45.21[2]. "[W]here the value of the total marital estate is sufficient to permit it," the trial court has the discretion to choose between the present value method and the fixed percentage method. *Seifert*, 319 N.C. at 370, 354 S.E.2d at 509. In both instances, the trial court is required to value the pension and retirement benefits as of the date of separation. *Id.* at 371, 354 S.E.2d at 509; *but see Golden* § 7.13, at 311 (Supp. 1993) ("majority holds that pension need not be valued" if court uses deferred distribution method).

[2] In reviewing the order of the trial court with respect to the DuPont defined benefit pension, we determine the trial court correctly assumed that the defendant ceased working for DuPont on the date of separation. As we have stated, the valuation must be made as of the date of separation and cannot include "compensation" accruing after that date. *Workman*, 106 N.C. App. at 570-71, 418 S.E.2d at 273-74. Thus it would have been error for the trial court to have valued the pension, as plaintiff suggests, "assuming continuous employment" beyond the date of separation. We do note that the order does not reflect that the trial court considered, as it must, any projected "gains and losses" on the portion of the pension which was vested as of the date of the separation. Our review of the record, however, does not reflect that any evidence was presented on this issue and this cannot therefore support reversal. *See Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990) (requirement that trial court value property "necessarily exist[s] only when evidence is presented").

The plaintiff further contends that the trial court erred "in not determining that the value [of the pension] on the date of separation . . . was in fact, $47,455.00." The plaintiff argues that the method used by the trial court "operated as a double reduction of the benefits allocable to the [plaintiff]." We disagree. The trial court, having determined the value of the pension at defendant's age sixty-five, was then, as we have stated, required to reduce that amount to a value as of the date of separation.

The trial court did, however, commit error when it valued the pension on the basis that defendant would not begin drawing his pension until age sixty-five. As we have stated, the calculation

must be based on the pension payments the employee will be entitled to receive at the later of the earliest retirement age or the date of separation. In this case the record indicates that defendant could have retired at age fifty and because defendant was only forty-eight on the date of separation, the computations of the value of the pension must be made based on the earliest retirement date.

II

[3] The plaintiff contends that the trial court erred in classifying defendant's military retirement as defendant's separate property. Specifically, plaintiff argues that "military retirement pay based on service-related disability . . . should be treated as any other military retirement pay and thus be subject to division as marital property." We disagree.

As a general proposition, disability benefits may be classified as either marital or separate depending on whether they compensate the recipient for personal suffering and lost wages after the date of separation or lost wages or earning capacity before the date of separation. *Golden* § 6.11, at 201 (Supp. 1993). Thus, like personal injury and worker's compensation awards, they may have both separate and marital property components. *See Lilly v. Lilly*, 107 N.C. App. 484, 486-87, 420 S.E.2d 492, 493 (1992); *Freeman v. Freeman*, 107 N.C. App. 644, 654, 421 S.E.2d 623, 628 (1992). That portion of the benefit compensating for personal suffering and lost wages after the date of separation would be separate property and that portion compensating for the lost wages and earning capacity before the date of separation would be marital property.

The rules governing the distribution of federal military disability benefits are, however, different. The federal Uniformed Services Former Spouses' Protection Act does permit a state court to treat "disposable retired or retainer pay" of a military retiree as marital property. 10 U.S.C.A. § 1408(c)(1) (Supp. 1993); *Mansell v. Mansell*, 490 U.S. 581, 588, 104 L. Ed. 2d 675, 685 (1989); *Armstrong v. Armstrong*, 322 N.C. 396, 401, 368 S.E.2d 595, 597-98 (1988). However, because military disability payments are not included within the definition of "disposable retired or retainer pay," such disability payments cannot be classified as marital property subject to distribution under state equitable distribution laws. 10 U.S.C.A. § 1408(a)(4) (Supp. 1993); *Mansell*, 490 U.S. at 594-95, 104 L. Ed. 2d at 689

(federal law continues to preempt state law with regard to all military payments except "disposable retired or retainer pay"); N.C.G.S. § 50-20(b)(1) ("military pensions" are marital property to the extent "eligible under the Uniformed Services Former Spouses' Protection Act"). Instead, the disability payments must be classified as the retiree's separate property and, as such, treated as a distributional factor. N.C.G.S. § 50-20(c)(1); *see Clauson v. Clauson*, 831 P.2d 1257, 1263 (Alaska 1992).

In this case, all of the evidence before the trial court was that defendant's military income was based on a "[s]ervice related disability retirement." This evidence supports the trial court's finding that the military payments were for a military service related disability. This finding supports the conclusion that the military income was not marital property.

Because of the error in the valuation of the DuPont pension, the order of distribution must be reversed and this case remanded to the trial court for a new valuation of the DuPont pension consistent with the method of valuation approved in this opinion and a new distributional order. New evidence may be admitted in support of the DuPont pension valuation.

Reversed in part, affirmed in part, and remanded.

Judges COZORT and ORR concur.

SELINDA JUDKINS, PLAINTIFF-APPELLEE v. JAMES C. JUDKINS, JR., DEFENDANT-APPELLANT

No. 9312DC302

(Filed 1 March 1994)

1. **Appearance § 4 (NCI4th)— general appearance by defendant— personal jurisdiction in trial court**

The trial court obtained personal jurisdiction over defendant where defendant made a general appearance by seeking affirmative relief in his answer without contesting personal jurisdiction. N.C.G.S. § 1-75.7.

Am Jur 2d, Appearance § 6.

2. **Trial § 27 (NCI4th)— stay pursuant to Soldiers' and Sailors' Civil Relief Act—denial proper**

The trial court's findings of fact supported its denial of defendant's motion for a stay pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 since the only evidence of defendant's unavailability after the Persian Gulf War was a letter from the Department of the Army stating that defendant was scheduled to depart for Southeast Asia on 30 August 1992 for approximately 46 days; the record failed to disclose whether defendant at any time requested leave to defend this action or whether leave was likely to be granted upon request; and defendant made no showing of the ways his defense would be prejudiced or his rights materially affected by his absence.

Am Jur 2d, Military and Civil Defense § 308.

Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting matrimonial actions. 54 ALR2d 390.

3. **Divorce and Separation § 161 (NCI4th)— equitable distribution —unequal distribution supported by findings of fact**

The trial court's finding of fact that it had considered all the factors as set forth in N.C.G.S. § 50-20(c), including the earning ability of each party, the need of the custodial parent for the use and possession of the marital home and furniture therein, the value of defendant's separate property, and defendant's expectation of additional pension, was sufficient to support its unequal distribution of marital property.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

4. **Divorce and Separation § 129 (NCI4th)— equitable distribution —military pension**

The trial court did not err by awarding plaintiff 50 percent of the marital portion of defendant's military pension where the court calculated the time defendant participated in the pension plan during his marriage to plaintiff and the total time defendant participated in the plan and determined that 88.66 percent of defendant's pension was marital property.

Am Jur 2d, Divorce and Separation § 909.

Judge JOHN concurring in the result.

Appeal by defendant from orders and judgment signed 4 November 1992 in Cumberland County District Court by Judge A. Elizabeth Keever. Heard in the Court of Appeals 12 January 1994.

Plaintiff and defendant were married on 19 July 1969 in Surry County, Virginia. Defendant is a lieutenant colonel in the United States Army and in 1983 was assigned to Fort Bragg in Fayetteville, North Carolina. On 3 August 1988, plaintiff commenced this action seeking a divorce from bed and board, child custody, child support, alimony, and equitable distribution. The parties were divorced by judgment entered 26 September 1989 in Cumberland County District Court. On 4 November 1992, the trial court entered orders denying defendant's motion to dismiss for lack of subject matter jurisdiction and denying defendant's motion for a stay. On 4 November 1992, the trial court also entered an equitable distribution judgment. Defendant appeals from these orders and judgment.

Blackwell, Luedeke, Hicks & Burns, P.A., by John V. Blackwell, Jr. and Kenneth D. Burns, for plaintiff-appellee.

Harris, Mitchell & Hancox, by Ronnie M. Mitchell and G. Robert Hicks III, for defendant-appellant.

WELLS, Judge.

[1] We must first consider defendant's argument that the trial court lacked jurisdiction to distribute defendant's disposable retired pay. Defendant contends that by the terms of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(c)(4) (1992), the trial court lacked subject matter jurisdiction to distribute his military pension. We disagree.

Section 1408(c)(4) provides:

> A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the *member* by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(Emphasis added.) Defendant contends that this provision establishes the requirements for a court's exercise of subject matter jurisdiction. We read this provision as establishing the requirements for personal jurisdiction and proceed to determine whether the trial

court properly obtained *in personam* jurisdiction over defendant as required by § 1408(c)(4).

A court may exercise personal jurisdiction in an action over a person who has made a general appearance in that action. N.C. Gen. Stat. § 1-75.7 (1) (1983). "A general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person." *In re Blalock*, 233 N.C. 493, 64 S.E.2d 848 (1951). Other than a motion to dismiss for lack of jurisdiction virtually any action constitutes a general appearance. *Jerson v. Jerson*, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

Plaintiff filed this action seeking a divorce from bed and board, child custody, child support, alimony, and equitable distribution. Defendant filed an answer containing counterclaims for child custody and support and equitable distribution. Defendant made a general appearance thereby consenting to personal jurisdiction by seeking affirmative relief in his answer without contesting personal jurisdiction. *Stern v. Stern*, 89 N.C. App. 689, 367 S.E.2d 7 (1988); *Hale v. Hale*, 73 N.C. App. 639, 327 S.E.2d 252 (1985). Consequently, the trial court obtained personal jurisdiction over defendant as required by § 1408(c)(4).

[2] We next consider defendant's argument that the trial court erred in denying his motion for a stay pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 521 (1988). Defendant contends that the trial court's findings do not support its denial of his motion for a stay. We disagree.

The trial court made the following findings of fact in its order denying defendant's motion:

I

> That the Plaintiff was present in Court and represented by Attorney John Blackwell, Jr. and the Defendant was not present in Court but was represented by Attorney Ronnie M. Mitchell.

II

> That a Complaint was filed on August 3, 1988 seeking a divorce from bed and board, alimony, custody and support of issue and equitable distribution of marital property. That the De-

fendant filed an answer and counterclaim, duly verified seeking custody and support of issue and equitable distribution of marital property. That an order was entered on April 27, 1989 providing for alimony pendente lite, and custody and support of issue; that Defendant has complied with said order since that time.

III

That prior to, and subsequent to, the aforesaid Order discovery was initiated by Counsel for Plaintiff by filing numerous motions for discovery, including interrogatories, request for documents and requests for depositions.

IV

That discovery was interrupted in August of 1990 as a result of the action in the Persian Gulf at which time the Court continued the matter over because of Defendant's service with the United States military in that action.

V

That, thereafter, the Court on numerous occasions entered orders continuing discovery and continuing the trial; that motions to compel discovery from the Defendant were filed in July 1991 and in December 1991. That on February 7, 1992, Judge Andrew Dempster entered an order to compel production of documents; that thereafter, the Court entered subsequent orders to compel production of documents.

VI

That this matter was scheduled for trial on April 13, 1992 at which time the Defendant requested the matter be continued due to military duties; that this Court contacted Sergeant Major Joseph in Dunn Loring, Virginia, made inquiry about the Defendant's ability to appear in Court, and was informed that he was in fact on a mission at that time, and that he would be available in July of 1992; that the Court entered an order at that time finding that the Defendant had failed to comply with previous orders of the Court requiring the Defendant to file the requested discovery and indicated that at the trial of the Equitable Distribution matter, the Court would impose sanctions for the Defendant's failure to comply; the Court then scheduled this matter for hearing in July 1992.

VII

That at the hearing scheduled in July 1992, the Defendant's attorney requested that the matter be continued once again because the Defendant would not be able to appear for trial at that time; That Defendant's attorney asserted that the Defendant would be available to complete discovery and the pretrial order in this case on or before August 3, 1992, and that the Defendant would be available for trial on August 31, 1992.

VIII

That the Court, pursuant to the Defendant's request that the matter be continued and scheduled peremptorily for hearing on August 31, 1992, provided the Defendant the opportunity to complete discovery and file a pretrial order on or before August 3, 1992; that the Court set the case peremptorily for hearing on August 31, 1992; that at the request of the Defendant's attorney, the Court extended the time to file the pre trial [sic] order from August 3, 1992 until August 24, 1992; that as of the date of this hearing, the Defendant has failed to provide the requested discovery, or to file a pretrial order in this case.

IX

That on the date of this hearing the Court received the Defendant's motion to continue and a motion for a stay pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, 50 App. U.S.C. 501 et seq.

X

That based upon the foregoing facts the Court finds that the Defendant has failed to exercise good faith and prope[r] diligence in appearing and resolving his case, and the Court in its discretion enters this order:

IT IS, THEREFORE, in the discretion of the Court ordered:

1. That the Defendant's motion for a stay pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, 50 App. U.S.C. 501 et seq is denied.

2. That the Defendant's motion to continue is denied.

3. This cause is retained for further orders of this Court.

Section 521 of the Soldiers' and Sailors' Civil Relief Act of 1940 provides:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided by this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

The question for determination is whether the trial court abused its discretion by not granting defendant's motion for a stay. A decision which rests in the discretion of the trial court will not be reversed absent a showing that the decision lacked any basis in reason. *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980). In *Boone v. Lightner*, 319 U.S. 561, 87 L. Ed. 1587, *reh'g denied*, 320 U.S. 809, 88 L.Ed. 489 (1943), the United States Supreme Court stated that the Soldiers' and Sailors' Civil Relief Act of 1940 "does not expressly require findings" but "requires only that the court be of opinion that ability to defend is not materially affected by military service." The Soldiers' and Sailors' Civil Relief Act of 1940 "cannot be construed to require continuance on mere showing that the defendant was in . . . military service." *Id.* For a serviceman to be entitled to a stay under § 521, "the man in service must himself exhibit some degree of good faith and his counsel some degree of diligence." *In re Paper Writing of Vestal*, 104 N.C. App. 739, 411 S.E.2d 167 (1991), *review denied*, 331 N.C. 117, 414 S.E.2d 767 (1992).

The only evidence of record of defendant's unavailability after the Persian Gulf War is a letter from the Department of the Army which states that defendant was scheduled to depart for Southeast Asia on 30 August 1992 for approximately 46 days. The record fails to disclose whether defendant at any time requested leave to defend this action or whether leave was likely to be granted upon request. In addition, defendant made no showing of the ways his defense would be prejudiced or his rights materially affected by his absence. Our examination of the record reveals that the trial court's findings of fact are substantially supported by the

evidence, and the showing made by defendant of his unavailability does not provide us with sufficient information to conclude that the trial court erred in denying defendant's motion for a stay. *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977), *rev'd on other grounds*, 294 N.C. 146, 240 S.E.2d 360 (1978); *In re Paper Writing of Vestal, supra.* We accept the trial court's finding that "defendant has failed to exercise good faith and prope[r] diligence in appearing and resolving his case" as evidencing the opinion of the trial court that defendant's ability to defend was not materially affected by his military service.

[3] Defendant next contends that the following finding of fact does not support the trial court's conclusion to make an unequal distribution of marital property:

> That the Court has considered all of the factors as set forth in G.S. 50-20(c) to include the following:
>
> 1. The earning ability of each party;
>
> 2. The need of the custodial parent for the use and possession of the marital residence and furniture located therein;
>
> 3. The value of defendant's separate property;
>
> 4. The defendant's expectation of additional pension.
>
> That based on the foregoing, the Court is of the opinion and finds as a fact that an unequal division of the marital assets and liabilities is equitable . . . .

Although there is a presumption that an equal division of marital property is equitable, so long as the trial court considers all the distributional factors in § 50-20(c) and makes sufficient findings as to each statutory factor on which evidence is offered, the finding of a single distributional factor by the trial court may support an unequal division. *Locklear v. Locklear*, 92 N.C. App. 299, 374 S.E.2d 406 (1988), *review allowed*, 324 N.C. 336, 378 S.E.2d 794 (1989); *Cobb v. Cobb*, 107 N.C. App. 382, 420 S.E.2d 212 (1992). The foregoing finding of the trial court comports with these requirements. The record reveals that the other findings made by the trial court are supported by the evidence and the conclusions of law are supported by the findings of fact.

[4] Defendant also asserts that the trial court erred by distributing more than 50 percent of defendant's military pension. We disagree.

The trial court employed the fixed percentage method of evaluating defendant's pension. By using this method, the trial court calculated the time defendant participated in the pension plan during his marriage to plaintiff and the time defendant participated in the plan *in toto* and determined that 88.66 percent of defendant's pension was marital property. This calculation is in accordance with *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506, *reh'g denied*, 319 N.C. 678, 356 S.E.2d 790 (1987). Accordingly, we find that the trial court did not abuse its discretion by awarding plaintiff 50 percent of the marital portion of defendant's pension.

Defendant makes no argument concerning the propriety of the trial court's classification, valuation, or distribution of the real and remaining personal property of the parties. The marital property consisted of real property, including a farm, valued at $140,000.00, the marital residence valued at $22,055.97, and personal property, which consisted primarily of defendant's military pension, valued at $237,880.00. The parties' net marital property totaled $458,260.49. The trial court distributed to plaintiff 50 percent of the marital portion of defendant's disposable retired pay, a distributive award of $25,000.00, and real and personal property valued at $67,504.89. The trial court distributed to defendant the farm valued at $140,000.00 and personal property valued at $37,875.60.

The trial court properly classified, valued and distributed the parties' marital property.

The orders and judgment appealed from are

Affirmed.

Judge JOHN concurs in the result in a separate opinion.

Judge McCRODDEN concurs.

Judge JOHN concurring in the result.

I concur in the result reached by the majority because I agree, under *Boone v. Lightner*, 319 U.S. 561, 87 L.Ed. 1587, *reh'g denied*, 320 U.S. 809, 88 L.Ed. 489 (1943), that the extensive findings *in this case* sufficiently reflect the court's "opinion . . . that defendant's ability to defend was not materially affected by his military service."

However, absent the comprehensive findings found in *Boone* and the case *sub judice* from which a court's opinion may fairly be determined, I believe the prescriptive language of the statute ("action or proceeding . . . *shall* . . . on application . . . be stayed . . . *unless, in the opinion of the court,* the ability of . . . the defendant to conduct his defense is not materially affected by reason of his military service") obliges a trial court in its ruling specifically to address the legislatively mandated opinion. 50 U.S.C. § 521 (emphasis added). I therefore write separately to emphasize that, at a minimum, the better practice would be for the record to contain the trial court's statutorily required opinion stated with particularity. It would not then be necessary on appeal to attempt to ascertain it in some other fashion.

IN THE MATTER OF: THE APPEAL OF JOEL HENRY DAVIS, JR. FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE CRAVEN COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1991 AND THE CARTERET COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1991

No. 9310PTC146

(Filed 1 March 1994)

1. Taxation § 83 (NCI4th)— property qualified for present use valuation—time for determining eligibility

The plain language of N.C.G.S. § 105-277.3(c) requires that the relevant time for determining the property's eligibility for present use valuation under the first prong of N.C.G.S. § 105-277.3(c) is *after* the property has been transferred to the new owner; therefore, for the purposes of qualifying for present use valuation under the first prong of N.C.G.S. § 105-277.3(c), the property should be viewed in the hands of the grantee and not the grantor. The Property Tax Commission did not err in concluding that the property in question qualified for present use valuation since, viewed in the hands of the taxpayer at the time title passed to taxpayer, he owned the property at issue individually; at the time title passed to taxpayer the property was forestland which was actively engaged in commercial tree production under a sound management program; and appellants conceded that taxpayer owned

other property classified under N.C.G.S. § 105-277.3(a) at the time title to the property passed to him.

Am Jur 2d, State and Local Taxation §§ 759 et seq.

2. **Taxation § 83 (NCI4th)— property qualified for present use valuation—four-year ownership requirement inapplicable**

There was no merit to appellant's contention that even if taxpayer met the two-prong requirement of N.C.G.S. § 105-277.3(c), the four-year ownership requirement of N.C.G.S. § 105-277.3(b) still applied to preclude taxpayer's property from qualifying for present use valuation, since the provisions of subsection (c) allow for an additional method for property to qualify under subsection (a) for present use valuation so that the requirements for qualifying under subsection (c) must be an alternative method from subsection (a); therefore, N.C.G.S. § 105-277.3(b) does not apply to N.C.G.S. § 105-277.3(c).

Am Jur 2d, State and Local Taxation §§ 759 et seq.

Appeal by Craven County, the Craven County Board of Equalization and Review for 1991, Carteret County, and the Carteret County Board of Equalization and Review for 1991 from a final decision of the North Carolina Property Tax Commission entered 21 October 1992. Heard in the Court of Appeals 3 December 1993.

Taxpayer Joel Henry Davis, Jr. applied in Carteret and Craven Counties for "present use" tax valuation on certain forestland located in each of these counties. Both counties' Board of Equalization and Review for 1991 denied taxpayer's application. Taxpayer appealed the decision of both Boards to the North Carolina Property Tax Commission (the "Commission"), and the appeals were consolidated. On 21 October 1992, the Commission entered a final decision reversing both decisions and finding the forestland eligible for "present use" valuation under N.C. Gen. Stat. § 105-277.3(c). From this decision, the Counties and their Boards of Equalization and Review for 1991 appeal.

Sumrell, Sugg, Carmichael & Ashton, P.A., by James R. Sugg and Jimmie B. Hicks, Jr., for appellants Craven County and the Craven County Board of Equalization and Review for 1991; and Hamilton, Bailey, Way & Brothers, by John Way, for

appellants Carteret County and the Carteret County Board of Equalization and Review for 1991.

Henderson, Baxter & Alford, P.A., by David S. Henderson, for appellee Joel Henry Davis, Jr.

ORR, Judge.

In 1990, Taxpayer acquired property from the United States Forest Service (the "USFS") in exchange for other property Taxpayer owned individually. Prior to the exchange, the property Taxpayer conveyed to the USFS had been classified and carried as "individually owned forestland" under N.C. Gen. Stat. §§ 105-277.2, -277.3 for ten or more years. Further, the property Taxpayer received from the USFS was sixty-two acres of land which had been held and used by the USFS for commercial growing of trees under the government's forest management program and was exempt from assessment and taxation by law.

I.

The sole question before this Court is whether the Property Tax Commission erred in finding the property Taxpayer received from the USFS was eligible for "present use" tax valuation pursuant to N.C. Gen. Stat. § 105-277.3(c). For the reasons stated below, we find no error.

"Property coming within one of the classes defined in G.S. 105-277.3 shall be eligible for taxation on the basis of the value of the property in its present use . . . ." N.C. Gen. Stat. § 105-277.4(a) (1992). N.C. Gen. Stat. § 105-277.3 states:

> (a) The following classes of property are hereby designated special classes of property . . . .
>
> . . .
>
> (3) Individually owned forestland consisting of one or more tracts, one of which consists of at least 20 acres that are in actual production and are not included in a farm unit.

Under this statute, "[i]ndividually owned" means owned by a natural person or a corporation as defined under N.C. Gen. Stat. § 105-277.2(4), and " '[f]orestland' means land that is a part of a forest unit that is actively engaged in the commercial growing of trees under a sound management program." N.C. Gen. Stat. § 105-277.2(2), (4).

If the forestland is owned by natural persons, the classification of such forestland for "present use" valuation is further limited by N.C. Gen. Stat. § 105-277.3(b) which states:

> In order to come within a classification described in subdivision (a) . . . (3), above, the property must, if owned by natural persons, also:
>
> (1) Be the owner's place of residence; or
>
> (2) Have been owned by the current owner or a relative of the current owner for the four years preceding January 1 of the year for which the benefit of this section is claimed.

Thus, absent another statutory provision, in order to qualify for "present use" valuation under N.C. Gen. Stat. § 105-277.3(a)(3), property owned by a natural person must be forestland consisting of one or more tracts, one of which consists of at least twenty acres that are in actual production and are not included in a farm unit. Further, the forestland owned by a natural person must either be the owner's residence or have been owned by the current owner, or a relative of the owner, for four years preceding January 1 of the year the benefit is claimed.

In the present case, it is undisputed that the property that Taxpayer received from the USFS falls under the category of "forestland" and that Taxpayer is an "individual" as defined by N.C. Gen. Stat. § 105-277.2(4) in that he is a "natural person". It is also undisputed that the property consists of a sixty-two acre tract of land used for commercial growing of trees under a forest management program. The forestland in question is not, however, Taxpayer's residence, and neither Taxpayer nor a relative of Taxpayer has owned the property for four years. Thus, absent another provision, the requirements of N.C. Gen. Stat. § 105-277.3(b) prevent Taxpayer's property from qualifying for present use valuation under N.C. Gen. Stat. § 105-277.3(a)(3).

N.C. Gen. Stat. § 105-277.3(c) provides an additional way, however, for taxpayers to qualify for present use valuation under N.C. Gen. Stat. § 105-277.3(a). N.C. Gen. Stat. § 105-277.3(c) states:

> *In addition*, property may come within one of the classifications described in subsection (a) above, if (i) it was appraised at its present use value or was eligible for appraisal at its present use value pursuant to that subsection at the time title to the

> property passed to the present owner, and (ii) at the time title to the property passed to the present owner he owned *other property classified under subsection* (a).

(Emphasis added.) Thus, in order to qualify for present use valuation under N.C. Gen. Stat. § 105-277.3(c), Taxpayer must meet a two-part test: at the time title to the property passed to Taxpayer, (1) the property must have been appraised at its present use value or have been eligible for appraisal at its present use value under N.C. Gen. Stat. § 105-277.3(a), and (2) Taxpayer must have owned other property classified under N.C. Gen. Stat. § 105-277.3(a).

In the present case, the appellants concede that Taxpayer has satisfied the second prong of the test by owning other property classified under N.C. Gen. Stat. § 105-277.3(a) at the time title to the property passed to him. Appellants contend, however, that Taxpayer has failed to meet the first prong of the test. It is undisputed that the property in question was not appraised at its present use valuation at the time title passed to Taxpayer. The sole issue before us is, therefore, whether the property was eligible for present use valuation at the time title passed to Taxpayer.

Appellants argue that in order to determine this issue, we must view the property in the hands of the grantor, not the grantee. Based on this argument, appellants contend that the property was not eligible for present use valuation under N.C. Gen. Stat. § 105-277.3(a) at the time title passed to Taxpayer because the United States Forest Service owned the property and this governmental agency does not qualify as an "individual" as defined by N.C. Gen. Stat. § 105-277.2(4) and as required to qualify for present use valuation under N.C. Gen. Stat. § 105-277.3(a). We disagree.

On the issue of statutory construction, our Supreme Court recently stated in *Fowler v. Valencourt*, 435 S.E.2d 530, 532 (1993):

> In construing a statute, the Court must first ascertain the legislative intent to assure that the purpose and intent of the legislation are carried out. . . . To make this determination, we look first to the language of the statute itself. . . . If the language used is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.

(Citations omitted.)

The statutory language at issue in the case *sub judice* is that the property must have been "eligible for appraisal at its present use value pursuant to [G.S. § 105-277.3(a)] *at the time title to the property passed to the present owner* . . . ." (Emphasis added.) The word "passed" is the past tense form of the verb "pass", which The American Heritage Dictionary defines, "[t]o be transferred or conveyed to another by will, deed, or the like . . . ." As the past tense of "pass", the plain and definite meaning of the word "passed" would be transferr*ed* or convey*ed*. In other words, the word "passed" in this context means that the transference or conveyance has already occurred and that for purposes of this portion of the statute, the property should be viewed in the hands of the grantee.

Additionally, by requiring that the property be viewed in the hands of the grantee instead of the grantor, the first prong of N.C. Gen. Stat. § 105-277.3(c) is consistent with the second prong of this statute. The second prong of G.S. § 105-277.3(c) that "at the time title to the property passed to the present owner *he* owned other property classified under subsection (a)" also focuses on the status of the owner of the land who is seeking present use valuation, not the grantor's status. N.C. Gen. Stat. § 105-277.3(c) (emphasis added). Further, by looking at the property in the hands of the grantee instead of the grantor, the first prong of N.C. Gen. Stat. § 105-277.3(c) is consistent with the other provisions and promotes the purpose behind G.S. § 105-277.3.

N.C. Gen. Stat. § 105-277.3 permits "preferential assessment of agricultural, forest and horticultural lands which reduces the property tax burden of the landowner." *W.R. Co. v. North Carolina Property Tax Comm'n*, 48 N.C. App. 245, 257, 269 S.E.2d 636, 643 (1980), *disc. review denied*, 301 N.C. 727, 276 S.E.2d 287 (1981); *In re Appeal of ELE, Inc.*, 97 N.C. App. 253, 255, 388 S.E.2d 241, 243, *disc. review on add'l issues dismissed*, 326 N.C. 482, 392 S.E.2d 92, *aff'd per curiam*, 327 N.C. 468, 396 S.E.2d 325 (1990). In order to reduce the tax burden of the landowner, the provisions of N.C. Gen. Stat. § 105-277.3(a) focus on the status of the property *owner* as an individual.

Under G.S. § 105-277.3(a)(1), (2), and (3), certain "*[i]ndividually owned* agricultural land", "*[i]ndividually owned* horticultural land", and "*[i]ndividually owned* forestland" qualify for present use valuation. (Emphasis added.) Each of these provisions focuses on the

status of the *owner* of the property who is seeking the present use valuation to determine whether the property is eligible for such valuation.

[1] Thus, we conclude that the plain language of N.C. Gen. Stat. § 105-277.3(c) requires that the relevant time for determining the property's eligibility for present use valuation under the first prong of N.C. Gen. Stat. § 105-277.3(c) is *after* the property has been transferred to the new owner. For purposes of qualifying under the first prong of G.S. § 105-277.3(c), therefore, the property should be viewed in the hands of the grantee, and not the grantor.

In the present case, when viewed in the hands of Taxpayer, at the time title passed to Taxpayer, he owned the property at issue individually. Further, at the time title passed to Taxpayer, the property was forestland which was actively engaged in commercial tree production under a sound management program. Thus, since appellants concede that Taxpayer also satisfied the second prong of N.C. Gen. Stat. § 105-277.3(c), we conclude that the property at issue meets all of the requirements of N.C. Gen. Stat. § 105-277.3(c) and that the Property Tax Commission did not err, therefore, in concluding that the property qualified for present use valuation.

II.

[2] Appellants contend, however, that even if Taxpayer met the two-prong requirement of N.C. Gen. Stat. § 105-277.3(c), the four-year ownership requirement of N.C. Gen. Stat. § 105-277.3(b) still applies to preclude Taxpayer's property from qualifying for present use valuation. We disagree.

Subsection (c) immediately follows subsection (b) and states, "*In addition*, property may come within one of the classifications described in subsection (a) above, if" at the time title to the property passed to the taxpayer, (1) the property was appraised at its present use value or was eligible for appraisal at its present use value under N.C. Gen. Stat. § 105-277.3(a), and (2) the taxpayer owned other property classified under N.C. Gen. Stat. § 105-277.3(a). Thus, subsection (c) essentially requires that the property meet the requirements found in the language of subsection (a) with the additional requirement that taxpayer own other property already classified under subsection (a) to qualify for present use valuation under subsection (a).

Because subsection (c) states that it is an "additional" method for property to qualify under subsection (a) for present use valuation, the requirements for qualifying under subsection (c) must be an alternative method from subsection (a) for qualifying for present use valuation; otherwise, there would be no need for subsection (c), and subsection (c) would be mere surplusage. "The presumption is that no part of a statute is mere surplusage, but each provision adds something which would not otherwise be included in its terms." *Domestic Elec. Service, Inc. v. City of Rocky Mount*, 285 N.C. 135, 143, 203 S.E.2d 838, 843 (1974).

In addition to the requirements found in the specific language of subsection (a), the language of subsection (b) requires that, in order for the property owned by "natural persons" to qualify for present use valuation under subsection (a), the property must also be the residence of the owner or have been owned by the owner or his relative for four years. As already stated, the requirements found in the specific language of subsection (a) also apply to property qualifying under subsection (c). Thus, the only difference between the two sections that could make subsection (c) an alternative to subsection (a) must be the residential or four-year ownership requirement imposed by subsection (b).

Thus, we conclude that N.C. Gen. Stat. § 105-277.3(b) does not apply to N.C. Gen. Stat. § 105-277.3(c). Our reading of the statute is bolstered by the fact that subsection (c) of G.S. 105-277.3(c) was ratified as Senate Bill 49 entitled, "AN ACT TO ELIMINATE THE FOUR-YEAR OWNERSHIP REQUIREMENT FOR USE-VALUE FORESTLAND TRANSFERRED TO THE OWNER OF OTHER USE-VALUE FORESTLAND."

Accordingly we find appellants' argument without merit.

III.

Finally, appellants contend that the Property Tax Commission's decision to grant Taxpayer present use valuation for his property violates the "goals of uniformity and equality" in taxation. In support of their contention, appellants argue that "allowing the taxpayer present use value of the property, in light of the failure to meet the requirements of G.S. § 105-277.3, would cause violence to the principle of uniformity and equality of taxation." In light of our holding that Taxpayer's property meets the requirements

of G.S. § 105-277.3(c) to qualify for present use valuation, appellants' argument is without merit.

Accordingly, we affirm the order of the Property Tax Commission.

Affirmed.

Judges LEWIS and JOHN concur.

JAMES P. CHRIS AND LINDA CHRIS, PLAINTIFFS-APPELLEES v. ALAN EPSTEIN AND JOYCE EPSTEIN, DEFENDANTS-APPELLANTS

No. 9215SC1221

(Filed 1 March 1994)

1. **Vendor and Purchaser § 8 (NCI3d)— breach of real estate sales contract—property sold one year later—evidence of sales price properly excluded**

In an action by plaintiffs to recover their earnest money deposit where defendants counterclaimed for breach of contract, the trial court did not err in preventing defendants from introducing evidence of the actual sales price of the subject property one year after the alleged breach, since a seller is entitled to recover the difference between the contract price and the fair market value of the property at the time of the breach, plus any consequential damages which might have been within the contemplation of the parties at the time the contract was made, and evidence of resale value one year after the breach therefore was not relevant.

Am Jur 2d, Vendor and Purchaser §§ 492 et seq.

2. **Vendor and Purchaser § 8 (NCI3d)— breach of real estate sales contract—ultimate price rule inapplicable in North Carolina**

North Carolina has not adopted the "ultimate price" rule which permits the use of the difference between the ultimate resale price and the contract price as an alternative measure of damages; therefore, the trial court did not err in its instruc-

tions on the measure of damages for breach of a real estate sales contract.

Am Jur 2d, Vendor and Purchaser §§ 492 et seq.

3. **Vendor and Purchaser § 8 (NCI3d)— breach of real estate sales contract—painting garage—renting furniture—damages not within contemplation of parties—damages not foreseeable**

In an action for breach of a real estate sales contract, the trial court did not err in excluding evidence of costs incurred by defendants to paint the sheetrock in their garage and to rent furniture for their new home so they could leave the subject house furnished in order to enhance its appearance, since these damages were not within the contemplation of the parties at the time the contract was made, and plaintiffs had no reason to foresee these damages as a probable result of their breach.

Am Jur 2d, Vendor and Purchaser §§ 492 et seq.

4. **Vendor and Purchaser § 8 (NCI3d)— earnest money deposit—no liquidated damages**

A $20,000 earnest money deposit did not serve as liquidated damages, since it was not set out in the parties' contract as the amount agreed upon which would serve as liquidated damages, and the language of the contract clearly allowed a seller to pursue other remedies for breach of contract in addition to forfeiture of a buyer's earnest money deposit.

Am Jur 2d, Vendor and Purchaser §§ 492 et seq.

Judge COZORT concurring.

Appeal by defendants from judgment entered 14 November 1990, *nunc pro tunc* 29 October 1990 by Judge D. B. Herring in Orange County Superior Court. Heard in the Court of Appeals 25 October 1993.

Northen, Blue, Rooks, Thibaut, Anderson & Woods, by David M. Rooks, III, for plaintiffs-appellees.

Wood & Bynum, by B. Jeffrey Wood and Kenneth P. Carlson, Jr., for defendants-appellants.

JOHNSON, Judge.

In June of 1988, after defendant Alan Epstein lost his job with General Electric, he sought other employment and was hired by a company in Ohio effective 28 July 1988. Defendants then placed their home on the market for sale. Soon after the home was on the market for sale, plaintiff James P. Chris executed a contract to purchase the home for $465,000.00, contingent upon his wife, plaintiff Linda Chris, giving written approval. Mrs. Chris agreed to the purchase, and the contract was finalized on 20 June 1988. Plaintiffs made a cash offer, deposited a $20,000.00 earnest money deposit with Goforth Properties, Inc., and scheduled the closing for 2 September 1988.

On 5 July 1988, the first of several inspections of defendants' home occurred pursuant to the contract to purchase. After the inspection, recommendations were made for changes to correct certain drainage and moisture problems. Defendants corrected these problems. However, on 29 August 1988, plaintiffs' attorney, David Rooks, III, faxed a letter to defendants' real estate agent, Martha Sayre, which notified defendants that plaintiffs were terminating the contract due to the drainage and moisture conditions and requested that plaintiffs' $20,000.00 earnest money deposit be returned.

Defendants' former counsel on 30 August 1988 notified plaintiffs that he would continue working toward a satisfactory closing and would make any repairs still needed to satisfy plaintiffs. The parties did not conduct the closing scheduled for 2 September 1988, and defendants did not return plaintiffs' $20,000.00 earnest money deposit.

Defendants then initiated many attempts to find another buyer for their home and mitigate their damages, including advertisements in newspapers and an international real estate magazine, listing in the area multiple listing service, open houses, catered luncheons for realtors at the home, private mailings to area professionals and business people, and continued upkeep and repairs to the home to ensure it was in the best possible condition for selling. Additionally, defendants hired E.M.A. Inc. Consulting Engineers of Raleigh, North Carolina, a "structural engineering" firm to rectify minor drainage problems discovered by E.M.A. Defendants then again asked plaintiffs to honor their contract; however, plaintiffs refused.

Defendants then moved to Ohio. Unable to afford paying for two homes, defendant Alan Epstein decided to quit his job in Ohio and attempted to find a job in North Carolina. When defendant's attempts to find a job in North Carolina were unsuccessful, he accepted a job in Chicago, Illinois which provided a relocation service to purchase their Chapel Hill home. Defendants sold their Chapel Hill home to the relocation service for $394,500.00, $70,500.00 less than plaintiffs' original offer.

Plaintiffs James P. Chris and Linda Chris filed suit against defendants Alan and Joyce Epstein on 5 October 1988, seeking the return of their $20,000.00 earnest money deposit. Defendants answered and counterclaimed for breach of contract. A jury trial was held before Judge D. B. Herring, Jr. in Orange County Superior Court. At trial, the court granted plaintiffs' motion in limine to exclude evidence of the home's $394,500.00 ultimate selling price, and ruled during trial that certain consequential damages from plaintiffs' breach could not be entered into evidence.

At the close of all of the evidence, the jury found that plaintiffs had breached the contract and awarded defendants $16,750.00 in consequential damages, the $20,000.00 earnest money deposit, costs, and interest. Defendants served their motion for a new trial on the issue of damages on 8 November 1990 and Judge Herring denied the motion by order entered 5 August 1992. Defendants gave notice of appeal to this Court on 26 August 1992. Plaintiffs cross appealed on 28 August 1992.

[1] Defendants argue in their first assignment of error that the trial court erred when it allowed plaintiffs' motion in limine, preventing defendants from introducing evidence of the actual sales price of the subject real property because this evidence is admissible under North Carolina law. We disagree.

Generally, a seller's damages for a buyer's breach of a real estate sales contract are those damages which the parties might reasonably have contemplated to be the probable result of a breach at the time they made the contract. *Johnson v. Sidbury*, 226 N.C. 345, 38 S.E.2d 82 (1946). A seller is entitled to recover the difference between the contract price and the fair market value of the property at the time of the breach, plus any consequential damages which might have been within the contemplation of the parties at the time the contract was made. *Taefi v. Stevens*, 53 N.C. App. 579, 281 S.E.2d 435 (1981), *modified*, 305 N.C. 291, 287 S.E.2d 898 (1982).

The issue for the jury in this case was whether there was any difference between the fair market value of the property at the time of the breach and the contract price. Evidence of the resale value one year after the breach was not relevant, as caselaw does not require the use of the resale price to formulate damages after a buyer has breached. Defendants propose that this Court should create a new standard of formulation for damages which would include the resale value. We do not deem it our place to change the formula for damages that has been set by precedent, where there has not been a plausible argument for such a change. We find the trial court correctly excluded evidence of the resale value.

[2] Defendants by their second assignment of error contend that the trial court erred when it instructed the jury on the measure of damages for breach of a real estate sales contract. More specifically, defendants contend the trial court should have instructed the jury on the "ultimate price" rule, permitting the use of the difference between the ultimate resale price and the contract price as an alternative measure of damages. We disagree.

In North Carolina, the seller is entitled to recover the difference between the contract price and the fair market value of the property at the time of the breach, plus any consequential damages which might have been contemplated by the parties at the time the contract was made. *Taefi*, 53 N.C. App. at 581, 281 S.E.2d at 437.

Defendants' evidence established a breach by plaintiffs, who were the buyers. Accordingly, the trial judge instructed the jury on the aforementioned measure of damages for breach of contract when a buyer breaches a real estate sales contract in North Carolina. Because North Carolina has not adopted the "ultimate price" rule proposed by defendants, the trial judge was correct in excluding it from its jury instructions. We find the trial court correctly instructed the jury on the law arising from the evidence presented at trial.

[3] Defendants argue by their third assignment of error that the trial court erred when it excluded evidence of defendants' cost to paint their garage and to rent furniture following plaintiffs' breach of the contract to purchase the subject real property because these actions are consequential damages under North Carolina law. We disagree.

> It is well established that, to recover special or consequential damages in a contract action, plaintiff must prove that these damages were in fact caused by the breach, that the amount of such damages can be proved with a reasonable degree of certainty, and that the damages were within the 'contemplation of the parties' at the time they contracted.

Stanback v. Stanback, 37 N.C. App. 324, 327, 246 S.E.2d 74, 78 (1978) (citing Dobbs, Remedies, § 12.3, p. 798). "In other words, the injured party may recover all of the damages which were *foreseeable* at the time of the contract as a probable result of the breach either because they were a *natural* result or because they were a *contemplated* result of the breach." *Pipkin v. Thomas & Hill, Inc.*, 33 N.C. App. 710, 718, 236 S.E.2d 725, 731 (1977) (emphasis retained).

In the case at bar, defendants incurred costs from painting the sheetrock in the garage and renting furniture for their new home so they might leave the Chapel Hill house furnished in order to enhance the appearance of the property. We find that these damages were not within the contemplation of the parties at the time the contract was made. Additionally, we find that plaintiffs had no reason to foresee these damages as a probable result of their breach. As such, we find the trial court properly excluded evidence of defendants' cost to paint their garage and rent furniture.

By defendants' fourth assignment of error, defendants contend that the trial court erred when it failed to instruct the jury that consequential damages could or should include defendants' expenses in painting their garage and renting furniture following plaintiffs' breach of the contract to purchase. As we have determined that the costs including the painting of defendants' garage and renting furniture were not consequential damages, we find the trial court properly excluded defendants' proposed instructions.

[4] By defendants' fifth assignment of error, defendants contend that the trial court erred when it denied defendants' motion for a new trial on the issue of damages because of assignments of error I through IV. We disagree.

In the case *sub judice*, we have carefully examined defendants' assignments of error I through IV and have found no error by the trial court. As such, we overrule this assignment of error.

By plaintiffs' cross-assignment of error, plaintiffs contend that the trial court committed reversible error in entering judgment for defendants, awarding them the amount of plaintiffs' earnest money deposit in addition to the actual damages determined by the jury because the award amounted to a penalty. More specifically, plaintiffs argue that the $20,000.00 earnest money deposit served as liquidated damages which set the amount due in the event of a breach. We disagree.

The parties in the case at bar entered into a real estate contract comprised of the standard "Offer to Purchase and Contract" approved by the North Carolina Bar Association and the North Carolina Association of Realtors, Inc., and an addendum. The contract included standard provision 1 regarding earnest money deposits which states:

> 1. EARNEST MONEY: In the event this offer is not accepted, or in the event that any of the conditions hereto are not satisfied, or in the event of a breach of this contract by Seller, then the earnest money shall be returned to Buyer, but such return shall not affect any other remedies available to Buyer for such breach. *In the event this offer is accepted and Buyer breaches this contract, then the earnest money shall be forfeited, but such forfeiture shall not affect any other remedies available to Seller for such breach. . . .* (Emphasis added.)

Liquidated damages are defined as a stipulated amount which the parties agree will serve as damages upon breach. *Knutton v. Cofield*, 273 N.C. 355, 361-62, 160 S.E.2d 29, 34-35 (1968). The language of the contract clearly allows a seller to pursue other remedies for breach of contract in addition to forfeiture of a buyer's earnest money deposit. The $20,000.00 earnest money deposit did not serve as liquidated damages because it was not set out in the contract as the amount agreed upon which would serve as liquidated damages. We find no error in the jury's award. Plaintiffs' cross-assignment of error is overruled.

We find no error.

Chief Judge ARNOLD concurs.

Judge COZORT concurs with separate opinion.

Judge COZORT concurring.

I concur completely with the majority's opinion regarding plaintiffs' cross appeal. On the defendants' appeal, I am compelled to write that I concur with the majority only because I am bound by the precedent of prior opinions of this Court and our Supreme Court. In all fairness, defendants should prevail on their arguments regarding evidence of damages and instructions on damages. As the majority accurately points out, we are bound by precedent and are not in a position to change the rules. For that reason, I concur.

NAEGELE OUTDOOR ADVERTISING, INC., D/B/A NAEGELE OUTDOOR ADVERTISING COMPANY OF THE TRIAD, PLAINTIFF-APPELLANT v. CITY OF WINSTON-SALEM, DEFENDANT-APPELLEE

No. 9221SC1137

(Filed 1 March 1994)

1. **Municipal Corporations § 30.13 (NCI3d)— zoning ordinance—billboard removal after amortization period—no taking**

Zoning ordinances involving billboard removal after an amortization period have been held to be lawful and to not constitute a taking.

Am Jur 2d, Zoning and Planning §§ 322-339.

Municipal power as to billboards and outdoor advertising. 58 ALR2d 1314.

2. **Municipal Corporations § 30.13 (NCI3d)— zoning ordinance regulating signs—sign company's action accrued on date of enactment of ordinance**

Plaintiff's inverse condemnation claim for the taking of its sign properties by enforcement of defendant's zoning ordinance accrued when the ordinance was adopted on 15 April 1985, and plaintiff's action was therefore barred by the statute of limitations.

Am Jur 2d, Zoning and Planning §§ 322-339.

Municipal power as to billboards and outdoor advertising. 58 ALR2d 1314.

Judge COZORT dissenting.

Appeal by plaintiff from order entered 14 August 1992 by Judge James M. Webb in Forsyth County Superior Court. Heard in the Court of Appeals 7 October 1993.

Smith Helms Mulliss & Moore, by William Sam Byassee and J. Donald Hobart, Jr., of counsel, for plaintiff-appellant.

City Attorney's Office, by City Attorney Ronald G. Seeber and Assistant City Attorney Charles C. Green, Jr., for defendant-appellee.

Womble Carlyle Sandridge & Rice, by Roddy M. Ligon, Jr., of counsel, for defendant-appellee.

JOHNSON, Judge.

This case concerns a zoning ordinance dealing with the regulation of signs which was adopted by the Winston-Salem Board of Aldermen on 15 April 1985. The part of the ordinance which is the subject of this appeal is the portion dealing with "off-premise grounded signs," defined in the ordinance by reference to size, zones, height, spacing, setback, distance from residential zones, number of faces, measurement, illumination, and C.B.D. view corridors. This ordinance contains an amortization schedule for these off-premise grounded signs stating that "[a]ll non-conforming off-premise signs shall be removed or brought into compliance with all requirements of this ordinance . . . within 7 years of the date of its adoption." The ordinance further stated "[t]his ordinance shall become effective upon adoption."

By letter to plaintiff dated 31 October 1986, defendant stated, in pertinent part, "that the following signs are in violation of the City of Winston-Salem Sign Ordinance and must be removed by April 15, 1992, in accordance with Section 25-12(f) of the Winston-Salem City Code." This letter made reference to signs located along I-40, Highway 52 and Corporation Freeway (those being Federal Aid Interstate and Federal Aid Primary Highways), and these were attached as Exhibit A. The letter further noted that those signs may be eligible for compensation pursuant to North Carolina General

Statutes § 136-131.1 (1993). Also attached to the letter was Exhibit B, a list of plaintiff's other billboards "required to be removed."

On 22 November 1991, defendant notified plaintiff by letter that removal of those billboards located along Federal Aid Interstate and Federal Aid Primary Highways (Exhibit A) required compensation upon removal, pursuant to North Carolina General Statutes § 136-131.1, and that therefore, those signs would not have to be removed until defendant appropriated the money to pay compensation, or until the law changed to no longer require compensation. However, this letter again gave notice that the signs listed in Exhibit B had to be removed by 15 April 1992 if they were still in violation of the ordinance on that date.

By letter dated 22 April 1992, defendant notified plaintiff that they were still in violation of the zoning ordinance, and that criminal charges may be brought if plaintiff permitted the violation to continue for as long as ten (10) days after receiving the letter.

On 11 May 1992, plaintiff filed an action against defendant seeking damages, due to the enactment of this ordinance which regulated signs within the city. Defendant filed an answer moving to dismiss plaintiff's motion for lack of subject matter jurisdiction and failure to exhaust administrative remedies, and to dismiss all claims for failure to state a claim upon which relief could be granted based upon the statute of limitations. The trial judge allowed defendant's motion to dismiss pursuant to North Carolina General Statutes § 1A-1, Rule 12(b)(6) (1990) on statute of limitations grounds. From this dismissal, plaintiff appeals to our Court.

Plaintiff argues that its "inverse condemnation claim for the taking of its sign properties by enforcement of the Winston-Salem zoning ordinance is not barred by the applicable statute of limitations." Specifically, plaintiff argues the date of "taking" should be the date the City required the removal of the signs, the last date of the amortization period, and that as a result, the statute of limitations should run from that date. Further, plaintiff argues that even if the "taking" occurred at some earlier date, the running of the statute of limitations does not begin to run until the date of completion of the "project." For reasons which follow, we find that plaintiff's argument fails.

[1] As an initial matter, we note that zoning ordinances involving billboard removal after an amortization period have been held to

be lawful and to *not* constitute a taking. *See Givins v. Town of Nags Head*, 58 N.C. App. 697, 294 S.E.2d 388, *cert. denied and appeal dismissed by* 307 N.C. 127, 297 S.E.2d 400 (1982), where our Court found that the town's prohibition (with a five and one half year amortization period) of off-premise commercial signs, while permitting on-premise signs, did not violate equal protection. *See also Summey Outdoor Advertising v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439, *disc. review denied*, 326 N.C. 486, 392 S.E.2d 101 (1990); *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed by* 422 U.S. 1002, 45 L.Ed.2d 666 (1975), where our Supreme Court found a zoning ordinance valid which provided for termination of certain non-conforming uses after an amortization period. Similarly, the enactment of the ordinance in the case *sub judice* does not constitute a taking.

[2] Therefore, this case turns on a determination of the statute of limitations. We note that this issue was presented in a Fourth Circuit case arising out of Raleigh on facts quite similar to the facts in this appeal. In *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), *cert. denied by* 118 L.Ed.2d 593 (1992), the plaintiff sign company brought suit against the city of Raleigh alleging that a city ordinance restricting off-premise outdoor advertising signs resulted in an unconstitutional taking of its property. The plaintiff argued that the trial court erred in finding that the cause of action accrued upon enactment of the ordinance in 1983, rather than when the amortization period expired. Although this case dealt with a 42 U.S.C. § 1983 action alleging an unconstitutional taking, the Court's reasoning as to when the statute of limitations accrued is persuasive:

> National [plaintiff sign company] contends that its cause of action did not accrue until the expiration of the 5½ year amortization period . . . when it faced the City's demand that the nonconforming signs be removed. Until then, National asserts, it suffered no actual injury because the . . . ordinance was neither applied nor enforced against it. . . .
>
> National's contentions miss the mark. Immediately upon enactment, the . . . ordinance interfered in a clear, concrete fashion with the property's primary use. Thus, [on the date the ordinance was enacted] National's signs became "nonconforming outdoor advertising signs." . . . The ordinance therefore interfered in a concrete fashion with National's primary use

> of its existing signs by mandating that this use change or cease within five years.

Id. at 1163. We adopt the reasoning of the Court in *National Advertising Co.* and hold that plaintiff's cause of action in the appeal before us accrued when the ordinance was adopted on 15 April 1985.

The applicable statute of limitations as to zoning ordinances is found in North Carolina General Statutes § 160A-364.1 (1987) which states "[a] cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Article or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within nine months as provided in G.S. § 1-54.1." Therefore, in the case at hand, we find the statute of limitations on this cause of action has run, and that the trial judge properly dismissed this case pursuant to North Carolina General Statutes § 1A-1, Rule 12(b)(6) on statute of limitations grounds.

We need not address plaintiff's remaining arguments.

The decision of the trial court is affirmed.

Judge McCRODDEN concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I disagree with the majority's decision affirming the trial court's dismissal of plaintiff's action based on the statute of limitations. The majority determined that the applicable statute of limitations in this case, located in N.C. Gen. Stat. § 160A-364.1 (1987), began to run when the Winston-Salem Board of Aldermen enacted the zoning ordinance on 15 April 1985. The statute provides, "[a] cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Article or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within nine months as provided in G.S. 1-54.1." Relying on *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), the majority concludes the plaintiff should have filed its action within nine months of the adoption of the ordinance.

In its complaint, plaintiff's first claim for relief alleged a cause of action for inverse condemnation. Later claims challenged the validity of the ordinance. In its brief, plaintiff argues only the inverse condemnation claim, thereby abandoning its challenge of the *validity* of the zoning ordinance. As a result, the applicable statute of limitations at issue here is not found in N.C. Gen. Stat. § 160A-364.1. The controlling statute of limitations is located in N.C. Gen. Stat. § 40A-51 (1984), which provides that an action for inverse condemnation "may be initiated within twenty-four (24) months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall accrue later."

At first glance, the *National Advertising* case appears to resolve the statute of limitations issue below. I find *National Advertising* distinguishable from this case. First, as the majority notes, *National Advertising* "dealt with a 42 U.S.C. § 1983 action alleging an unconstitutional taking," rather than an action for damages for inverse condemnation. The holding in *National Advertising* was based on a federal accrual statute, rather than a state statute of limitations. The federal law governing a § 1983 claim utilizes a different standard for determining an accrual date: the action's accrual date is at the time the plaintiff "knows or has reason to know" of the injury which is the foundation for the action.

Furthermore, the Fourth Circuit's reasoning in *National Advertising*, holding that a "taking" of the property occurred at the time of the adoption of the ordinance, is unpersuasive. I find the "taking of the affected property" did *not* occur when the ordinance was enacted; rather it occurred at the termination of the amortization period. Since the City of Winston-Salem had the ability to amend the ordinance at any time during the amortization period, both plaintiff's right to seek compensation under the ordinance and the City's right to enforce it did not vest, or fix, until the end of the amortization period. I do not agree with the proposition outlined in *National Advertising* and cited by the majority that "[i]mmediately upon enactment, the . . . ordinance interfered in a clear, concrete fashion with the property's primary use." *National Advertising*, 947 F.2d at 1163. Here, no *actual* interference occurred until plaintiff was compelled to pull down all billboards not in compliance on the last day of the amortization period.

Assuming arguendo, that a taking did occur at the time of the ordinance's enactment, the project was not completed until the signs were due to be removed on 15 April 1992. N.C. Gen. Stat. § 40A-51 provides for the statute to run at the later date of either the taking or the "completion of the project involving the taking." Here, the completion of the project obviously did not transpire until 15 April 1992. The purpose for the accrual date being at the "completion of the project" is "to provide plaintiffs adequate opportunity to discover damage." *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 572, 372 S.E.2d 742, 743-44 (1988). In the present case, plaintiff could not determine the amount of damage or change in value of its property until the billboards were to be extracted at the project's completion—the end of the amortization period. Accordingly, I vote to reverse the trial court's order dismissing plaintiff's complaint based on the statute of limitations, since the complaint complied with N.C. Gen. Stat. § 40A-51 by being filed within two years of 15 April 1992.

Having found the trial court erred by dismissing the complaint on statute of limitation grounds, I am compelled to consider defendant's cross-assignment of error that plaintiff's claims were subject to dismissal on the grounds that the plaintiff failed to exhaust its administrative remedies pursuant to N.C. Gen. Stat. § 160A-388. In general, when the legislature had provided for an effective administrative remedy to address a complaint, the remedy must be exhausted before a party may result to action in court. *See, i.e., Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). However, in the case below, an appeal to the Board of Adjustment would have been an ineffective remedy because plaintiff's complaint contained constitutional claims based on the conduct of city officials; the claims would have reached beyond the Board's authority to review. The law does not provide for the review of constitutional questions by administrative boards. *Bailey v. State*, 330 N.C. 227, 245, 412 S.E.2d 295, 306 (1991), *cert. denied*, --- U.S. ---, 118 L.Ed.2d 547 (1992).

I vote to reverse the trial court's order and to remand the matter for further proceedings.

STATE OF NORTH CAROLINA v. TERRY ALEXANDER LONG

No. 9320SC413

(Filed 1 March 1994)

1. Evidence and Witnesses § 694 (NCI4th)— murder—threats by victim excluded—no offer of proof

Assignments of error to the exclusion of evidence of the victim's threats in a murder prosecution were overruled where defendant failed to make any offer of proof and the record failed to disclose the significance of the excluded evidence. N.C.G.S. § 8C-1, Rule 103(a)(2).

Am Jur 2d, Appeal and Error § 604; Trial §§ 129, 130.

2. Evidence and Witnesses § 697 (NCI4th)— offer of proof— statement by attorney—not sufficient

A defense counsel's comments were not sufficient to constitute an offer of proof and preserve excluded evidence for appellate review.

Am Jur 2d, Trial § 131.

3. Criminal Law § 369 (NCI4th)— murder—objections and questions by court—no abuse of discretion

The trial court did not abuse its discretion in a murder prosecution by questioning a witness and sustaining its own objections. A trial judge may participate in the examination of witnesses on his or her own initiative and has a duty to do so in order to clarify the testimony being given or to elicit overlooked but pertinent facts. Additionally, the trial court has the duty to ensure that time is not wasted in useless and repetitive presentation of the evidence.

Am Jur 2d, Trial § 98.

4. Criminal Law § 1239 (NCI4th)— second-degree murder— aggravating factor—strong provocation

The trial court did not err when sentencing defendant for second-degree murder by failing to find as a statutory mitigating factor that defendant had acted under strong provocation where evidence presented by defendant showing the victim as the aggressor was contradicted by evidence tending to show that defendant grabbed a gun from his car and evidence

that the victim made threats against defendant was contradicted by evidence tending to show that the victim never made any threats against defendant. The evidence did not compel a finding that defendant acted under strong provocation.

Am Jur 2d, Criminal Law §§ 598, 599.

5. **Criminal Law § 762 (NCI4th)— second-degree murder—instructions—reasonable doubt**

The trial court did not err in a second-degree murder prosecution by giving a reasonable doubt instruction in harmony with the instruction approved in *State v. Patterson,* 335 N.C. 437.

Am Jur 2d, Trial § 832.

Appeal by defendant from judgment and commitment entered 13 January 1993 in Anson County Superior Court by Judge Julius A. Rousseau, Jr. Heard in the Court of Appeals 3 January 1994.

On 5 May 1992, defendant and the deceased victim, Cory Davis, argued over what Davis thought defendant heard him say. Davis ran toward defendant, screaming obscenities and throwing punches. Defendant fired a twelve-gauge shotgun at the ground as a warning, but Davis continued to advance toward him. Defendant then shot Davis in the abdomen, killing him.

On 31 August 1992, defendant was indicted for murder and was found guilty of second degree murder by a jury. The trial court found as an aggravating factor that defendant knowingly created a risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. The trial court made no findings of any mitigating factors and, by judgment and commitment entered 13 January 1993, sentenced defendant to thirty years imprisonment. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Deborah L. McSwain, for the State.

Office of the Appellate Defender, by Assistant Appellate Defender Janine M. Crawley, for defendant-appellant.

WELLS, Judge.

We note that defendant brings forth twenty assignments of error but sets out only eight in his brief. Pursuant to Rule 28(a) of the North Carolina Rules of Appellate Procedure, defendant's remaining assignments of error are taken as abandoned.

[1] In assignments of error 5, 9, and 10, defendant argues that the trial court erred by excluding evidence of threats made by the victim against defendant which tended to support his claim of self-defense. However, this Court cannot review the propriety of the trial court's exclusion of evidence when the record fails to disclose the significance of the excluded evidence.

The following exchange occurred on direct examination of defendant:

Q. Did you have any conversation with [Cory Davis]?

A. The first time I spoke with him he seemed to be a nice and friendly guy. That was brief 'cause we were leaving the time I spoke to him the first time.

Q. How about after that?

A. It really wasn't no conversation, just a lot of eyeballing, "I'll slap you all," a lot of jealousy, tension in the air.

Q. He indicated at some prior time he would slap you?

MR. BREWER: Objection.

COURT: Sustained.

On direct examination of defendant's witness, Ameakia Horn, the following exchange occurred:

Q. Did you have a conversation with Cory Davis?

A. Yes, I did.

Q. Can you recall what was said?

MR. BREWER: Objection.

COURT: Sustained.

* * * *

Q. Did you have some conversation with [Cory Davis]?

A. Yes, I did.

Q. Can you describe that conversation?

MR. BREWER: Objection.

COURT: Sustained.

Q. Did you hear Cory Davis make any threats?

MR. BREWER: Objection.

COURT: Sustained.

In order for this Court to rule on the trial court's exclusion of evidence, a specific offer of proof is required unless the significance of the excluded evidence is clear from the record. N.C. Gen. Stat. § 8C, Rule 103(a)(2) (1992); *State v. Simpson*, 314 N.C. 359, 334 S.E.2d 53 (1985). In the above two instances, defendant failed to make any offer of proof and the record fails to disclose the significance of the excluded evidence. Assignments of error 9 and 10 are therefore overruled.

[2] In the following instance, defendant contends that his counsel's comments constitute a sufficient offer of proof:

COURT: Mr. Lowe, when Mr. Polk was testifying you wanted to be heard about what Nisey said to him.

MR. LOWE: Yes, sir. I believe, Your Honor,—

COURT: What did she say to him?

MR. LOWE: What I was trying to elicit was that on prior occasions Nisey had been told by Charles—I'm sorry—by Cory Davis to tell these gentlemen that he would slap them, they were punk mother fuckers. I believe, Your Honor, that in a homicide case that's admissible evidence.

Although there may be instances where a witness need not be questioned in order to preserve appellate review of excluded evidence, *see State v. McCormick*, 298 N.C. 788, 259 S.E.2d 880 (1979) (witness answered question before objection was sustained); *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979) (opposing counsel stipulated to the contents of the excluded testimony), we will not encourage the practice of permitting counsel to insert answers rather than have the witness give them in the absence of the jury. *State v. Willis*, 285 N.C. 195, 204 S.E.2d 33 (1974). Defense counsel's statements are not adequate to preserve the excluded

evidence for our review. *Simpson, supra.* Assignment of error 5 is therefore overruled.

[3] In assignments of error 2, 8, and 17, defendant argues that the trial court erred by raising and sustaining its own objections, questioning witnesses and making improper comments in violation of defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, Article I of the North Carolina Constitution and G.S. §§ 15A-1222 and 1223. We disagree.

Defendant contends that the following questioning of the State's expert witness was the most conspicuous intervention by the trial court:

> Q. Based on your training and experience in the field if you would state how that compares with other weapons of this caliber.
>
> A. A trigger pull of greater than five and a half but less than or equal to six pounds is standard for this type of weapon.
>
> > COURT: What is a weapon such as that most commonly used for?
> >
> > MR. LOWE: Objection.
> >
> > COURT: Overruled.

Defendant contends that the following exchange which occurred during defendant's redirect and direct examinations demonstrates the trial court's partiality against him:

> Q. And Terry was on this side of the car (indicating).
>
> A. Yes.
>
> Q. The sidewalk runs parallel to the parking lot here.
>
> > COURT: We've been over all that.
> >
> > MR. LOWE: I just want to clarify it, if the Court please.
> >
> > COURT: We've been over it.
>
> Q. Your testimony is that Terry backed from here to here (indicating), is that right?
>
> A. Yes.

Q. Part of the time he was in the parking lot, and part of the time he was on the sidewalk.

COURT: We've been over that. Sustained.

A. Walking from—

COURT: No, sustained. We've been over that.

* * * *

COURT: All of you ought to feel better today. The sun is shining. All right, Mr. Lowe, yesterday when we stopped she testified about what had taken place that day. She was outside trying to stop the defendant. The defendant was backing out. Let's proceed from there without going back too far.

MR. LOWE: May I approach, Your Honor?

COURT: What about?

MR. LOWE: Your Honor, my recollection—I don't mean to argue with the Court—is that I was at the point of asking her what manner or tone of voice Mr.—

COURT: You've been through that. They were outside. He was backing up on the sidewalk or either the parking lot. She was trying to stop him.

Q. When you first got outside where was Cory Davis?

A. Walking up to Terry.

Q. What if anything was he saying?

A. I didn't understand what he was saying.

Q. Describe his tone of voice.

COURT: We've been over that. Sustained.

* * * *

Q. Can you use some point in this courtroom as a reference point to indicate how far it was from you to somewhere for instance? Would it be helpful if I stood—

A. Come back.

> COURT: Have a seat, Mr. Lowe. Let her point it out in the courtroom.
>
> MR. LOWE: I'm just trying to help her, Your Honor.
>
> COURT: I understand that. I'm trying to speed up the case.

The trial judge must at all times be absolutely impartial. *State v. Brady*, 299 N.C. 547, 264 S.E.2d 66 (1980); N.C. Gen. Stat. § 15A-1222 (1988). The trial court is prohibited from expressing any opinion in the presence of the jury on any question of fact. *State v. Bearthes*, 329 N.C. 149, 405 S.E.2d 170 (1991). However, a trial judge, on his own initiative, may participate in the examination of witnesses and has a duty to do so in order to clarify the testimony being given or to elicit overlooked but pertinent facts. *State v. Efird*, 309 N.C. 802, 309 S.E.2d 228 (1983). Questioning by the trial court does not amount to the expression of opinion "unless a jury could reasonably infer that the questions intimated the court's opinion as to the witness's credibility, the defendants' guilt or as to a factual controversy to be resolved by the jury." *State v. Yellorday*, 297 N.C. 574, 256 S.E.2d 205 (1979). In addition, the trial court has the duty to ensure that time is not wasted in useless and repetitive presentation of the evidence. When the trial court sustains its own objection, the determination of prejudice must be made not by counting the number of occurrences "but by reviewing the record with an awareness of the appropriateness of the ruling and the likelihood that the judge's action created an appearance to the jury of partiality on the trial judge's part." *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986). This Court will not interfere with the trial court's exercise of its duty to control the conduct and course of the trial absent a showing of manifest abuse. *State v. Lednum*, 51 N.C. App. 387, 276 S.E.2d 920, *rev. denied*, 303 N.C. 317, 281 S.E.2d 656 (1981).

Our review of the record persuades us that the trial court did not express any opinion in the presence of the jury on any question of fact to be decided by the jury. By questioning one witness and sustaining its own objections, the trial court properly exercised its discretion in controlling the conduct of the trial. Assignments of error 2, 8, and 17 are therefore overruled.

[4] In his assignment of error 20, defendant argues that the trial court erred by failing to find as a statutory mitigating factor in

sentencing that defendant acted under strong provocation. We cannot agree.

Findings in aggravation and mitigation must be proved by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.3 (1993); *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983). Defendant bears the burden of persuasion on mitigating factors, and when defendant argues that the trial court erred in failing to find a mitigating factor, he is asking this Court to conclude that " 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn' and that the credibility of the evidence 'is manifest as a matter of law.' " *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983) (*quoting North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388 (1979)).

Our review of the record does not indicate that the evidence compels a finding that defendant acted under strong provocation. *State v. Clark*, 314 N.C. 638, 336 S.E.2d 83 (1985). Evidence presented by defendant showing the victim as the aggressor was contradicted by evidence tending to show that when the victim approached defendant, defendant grabbed a gun from his car. Evidence that the victim made threats against defendant was contradicted by evidence tending to show that the victim never made any threats against defendant. We conclude, therefore, that the trial court did not err in failing to find as a mitigating factor that defendant acted under strong provocation.

[5] In his remaining assignment of error, defendant argues that the trial court erred by giving a reasonable doubt instruction which reduced the State's burden below the standard mandated by the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution and violated the Sixth Amendment right to a jury trial. We disagree.

In *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990), the United States Supreme Court held that a reasonable doubt instruction which equated reasonable doubt with "grave uncertainty" and "actual substantial doubt" and that required a "moral certainty" that defendant was guilty violated the Due Process Clause. In *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), our Supreme Court held that a reasonable doubt instruction which defined reasonable doubt in terms of "honest substantial misgiving" and which required "moral certainty" in the truth of the charge for conviction violated *Cage*.

However, in *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578, (1994), our Supreme Court found that the following jury instruction did not violate the Due Process Clause:

> The State must prove to you that the Defendant is guilty beyond a reasonable doubt. Of course a reasonable doubt of a Defendant's guilt also might arise from a lack or insufficiency of the evidence. However, a reasonable doubt is not a vain, imaginary or fanciful doubt but it is a sane, rational doubt. Proof beyond a reasonable doubt means that you must be fully satisfied, entirely convinced or satisfied to a moral certainty of the Defendant's guilt.

In this case, the trial court gave the following instruction on reasonable doubt:

> Now, a reasonable doubt is not a vain, imaginary or fanciful doubt, but it's a sane and rational doubt. It's a doubt based on common sense. When it is said that you, the jury, must be satisfied of the defendant's guilt beyond a reasonable doubt it is meant that you must be fully satisfied, or entirely satisfied, or satisfied to a moral certainty of the truth of the charge. If, after considering, comparing and weighing the evidence or lack of evidence the minds of the jury are left in such a condition that you cannot say you have an abiding faith to a moral certainty in the defendant's guilt then you have a reasonable doubt, otherwise not.

We find the above instruction to be in harmony with the instruction given and approved in *Patterson* and therefore hold that the instruction given in this case was free of prejudicial error. This assignment is therefore overruled.

No error.

Chief Judge ARNOLD and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. DANIEL C. MARR

No. 9329SC301

(Filed 1 March 1994)

Criminal Law § 49 (NCI4th)— murder—accessory before the fact—plan to steal property—guilty

The trial court did not err by denying defendant's motions to dismiss charges of accessory before the fact to first-degree murder, first-degree burglary, armed robbery, and first-degree arson where an accomplice testified that the only purpose in going to the property was to steal items and there was no murder, arson, or robbery planned. Once an accessory before the fact has counseled, procured or planned a criminal event, he or she must answer for all crimes flowing from the accomplished event.

Am Jur 2d, Criminal Law § 172.

Appeal by defendant from judgment entered 9 July 1992 by Judge Chase B. Saunders in Polk County Superior Court. Heard in the Court of Appeals 29 November 1993.

At trial, the State presented evidence which tended to show that Shane Smith and Jimmy Jaynes committed breaking and enterings in Polk and Henderson Counties in 1990. In September of 1990, Smith and Jaynes went with defendant to the Paul Acker property.

Smith testified that defendant furnished information about Mr. Acker's property to him and Jaynes so that they could rob Mr. Acker. When the three men arrived at the property, defendant told Jaynes and Smith that they should not drive on Fowler Road because there were older people who lived on the road and kept watch. Defendant described a building and a trailer on the property that were fully equipped with tools. Defendant told Smith and Jaynes about certain habits of Mr. Acker, such as when he went out of town and when he left his home. Defendant told the men about barking dogs on the property. Defendant told them that Mr. Acker never locked his doors and that when he left his home, his trailer was unlocked and unsecured. He told them that there were tractors, bulldozers, and two automobiles on the property and that Mr. Acker left the keys in these vehicles.

Smith testified that defendant told him and Jaynes that defendant knew about Mr. Acker's property and habits because he had worked there cutting timber while he was in the Spindale Prison unit. Defendant told Smith that he wanted several tools from Mr. Acker's property, including an air compressor, welder and other common shop tools. Defendant told Smith and Jaynes that he could not take the tools himself because he was just released from prison and was on parole.

Smith and Jaynes went back to the Acker property in early October. The two men made a total of four trips to the property together. During these four trips, Jaynes and Smith went into the mobile home and the shop on two occasions.

On 10 October 1990, Smith and Jaynes met each other at Smith's place of employment in Rutherford County. Later that evening, they travelled to Mr. Acker's home. Jaynes carried a .25 caliber pistol and a .22 rifle. Smith testified that if they were caught on the property and asked what they were doing, they had planned to say that they were deer hunting.

Smith testified that no lights were on in the trailer, but that both of Mr. Acker's automobiles were there. Smith went to the back of the trailer and Jaynes went to the front. Jaynes knocked on the front door and then banged and yelled for someone to come to the door. Smith heard a gunshot while he was still at the back of the trailer.

Smith went to the trailer's front porch, where he saw Jaynes standing over Mr. Acker's motionless body. Jaynes pulled from his shoe the .25 caliber pistol, aimed it at Mr. Acker and fired twice. Jaynes then handed the gun to Smith, who raised his arms, closed his eyes and fired the weapon in Mr. Acker's direction. After firing the weapon at Mr. Acker, Smith threw the gun down and ran out the door. Once outside, Smith heard two more shots. Smith and Jaynes went back inside the trailer, and Jaynes covered Mr. Acker's body. The two men loaded Mr. Acker's Volvo and the truck they drove with items from Mr. Acker's trailer. They then left the residence and went to Crutchfield Road in Rutherford County. The men left the Ford truck there and drove the Volvo back to the Acker property to get Smith's automobile.

When they returned to the property, Jaynes took a container of gasoline from Mr. Acker's shed. Jaynes told Smith to meet

him at the bottom of the hill. Smith started down the hill and saw flames coming from the residence. The two then left the property a second time, with Jaynes still driving the Volvo and Smith now driving his own car. They left the Volvo off Nantytown Road in Rutherford County. Smith took Jaynes to his grandmother's house in Rutherford County.

Smith saw Jaynes again on 12 October 1990. They agreed to get the truck and put the stolen items in a barn off Oak Springs Road. They then took the truck back to its original location on Crutchfield Road.

On 13 October 1990, Jaynes and Smith went to defendant's home, but defendant was not there. They drove back to where they had hidden the Volvo, and Rutherford County sheriffs were there to arrest them.

The forensic pathologist testified that the cause of death to Mr. Acker was two gunshot wounds to the head and that Mr. Acker was dead before the fire started.

The defendant presented evidence that Clay Nelon had had conversations with Shane Smith while in the Polk County Jail, and that Smith had told Nelon that "all Dan [Marr] had to do with it was take him over there and get him permission to hunt on Paul's property."

Jimmy Jaynes testified that defendant is his uncle by marriage. Jaynes testified that he and defendant never had a conversation about breaking into the mobile home of Mr. Acker, nor about taking items of personal property belonging to Mr. Acker. Jaynes denied that defendant ever told them anything about Mr. Acker's property. Jaynes denied picking up defendant and going to Polk County with him and Shane Smith.

After a trial by jury, defendant was found guilty of accessory before the fact to first degree murder, accessory before the fact to first degree burglary, accessory before the fact to robbery with a dangerous weapon, accessory before the fact to felonious entering a dwelling house, accessory before the fact of larceny pursuant to entering a dwelling house, accessory before the fact to felonious entering of a building, accessory before the fact to felonious larceny pursuant to entry of a building, accessory before the fact to first degree arson of a mobile home, and accessory before the fact to two counts of larceny of a motor vehicle. Defendant was sentenced

to three consecutive three-year terms, one consecutive ten-year term, one consecutive forty-year term, two consecutive fifty-year terms, and one term of life in prison. Defendant now appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General James C. Gulick, for the State.

Brent Conner for defendant-appellant.

WELLS, Judge.

Defendant argues, *inter alia*, that the trial court erred by refusing to grant his motion to dismiss the charges of accessory before the fact to first degree murder, first degree burglary, armed robbery, and first degree arson.

Defendant contends that there was insufficient evidence that he instigated, counseled or procured principals Smith and Jaynes to commit armed robbery, burglary, murder or arson to let those charges go to the jury. He argues that these crimes are entirely different from the planned crimes of stealing property from Paul Acker's shop and mobile home, and thus there was no causal connection between his actions and the actions of the principals in committing the crimes as required by *State v. Davis*, 319 N.C. 620, 356 S.E.2d 340 (1987).

When a defendant moves for dismissal, the court must determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser included offense, and (b) of defendant's 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, 265 S.E.2d 164 (1980).

Defendant was indicted for wrongs allegedly committed by him as an accessory. In order to convict the defendant of being an accessory before the fact the State was required to prove (1) that defendant counseled, procured, commanded, encouraged, or aided another to commit the offense; (2) defendant was not present when the crime was committed; and (3) the principal committed the crime. *See generally State v. Davis, supra*, (murder); *State v. Fletcher*, 66 N.C. App. 36, 310 S.E.2d 787, *disc. rev. denied*, 310 N.C. 627, 315 S.E.2d 693 (1984). With respect to the crimes of murder, burglary, and arson in this case, Smith's testimony

tends to exonerate defendant. Smith testified that the only purpose for going to the Acker property on 11 October 1990 was to steal items from the mobile home and the shop, and that there was "no murder planned, no arson, no robbery. . . ." To the extent which Smith's testimony tended to exculpate defendant, the State is bound by it. *See generally State v. Horton*, 275 N.C. 651, 170 S.E.2d 466, *cert. denied*, 398 U.S. 959, 26 L.Ed.2d 545, *reh'g denied*, 400 U.S. 857, 27 L.Ed.2d 97 (1970).

The inquiry does not end there, however. With respect to the guilt of accused accessories, our appellate courts have held that accessories may be held accountable not only for the crimes they counsel or procure, but also for any other crimes committed by the principal which are the natural or probable consequence of the common purpose. *State v. Ruffin*, 90 N.C. App. 705, 370 S.E.2d 275 (1988); *State v. Hewitt*, 33 N.C. App. 168, 234 S.E.2d 468 (1977). That, of course, is a standard more easily stated than applied. For example, in a civil case, one court has defined "natural or probable" consequences as follows: "Those consequences that a person by prudent human foresight can anticipate as likely to result from an act, because they happen so frequently from the commission of such an act that in the field of human experience they may be expected to happen again." *Pope v. Pinkerton-Hays Lumber Co.*, 120 So.2d 227, *cert. denied*, 127 So.2d 441 (1961).

However, we find the dispositive standard to be somewhat at variance with the "natural and probable" consequence standard relied upon by the State. The requirement for conviction of an accessory before the fact is that the State must prove beyond a reasonable doubt that the action or statements of the defendant somehow caused or contributed to the actions of the principal. *See State v. Davis*, 319 N.C. 620, 356 S.E.2d 340 (1987). Generally, there is not a great deal of dispute over whether an accessory's words or acts caused or contributed to the actions of the principal. *See State v. Sams*, 317 N.C. 230, 345 S.E.2d 179 (1986); *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982). Rather, the factual issue is more likely to focus on whether the accesory "counseled, procured, or commanded the principal *at all*." (Emphasis added.) *State v. Hunter*, 290 N.C. 556, 227 S.E.2d 535 (1976); *cert. denied*, 429 U.S. 1093, 51 L.Ed.2d 539 (1977). *See also State v. Davis, supra.*

Our review of the accessory cases indicates that where crimes of intent are involved, the accused accessory typically did or said

something which would tend to show that he at least anticipated that the plan he encouraged might lead to the "consequential" crime in question. The reasoning of our Supreme Court in the cases we have cited above, however, clearly indicates under our law that once an accessory before the fact has counseled, procured or planned a criminal event, he must answer for all crimes flowing from the accomplished event.

We have carefully reviewed defendant's other assignment of error and find no merit in his argument.

No error.

Chief Judge ARNOLD and Judge EAGLES concur.

METROPOLITAN LIFE INSURANCE CO., PLAINTIFF v. C. E. ROWELL, DEFENDANT

No. 9226SC877

(Filed 1 March 1994)

Liens § 27 (NCI4th)— construction of apartment—lien—priority over deed of trust—sale of property

Defendant's lien has priority over a deed of trust held by plaintiff where defendant supplied labor and materials to the construction of an apartment project; the owner of the project was Tantilla Associates, a North Carolina general partnership; the general contractor was Waller Development, which served as general contractor as an accommodation to a general partner and did not perform any work on the project; defendant contracted with Tantilla; Tantilla executed a deed of trust to Metropolitan ten days before defendant's last performance of work; Waller executed a contractor's affidavit to induce Metropolitan to make the loan to Tantilla; this affidavit stated that all subcontractors had been paid; defendant filed a lien under N.C.G.S. § 44A-8 for labor and materials and a complaint to enforce the lien by sale of the real property; a judgment was entered for defendant and defendant sought sale of the property at public auction; Metropolitan filed this action seeking injunctive relief preventing defendant's execution sale of

the property; and the court granted summary judgment for Metropolitan, finding that the lien of the deed of trust had priority over defendant's lien. Defendant timely filed a claim of lien pursuant to N.C.G.S. §§ 44A-8 and 44A-12 and, while defendant's claim of lien appears to include questionable items, the judgment granting the lien was not appealed. The judgment properly awards a total of $267,700 to defendant, with interest from 29 January 1989 and properly orders a sale of property to enforce the lien. The omission of the effective date of the lien from the judgment should not bar the lien.

Am Jur 2d, Mechanics' Liens §§ 263 et seq., 339 et seq.

Appeal by defendant from judgment entered 2 July 1992 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 August 1993.

Petree Stockton, by David B. Hamilton and B. David Carson, for plaintiff-appellee.

William G. Robinson for defendant-appellant.

JOHNSON, Judge.

Plaintiff brought suit against defendant both to enjoin him from selling an apartment project at execution sale while enforcing his lien obtained in an action entitled *C. E. Rowell v. Tantilla Associates*, 89 CVS 7238 Mecklenburg County Superior Court, and to determine the relative priority of security as between plaintiff and defendant.

In August 1986, defendant C. E. Rowell, from South Carolina, first began to supply labor and materials to the construction of a 53 unit apartment project in Charlotte. The owner of the project was Tantilla Associates (Tantilla), a North Carolina general partnership operated by two general partners, Carl and Joe Schneider. The general contractor for this project was Waller Development, Inc. (Waller) who was licensed in North Carolina. Waller did not perform any work on the project; Waller only went to the job site once or twice and was accommodating Carl Schneider by serving as the general contractor.

Defendant's contract with Tantilla was basically to work until the job was completed and to complete certain jobs commonly referred to as subcontract work. Tantilla was to pay defendant

for these jobs, at a rate of one half the savings to Tantilla, based on the other subcontract bids Tantilla had obtained. Carl Schneider asked defendant to hold out until the end of the job and he would be paid in full. Defendant performed his last work 29 December 1988.

On 19 December 1988, which was ten days before defendant's last performance of work, Tantilla executed a deed of trust on the real property to Metropolitan Life Insurance Co. (Metropolitan) to secure a $1,680,000.00 loan. Waller executed a contractor's affidavit on 9 December 1988 to evidence to Tantilla that Waller had performed his general contractor obligations and to induce Metropolitan to make this loan to Tantilla. The affidavit stated that as "general contractor," Waller constructed certain improvements which included the apartment complex; that Waller had been paid in full for construction at the property; and that

> [a]ll work, labor, services and materials utilized in the construction of the Improvements were furnished and performed at the instance of General Contractor, as general contractor, for and on behalf of Owner, and that General Contractor has paid in full all subcontractors, suppliers, laborers and materialmen for all work, labor and services performed on, and has fully and completely paid for all materials supplied or ordered for or used in connection with the Improvements, at the agreed price therefor or reasonable value thereof.

On 14 April 1989, defendant timely filed a claim of lien pursuant to North Carolina General Statutes § 44A-8 (1989) asserting a lien against the real property for labor and materials supplied in its improvement. On or about 12 June 1989, defendant filed a complaint against Tantilla and the Schneiders to enforce the lien by sale of the real property pursuant to North Carolina General Statutes §§ 44A-13 and 44A-14 (1989). On 10 June 1991, a judgment was entered in favor of defendant and against Tantilla and the Schneiders. The judgment awarded a total of $267,700.00 to defendant, with interest at the legal rate from 29 January 1989. The judgment further ordered a sale of the property to enforce the lien.

On or about 3 October 1991, defendant had execution issued upon the judgment. Pursuant to this execution, defendant sought sale of the real property at public auction. Subsequently, Metropolitan filed the action which is the subject of this appeal, seeking injunctive relief preventing defendant's execution sale of the property. Metropolitan filed a motion for summary judgment which the court

granted, finding that the lien of the deed of trust had priority over defendant's lien. In addition, the court denied a summary judgment motion filed by defendant. Defendant filed timely notice of appeal.

Defendant argues that the trial court erred when it granted summary judgment for plaintiff and denied defendant's summary judgment motion. Defendant argues that because defendant contracted only with the owner, defendant's lien rights were not waived under Waller's contractor's affidavit, because plaintiff did not establish that defendant was a first-tier sub-contractor under Waller. As a result, defendant claims that due to the relation-back nature of defendant's judgment lien, defendant has priority over plaintiff's deed of trust.

Plaintiff, however, contends that the dispositive issue on appeal is not whether defendant was a prime contractor or subcontractor, but rather, whether the judgment is an ordinary judgment lien because the judgment imposed fails to meet the requirements of North Carolina General Statutes § 44A. If the judgment is an ordinary judgment lien, the judgment is effective from the date of entry.

Summary judgment is appropriate where there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56. *Burton v. NCNB*, 85 N.C. App. 702, 355 S.E.2d 800 (1987). The goal of summary judgment is to allow the disposition before trial of an unfounded claim or defense. *Cutchin v. Pledger*, 71 N.C. App. 279, 321 S.E.2d 462 (1984).

North Carolina General Statutes § 44A-8 states:

> **Mechanics', laborers' and materialmen's lien; persons entitled to lien.**
>
> Any person who performs or furnishes labor or professional design or surveying services or furnishes materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished pursuant to such contract.

North Carolina General Statutes § 44A-10 (1989) states that "[l]iens granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the lien." Liens granted by the Article are perfected upon filing of the claim of lien pursuant to North Carolina General Statutes § 44A-12 (1989), and actions to enforce the lien are instituted pursuant to North Carolina General Statutes § 44A-13.

Defendant timely filed a claim of lien pursuant to North Carolina General Statutes §§ 44A-8 and 44A-12. Our Court has stated "[i]t is apparent that 'labor' . . . contemplate[s] actual work done by the person claiming a lien, whether that person be a manual laborer, supervisor, or skilled professional, which *directly* impact[s] on the real property in question." *Southeastern Steel Erectors v. Inco, Inc.*, 108 N.C. App. 429, 434, 424 S.E.2d 433, 437 (1993) (emphasis retained). However, the evidence indicates that the claim of lien which defendant filed includes items that appear to be questionably lienable. For example, one item in the claim of lien states defendant was hired "as an employee to work on the Tantilla Apartments[.] . . . The general description of the employment contract . . . provid[ed] for $44,000 per year, plus $150 per week for gas expenses in using . . . [defendant's] truck for the owners." Another item states that "[o]wners also promised to pay [defendant's] bill at Myrtle Beach Lumber in the amount of $20,000 plus accumulated interest. This was an additional amount of [defendant's] employment contract." The judgment entered by the trial court resulting in defendant obtaining the statutory lien does not specifically address these questionable items; evidently, these items were resolved in determining the damages as to the breach of the contract to build and construct the project between defendant and Tantilla.

We further note that the amounts awarded in the judgment for specific items vary from the amounts set forth in the claim of lien; that the judgment contains two items which were not listed in the claim of lien; and that the total judgment award differs but does not exceed the total amount asserted in the claim of lien. (*But see Conner Co. v. Spanish Inns*, 294 N.C. 661, 242 S.E.2d 785 (1978), where the plaintiff timely filed a claim of lien under North Carolina General Statutes § 44A in the amount of $543,919.58 due under a construction contract, and a panel of arbitrators determined the amount of the lien on the property to be $195,936.00. In *Conner Co.*, 294 N.C. at 673, 242 S.E.2d at 792, *quoting Widenhouse*

v. Russ, 234 N.C. 382, 384, 67 S.E.2d 287, 289 (1951), the Court stated "it is material to ascertain and determine what amount, if any, was due by the owner . . . to the contractor[.]") And, the trial court's judgment award does not exceed the total amount asserted in the claim of lien, in compliance with North Carolina General Statutes § 44A-13(b) which states in pertinent part that "[j]udgment enforcing a lien under this Article may . . . not exceed[ ] the principal amount stated in the claim of lien enforced thereby."

However, we do not now question whether these concerns we have cited were properly or improperly considered by the trial court because this judgment, having not been appealed, is *res judicata*. After filing and perfecting this lien, defendant instituted an action to enforce the lien pursuant to North Carolina General Statutes § 44A-13. The judgment properly awards a total of $267,700.00 to defendant, with interest at the legal rate from 29 January 1989, and properly orders a sale of the property to enforce the lien. We further find that the trial court's omission of the effective date of the lien from the judgment should not bar plaintiff's lien, because "[p]laintiff should not be barred from the benefits of a remedy by the trial court's failure to include in its judgment the beginning . . . date[ ] of the work." *Jennings Glass Co. v. Brummer*, 88 N.C. App. 44, 52, 362 S.E.2d 578, 583 (1987), *disc. review denied*, 321 N.C. 473, 364 S.E.2d 921 (1988).

Plaintiff cites *Miller v. Lemon Tree Inn*, 32 N.C. App. 524, 233 S.E.2d 69 (1977) as standing for the proposition that a judgment which fails to meet the requirements of North Carolina General Statutes § 44A is only a money judgment. In *Miller*, the plaintiff filed a materialmen's claim of lien on the subject property, noting the record owner of the subject property and further noting the lessor and the lessor's assignee of the property; these latter parties were those with whom the plaintiff had contracted. The plaintiff obtained a judgment against the assignee of the lessor of the subject property and wanted this judgment declared a lien on the subject property; however, this judgment signed by the clerk of superior court did not refer to the site upon which plaintiff wanted a lien declared and did not relate the lien back to the date when labor and materials were first furnished at the site. In the case *sub judice*, defendant properly met the requirements of North Carolina General Statutes § 44A and the judgment signed by the trial judge referred to the site upon which plaintiff wanted a lien

declared and related the lien back to the date when labor and materials were first furnished at the site.

Because we find the judgment in defendant's favor properly ordered a sale of the property to enforce defendant's statutory lien, we find the lien relates back to the date of the first furnishing listed in the claim of lien and judgment. Therefore, defendant's lien has priority over the deed of trust held by Metropolitan.

The decision of the trial judge is reversed.

Judges WYNN and JOHN concur.

BILLY RAY TUCKER v. YVONNE C. MILLER, EXECUTRIX OF THE ESTATE OF NANCY W. TUCKER, DECEASED

No. 9218DC1315

(Filed 1 March 1994)

1. **Divorce and Separation § 111 (NCI4th)— equitable distribution —property right—no abatement on death of party**

The trial court did not err in an equitable distribution action by denying plaintiff's motion to abate the action where his wife died after the judgment of absolute divorce and before the order of equitable distribution. Once a trial court enters a judgment of divorce, a claimant cannot be divested of the right to equitable distribution and his or her claim survives his or her death.

Am Jur 2d, Divorce and Separation § 177.

Effect of death of party to divorce proceeding pending appeal or time allowed for appeal. 33 ALR4th 47.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

2. **Divorce and Separation § 158 (NCI4th)— equitable distribution —distribution factors—death of party**

The trial court did not err in an equitable distribution action in its consideration of distribution factors where defendant had died between the judgment of divorce and the equitable distribution order, the court took cognizance of the death in

its finding on distribution factor 1, and, even assuming that either factor 1 or 12 would allow the court to consider the needs of the parties and the evidence of defendant's death on its own as sufficient to show that her estate had no needs, plaintiff presented no evidence of his needs that might justify an unequal distribution.

Am Jur 2d, Divorce and Separation § 915.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

3. Divorce and Separation § 139 (NCI4th)— equitable distribution —valuation of business goodwill

The trial court erred in an equitable distribution action by concluding that the goodwill in plaintiff's business was an asset unique to plaintiff and in finding one hundred percent of the goodwill to be a marital asset. Since goodwill only exists incident to the property rights, the marital portion of the goodwill value of the business could not exceed the marital share of the property rights in the corporation.

Am Jur 2d, Divorce and Separation § 945.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

4. Divorce and Separation § 147 (NCI4th)— equitable distribution —debt—not marital

The trial court did not err in an equitable distribution action by not determining that a $39,315 contingent debt was marital where the record indicates that plaintiff had co-signed a lease with Nautilus Elite, a company partly owned by plaintiff's business; that the balance of the debt on the date of separation was $39,315; plaintiff testified that his business did not own Nautilus Elite at the date of separation; there is no evidence indicating the capacity in which plaintiff had co-signed the lease and no evidence that his wife had signed the lease; while plaintiff presented evidence to show that his business had reacquired an interest in Nautilus Elite after the date of separation and that he paid $39,315 in satisfaction of the lease obligation after the date of separation, he presented no evidence to show that he made any of the post-separation lease payments with marital funds; and there was no evidence to indicate that the liability for the debt at the date of separation was anything other than plaintiff's separate debt.

Am Jur 2d, Divorce and Separation § 935.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Appeal by plaintiff from order entered 30 June 1992 by Judge J. Bruce Morton in Guilford County District Court. Heard in the Court of Appeals 29 October 1993.

This appeal arises out of a claim for equitable distribution of the marital property of plaintiff, Billy R. Tucker, and Nancy W. Tucker. Plaintiff and Nancy Tucker were married on 21 July 1951. They separated on 25 May 1983, and plaintiff commenced an action for absolute divorce on 8 June 1984. On 10 August 1984, Nancy Tucker answered and requested an equitable distribution of their marital property, pursuant to N.C. Gen. Stat. § 50-20 (1987). The trial court entered a judgment of absolute divorce on 10 September 1984.

In April 1990, the trial court began hearing the equitable distribution matter. The hearing was interrupted, however, and no definite date for resumption was set. On 26 May 1990, Nancy Tucker died. The trial court substituted as defendant the duly appointed executrix of Nancy Tucker's estate and resumed the trial. On 6 June 1991, plaintiff moved to abate this action. The court denied this motion and heard further evidence on 6 June 1991 and 8 April 1992. On 30 June 1992 and 8 July 1992, respectively, the court entered an order of equitable distribution and a corrected judgment under which plaintiff had to pay a distributive award of $259,290.80 to Nancy Tucker's estate. From this order, plaintiff appeals.

Baker Law Offices, by Walter W. Baker, Jr. and Jeffrey L. Mabe, for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans and Murrelle, by William W. Jordan and ToNola D. Brown, for defendant-appellee.

McCRODDEN, Judge.

Relying on four assignments of error, plaintiff presents four arguments for our consideration. The issues we must decide are (I) whether the death of a party, after absolute divorce but before an order of equitable distribution, abates the equitable distribution proceeding; (II) whether the trial court was required to consider Nancy Tucker's death in making its equitable distribution de-

termination; (III) whether it erred in classifying the goodwill of plaintiff's business as marital property; and (IV) whether its classification of a contingent debt as plaintiff's sole property was appropriate.

I.

[1] Plaintiff's first argument is that the trial court erred in refusing to abate this action because, according to plaintiff, a claim for equitable distribution does not survive the death of a party. We disagree.

Equitable distribution is a property right. *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987); N.C.G.S. § 50-20(k). While it is true that subsection (k) does not grant a party a right in any particular property, it does create a right to an equitable portion of that which the court determines to be marital property. *Wilson v. Wilson*, 73 N.C. App. 96, 325 S.E.2d 668, *disc. review denied*, 314 N.C. 121, 332 S.E.2d 490 (1985). Once a trial court enters a judgment of divorce, a claimant cannot be divested of the right to equitable distribution, and, therefore, his claim survives his death. *See Swindell v. Lewis*, 82 N.C. App. 423, 346 S.E.2d 237 (1986) (holding that where a spouse had died after entry of judgment of divorce but prior to equitable distribution, spouse's heirs were necessary parties to the equitable distribution action); *see also Peterson v. Goldberg*, 585 N.Y.S.2d 439 (N.Y. App. Div. 1992) (holding that right to equitable distribution, which vests upon entry of divorce judgment, survives the death of the claiming spouse). *Trogdon v. Trogdon*, 97 N.C. App. 330, 330, 388 S.E.2d 212, 213, *cert. denied*, 326 N.C. 487, 392 S.E.2d 102 (1990), cited by plaintiff, is distinguishable, holding that there can be no claim for equitable distribution where the marriage was "dissolved by death" *before* the entry of judgment of divorce. We hold that Nancy Tucker's death, which came subsequent to her divorce from plaintiff and which followed the institution of the claim for equitable distribution, did not abate her estate's action for equitable distribution.

II.

[2] The plaintiff next alleges that the trial court erred in failing to consider the death of Nancy Tucker and the lack of need by her estate as factors in support of an unequal distribution in plaintiff's favor. First, the trial court did take cognizance of Tucker's death. In its order, it made findings on each N.C.G.S. § 50-20(c)

factor which might support an award of unequal distribution, including:

> (1) The income, property, and liabilities of each party at the time the division is to become effective. The defendant died on the 26th day of May, 1990, while the trial of this action was in progress. The plaintiff is self employed at an annual income slightly in excess of $100,000. His property consists of those items listed on plaintiff's exhibit 19. After deducting debts in the sum of $87,500.00, his net worth is $1,029,600.00.

In support of the second portion of this argument, plaintiff asserts that Nancy Tucker's estate had no needs and that the trial court erred in failing to consider this lack of need as supportive of an unequal distribution in his favor. Plaintiff contends that factor (1), "[t]he income, property, and liabilities of each party at the time the division of property is to become effective," and factor (12) "[a]ny other factor which the court finds to be just and proper," N.C.G.S. § 50-20(c), are based upon the needs of the parties and that the trial court erred in failing to make findings relative to the parties' needs.

When there is evidence presented that would allow the court to conclude that an equal division of the marital property would be inequitable, the trial court must consider all of the factors listed in N.C.G.S. § 50-20(c), *Locklear v. Locklear*, 92 N.C. App. 299, 305-06, 374 S.E.2d 406, 410 (1988), and "exercise its discretion in assigning the weight each factor should receive." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Nonetheless, the court must only make findings concerning those factors for which evidence was presented. *Locklear*, 92 N.C. App. at 306, 374 S.E.2d at 410.

Even assuming that either factor (1) or (12) would allow the trial court to consider the needs of the parties and that evidence of Nancy Tucker's death, on its own, is sufficient to show that her estate had no needs, we are unable to find fault in the trial court's order. Plaintiff presented no evidence of his needs that might justify an unequal distribution. Indeed, the court's determination that plaintiff's net worth exceeds a million dollars indicates that this case does not involve a surviving party whose future welfare is jeopardized by an equal distribution of marital assets. We overrule this assignment of error.

III.

[3] Plaintiff's third argument is that the court erred in concluding that one hundred percent of the goodwill of plaintiff's business, Tucker Enterprises, Inc., was a marital asset. We find merit in this contention.

In its order, the trial court found that eighty percent of the shares of stock in plaintiff's business, Tucker Enterprises, Inc., was a marital asset, that the corporation had goodwill worth $113,257.00, and that:

> [T]he marital value of all corporate assets other than goodwill to be eighty percent of the net value of such assets in the corporation, which is the percentage of marital shares to total shares in the corporation. Since the goodwill of the corporation was a unique asset of the plaintiff, the court finds one hundred percent of such goodwill value to be marital.

Plaintiff does not contest in this appeal either the valuation of the goodwill or the finding that the marital share of the corporate assets was eighty percent. He correctly contests, however, the court's conclusion that the goodwill of Tucker Enterprises was an asset unique to plaintiff. Plaintiff can have no goodwill separate from Tucker Enterprises. "Goodwill exists as property merely as an incident to other property rights, and is not susceptible of being owned and disposed of separately from the property right to which it is incident." *Ice Cream Co. v. Ice Cream Co.*, 238 N.C. 317, 321, 77 S.E.2d 910, 914 (1953) (quoting 38 C.J.S. *Good Will* § 3, at 951 (1943)). Goodwill of a professional practice is an asset that must be valued and considered in determining the value of the business for equitable distribution. *Poore v. Poore*, 75 N.C. App. 414, 420-21, 331 S.E.2d 266, 271, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985).

"So it is held that the owner of an appreciable interest in the stock of a corporation has a proportionate vendible interest in the good will of the corporate business . . . ." 38 C.J.S. *Good Will* § 5, at 953. Since goodwill only exists incident to property rights, the marital portion of the goodwill value of Tucker Enterprises could not exceed the marital share of the property rights in the corporation, which is proportionate to their interest (80%) in Tucker Enterprises. We find that the trial court erred in concluding that the goodwill of the corporation was an asset unique

to plaintiff and in finding one hundred percent of the goodwill to be a marital asset. Using the uncontested value of the goodwill, the trial court should include that value as part of the valuation of Tucker Enterprises, calculate the portion of the corporation that is marital at eighty percent, and distribute accordingly.

IV.

[4] Finally, the plaintiff argues that the court erred in failing to determine that a $39,315.00 contingent debt was marital.

In making an equitable distribution of the marital property of the parties, the trial court must consider all the debts of the parties. *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987). A marital debt is one incurred during marriage for the joint benefit of the parties, regardless of who is legally liable for the debt. *Id.* The party who claims that any debt is marital bears the burden of proof on that issue. *Albritton v. Albritton*, 109 N.C. App. 36, 40-41, 426 S.E.2d 80, 83 (1993). He must demonstrate the value of the debt as of the date of separation and that the debt was incurred during the marriage for the joint benefit of the husband and wife. *Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181, 183 (1990).

Plaintiff contends that there was evidence presented that he had incurred $39,315.00 as a marital debt and that the trial court erred in failing to classify, value or include the debt. The record indicates evidence that plaintiff had co-signed a lease with Nautilus Elite, a company partly owned by Tucker Enterprises, and that, at the date of separation, the balance of the debt on the lease was $39,315.00.

Plaintiff testified, however, that Tucker Enterprises did not own Nautilus Elite at the date of separation. There is no evidence indicating in what capacity he had co-signed the lease, nor is there any evidence that Nancy Tucker signed the lease. Plaintiff did present evidence to show that, subsequent to the date of separation, Tucker Enterprises reacquired an interest in Nautilus Elite and that he paid $39,315.00 in satisfaction of the lease obligation after the date of separation. He presented no evidence, however, to show that he made any of the post-separation lease payments with marital funds. Hence, there was no evidence to indicate that, at the date of separation, the liability for the debt was anything other than his separate debt. We conclude that plaintiff failed to meet

his burden of proving that the liability was marital and that he may not now claim error in the trial court's classification of the debt. *Miller*, 97 N.C. App. at 80, 387 S.E.2d at 184.

In summary, we reverse the finding of the trial court that the goodwill of Tucker Enterprises was an asset unique to plaintiff, and we remand the case to the district court with instructions to adjust the award in a manner consistent with this opinion. We find no other basis upon which to modify the trial court's order.

Affirmed in part; reversed in part.

Judges LEWIS and WYNN concur.

FIRST-CITIZENS BANK & TRUST COMPANY, PLAINTIFF-APPELLANT v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, DEFENDANT-APPELLEE

No. 933SC174

(Filed 1 March 1994)

Insurance § 877 (NCI4th)— theft of auto from dealer's lot—assignment of insurance—assignment valid

The trial court correctly granted summary judgment for defendant in an action to enforce the terms of an insurance policy where a repossessed automobile was stolen off the lot of Sigmon Chevrolet; plaintiff had financed the purchase of the automobile; Sigmon Chevrolet executed a contract after the theft which assigned to plaintiff all its rights in the insurance policy relating to the loss; and defendant refused payment, contending that the assignment was invalid under the terms of the insurance policy. The assignment of the mere right to payment after loss in no way broadened the scope of the coverage of insurable risks provided by the policy. It was noted that this disposition turns on the express words chosen by the defendant-insurer in this policy.

Am Jur 2d, Insurance §§ 497 et seq.

Appeal by plaintiff from order entered 14 December 1992 by Judge G.K. Butterfield in Pitt County Superior Court. Heard in the Court of Appeals 6 December 1993.

On 16 April 1992, plaintiff filed a complaint seeking to enforce the terms of an insurance policy issued by defendant to Sigmon Chevrolet Buick Pontiac GMC Truck, Inc. (hereinafter "Sigmon Chevrolet"). Plaintiff sought recovery of the replacement value of a repossessed motor vehicle stolen from the premises of Sigmon Chevrolet. By an amended answer filed 22 July 1992, defendant *inter alia* admitted that the truck had been repossessed, denied that plaintiff had a contractual right to recover any proceeds under the terms of the insurance policy, and demanded a trial by jury.

The facts pertinent to this appeal are as follows: on 24 January 1990, Sigmon Chevrolet sold a 1987 S-10 Chevrolet Blazer to Kathryn S. Comfort. Plaintiff financed the purchase and subsequently perfected its security interest in the vehicle. Ms. Comfort defaulted under the terms of the note. On 20 February 1991, plaintiff repossessed the truck and caused it to be placed on Sigmon Chevrolet's premises pursuant to a 2 November 1989 "Retail Protection Agreement for Motor Vehicle Dealers," executed between plaintiff and Sigmon Chevrolet, which provided that:

> 13. You [plaintiff] shall have the sole right to make collections on all contracts and we agree not to solicit or make any collections with respect to any contracts held by you except pursuant to your instructions. We [Sigmon Chevrolet] agree to hold any repossessions in trust for you . . . .
>
> 14. In the event of repossession and foreclosure sale of a motor vehicle with respect to which the sale proceeds exceed an amount which covers our expenses and satisfies our repurchase obligation to you, we agree to reimburse you, to the extent of the balance of the sale proceeds remaining, for your reasonable costs of repossession, including the expense of recovering the vehicle . . . .

(Alterations added.)

Sometime prior to 3 May 1991, the truck was removed from Sigmon Chevrolet's premises by an unknown person or persons. On 3 May 1991, Mr. Don Sigmon, Sigmon Chevrolet's president, reported the truck as stolen to the police. Defendant contends that "[h]owever, Mr. Sigmon did not at that time or at any other

time notify Universal Underwriters. In fact, Universal Underwriters did not learn of the theft until one month later, June 7, 1991, when they received a report from plaintiff's agent, Gaither Tadlock." Plaintiff contends that "Mr. Sigmon engaged in discussions with a claims representative of defendant a short time after the loss." A letter from defendant's claims examiner dated 4 September 1991 (in which defendant refused "voluntary payments" to plaintiff under Sigmon Chevrolet's policy) indicates that "[a] short time later [after the truck was repossessed on 20 February 1991], Don Sigmon has [sic] advised our Adjuster Ray Warren that a bank representative called Mr. Sigmon and informed him that they would take the vehicle to Toyota East in Greenville in order to sell the vehicle at retail prices. Therefore, when the vehicle was discovered missing, there was no alarm as Mr. Don Sigmon felt the vehicle had been towed to Toyota East in Greenville by a representative of First Citizens Bank."

On 15 April 1992, Sigmon Chevrolet executed a contract assigning to plaintiff: (1) "[a]ll rights, title, and interest (both legal and equitable)" in Sigmon Chevrolet's insurance policy "with respect to any and all claims which Sigmon may possess as against Universal [defendant] pursuant to said policy for or relating to any loss which may be attributed to the theft and/or disappearance of the Chevrolet Blazer in the possession of Sigmon at the time of said theft and/or disappearance"; (2) "[a]ll causes of action (both legal and equitable) which Sigmon may have as against Universal in connection with the claim or claims at issue and/or arising out of the failure of Universal to pay for said loss pursuant to the terms of the insurance policy," and; (3) "[a]ll rights, title, and interest (both legal and equitable) of Sigmon in and to the aforementioned Chevrolet Blazer." Subsequently, plaintiff made a demand for payment under the terms of the insurance policy. Defendant refused payment, contending that the assignment was invalid under the terms of the insurance policy. Plaintiff filed suit against defendant on 16 April 1992. On 30 November 1992, plaintiff filed a motion for summary judgment pursuant to G.S. 1A-1, Rule 56. On 2 December 1992, defendant filed a motion for summary judgment pursuant to G.S. 1A-1, Rule 56. On 14 December 1992, the trial court denied plaintiff's motion and granted defendant's motion for summary judgment. Plaintiff appeals.

Ward and Smith, P.A., by Louise W. Flanagan, for plaintiff-appellant.

Wallace, Morris, Barwick & Rochelle, P.A., by Stuart L. Stroud, for defendant-appellee.

EAGLES, Judge.

Plaintiff brings forward one assignment of error. After a careful consideration of the briefs and record, we reverse and remand.

Plaintiff argues that the trial court erred by granting summary judgment for defendant. We agree.

Under the section entitled "Unicover Coverage Part 300 Auto Inventory Physical Damage" of the policy issued by defendant to Sigmon Chevrolet, the following terms appeared:

> "AUTO" means any type of land motor vehicle, (whether crated or not), trailer or semi-trailer, farm tractor or implement, each including its equipment and other equipment permanently attached to it. AUTO does not include hovercraft.
>
> . . . .
>
> "COVERED AUTO" means an AUTO (1) owned by or acquired by YOU or (2) not owned by YOU but in YOUR care, custody, or control.

In a request for admissions, defendant admitted "that as of the time of delivery and acceptance of the subject motor vehicle to Don Sigmon by First Citizens, it adhered to the definition of a covered auto." In another request for admissions, defendant answered as follows:

> No. 12 Interrogatory: Does the Unicover Coverage Part 300 Auto Inventory Physical Damage apply to and cover theft of the subject motor vehicle from the premises of Sigmon Chevrolet as the same is a "Covered Auto" "not owned by [Sigmon Chevrolet] but in [Sigmon Chevrolet's] care, custody or control"?
>
> Answer: Without admitting that defendant has any obligation to pay hereunder, it is admitted the subject motor vehicle does come under the definition of a covered automobile, as defined in Unicover Coverage Part 300.

(Alterations in original.)

Defendant argues that the 15 April 1992 "attempted assignment is invalid under the terms of the policy and plaintiff is only entitled to recovery from their contractual partner." We disagree. The provision regarding assignment of the insurance policy read as follows: "ASSIGNMENT—No assignment of interest will affect this policy unless WE [defendant] change the policy." The following provision also appears in the policy:

> Changes—The only way this policy can be changed is OUR issuing an endorsement(s) or substituting the declarations. They must be signed by one of OUR representatives when required by law. Nothing else will change this policy, waive any of its terms, or stop US from asserting any of OUR rights, not even notice to or knowledge learned by one of OUR representatives.
>
> If WE change any of the terms of this policy, which broadens or extends the coverage, this policy will automatically be broadened or extended as if it were actually endorsed, if the change
>
> > (a) was approved by YOUR state insurance regulatory authority, during the policy period or 45 days before the policy became effective; and
> >
> > (b) is available to YOU without additional premiums.

Given defendant's admissions, *supra*, we conclude that the assignment of the mere right to payment after loss in no way broadened the scope of the coverage of insurable risks provided by defendant's policy. We particularly note that this policy did not expressly prohibit assignments: rather, our disposition here turns on the express words chosen by the defendant-insurer in this policy. *See Burk v. Prudential Ins. Co.*, 7 N.C. App. 209, 172 S.E.2d 67 (1970); *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967). We note further that most of the cases from other jurisdictions regard such express prohibitions as generally ineffective when applied to assignments which occur after the loss has been incurred:

> [T]he great weight of authority supports the rule that general stipulations in policies prohibiting assignments thereof except with the consent of the insurer apply to assignments before loss only, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as

> distinguished from a claim arising thereunder, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim.

16 George J. Couch *et al.*, *Couch on Insurance 2d*, § 63.40, at 763-65 (Rev. ed. 1983) (footnotes omitted). *See also* 5A John A. Appleman and Jean Appleman, *Insurance Law and Practice*, § 3458, at 408-09 (1970).

For the reasons stated, the trial court's 14 December 1992 order is reversed and the cause is remanded for entry of an order granting partial summary judgment for plaintiff on the issue of liability. Accordingly, the cause is remanded for further proceedings, including a determination of the amount of damages, not inconsistent with this opinion.

Reversed and remanded.

Chief Judge ARNOLD and Judge WELLS concur.

GARY O. BARLOWE, PLAINTIFF v. MARCELLA D. BARLOWE, DEFENDANT

No. 9322DC863

(Filed 1 March 1994)

1. Divorce and Separation § 149 (NCI4th)— equitable distribution —unequal division of property—physical custody of children— evidence sufficient

The trial court did not err by ordering an unequal division of the marital property in favor of defendant-wife where the court concluded that because the defendant had physical custody of the two children she had a need to occupy the marital residence and that an unequal division was equitable because plaintiff had an income approximately twice the defendant's income. Both of those reasons are factors within the scope of N.C.G.S. § 50-20(c).

Am Jur 2d, Divorce and Separation §§ 923, 930.

Divorce and separation: effect of trial court giving consideration to needs of children in making property division—modern status. 19 ALR4th 239.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

2. **Divorce and Separation § 176 (NCI4th)— equitable distribution —unequal distribution—not arbitrary**

The trial court did not abuse its discretion in an equitable distribution action in the degree of the unequal division distributed to defendant where the court did not articulate in the judgment the percentage of the marital property that would be distributed to each party, but the percentages to be distributed to each party could be determined from the judgment and, given the distributive factors found by the trial court, it could not be said that the distribution was not the result of a reasoned decision.

Am Jur 2d, Divorce and Separation § 932.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Judge JOHNSON dissenting.

Appeal by plaintiff from judgment filed 2 July 1993 by Judge James M. Honeycutt in Alexander County District Court. Heard in the Court of Appeals 18 January 1994.

Edward Jennings for plaintiff-appellant.

Homesley, Jones, Gaines & Fields, by Edmund L. Gaines, for defendant-appellee.

GREENE, Judge.

Gary O. Barlowe (plaintiff) appeals from an equitable distribution judgment which unequally distributed the marital property of plaintiff and Marcella D. Barlowe (defendant).

The trial court's relevant findings are summarized as follows: Two children were born of the marriage, ages seventeen and twelve at the time of the equitable distribution hearing; a consent order entered in November of 1991 gave the parties joint custody of the children with defendant having primary physical custody; plain-

tiff was granted secondary custody in the form of alternate weekend visitation; since the parties' separation, defendant and the children have continued to reside in the marital home; plaintiff is employed and had a gross income in 1992 of $14,000.00; defendant is employed part-time and had a gross income of $6,480.00 in 1992; and the value and distribution of the property was to be as noted on the schedules attached to the judgment which listed the various items of marital property and reflected a net value on each item.

The court concluded that an unequal division of the marital property in favor of defendant was equitable "based upon the need of the defendant who has primary physical custody of the parties' minor children to the use of the marital home, and based also upon the disparity in the incomes of the parties." The trial court ordered that the respective parties were the owners of the "property distributed to . . . [them] pursuant to the attached schedules" and directed defendant to pay plaintiff "a distributive award in the total amount of $4,973.50."

The judgment does not reflect the percentage of the marital estate each party was to receive or did in fact receive. Our review of the judgment and its attachments, however, reveals that after consideration of the cash payment defendant was required to make to the plaintiff, plaintiff received assets having a net value of $12,298.50 and the defendant received assets having a net value of $36,885.50.

The issues are (I) whether the findings of fact support the conclusion that an unequal division of the marital property was equitable, and if so, (II) whether the degree of the division in favor of the defendant was an abuse of discretion.

I

[1] "When evidence tending to show that an equal division of marital property would not be equitable is admitted" in an equitable distribution proceeding, the trial court has wide discretion to divide the property unequally. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "[I]f no evidence is admitted tending to show that an equal division would be inequitable, the trial court must divide the marital property equally." *Id.* at 776, 324 N.C. at 832-33.

In this case, the judgment shows that the trial court was convinced that the defendant met her burden of showing by a preponderance of the evidence that an equal division would not be equitable. The trial court concluded, based on findings of fact in the record, that because the defendant had physical custody of the two minor children born of the marriage she had a need to occupy the marital residence and because the plaintiff had an income approximately twice the defendant's income "an unequal division . . . in favor of the defendant" was equitable. Both of the reasons given by the trial court are factors within the scope of N.C. Gen. Stat. § 50-20(c) and thus can support an unequal division. N.C.G.S. § 50-20(c)(1) & (4); *see Patterson v. Patterson*, 81 N.C. App. 255, 260, 343 S.E.2d 595, 599 (1986); *Bradley v. Bradley*, 78 N.C. App. 150, 153-54, 336 S.E.2d 658, 660-61 (1985) (no error in unequal distribution based in part upon finding of disparity in parties' incomes). Thus, the trial court did not abuse its discretion in ordering an unequal division of the marital property "in favor of the defendant."

II

[2] The plaintiff nonetheless contends that the degree of the unequal division "in favor of the defendant" is arbitrary and thus an abuse of discretion. If the decision is "so arbitrary that it could not have been the result of a reasoned decision," it must be reversed. *White*, 312 N.C. at 777, 324 S.E.2d at 833.

In this case, the trial court did not articulate in its judgment the percentage of the division of the marital property that would be distributed to each party. Although such a statement in the judgment would assist this Court in reviewing the trial court's exercise of its discretion, it is not necessary when, as in this case, we are able to determine from the judgment the percentages of marital property actually awarded to each party. After adjusting the percentages to reflect the distributive award, plaintiff received 25.005% of the marital property and defendant received 74.994% of the marital property. We are unable to say, in light of the Section 50-20(c) factors found by the trial court, that this distribution was not "the result of a reasoned decision" by the trial court.

Affirmed.

Judge JOHN concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent. I agree with the majority that no abuse of discretion appears in the trial court's determination that an unequal distribution in favor of defendant is warranted. I disagree, however, that the findings made are sufficient to support the distribution ordered.

Plaintiff specifically assigns as error and argues in his brief that the distributive award is arbitrary and is not supported by the facts or applicable law. He further argues more generally that the division ordered by the court is not supported by the evidence or by sufficient findings of fact. I agree with plaintiff that the court failed to make sufficient findings of fact to support its division in that it failed to make any findings concerning the distributive award. The judgment shows that the trial court directed defendant to pay a distributive award in the total amount of $4,973.50, but made no findings of fact and no conclusions of law addressing the distributive award or the amount ordered to be paid.

Although the trial court has wide discretion in determining an equitable distribution of marital property, its discretion is not unlimited. The trial court's determination will not be upheld on appeal if the evidence fails to show any rational basis for the distribution ordered. *See Nix v. Nix*, 80 N.C. App. 110, 341 S.E.2d 116 (1986). Furthermore, the court's exercise of its discretion is restricted in that the court must make findings and conclusions that support its division. *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196, *reh'g denied*, 335 N.C. 177, 438 S.E.2d 202 (1993). Although the court is not required to make exhaustive findings regarding the evidence presented at the equitable distribution hearing, it is required to make findings sufficient to permit the appellate court on review to determine from the record whether the judgment and the conclusions underlying it represent a correct application of the law. *Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988). "When the findings and conclusions are inadequate, appellate review is effectively precluded." *Id.* at 405, 368 S.E.2d at 600.

The court's discretion is not so broad that it can order a party to pay a distributive award in any amount it chooses. Rather, there must be a rational basis in the evidence for the amount ordered to be paid, and the court must make sufficient findings to show the basis for the amount of the award or at least sufficient findings from which the appellate court can determine for itself

the basis for the award. The absence of such findings precludes any meaningful appellate review of the distributive award, thereby hampering appellate review of the distribution as a whole.

Although the distributive award in the present case may very well be proper, we are unable to determine whether it is appropriate because the judgment is devoid of any findings of fact concerning the award. In the absence of any findings of fact or conclusions of law concerning the distributive award, we cannot determine whether there is a rational basis in the evidence for the award or whether the award constitutes an abuse of discretion. Because the trial court failed to make any findings of fact showing the basis for the distributive award, or any findings from which we can determine the basis for the award, I vote to vacate the judgment and remand the cause for additional findings and conclusions and entry of a proper judgment.

CLARENCE EDWARD SWICEGOOD, JR. v. CAROL INMAN COOPER

No. 9310DC476

(Filed 1 March 1994)

Automobiles and Other Vehicles § 440 (NCI4th) — driver's speeding and safe movement violations — insufficient evidence of negligent entrustment

Defendant's evidence was insufficient to require submission to the jury of an issue of plaintiff's negligent entrustment of his automobile to his twenty-five-year-old son where it tended to show that, during a five-year period, the son had been convicted of six speeding violations, ranging from a high of speeding 75 m.p.h. in a 65 m.p.h. zone to a low of speeding 40 m.p.h. in a 35 m.p.h. zone; he had also been convicted of three safe movement violations; and his license had been suspended for a sixty-day period because he had accumulated more than twelve points on his driving record. Traffic violations of the type and frequency shown by the evidence do not support a conclusion that the son was an incompetent or reckless driver likely to cause harm to others in the operation of plaintiff's automobile.

Am Jur 2d, Automobiles and Highway Traffic §§ 643-646.

Judge COZORT dissenting.

Appeal by defendant from judgment entered 20 January 1993 in Wake County District Court by Judge Joyce A. Hamilton. Heard in the Court of Appeals 8 February 1994.

Tantum & Hamrick, by John E. Tantum and William B. L. Little, for plaintiff-appellee.

Law Offices of Robert E. Smith, by Robert E. Ruegger, for defendant-appellant.

GREENE, Judge.

Carol Inman Cooper (defendant) appeals from judgment entered 20 January 1993 in favor of Clarence Edward Swicegood, Jr. (plaintiff), in this action for damage to personal property.

On 1 April 1992, defendant was involved in an automobile accident with a car driven by Reggie Swicegood (plaintiff's son) and owned by plaintiff. As defendant was driving her Plymouth van west on Brassfield Road through the intersection of Honeycutt Road, her van was struck in the right rear wheel area by plaintiff's automobile, which Reggie Swicegood was driving south on Honeycutt Road.

At the time of the accident, Reggie Swicegood, age twenty-five, did not live with plaintiff, although he was driving plaintiff's automobile with plaintiff's permission. Testimony established that he had driven plaintiff's automobile on several previous occasions.

Plaintiff brought this suit to recover for damages to his automobile. Prior to trial, the trial court granted plaintiff's motion in limine to prohibit any evidence regarding the issue of negligent entrustment. Defendant, during her offer of proof submitted Reggie Swicegood's driving record, which revealed that, between 1986 and 1991, Reggie Swicegood had been convicted of six separate speeding violations, ranging from a high of traveling seventy-five miles per hour in a sixty-five mile per hour zone to a low of forty miles per hour in a thirty-five mile per hour zone. He had also been convicted of three safe movement violations. On one occasion in 1988 his license was suspended for a sixty-day period for accumulating more than twelve driving license points. Defendant also tendered

the testimony of plaintiff that plaintiff was aware only of two of his son's violations of the motor vehicle law, namely two of the safe movement violations. Plaintiff testified that he was not aware that his son's license had been suspended.

Defendant's request to submit negligent entrustment to the jury was denied by the trial court. The trial court submitted only the following issue to the jury:

> 1. Was the plaintiff, Clarence Edward Swicegood, [J]r., damaged by the negligence of the defendant, Carol Inman Cooper?

The jury answered this issue "yes" and awarded plaintiff $8,000. On the bottom of the jury verdict form the jury wrote: "We also feel that Mr. [Reggie] Swicegood was guilty of speeding & was partly responsible for this accident."

The determinative issue presented is whether the evidence tendered by defendant on the issue of negligent entrustment supported submitting that issue to the jury.

In North Carolina, the owner of an automobile "who entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver" who is "likely to cause injury to others in its use" is liable to third parties for injuries caused by the borrower's negligence. *Dinkins v. Booe*, 252 N.C. 731, 735, 114 S.E.2d 672, 675 (1960); *Roberts v. Hill*, 240 N.C. 373, 377, 82 S.E.2d 373, 377 (1954). Likewise, under the doctrine of contributory negligence, the owner of an automobile who is negligent in the entrustment of his automobile to another is barred from recovering for damages to his automobile caused by a negligent third party while the automobile was being operated by the borrower.

The cases are not particularly helpful in providing guidance as to what qualifies the borrower as "incompetent or reckless." In *Dinkins*, the Supreme Court held that evidence that the owner knew that the borrower had been involved in several automobile accidents and had been convicted of driving without his license was sufficient to present a jury question as to negligent entrustment. *Dinkins*, 252 N.C. at 735, 114 S.E.2d at 675. Evidence that the borrower of the owner's automobile did not have a driver's license and had not been given adequate driving instructions was held

adequate to support submission of negligent entrustment in a Michigan case. *Shepherd v. Barber*, 174 N.W.2d 163, 164 (Mich. App. 1969). A Louisiana case held that evidence that the borrower suffered from severe emotional disorder and was under the influence of drugs was sufficient to support negligent entrustment. *Frain v. State Farm Ins. Co.*, 421 So. 2d 1169, 1173 (La. Ct. App. 1982).

In this case, even if we assume plaintiff knew of his son's complete record of traffic violations, it would have been error to submit the issue of negligent entrustment to the jury. Traffic violations of the type and frequency as shown in this case cannot support a conclusion that the son was an incompetent or reckless driver likely to cause harm to others in the operation of the plaintiff's motor vehicle. *See McFetters v. McFetters*, 98 N.C. App. 187, 390 S.E.2d 348 (substantial evidence needed to support submission of issue to jury), *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 177 (1990). Thus, the trial court correctly refused to submit the issue of negligent entrustment to the jury.

No error.

Judge ORR concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

The majority has concluded that "traffic violations of the type and frequency as shown in this case cannot support a conclusion that the son was an incompetent or reckless driver likely to cause harm to others in the operation of the plaintiff's motor vehicle." I believe this conclusion is wrong as a matter of law, and I dissent.

The evidence showed that defendant stopped her van at the intersection of Honeycutt Road and Brassfield Road at 3:00 p.m. on Wednesday afternoon, 1 April 1992. Defendant testified she looked to the right and saw nothing coming. As she proceeded to cross the intersection, her van was struck from the right by the 1983 Porsche owned by plaintiff and being driven by his son. The son, a twenty-five-year-old college student, was driving from his father's house in north Raleigh to attend a class, the starting time of which was unknown to the son, at North Carolina State University. The son did not live with his father at that time. The

son was driving his father's Porsche because the son's Jeep was in the repair shop on that particular day.

The son stated to the investigating officer that "I might have been in excess of 55 m.p.h., no faster." Thus, the evidence shows that, when the collision occurred, the plaintiff's son was driving plaintiff's Porsche at least 55 m.p.h. through a school zone at 3:10 p.m. on an April Wednesday afternoon, when the collision occurred.

Plaintiff car owner sued defendant for the property damage to the Porsche. Plaintiff's son, the driver of the Porsche at the time of the accident, did not live with plaintiff at the time, and the Porsche was not subject to the Family Purpose Doctrine. Therefore, the issue of the driver's contributory negligence as a proximate cause of the damage to the Porsche was not an issue which could be submitted to the jury.

The defendant sought to introduce evidence, and requested that the trial court charge the jury, on negligent entrustment. The defendant desired to offer evidence that it was negligence for the owner of the Porsche, a high speed, high performance automobile, to entrust the car to his son. The son had been convicted of nine speeding and safe movement violations during a period beginning 1 May 1986 and ending 24 February 1991. The son also had two other convictions for which he had received a prayer for judgment continued. The son's driver's license had been suspended in 1988 because he accumulated 12 points against his driving record. The offenses included speeding 40 m.p.h. in a 30 m.p.h. zone, speeding 45 in a 35, speeding 60 in a 55, speeding 50 in a 35, speeding over 35 in a 35, speeding 46 in a 35, and speeding 75 in a 65. The majority's conclusion that this record is not evidence of reckless driving habits defies common sense.

I believe the defendant's proposed evidence made out a case for negligent entrustment. The defendant then would have been able to offer evidence that the owner of the Porsche knew, or reasonably should have known, that his son had such a record. The defendant could have inquired into whether the son lived with his father during that period in which he was convicted of the 11 offenses and when his license was suspended, whether any of the offenses were committed in cars owned by the owner of the Porsche, whether the plaintiff provided insurance for his son and would have been on notice by the insurance company of his son's driving record, and any other such factors as would put a reasonable

person on notice as to his son's driving record. The case should be remanded for a new trial.

For these reasons, I respectfully dissent.

IN RE BRANDON LEE LaRUE, DANIEL LEE LaRUE, IVA GEAN LaRUE

No. 9323DC180

(Filed 1 March 1994)

1. **Judges, Justices, and Magistrates § 26 (NCI4th)— termination of parental rights—previous recommendation by judge that termination be pursued—recusal denied**

The trial judge in a termination of parental rights proceeding did not err by failing to recuse himself where he had conducted an earlier review hearing, concluded that the juveniles should remain in the custody of DSS, and recommended that DSS pursue termination of parental rights. Canon 3(C)(1) of the Code of Judicial Conduct states that a judge should disqualify himself where he has a personal bias or prejudice or personal knowledge of disputed evidentiary facts. Conducting a review hearing pursuant to N.C.G.S. § 7A-657 and concluding that the children should remain with DSS is not sufficient to support a finding of bias or prejudice; the knowledge of evidentiary facts gained by the trial judge from the earlier proceeding does not require disqualification; and the court is required at a review hearing to evaluate when and if termination of parental rights should be considered.

Am Jur 2d, Judges §§ 86 et seq.

2. **Parent and Child § 109 (NCI4th)— termination of parental rights—mental retardation of parents—borderline IQ—evidence not sufficient**

The evidence in a termination of parental rights hearing did not support the finding that the parents were mentally retarded within the meaning of N.C.G.S. § 7A-289.32(7). Although the parents had IQs of 71 and 72, the record does not reflect that they exhibited significant defects in adaptive behavior and neither psychologist was willing to classify the parents as retarded, instead using the label "borderline." The action

was remanded for a hearing on a petition to terminate for neglect, which had not been addressed.

Am Jur 2d, Parent and Child §§ 34, 35.

Appeal by respondents from order entered 17 November 1992 in Alleghany County District Court by Judge Edgar B. Gregory. Heard in the Court of Appeals 4 January 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Jane Rankin Thompson, for petitioner-appellee Alleghany County Department of Social Services.

Doughton & Marshall, by Wm. Bynum Marshall, for respondent-appellants.

Edmund I. Adams, Guardian ad Litem, for Brandon Lee LaRue, Daniel Lee LaRue, and Iva Gean LaRue.

GREENE, Judge.

Ernest, born 16 July 1949, and Dorothy LaRue, born 4 March 1954, (the LaRues), the parents of three children, appeal from an order terminating their parental rights under N.C. Gen. Stat. § 7A-289.32(7) (Supp. 1993) based on their "incapab[ability] as a result of their mental retardation of providing for the proper care and supervision of their children."

Alleghany County Department of Social Services (DSS) became involved with the LaRues in March 1982 and first filed a petition alleging neglect on 29 July 1991. Pursuant to that petition, a hearing was conducted by District Court Judge Michael E. Helms, and the children were adjudicated, on 3 September 1991, neglected within the meaning of N.C. Gen. Stat. § 7A-517(21). Judge Helms placed custody of the children with DSS. The matter came on for review before District Court Judge Edgar B. Gregory on 4 February 1992. Pursuant to that hearing, Judge Gregory entered an order concluding that "it would be in the best interest of all three juveniles to continue their legal and physical custody" with DSS. Judge Gregory also "recommended that the DSS pursue Termination of Parental Rights under G.S. 7A-289.32(2) [neglect] to the end that the three juveniles can be adopted." DSS subsequently filed a petition to terminate the LaRues' parental rights based on neglect. At the hearing on this petition, the LaRues moved for Judge Gregory to recuse himself based on his earlier recommen-

dation that DSS pursue termination of parental rights. On 18 May 1992, Judge Gregory entered an order denying the motion to recuse. DSS subsequently filed an additional petition to terminate the LaRues' parental rights alleging as the basis for the petition that the LaRues were mentally retarded and unable to care for the children. N.C.G.S. § 7A-289.32(7).

The petition to terminate based on Section 7A-289.32(7) was heard in the trial court on 6 October 1992. The evidence before the court reveals that David L. Tate (Tate), a clinical psychologist, evaluated the intellectual abilities of the LaRues in November 1990. Dorothy LaRue had a full scale IQ of 71 and Ernest LaRue had a full scale IQ of 72. Tate characterized them as being in the "borderline range of mental retardation." Dr. Phillip Batten (Dr. Batten), an expert in psychology, confirmed Tate's earlier IQ findings and based on his interaction with the LaRues, classified them as falling "into the category of borderline functioning." He testified that the LaRues suffered from no organic brain syndrome or other degenerative mental condition, and there was no evidence they suffered from any mental illness.

The issues presented are whether the trial judge erred in (I) denying the LaRues' motion for him to recuse himself from the hearing to terminate their parental rights; and (II) finding and concluding that the LaRues are mentally retarded within the meaning of N.C. Gen. Stat. § 7A-289.32(7).

I

[1] The LaRues first argue that Judge Gregory erred in failing to recuse himself in the action to terminate their parental rights because the record reveals that he had "a personal bias or prejudice" concerning them. We disagree.

The Code of Judicial Conduct does state that a judge "should disqualify himself . . . where . . . [h]e has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings." Code of Judicial Conduct Canon 3(C)(1) (1993). "The burden is on the party moving for recusal to 'demonstrate objectively that grounds for disqualification actually exist.' " *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993). The LaRues have not met their burden in this case. The only evidence presented is that Judge Gregory, some eight

months earlier, had conducted a review hearing pursuant to N.C. Gen. Stat. § 7A-657 and had concluded that the three children should remain with DSS. This is not sufficient to support a finding of bias or prejudice. Furthermore, the knowledge of "evidentiary facts" gained by the trial judge from the earlier proceedings does not require disqualification. We also reject the LaRues' argument that Judge Gregory should be disqualified because he "recommended" that DSS pursue a termination of parental rights proceeding against them. Indeed, the trial court is required at a review hearing to evaluate "[w]hen and if termination of parental rights should be considered." N.C. Gen. Stat. § 7A-657(c)(6) (1989). Therefore, Judge Gregory did not err in denying the LaRues' motion for recusal.

II

[2] The LaRues next argue that the evidence does not support that they are mentally retarded within the meaning of N.C. Gen. Stat. § 7A-289.32(7). We agree.

A district court can terminate parental rights if the petitioner shows by clear, cogent, and convincing evidence:

> (7) That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. 7A-517(13), and that there is a reasonable probability that such incapability will continue throughout the minority of the child.

N.C.G.S. § 7A-289.32(7) (Supp. 1993). In this case, the testimony is that the LaRues do not suffer from mental illness, organic brain syndrome, or any other degenerative mental condition. The only question is whether they are mentally retarded. N.C. Gen. Stat. § 7A-289.32(7) does not define the term "mental retardation." Because, however, the language of the "statute is clear and is not ambiguous" it must be "implemented according to the plain meaning of its terms." *Hyler v. GTE Products Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993). Dictionaries are properly used to ascertain the "plain meaning" or the "natural and ordinary meaning" of words used in a statute. *Hatteras Yacht Co. v. High*, 265 N.C. 653, 657, 144 S.E.2d 821, 824 (1965); *Edwards v. University of North Carolina*, 107 N.C. App. 606, 609, 421 S.E.2d 383, 385, *disc. rev. denied*, 333 N.C. 167, 424 S.E.2d 909 (1992). Definitions of the word or

term contained in other statutes, although not controlling, "throw some light upon . . . [its] normal usage." *Hatteras*, 265 N.C. at 657, 144 S.E.2d at 824.

A medical dictionary defines mental retardation as follows:

> Below normal intellectual function that has its cause or onset during the developmental period and usually in the first years after birth. There is impaired learning, social adjustment, and maturation. The causes may be but do not have to be genetic. . . . The degree of intellectual impairment is classed on the basis of the Wechsler IQ scale as follows: 1. Mild, IQ 69-55. These children are educable. 2. Moderate, IQ 54-40. These children are trainable. 3. Severe, IQ 39-25. 4. Profound, IQ below 25.

Taber's Cyclopedic Medical Dictionary 1108 (16th ed. 1989) (*Taber's*). The North Carolina Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985 defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22." N.C.G.S. § 122C-3(22) (1993). The American Association on Mental Deficiency refers to mental retardation as "sub-average general intellectual functioning which originated during the developmental period and is associated with impairment in adaptive behavior." *Matter of Grady*, 405 A.2d 851, 855 (N.J. 1979); *see also North Carolina Ass'n for Retarded Children v. State of North Carolina*, 420 F. Supp. 451, 453 (1976). The American Psychiatric Association's diagnostic criteria for mental retardation provides that mental retardation is (1) significantly subaverage general intellectual functioning, (2) significant impairments in adaptive functioning, and (3) onset before the age of 18. *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* at 31-32 (3d ed. 1987) (DSM-III).

Having reviewed these various definitions, which are very similar, we believe the definition of mental retardation adopted by our legislature in N.C. Gen. Stat. § 122C-3(22) represents the plain meaning of the term "mental retardation" used in N.C. Gen. Stat. § 7A-289.32(7). Applying this definition to the evidence in this case, there is not clear, cogent, and convincing evidence of mental retardation of either parent. "Significantly subaverage general intellectual functioning" is generally manifested by an IQ score of less than 70. Nonetheless, IQ scores of 71 and 72, as received

by the LaRues, can represent subaverage general intellectual functioning if the persons "exhibit significant defects in adaptive behavior." *DSM-III* at 28 ("[t]reating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70"). This record does not reflect that the LaRues exhibited significant defects in adaptive behavior: neither psychologist was willing to classify the LaRues as mentally retarded, instead using the label "borderline," defined as "a patient who has some of the requirements for a definite diagnosis but not enough for certainty." *Taber's* at 236. Thus, the psychologists necessarily were unable to conclude that the LaRues exhibited significant defects in adaptive behavior. The trial court therefore erred in terminating their parental rights under N.C. Gen. Stat. § 7A-289.32(7).

Because the record reveals that DSS's petition to terminate parental rights for neglect under Section 7A-289.32(2) filed 24 February 1992 was never addressed or dismissed, we remand for a hearing on that petition.

Affirmed in part, reversed in part, and remanded.

Judges COZORT and WYNN concur.

RICHARD A. WILLIAMS, PLAINTIFF v. FRANK R. LIGGETT III; ALEX B. ANDREWS; J. A. HENDRICKSON; ROBERT C. WHITE; AND MARY C. WHITE, DEFENDANTS

No. 9310SC145

(Filed 1 March 1994)

1. Receivers § 9 (NCI4th)— appointment of receiver pending litigation—no statutory authority

The trial court had no authority under N.C.G.S. § 1-502(1) to appoint a receiver pending litigation for a limited partnership which automatically dissolved upon the bankruptcy of the general partner where the partnership's only asset was an apartment complex, plaintiff produced no evidence that the apartment complex or its rents and profits were in danger of being lost or materially injured or impaired, and the evidence

showed that the apartment complex was in excellent financial condition.

Am Jur 2d, Receivers § 29.

2. **Receivers § 9 (NCI4th)— appointment of receiver pending litigation—no equitable authority**

The trial court had no equitable power to appoint a receiver pending litigation for a limited partnership which owned an apartment complex and which automatically dissolved upon the bankruptcy of the general partner because the partners could not agree on a substitute general partner and therefore could not prepare tax returns, refinance the mortgage and manage the property where the partnership had taken no action on its own to wind up its own affairs; the apartment complex was in excellent financial condition; and there was no evidence that this asset was in danger of being lost, destroyed, or otherwise injured.

Am Jur 2d, Receivers § 29.

3. **Pleadings § 65 (NCI4th)— motion for Rule 11 sanctions—remand for findings and conclusions**

Defendants' motion for Rule 11 sanctions on the ground that plaintiff testified at his deposition that he had not read the complaint or the application for a receiver must be remanded for findings of fact and conclusions of law where the trial court failed to make findings and conclusions regarding its decision to deny sanctions.

Am Jur 2d, Pleading § 339.

Appeal by defendants from orders entered 1 October 1992 by Judge Anthony M. Brannon in Wake County Superior Court. Heard in the Court of Appeals 1 December 1993.

Manning, Fulton & Skinner, P.A., by John B. McMillan and Linda K. Wood, for plaintiff-appellee.

LeBoeuf, Lamb, Leiby & MacRae, by George R. Ragsdale and Kristin K. Eldridge, for defendants-appellants.

LEWIS, Judge.

Plaintiff, a limited partner in the Blue Heron Group 3 Limited Partnership (hereinafter "Blue Heron" or "the partnership"), filed

a complaint on 22 April 1992 seeking dissolution of the partnership and appointment of a receiver. Plaintiff also filed an application and motion for the immediate appointment of a receiver under N.C.G.S. § 1-502 and for a preliminary injunction. Defendants, other limited partners of Blue Heron, filed an answer, and asserted affirmative defenses and counterclaims. After deposing plaintiff, defendants filed a motion for a judgment on the pleadings, a dismissal and Rule 11 sanctions, based upon the fact that plaintiff admitted he had not read the complaint or application for a receiver. On 1 October 1992, Judge Brannon denied defendants' motions and granted plaintiff's application for the immediate appointment of a receiver, stating that the appointment was "necessary to wind up the Partnership and to protect plaintiff's rights during the course of litigation." Defendants now appeal.

Blue Heron was created by the filing of a Certificate of Limited Partnership on 5 August 1981. Plaintiff's brother, Thomas Williams, was the general partner, and plaintiff and defendants were among the limited partners. The sole assets of Blue Heron are the Deblyn Apartments in Raleigh. According to the Partnership Agreement, the general partner had complete management authority over the partnership and its assets. The limited partners were prohibited from interfering with the management of Blue Heron, and had no right to act for or bind the partnership in any manner. The Partnership Agreement stipulated that bankruptcy of the general partner would result in the dissolution of the partnership, unless a substitute general partner was admitted within 90 days of the adjudication of bankruptcy.

On 15 June 1990 Thomas Williams entered into a management agreement with John M. Titchener to manage and operate the apartments. On 5 July 1990 Thomas Williams filed a petition for Chapter 7 bankruptcy. The bankruptcy trustee sold Williams' 38.6 percent interest in the partnership to his brother, the plaintiff in this case. No substitute general partner was appointed, and Titchener continued to operate the apartments after Williams' bankruptcy. According to plaintiff, he filed the present proceedings to have a receiver appointed in an effort to move towards dissolution of the partnership and the winding up of its affairs. There is no dispute that the bankruptcy of the general partner automatically dissolved the partnership.

The issue before us is whether or not the trial court erred in immediately appointing a receiver, pursuant to section 1-502(1), pending the outcome of plaintiff's lawsuit. Defendants contend the appointment of a receiver was not warranted, and further argue that plaintiff should have been sanctioned under Rule 11.

I.

[1] A trial court's decision whether or not to appoint a receiver is reviewable under an abuse of discretion standard. *Murphy v. Murphy*, 261 N.C. 95, 101, 134 S.E.2d 148, 153 (1963). Defendants contend Judge Brannon abused his discretion in failing to follow the applicable statute and the decisions of our courts.

In his application and motion for a receiver, plaintiff argued the receiver was "necessitated pursuant to N.C. Gen. Stat. Section 1-502," which governs when and in what situations a receiver may be appointed. According to that section, a receiver may be appointed

> [b]efore judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; . . . .

N.C.G.S. § 1-502(1) (1983). We agree with defendants that the requirements of section 1-502(1) have not been met in this case.

According to the statute, the requirements for appointing a receiver before judgment are: (1) the party requesting the receiver must show an apparent right to the property which is the subject of the action; (2) the property must be in the possession of an adverse party; and (3) the property or its rents and profits must be in danger of being lost or materially injured or impaired. *Id.* The legislature's use of the conjunctive indicates that failure to establish any one of these elements would preclude the appointment of a receiver under this subsection of the statute. Because it is clear that plaintiff failed to establish the third element, we find it unnecessary to discuss the first two elements.

Plaintiff produced no evidence that the Deblyn Apartments or its rents and profits were in danger of being lost or materially injured or impaired. In fact, plaintiff admitted under oath that he knew of no immediate and irreparable loss or damage to the apartments. He further testified that he knew of no loss of rents

or profits. To the contrary, other testimony indicated that the apartments were in excellent financial condition at that time, and were more profitable than they had ever been. Plaintiff's only arguments regarding this element of the analysis are that the partnership did not refinance the first and second mortgages on the apartments, it could not sell the property in light of the stalemate among the limited partners, some partnership funds were not earning any interest because no one could sign the appropriate documents, and tax returns were prepared without the assistance of a general partner or the involvement of the remaining limited partners. We do not believe that this evidence indicates that the property or its rents and profits were in danger of being lost or materially injured or impaired. Defendants point out that the lost interest would only amount to $1,000 or $2,000. We do not believe this constitutes a material injury or impairment to the partnership property, nor does it justify the immediate appointment of a receiver.

[2] Notwithstanding any statutory provisions, plaintiff and defendants dispute whether or not the court had the power as a court of equity to appoint a receiver. In *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981), the Supreme Court indicated that a court of equity has the "inherent power to appoint a receiver, notwithstanding specific statutory authorization." *Id.* at 576, 273 S.E.2d at 256. However, the Court noted that the appointment of a receiver is considered a harsh remedy, and stated that there should be fraud or imminent danger that the property will be, among other things, lost, destroyed, squandered, or wasted. *Id.* at 577, 273 S.E.2d at 256. Furthermore, a receiver should be appointed for a going, solvent corporation only in rare and drastic situations. *Id.*

Plaintiff testified at his deposition that the factors mentioned in *Lowder* are not present in this case. Plaintiff argues, however, that the appointment was justified in light of the fact that the partnership was dissolved and had to wind up its affairs. The partnership had taken no action on its own to wind up its affairs. According to plaintiff, a receiver was necessary because the partners were "unable to cooperate and lack[ed] confidence in each other to begin the process of winding up." They could not agree on a substitute general partner, and therefore could not prepare tax returns, refinance the mortgage and manage the property.

Although these arguments may be relevant to the overall proceeding before the court, we do not believe that they justify the immediate appointment of a receiver pending the final outcome of the case. The Deblyn Apartments were solvent and doing well at the time of plaintiff's lawsuit. The situation described by plaintiff is not rare and drastic. As stated above, there was no evidence that this asset was in danger of being lost, destroyed, or otherwise injured. We conclude that the trial court did not have the statutory or equitable power to appoint a receiver under these circumstances.

II.

[3] Defendants' second argument concerns the imposition of Rule 11 sanctions upon plaintiff. At his deposition, plaintiff testified that he had not read the complaint or the application and motion for the appointment of a receiver. Defendants argue that this conduct is sanctionable under Rule 11. According to Rule 11,

> [t]he signature of . . . a 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.G.S. § 1A-1, Rule 11(a) (1990).

An appellate court has de novo review of a trial court's decision regarding the imposition of Rule 11 sanctions. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). The reviewing court must determine whether the trial court's conclusions of law support its judgment, whether the conclusions of law are supported by the findings of fact, and whether the findings of fact are supported by sufficient evidence. *Id.*

We are unable to review this assignment of error, because the trial court failed to make any findings of fact or conclusions of law in its 1 October 1992 order denying the motion for sanctions. We must therefore remand for entry of findings of fact and conclusions of law regarding the court's decision to deny Rule 11 sanctions.

Reversed and remanded.

Judges ORR and JOHN concur.

RONALD W. McKEITHAN, PLAINTIFF v. CSX TRANSPORTATION, INC., DEFENDANT

No. 9312SC25

(Filed 1 March 1994)

Labor and Employment § 216 (NCI4th)— F.E.L.A. action—failure to provide equipment—foreseeability of injury—summary judgment inappropriate

A genuine issue of fact existed in an action under the F.E.L.A. as to whether defendant railroad should have foreseen that plaintiff signal maintainer might be injured as a result of its failure to provide plaintiff with equipment or assistance to move spools of wire where plaintiff's forecast of evidence tended to show that plaintiff worked alone repairing and maintaining signalling equipment; plaintiff was directed to repair a downed line in his territory and knew that he would need 9-gauge wire to make the necessary repair, but he did not know the amount of the wire needed; plaintiff injured his back while loading a 300-pound spool of wire onto his truck; although plaintiff had never complained to defendant about the size of the spools of wire, he had heard other employees complain about the size and weight of the spools; and at least some of the service trucks used by crews that installed signal equipment had booms for loading spools of wire.

Am Jur 2d, Federal Employers' Liability and Compensation Acts § 76.

Appeal by plaintiff from order entered 28 October 1992 by Judge George R. Greene in Cumberland County Superior Court. Heard in the Court of Appeals 18 November 1993.

Plaintiff filed this action against his employer, CSX Transportation, Inc. (CSX), under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (FELA), alleging that he sustained a work related

injury which was proximately caused by defendant's negligence. Prior to his injury, plaintiff had worked for defendant's signal department for approximately seven and one half years. For several years he worked with a crew which was responsible for installing poles, wires, signal equipment and the like. He was then promoted to the position of signal maintainer, the position he held at the time of his injury. As a signal maintainer, plaintiff worked by himself within a certain geographical territory repairing and maintaining various types of signalling equipment.

On 12 September 1988, plaintiff's supervisor advised plaintiff that a line was down within his territory. From experience, plaintiff knew that he would need 9-gauge wire to make the necessary repair; he did not know, however, what amount of wire would be required. Plaintiff drove his truck to the supply shed where the wire was stored, backed his truck to the loading dock, and lowered the truck's tailgate onto the loading dock. The tailgate was positioned so that it was resting on the floor of the loading dock and inclined upward to the point where it connected to the truck. Plaintiff then entered the supply shed and obtained a spool of 9-gauge wire containing 5,300 feet of wire and weighing approximately 300 pounds. Plaintiff tipped the spool onto its side and rolled it to where the truck's tailgate rested on the loading dock floor. Due to the thickness of the tailgate, the spool would not roll onto the tailgate so that plaintiff could push it onto the bed of the truck. Plaintiff testified that there was no one available to help him load the wire onto the truck and no equipment furnished with which to load the spool. Plaintiff therefore attempted to lift the spool over the lip of the tailgate by hand. While lifting the spool, plaintiff felt and heard a "pop" in his back. He immediately experienced pain in both legs and in his testicles and fell backwards onto the floor of the loading dock. Subsequently, however, plaintiff was able to get the spool of wire onto the truck and to complete the repair of the downed line. He reported his injury to his supervisor at the end of his shift the same day.

In his deposition, plaintiff testified that on previous occasions he had moved partial spools of wire and had loaded them onto trucks by hand. This, however, was the first time he had attempted to manually load a full spool of wire onto his truck by himself. He had never told anyone that he needed a boom on his truck and had never complained to his employer about the size of the spools, although he had heard others complain. He also testified

that when he worked on a signal crew, the service truck used by the crew was equipped with a boom which was used to load spools of wire. Plaintiff did not think he needed assistance loading the spool and therefore did not request his supervisor to provide him with assistance.

The trial court granted defendant's motion for summary judgment. Plaintiff appealed.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Jerome P. Trehy, Jr., and Savage & Schwartzman, P.A., by Irving Schwartzman and Ira E. Hoffman, for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by John C. Millberg and James C. Dever, III, for defendant-appellee.

MARTIN, Judge.

The sole issue raised by this appeal is whether it was error to grant defendant's motion for summary judgment. We conclude that summary judgment was improvidently granted.

A party seeking summary judgment has the burden of showing, based on pleadings, depositions, answers, admissions, and affidavits, that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The evidence must be viewed in the light most favorable to the non-movant. *Clark v. Brown*, 99 N.C. App. 255, 259-60, 393 S.E.2d 134, 136, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). The evidentiary materials offered by the movant "are carefully scrutinized and those of the opposing party are on the whole indulgently regarded." *Vassey v. Burch*, 301 N.C. 68, 72-73, 269 S.E.2d 137, 140 (1980) *quoting* 6 Pt. 2 Moore's Federal Practice, § 56.15[8] at 642 (2d ed. 1980). The movant may meet its summary judgment burden by showing either (1) an essential element of the non-movant's claim is nonexistent, or (2) the non-movant cannot produce evidence to support an essential element of his claim. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980). However, summary judgment is rarely appropriate for negligence issues. *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979).

Under FELA, an employer is not an insurer of the safety of its employees, but it owes them a continuing duty to provide a reasonably safe work place. *Kimbler v. Pittsburgh & L.E.R.*,

Co., 331 F.2d 383 (1964); *Fluck v. Norfolk & Western Railway Co.*, 334 F. Supp. 433 (1971). The duty to provide a safe work place is nondelegable, *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 10 L.Ed.2d 709 (1963), and includes a duty to provide employees with the equipment and assistance necessary to complete the tasks assigned. *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600, 89 L.Ed. 490 (1944); *Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525 (1951), *cert. denied*, 342 U.S. 830, 96 L.Ed. 628 (1951); *Beeber v. Norfolk Southern Corp.*, 754 F. Supp. 1364 (1990). However, an employer will not be held liable for an employee's injury if it had no reasonable way of knowing about the hazard that caused the injury. *Peyton v. St. Louis Southwestern Ry. Co.*, 962 F.2d 832 (1992).

Under federal law, FELA is accorded a liberal construction; recovery should be allowed if the employing railroad's negligence played any part, even the slightest, in causing the employee's injury. *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, 1 L.Ed.2d 493, *reh'g denied*, 353 U.S. 943, 1 L.Ed.2d 764 (1957); *Webb v. Illinois C. R. Co.*, 352 U.S. 512, 1 L.Ed.2d 503, *reh'g denied*, 353 U.S. 943, 1 L.Ed.2d 764 (1957). Even so, the usual common law criteria of negligence, which include reasonable foreseeability that the defendant's action or omission might result in injury, must be met. *Beeber, supra.* However, neither contributory negligence nor assumption of the risk is a bar to a FELA claim. 45 U.S.C. §§ 51, 53; *Southern Railway Co. v. Welch*, 247 F.2d 340 (1957). The leniency of the test for negligence under FELA may be clearly illustrated by the decision in *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 9 L.Ed.2d 618 (1963), where the Court upheld a verdict in favor of a railroad foreman for injuries sustained as a result of his being bitten by an insect while he was working near a pool of stagnant water. The Court reasoned that the evidence was sufficient to permit a finding that the defendant was negligent in allowing a fetid pool to exist and that it was reasonably foreseeable that harm could result. The evidence presented a jury issue as to whether the infected insect which bit the plaintiff had come from the pool.

Despite the leniency with which FELA claims are viewed, defendant contends that it is entitled to summary judgment because it showed that an essential element of plaintiff's claim, namely foreseeability, is nonexistent. Defendant argues that it had neither actual nor constructive notice of the hazard that caused plaintiff's

injury because it had received no complaints about the spools and there had been no previous similar occurrences. Without such notice, defendant contends that it could not have reasonably foreseen the hazard which caused plaintiff's injury. We disagree.

In response to questioning by defendant's counsel at his deposition, plaintiff testified that although he had never complained to defendant, he had heard other employees complain about the size of the spools of wire. Defendant, as purchaser of the 300 pound spools of wire, is chargeable with knowledge of their size and weight. Additionally, defendant knew that plaintiff worked alone within his assigned geographical territory and that his duties required him to repair downed signal lines using the spools of 9-gauge wire. On the date of the injury, plaintiff was directed to repair the downed line, but was provided no information as to what amount of wire would be needed to make the repair, so that it was reasonably foreseeable that plaintiff would take an entire spool of wire on his assignment. Despite the weight and size of the spools of wire, defendant did not provide plaintiff with equipment or assistance with which to safely load the wire onto his truck. That defendant knew of the dangers inherent in loading the spools of wire may be inferred from the evidence that at least some of its trucks were equipped with booms to facilitate the loading of heavy materials.

We hold that this evidence, viewed in the light most favorable to plaintiff, is sufficient to permit an inference that defendant had at least constructive notice that its failure to provide plaintiff with equipment or assistance to move the spools of wire, might result in injury. Therefore, a genuine issue of fact exists as to whether defendant should have foreseen that plaintiff might be injured as a result of its failure to provide plaintiff with assistance or equipment which would facilitate his gathering of the supplies necessary for the performance of his duties. Summary judgment for defendant must be reversed and this case remanded to the trial court for resolution of the factual issues.

Reversed.

Judges GREENE and JOHN concur.

ALICE JEANETTE AIKENS, PLAINTIFF v. MONICA HOBBY LUDLUM AND HENRY BRUCE LUDLUM, III, DEFENDANTS

No. 9210SC1304

(Filed 1 March 1994)

1. Judgments § 115 (NCI4th)— offer of judgment—lump sum

A lump sum offer of judgment is permissible under Rule 68, but it is incumbent on the defendant to make sure that he has used language which conveys that he is making a lump sum offer. N.C.G.S. § 1A-1, Rule 68.

Am Jur 2d, Judgments §§ 1132-1137.

2. Judgments § 115 (NCI4th)— offer of judgment—ambiguity—lump sum not intended

Defendants' offer of judgment "of $10,001.00 for all damages and attorney's fees taxable as costs, together with the remaining costs accrued at the time this offer is filed" was ambiguous as to whether it included only the substantive claim and attorney's fees or whether it was a lump sum offer that also included other costs such as interest. Construing the offer against defendants, as the drafters thereof, no lump sum offer was intended, and the case is remanded for entry of a judgment for $10,001.00 (which includes damages and attorney's fees) plus those remaining accrued costs (which includes interest) to be calculated by the court.

Am Jur 2d, Judgments §§ 1132-1137.

Appeal by plaintiff from judgment entered 6 November 1992 by Judge F. Gordon Battle in Wake County Superior Court. Heard in the Court of Appeals 29 October 1993.

E. Gregory Stott for plaintiff-appellant.

Bailey & Dixon, by David S. Coats, for defendant-appellees.

LEWIS, Judge.

By this appeal we are asked to interpret the provisions of an Offer of Judgment made pursuant to Rule 68 of the North Carolina Rules of Civil Procedure. There is no dispute between the parties as to the underlying facts, only as to the effect of

defendants' Offer of Judgment. On 15 October 1992, defendants served plaintiff with an Offer of Judgment which stated:

> Defendants, pursuant to G.S. § 1A-1, Rule 68, more than ten days before trial, offers [sic] to allow judgment to be taken against them in this action in the amount of $10,001.00 for all damages and attorney's fees taxable as costs, together with the remaining costs accrued at the time this offer is filed.

(Emphasis added.) Five days later plaintiff filed his Notice of Acceptance which stated: "The plaintiff hereby accepts Offer of Judgment in the sum of $10,001.00 tendered by defendant together with cost[s] accrued at the time said offer was filed." This matter came on for hearing before Judge Battle on plaintiff's oral motion to have costs and interest assessed against defendants. After hearing the arguments of counsel, Judge Battle ruled that defendants' Offer of Judgment included all costs and interest and that plaintiff was not entitled to anything beyond $10,001.00. Plaintiff now appeals and we reverse.

[1] A purpose of Rule 68 is to encourage compromise and to avoid protracted litigation. *Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E.2d 843, *disc. review denied*, 306 N.C. 744, 295 S.E.2d 480 (1982). To that end Rule 68 provides in pertinent part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment.

N.C.G.S. § 1A-1, Rule 68(a) (1990). The specific issue presented by this appeal is whether defendants have made a valid lump sum offer of judgment. This first requires us to determine if lump sum offers are valid. Because the North Carolina decisions addressing Rule 68 are insufficient to answer this question, we are guided by federal law since the North Carolina version of Rule 68 is virtually identical to its United States counterpart. *See Purdy v. Brown*, 56 N.C. App. 792, 290 S.E.2d 397, *rev'd on other grounds*, 307 N.C. 93, 296 S.E.2d 459 (1982).

One of the critical features of any Rule 68 offer of judgment is that it must include a tender of costs then accrued. G. Gray Wilson, *North Carolina Civil Procedure*, § 68-1 (1989). However, the United States Supreme Court's decision of *Marek v. Chesny*, 473 U.S. 1, 87 L. Ed. 2d 1 (1985), reveals that there are several ways in which an offer of judgment may include costs:

> [i]f an offer recites that costs are included or specifies an amount for costs, . . . the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount which in its discretion it determines to be sufficient to cover the costs.

Id. at 6, 87 L. Ed. 2d at 7. This language essentially gives a defendant who makes an offer of judgment three options: 1) to specify the amount of the judgment and the amount of costs, 2) to specify the amount of the judgment and leave the amount of costs open to be determined by the court, or 3) to make a lump sum offer which expressly includes both the amount of the judgment and the amount of costs.

Not only is the language used by the Supreme Court important to a complete understanding of this dispute, but so, too, is the context in which it arose. In *Delta Air Lines Inc. v. August*, 450 U.S. 346, 67 L. Ed. 2d 287 (1981), Justice Powell, in a separate concurring opinion, argued that a lump sum offer of judgment did not comply with the dictates of Rule 68 because an offer of judgment should consist of two components: the substantive relief and the costs then accrued. Under Justice Powell's interpretation, the substantive relief component of the offer had to be exact, but the costs component could either be specified or left open for a later determination by the court. It was this component approach which the Supreme Court rejected in *Marek*. The Court stated that:

> [t]he critical feature of this portion of the Rule is that the offer be one that *allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued.* In other words, the drafters' concern was not so much with the particular components of offers, but with the *judgments* to be allowed against defendants.

Marek at 6, 87 L. Ed. 2d at 7 (emphasis in original). Therefore, after *Marek* it is clear that a lump sum offer of judgment is permissible, but it is incumbent on the defendant to make sure that he has used language which conveys that he is making a lump sum offer.

[2] The relevant portion of defendants' Offer of Judgment allows judgment to be taken against them for "$10,001.00 for all damages and attorney's fees taxable as costs, together with the remaining costs accrued." It is plaintiff's contention that defendants' use of the language "together with" evidences an intent to make an offer of judgment only as to the substantive claim and attorney fees, but not as to any other costs such as interest. We agree.

In *Marek* the lump sum offer of judgment was "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND ($100,000) DOLLARS." There can be no doubt from this language that a lump sum offer of judgment was intended. However, as to the Offer of Judgment in the present case, it is not clear whether the "together with" clause modifies the "all damages" language or whether it is a separate component to be determined by the court because of the way in which it is set off by a comma. Therefore, defendants' Offer of Judgment is ambiguous at best.

We find this situation analogous to that in *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973). There the Supreme Court was called upon to interpret an offer of judgment which allowed "judgment to be taken against [defendant] . . . for the sum of $150.00 plus the costs accrued to the date of this offer." *Id.* at 237, 200 S.E.2d at 41. The plaintiff accepted the offer but argued on appeal that he interpreted costs to include attorney's fees. In holding that plaintiff's interpretation was reasonable the Supreme Court stated: "If this was not the interpretation intended by the defendant, the misunderstanding is due to ambiguous language used by the defendant in making his offer and the defendant must bear any loss resulting therefrom." *Id.* at 241, 200 S.E.2d at 43.

In applying *Hicks* to the present case we find that any ambiguity is the result of poor drafting on the part of defendants. A review of plaintiff's Notice of Acceptance shows that plaintiff thought he was accepting something different from what defendants thought they were offering. We find that defendants' Offer of Judgment is ambiguous as to whether or not a lump sum offer of judgment was intended. Therefore, construing the offer against defendants,

as the drafters, we conclude that a lump sum offer was not intended, and we remand this case to the trial court for entry of an order for $10,001 (which includes damages and attorney's fees) plus those remaining costs accrued (which include interest), to be calculated by the court.

Reversed.

Judges WYNN and McCRODDEN concur.

STATE OF NORTH CAROLINA v. KENNETH RAY SMITH

No. 9319SC136

(Filed 1 March 1994)

Evidence and Witnesses § 2616 (NCI4th)— rape of stepdaughter—statements to wife—not a marital communication

The trial court did not err in a prosecution of defendant for the attempted rape of his twelve-year-old stepdaughter by permitting his wife to testify that defendant had admitted to her that he had sexually abused the girl. Defendant's confession was driven by his own psychological motivations rather than by any confidence induced by the marital relationship. N.C.G.S. § 8-57(b)(5).

Am Jur 2d, Witnesses §§ 152 et seq.

Appeal by defendant from judgment and commitment entered 13 February 1992 by Judge Thomas W. Seay, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 19 October 1993.

Attorney General Michael F. Easley, by Special Deputy Attorney General Daniel C. Oakley, for the State.

R. Marshall Bickett, Jr., for defendant appellant.

COZORT, Judge.

Defendant appeals from a conviction of attempted first degree rape of his twelve-year-old stepdaughter. We find no error.

The State presented the following evidence. On 30 July 1989, defendant lived with his wife, his twelve-year-old stepdaughter, and his eight-year-old son. Defendant was at home with the two children. Defendant began fondling the girl as she sat on his lap. Defendant asked the girl if she wanted him to come into her room. She said, "No." After watching television, each person went to his or her respective bedroom. The girl went to her room and used stuffed animals to make it appear that she was in bed. She then went back to the living room and ducked down beside the couch. Defendant came back to the living room without his clothes on. Defendant then took the girl into his bedroom and told her to take her clothes off. Defendant placed a plastic bag on his penis with two rubber bands, got on top of the girl, and started to have sexual intercourse with her. Defendant had almost completed penetration when his wife returned home from work and knocked on the locked bedroom door. The girl hid in the closet. When defendant's wife came into the room, she saw the girl in the closet, and the girl came out of the closet crying. Defendant's wife began screaming at defendant. She then asked the girl if defendant had assaulted her, and the girl responded that he had. Defendant's wife took the children to her mother's and father's house. Defendant's wife and the boy eventually moved back into the house with defendant. The girl remained with her grandparents.

Sometime after the incident, defendant took his wife into the bedroom and confessed that he had assaulted the girl. Defendant took a rifle and put it to his mouth and asked his wife to pull the trigger. Defendant stated he wanted his wife to pull the trigger because he could not go to heaven if he committed suicide. Defendant later recanted the confession. Defendant's wife also testified that in the past every time she had threatened to leave defendant, he threatened to kill himself.

Defendant denied the incident and testified that he went to bed, and the girl came out of the closet when his wife came into the bedroom. Defendant further testified that sometime around Christmas he put a gun in his mouth and asked his wife to pull the trigger. He stated: "I heard a bunch of what [the girl] was supposed to have said about me and I told her, I said that if that's what y'all want to hear, I will tell you just to keep from putting me out of my misery because it got so I couldn't hardly handle it anymore."

Defendant was convicted of one count of attempted first degree rape and sentenced to six years in prison.

Defendant's sole argument on appeal is that the trial court erred in permitting his wife to testify that defendant had admitted to her that he had sexually abused the girl. Specifically, defendant argues that the communication was a privileged confidential marital communication which should have been excluded from evidence. We disagree. N.C. Gen. Stat. § 8-57 (1986) provides in part:

> (b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:
>
> * * * *
>
> (5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse.
>
> (c) No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.

In *State v. Holmes*, 330 N.C. 826, 829, 412 S.E.2d 660, 662 (1992), the North Carolina Supreme Court concluded that "while section 8-57 modifies the [common law] rule against adverse spousal testimony, it preserves the [common law] rule against disclosure of confidential marital communications." The Court stated:

> N.C.G.S. § 8-56 provides essentially that while no husband or wife shall be compellable to disclose any confidential communications made by one to the other during their marriage, each is 'competent and compellable to give evidence, as any other witness, on behalf of any party to such suit, action or proceeding.' On the other hand, N.C.G.S. 8-57, when read properly, provides that the spouse of a defendant is competent to testify for or against a defendant and may be compelled to testify for the State and against defendant in the five instances listed in section 8-57(b), provided that '[n]o husband or wife shall be compellable *in any event* to disclose any confidential communications made by one to the other during their marriage.' Neither of these statutes destroys the common law

privilege against disclosure of confidential marital communications; rather, they protect the privilege.

Id. at 834, 412 S.E.2d at 664 (emphasis in the original). A communication is a confidential marital communication if it is "induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship." *State v. Freeman*, 302 N.C. 591, 598, 276 S.E.2d 450, 454 (1981).

We find that defendant's admission to his wife that he had sexual intercourse with the girl was not a marital communication induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship. Defendant's wife testified that she had threatened to leave defendant on several occasions and that he had threatened to kill himself. She further testified that on the occasion that defendant admitted that he had assaulted the girl, defendant asked her to pull the trigger so that he could go to heaven. Defendant later recanted the confession. Defendant testified that he confessed and asked his wife to pull the trigger because "he couldn't hardly handle it anymore." We agree with the State that defendant's confession was driven by his own psychological motivations rather than by any confidence induced by the marital relationship. Since the confession was not a marital communication, we find the evidence admissible pursuant to N.C. Gen. Stat. § 8-57(b)(5).

No error.

Judges EAGLES and ORR concur.

KIMBRELL'S OF SANFORD, N.C., INC. v. KPS, INC., T/A KENDALE PAWN SHOP AND LEE BURNS

No. 9311DC49

(Filed 1 March 1994)

1. Secured Transactions § 62 (NCI4th)— seller's security interest in pawned VCR—default by purchaser—right to possession

Plaintiff was entitled to recover from defendant pawn shop a VCR sold to defendant purchaser under a purchase

money security agreement where the purchaser immediately pawned the VCR, failed to make further payments, and defaulted on the security agreement. Since a VCR is a consumer good, plaintiff did not have to file a financing statement in order to perfect its purchase money security interest in the VCR. N.C.G.S. §§ 25-9-107, 25-9-302(1)(d).

Am Jur 2d, Secured Transactions §§ 306, 465.

2. **Appearance § 6 (NCI4th); Process and Service § 26 (NCI4th)—failure to name corporation as defendant—mere misnomer—waiver by general appearance**

The naming of the defendant in the complaint and summons as Kendale Pawn Shop when the legal entity for the pawn shop is KPS, Inc., d/b/a Kendale Pawn Shop was a mere misnomer which defendant waived by answering the complaint and appearing at trial where the complaint and summons were served on the owner of the pawn shop, and all parties considered the corporation to be the defendant.

Am Jur 2d, Appearance § 7.

Appeal by plaintiff from judgment entered 5 November 1992 by Judge William A. Christian in Lee County District Court. Heard in the Court of Appeals 18 November 1993.

This action arises out of plaintiff's attempt to recover from defendant KPS, Inc. a VCR which plaintiff had sold to defendant Burns and which Burns had immediately pawned at the Kendale Pawn Shop. Plaintiff filed a complaint in small claims court, and the magistrate, after a hearing on 17 February 1992, entered judgment denying plaintiff recovery of the VCR. Plaintiff appealed to the district court. Judge William A. Christian, sitting without a jury, entered judgment denying plaintiff recovery and dismissing the action. From this judgment, plaintiff appeals.

Harrington, Ward, Gilleland & Winstead, by F. Jefferson Ward, Jr., for plaintiff-appellant.

Staton, Perkinson, Doster, Post, Silverman & Adcock, by Jonathan Silverman and Diane W. Stevens, for defendant-appellee.

McCRODDEN, Judge.

[1] Plaintiff offers one argument raising the issue of whether it was entitled to recover from defendant pawn shop a VCR plaintiff had sold to defendant Burns under a purchase money security agreement. Defendant KPS, Inc. made several cross-assignments of error, but raises only the issue of whether the trial court could enter judgment against it when the complaint and summons named only Kendale Pawn Shop.

Plaintiff argues that the judgment denying it recovery of the VCR contravened Article 9 of the Uniform Commercial Code, as contained in N.C. Gen. Stat. §§ 25-9-101 to -9-607 (1986 and Supp. 1993). We agree.

At the time defendant Burns purchased the VCR from plaintiff, he signed a purchase money security agreement, thereby granting plaintiff a purchase money security interest in the VCR. N.C.G.S. § 25-9-107. Since a VCR is a consumer good, N.C.G.S. § 25-9-109(1), plaintiff did not have to file a financing statement in order to perfect its purchase money security interest in the VCR. N.C.G.S. § 25-9-302(1)(d). Defendant Burns failed to make any further payments for the VCR and defaulted on the security agreement. Therefore, plaintiff was entitled to recover possession of the VCR when it filed its action in small claims court. N.C.G.S. §§ 25-9-501, 25-9-503. Accordingly, we hold that the trial court erred in dismissing plaintiff's claim to recover possession of the VCR.

[2] Defendant KPS, Inc., however, argues in support of its cross-assignment of error that the trial court erred in entering a judgment which referred to KPS, Inc. as a defendant when the summons and complaint had been addressed to Kendale Pawn Shop. Defendant argues that KPS, Inc. was never served with notice, did not voluntarily appear in its corporate capacity, and thus was never a party to this action. We reject this argument.

At the trial in district court, Jim Johnson testified as follows:

Q. How are you employed, Mr. Johnson?

A. With *Kendale Pawn Shop which is KPS, Inc.*

Q. Is there any such legal entity as Kendale Pawn Shop?

A. *Well, it is KPS, Inc. and we operate under Kendale Pawn Shop.*

Q. So it is KPS, Inc., D/B/S [sic] Kendale Pawn Shop?

A. That is correct.

Q. How are you employed by KPS, Inc.?

A. I own it and, I guess, manage it too.

Q. Did you take the pawn on this VCR?

A. Yes, we did.

Defendant KPS, Inc. has conceded that the summons and complaint against Kendale Pawn Shop were originally served upon Jim Johnson as its owner. Defendant answered the district court complaint by admitting that the defendant was a resident of Lee County and denying all the other allegations contained therein. The record reveals that there is no separate legal entity known as Kendale Pawn Shop; there is only KPS, Inc., which does business under the name Kendale Pawn Shop. All parties considered the corporation to be the defendant. It is therefore immaterial that the judgment was entered in favor of KPS, Inc. d/b/a Kendale Pawn Shop while the initial caption of the case referred only to Kendale Pawn Shop.

Defendant's reliance on *Barber v. Dixon*, 62 N.C. App. 455, 302 S.E.2d 915, *disc. review denied*, 309 N.C. 191, 305 S.E.2d 732 (1983), is misplaced. While it is true that a judgment rendered against a person in an action to which he is not a party is void, 62 N.C. App. at 460, 302 S.E.2d at 918, in this case the use of the name Kendale Pawn Shop to refer to the defendant in the complaint was a mere misnomer, which defendant waived by answering the complaint and appearing at trial. *See Drainage District v. Commissioners*, 174 N.C. 738, 739, 94 S.E. 530, 531 (1917) ("[A] general appearance cures a misnomer of defendant in process or pleadings.").

We hold that the trial court had jurisdiction over the corporation so that its entry of judgment referring to KPS, Inc. was proper. We overrule defendant's cross-assignment of error.

For the foregoing reasons, we reverse the judgment of the trial court and remand for entry of judgment in favor of plaintiff.

Reversed.

Judges LEWIS and WYNN concur.

ROBERT D. AYCOCK, SR., PLAINTIFF v. SARAH B. AYCOCK (NOW SCOTT), DEFENDANT

No. 9326DC369

(Filed 1 March 1994)

Divorce and Separation § 164 (NCI4th)— equitable distribution— stipulation to equal distribution—not reduced to writing—no inquiry by court

An order of equitable distribution based upon the parties' stipulation that their property should be equally divided was vacated and remanded where there was no evidence that the terms of the stipulation were reduced to writing. Notwithstanding any reference by the parties or the court to the stipulation, it was incumbent upon the court to make inquiries and ascertain whether the parties fully understood their actions in entering into a stipulation.

Am Jur 2d, Divorce and Separation § 820.

Appeal by defendant from order and judgment entered 4 January 1993 by Judge Jane V. Harper in Mecklenburg County District Court. Heard in the Court of Appeals 1 February 1994.

Knox, Knox, Freeman & Brotherton, by Edwin C. Ham and Bobby L. Bollinger, for plaintiff-appellee.

Joe T. Millsaps for defendant-appellant.

LEWIS, Judge.

The trial court entered an order of equitable distribution based upon the parties' stipulation that their property should be divided equally between them. Because we find the stipulation ineffectual, we must vacate and remand. Our disposition of this appeal renders a recitation of the facts unnecessary.

In its order, the trial court found as a fact that the parties had stipulated to an equal distribution of marital property in an Equitable Distribution Pre-Trial Order. The court entered a conclusion of law to the same effect. Defendant contends the court erred in finding and concluding that the parties had stipulated to an equal division of their property, because there is no evidence of a stipulation in the record. In fact, a review of the transcript reveals

that the court itself stated that the Pre-Trial Order was never entered.

Plaintiff argues that the stipulation is valid, and contends that defendant acknowledged the stipulation by referring to it in opening arguments. Plaintiff also points to several places in the transcript and record where the trial court mentioned the existence of the stipulation. For example, before the trial began the judge mentioned that the trial would concern an equal distribution.

According to *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985), if stipulations regarding equitable distribution are not reduced to writing or acknowledged by the parties, the trial court must make inquiries of the parties in order to insure that "each party's rights are protected and to prevent fraud and overreaching on the part of either spouse." 74 N.C. App. at 556, 328 S.E.2d at 602. *Accord Cornelius v. Cornelius*, 87 N.C. App. 269, 360 S.E.2d 703 (1987). "It should appear that the court read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms of the agreement, and agreed to abide by those terms of their own free will." 74 N.C. App. at 556, 328 S.E.2d at 602. In *McIntosh*, the parties had informally dictated their stipulations to a court reporter at a hearing regarding alimony. The stipulations were not reduced to writing or acknowledged by the parties, and the court made no inquiry as to whether or not the parties understood their agreement. This Court vacated the judgment of the trial court and remanded the case for further proceedings. *Id.* at 555, 328 S.E.2d at 601.

In the case at hand, there is no evidence that the terms of the stipulation were reduced to writing. Notwithstanding any reference by the parties or the court to the stipulation, we find it was incumbent upon the court, according to *McIntosh*, to make inquiries and ascertain whether or not the parties fully understood their actions in entering into a stipulation. In the absence of any evidence of such inquiries, we must vacate and remand.

Vacated and remanded.

Judges JOHNSON and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 MARCH 1994

ANDERSON v. PERRY No. 938DC283	Wayne (92CVD1032)	Affirmed
CITY OF HIGH SHOALS v. VULCAN MATERIALS CO. No. 9327SC309	Gaston (90CVS1221)	Affirmed
DAVIS v. SMITH No. 9221DC852	Forsyth (91CVD2365)	Affirmed
FIRST UNION NATIONAL BANK v. HINRICHS No. 9223DC1327	Ashe (91CVD181)	Dismissed
HOLDERFIELD v. WAL-MART STORES, INC. No. 9319SC467	Rowan (91CVS1313)	Affirmed
LEAK v. HOLLAR No. 9328SC112	Buncombe (91CVS1361)	Affirmed
LISTER v. HAMPTON No. 931SC378	Pasquotank (91CVS251)	No Error
LOREMAN v. TOUCHAMERICA, INC. No. 9210IC1159	Ind. Comm. (657110)	Affirmed
McDERMOTT v. METROPOLITAN INS. & ANNUITY CO. No. 9329SC142	Henderson (90CVS597)	Affirmed
MOROSANI v. KWANG JA YUN No. 9328SC435	Buncombe (91CVS2795)	Affirmed
PENSKE TRUCK LEASING CO. v. BENNETT No. 9317DC609	Rockingham (93CVD189)	Reversed in part; vacated in part; & remanded for further proceedings
SHEPHERD v. ESTES No. 9315DC101	Alamance (89CVD22)	Affirmed in part, reversed & remanded in part, reversed in part
SOUTHER v. N.C. FARM BUREAU MUT. INS. CO. No. 9322SC671	Iredell (92CVS923)	Affirmed

STATE v. BELL No. 934SC622	Onslow (91CRS16263) (91CRS16264) (91CRS16265)	No Error
STATE v. BLACKBURN No. 9225SC549	Catawba (91CRS6303)	Remanded for correction of the judgment
STATE v. BOULDIN No. 9317SC787	Rockingham (92CRS7024)	No Error
STATE v. FANN No. 9310SC837	Wake (92CRS24311) (92CRS24312)	No Error
STATE v. GARDNER No. 934SC699	Onslow (92CRS14185)	Affirmed
STATE v. HILL No. 9310SC802	Wake (92CRS67677)	No Error
STATE v. HINTON No. 934SC386	Duplin (91CRS5793) (91CRS5794) (92CRS139)	Affirmed
STATE v. HOOVER No. 9318SC700	Guilford (92CRS54893) (92CRS54895)	No Error
STATE v. INGRAM No. 9318SC829	Guilford (92CRS2036) (92CRS2037) (92CRS20133) (92CRS20134)	No Error
STATE v. JOHNSON No. 938SC668	Lenoir (92CRS9690) (92CRS9959)	No Error
STATE v. JOYNER No. 933SC647	Pitt (88CRS14621)	Remanded for resentencing
STATE v. McLEAN No. 9316SC679	Robeson (92CRS19906)	No Error
STATE v. MILLHOFF No. 933SC532	Pitt (91CRS16107) (91CRS16108) (91CRS16109)	No Error
STATE v. NEWELL No. 9321SC670	Forsyth (91CRS30434)	No Error

STATE v. PIGOTT No. 9313SC757	Brunswick (89CRS846) (89CRS847) (89CRS941)	Affirmed
STATE v. UPTON No. 9311SC705	Johnston (92CRS8688) (91CRS12426) (92CRS14361)	No Error
TATE v. COLUMBIA CAROLINA CORP. No. 9329SC103	McDowell (91CVS466) (91CVS467)	No Error

APPENDIXES

AMENDMENTS TO RULES OF
APPELLATE PROCEDURE

REVISIONS TO RULES OF
MEDIATED SETTLEMENT CONFERENCES

AMENDMENT TO GENERAL RULES OF
PRACTICE FOR THE
SUPERIOR AND DISTRICT COURTS

ORDER ADOPTING
AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Rules 41 and 42 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages. Rule 41 is added, and former Rule 41 is renumbered Rule 42. The amendments shall be effective 15 March 1994, and Rule 41 shall apply to all appeals docketed in the Court of Appeals on or after that date.

Adopted by the Court in conference this 3rd day of March 1994. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

s/Parker, J.
PARKER, J.
For the Court

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 8th day of March 1994.

s/Christie Speir Cameron
CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

Rule 41

APPEAL INFORMATION STATEMENT

(a) The Court of Appeals has adopted an APPEAL INFORMATION STATEMENT which will be revised from time to time. The purpose of the APPEAL INFORMATION STATEMENT is to provide the Court the substance of an appeal and the information needed by the Court for effective case management.

(b) Each appellant shall complete, file and serve the APPEAL INFORMATION STATEMENT as set out in this Rule.

(1) The Clerk of the Court of Appeals shall furnish an APPEAL INFORMATION STATEMENT form to all parties to the appeal when the record on appeal is docketed in the Court of Appeals.

(2) Each appellant shall complete and file the APPEAL INFORMATION STATEMENT with the Clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the statement upon all other parties to the appeal pursuant to Rule 26. The APPEAL INFORMATION STATEMENT may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

(3) If any party to the appeal concludes that the APPEAL INFORMATION STATEMENT is in any way inaccurate or incomplete, that party may file with the Court of Appeals a written statement setting out additions or corrections within 7 days of the service of the APPEAL INFORMATION STATEMENT and shall serve a copy of the written statement upon all other parties to the appeal pursuant to Rule 26. The written statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

ADMINISTRATIVE HISTORY

Adopted: 3 March 1994.
Effective 15 March 1994 for all appeals docketed in the Court of Appeals on or after 15 March 1994.

Rule 42

TITLE

The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "App. R. ________," is also appropriate.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 3 March 1994—renumbered—effective 15 March 1994.

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER AMENDING 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(d) enables this Court to implement section 7A-38 by adopting rules and amendments to rules concerning said mediated settlement conferences;

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38(d), Rules 7 and 8 of the Rules of Mediated Settlement Conferences, 329 N.C. 795, as amended in 336 N.C. --- and 111 N.C. App. 935 are hereby amended to read as in the following pages. The Amended Rules shall be effective the 1st day of July, 1994.

Adopted by the Court in conference the 7th day of April, 1994. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

Parker, J.
For the Court

RULE 2. SELECTION OF MEDIATOR

(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. The motion shall state whether any party prefers a certified attorney mediator, and if so, the Senior Resident Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the Senior Resident Judge shall appoint a certified non-attorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the Senior Resident Judge may appoint a certified attorney mediator or a certified non-attorney mediator.

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.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

(b) Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she

(i) is a member in good standing of the North Carolina State Bar, and

(ii) has at least five years of experience as a judge, practicing attorney, law professor or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8(b)(1) or Rule 8(b)(2).

(2) A non-attorney may be certified if he or she has completed the following:

(i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Administrative Office of the Courts;

(ii) after completing the 20 hour training required by Rule 8(b)(2)(i), five years of experience as a mediator, having mediated: (a) at least 12 cases in each year, and (b) for at least 20 hours in each year;

(iii) a six hour training on North Carolina legal terminology and civil court procedure, mediator ethics and confidentiality, provided by a trainer certified by the Administrative Office of the Courts;

(iv) provide to the Administrative Office of the Courts three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's mediation experience;

(v) a four year degree from an accredited college or university.

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are amended by the adoption of new Rule 24, to read as follows:

PRETRIAL CONFERENCE IN CAPITAL CASES

There shall be a pretrial conference in every case in which the defendant stands charged with a crime punishable by death. No later than ten days after the superior court obtains jurisdiction in such a case, the district attorney shall apply to the presiding superior court judge or other superior court judge holding court in the district, who shall enter an order requiring the prosecution and defense counsel to appear before the court within forty-five days thereafter for the pretrial conference. Upon request of either party at the pretrial conference the judge may for good cause shown continue the pretrial conference for a reasonable time.

At the pretrial conference, the court and the parties shall consider:

(1) simplification and formulation of the issues, including, but not limited to, the nature of the charges against the defendant, and the existence of evidence of aggravating circumstances;

(2) timely appointment of assistant counsel for an indigent defendant when the State is seeking the death penalty; and

(3) such other matters as may aid in the disposition of the action.

The judge shall enter an order that recites that the pretrial conference took place, and any other actions taken at the pretrial conference.

This rule does not affect the rights of the defense or the prosecution to request, or the court's authority to grant, any relief authorized by law, including but not limited to appointment of assistant counsel, in advance of the pretrial conference.

Adopted by the Court in Conference this 7th day of April, 1994. The amendment shall be effective 1 June 1994, and shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals and by distribution by mail to each superior court judge in the State.

s/Parker, J.

PARKER, J.
For the Court

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ADMINISTRATIVE LAW AND PROCEDURE

§ 55 (NCI4th). Who are "aggrieved" persons entitled to judicial review; injury required

Petitioners were aggrieved parties who were entitled to judicial review of DEHNR's decision to modify respondent city's wastewater treatment plant discharge permit since they were residents of the county who used the river in question for recreational, religious, and other purposes and owned land adjoining the river, and their petition for judicial review was sufficient where they were obviously challenging the agency's failure to perform an environmental assessment before modifying the city's permit. **Save Our Rivers, Inc. v. Town of Highlands**, 716.

§ 77 (NCI4th). Application for presentation of new evidence

The trial court properly denied petitioners' petition for remand to the Division of Environmental Management for the taking of additional evidence pursuant to G.S. 150B-49 where the proposed new evidence was cumulative and not materially different from that considered by the administrative agency when the decisions were made. **Save Our Rivers, Inc. v. Town of Highlands**, 716.

ADVERSE POSSESSION

§ 12 (NCI4th). Possession under color of title; necessity of description of property

The trial court properly entered summary judgment for defendants where plaintiffs could not show that the deed upon which they relied for possession under color of title contained an adequate description of the property. **Foreman v. Sholl**, 282.

APPEAL AND ERROR

§ 89 (NCI4th). Form, effect, or finality of judgment or order appealed; what constitutes order affecting substantial right, generally

The grant of partial summary judgment for plaintiff in an action involving ownership of a patent for a tobacco quickaging process was immediately appealable as affecting a substantial right where the trial court effectively decided that ownership of the process rested with plaintiff by granting summary judgment on the first of plaintiff's six claims. **Liggett Group v. Sunas**, 19.

§ 105 (NCI4th). Appealability of orders relating to domestic matters generally

The trial court's order for defendant husband to show cause why sanctions should not be imposed against him with regard to a prior order to transfer to plaintiff wife an automobile in good working order was interlocutory and not immediately appealable. **Huguelet v. Huguelet**, 533.

§ 122 (NCI4th). Appealability of summary judgment orders; danger of inconsistent verdicts; right to trial before same trier of fact

Summary judgment in favor of one defendant in an action to enforce a lien for architectural and engineering services for construction of a shopping center affected a substantial right and was immediately appealable by plaintiff where the issues are identical with respect to each defendant and a successful enforcement of the lien will require an apportionment among the several defendants. **Dalton Moran Shook Inc. v. Pitt Development Co.**, 707.

§ 125 (NCI4th). Appealability of particular orders; orders relating to attachment and seizure

Plaintiff's appeal was dismissed as interlocutory where the order at issue required the third-party cross-appellant to take certain actions with regard to evi-

APPEAL AND ERROR — Continued

dence of debts due defendant "pending further orders of this court." **Transtector Systems, Inc. v. Electric Supply, Inc.**, 148.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

A defendant's arguments were not reviewed where defendant failed to object at trial. **Barbee v. Atlantic Marine Sales & Service**, 80.

§ 175 (NCI4th). Mootness of other particular questions

An appeal from the trial of a dispute between a board of education and a board of county commissioners as to the amount appropriated to maintain a system of free public schools in the county for the 1992-93 school year is moot where that school year has ended. **Cumberland County Bd. of Educ. v. Cumberland County Bd. of Comrs.**, 164.

§ 176 (NCI4th). Effect of appeal on power of trial court generally

The trial court had jurisdiction to hear a motion for attorney fees in a child custody action after notice of appeal where the court had expressly reserved the issue of attorney fees at the time it rendered judgment as to the custody matters. **Surles v. Surles**, 32.

§ 209 (NCI4th). Appeal in civil action; content of notice

Plaintiffs' intent to appeal from the denial of their motion to file a supplemental pleading could not be fairly inferred from their notice of appeal stating that they appealed from an order for partial summary judgment. **Foreman v. Sholl**, 282.

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

A defendant's argument was not reviewed where defendant did not assign error in the record on appeal. **Barbee v. Atlantic Marine Sales & Service**, 80.

§ 421 (NCI4th). Appellant's brief

Plaintiff insurance company abandoned a claim under 42 U.S.C. § 1983 against the Insurance Commissioner personally by failing to include any discussion of that claim in its initial brief. **Golden Rule Insurance Co. v. Long**, 187.

§ 555 (NCI4th). Law of the case and subsequent proceedings generally

The doctrine of the law of the case prevented defendant from relitigating the issue of race discrimination in his dismissal from the staff of defendant hospital. **Weston v. Carolina Medicorp, Inc.**, 415.

APPEARANCE

§ 4 (NCI4th). Effect of appearance; generally

The trial court obtained personal jurisdiction over defendant where defendant made a general appearance by seeking affirmative relief in his answer without contesting personal jurisdiction. **Judkins v. Judkins**, 734.

§ 6 (NCI4th). Effect of appearance; waiver of claim asserting improper process

Defendant made a general appearance and waived any defect in service of process when defendant and his counsel appeared in court and proceeded with the action for absolute divorce without contesting jurisdiction for lack of service of process. **Bumgardner v. Bumgardner**, 314.

APPEARANCE — Continued

The naming of the defendant in the complaint and summons as Kendale Pawn Shop when the legal entity for the pawn shop is KPS, Inc., d/b/a Kendale Pawn Shop was a mere misnomer which defendant waived by answering the complaint and appearing at trial. **Kimbrell's of Sanford v. KPS, Inc.**, 830.

ARBITRATION AND AWARD

§ 14 (NCI4th). Action to compel arbitration

The trial court erred by denying plaintiff's motion to compel arbitration and in granting defendant's motion to stay arbitration where plaintiff's demand for arbitration was not untimely or unreasonably delayed by plaintiff. **Hackett v. Bonta**, 89.

§ 46 (NCI4th). Court-ordered nonbinding arbitration generally

The record supported the trial court's finding that defendant offered no good cause for its failure to attend a court-ordered mediated settlement conference, and the trial court did not abuse its discretion by striking defendant's answer and entering default because of defendant's failure to attend. **Triad Mack Sales & Service v. Clement Bros. Co.**, 405.

ARREST AND BAIL

§ 159 (NCI4th). Revocation of pretrial release order

Defendant was not prejudiced by the trial court's revocation of his bond after the second day of trial although defendant contended that he was precluded from assisting his attorney in preparing for the final day of trial. **State v. Ballew**, 674.

AUTOMOBILES AND OTHER VEHICLES

§ 440 (NCI4th). Negligence of owner in permitting incompetent or reckless person to drive

Defendant's evidence was insufficient to require submission to the jury of an issue of plaintiff's negligent entrustment of his automobile to his twenty-five-year-old son where it tended to show that the son had been convicted of six speeding violations and three safe movement violations during a five-year period and that his license had been suspended for sixty days because he accumulated twelve points on his driving record. **Swicegood v. Cooper**, 802.

§ 637 (NCI4th). Contributory negligence; accidents involving crossing intersections and making turns generally

Plaintiff's failure to look left or right as she entered an intersection on a green light did not create an issue of contributory negligence where there was no evidence that plaintiff could have avoided the accident even had she seen defendant's automobile as it approached the intersection. **Myrick v. Peeden**, 638.

§ 716 (NCI4th). Instructions on last clear chance

The trial court erred by failing to instruct on last clear chance where the jury could reasonably find that defendant had both the time and opportunity to avoid the collision with decedent's car which was partially in his lane of travel by blowing his truck's horn. **Hurley v. Miller**, 658.

§ 738 (NCI4th). Instructions on crossing center line; staying in proper lane

The trial court did not err by failing to instruct the jury that defendant violated G.S. 20-150 by crossing the center line at a crest or curve and was negligent

AUTOMOBILES AND OTHER VEHICLES — Continued

per se where the jury could reasonably conclude that defendant took reasonable action in light of the uncontroverted evidence of decedent's initial act of obstructing the road. **Hurley v. Miller**, 658.

§ 776 (NCI4th). Criminal prosecutions for vehicle and traffic violations generally

G.S. 20-135.2A(d) required the dismissal of a driving while impaired charge against defendant who was initially stopped for a seat belt violation where the officer discovered that the driver was impaired during the course of the stop. **State v. Williams**, 686.

§ 834 (NCI4th). Legality of arrest; effect of probable cause

G.S. 20-135.2A(d) required the dismissal of a driving while impaired charge against defendant who was initially stopped for a seat belt violation where the officer discovered that defendant was impaired during the course of the stop. **State v. Williams**, 686.

BURGLARY AND UNLAWFUL BREAKINGS

§ 74 (NCI4th). Sufficiency of evidence of burglary; time of offense

The State presented insufficient evidence that the offense was committed in the nighttime to support defendant's conviction of first-degree burglary, but the verdict will be considered a verdict of felonious breaking and entering. **State v. Barnett**, 69.

CONSTITUTIONAL LAW

§ 24 (NCI4th). Local, private, and special legislation

The trial court did not err in declaring unconstitutional as local acts three statutes which transferred exclusive jurisdiction of the enforcement of various building codes from the City of New Bern, North Carolina, to Craven County, or by applying its ruling of unconstitutionality prospectively only. **City of New Bern v. New Bern-Craven County Board of Education**, 98.

§ 86 (NCI4th). State and federal aspects of discrimination

Landowners in a predominantly black neighborhood failed to forecast proof of discriminatory intent or purpose required to support their claim of racial discrimination in the denial of their petition to rezone their neighborhood from residential to commercial where they showed only that similar petitions to rezone were allowed for white landowners on the other end of the street across the lake. **Brown v. Town of Davidson**, 553.

§ 88 (NCI4th). Private discrimination

The doctrine of the law of the case prevented defendant from relitigating the issue of race discrimination in his dismissal from the staff of defendant hospital. **Weston v. Carolina Medicorp, Inc.**, 415.

§ 98 (NCI4th). State and federal aspects of due process

Landowners who petitioned for rezoning of their neighborhood from residential to commercial were not denied due process because several of the town commissioners stated before the public hearing that they would vote against rezoning. **Brown v. Town of Davidson**, 553.

CONSTITUTIONAL LAW — *Continued*

§ 149 (NCI4th). Grounds for denial of full faith and credit to foreign judgments; judgments obtained without personal jurisdiction

Defendant North Carolina resident did not have sufficient minimum contacts with New Jersey to give the courts of that state personal jurisdiction over him, and the North Carolina courts were not required to give full faith and credit to a default judgment entered against defendant in New Jersey. **Bell Atlantic Tricon Leasing Corp. v. Johnnie's Garbage Service**, 476.

§ 349 (NCI4th). Right of confrontation; cross-examination of witnesses

A murder defendant's Sixth Amendment right to confront adverse witnesses was not violated by the testimony of an SBI agent regarding blood grouping tests where the only part of the testimony not based on the agent's personal knowledge was the statistical database. **State v. Demery**, 58.

§ 367 (NCI4th). Prohibition on cruel and unusual punishment; consecutive sentences

Imposition of consecutive terms of life imprisonment did not constitute cruel or unusual punishment. **State v. Jacob**, 605.

CONTRACTORS

§ 4 (NCI4th). Who is a general contractor generally; cost of undertaking

A contractor who manufactured and installed prestressed concrete components for highway bridges was required to possess a general contractor's license when performing DOT bridge construction projects if the cost of the undertaking exceeded the statutory minimum. **Florence Concrete v. N.C. Licensing Bd. for General Contractors**, 270.

CONTRACTS

§ 180 (NCI4th). Third-party interference with contractual rights generally

Plaintiff teacher could not maintain an action against defendant board of education or defendant superintendent of schools for malicious interference with contract since the board and the superintendent were parties to the contract. **Wagoner v. Elkin City Schools' Bd. of Education**, 579.

§ 181 (NCI4th). Third-party interference with contractual rights; actual malice requirement

Even if plaintiff city manager was terminated by defendant town council members for personal or political reasons, defendants would not be liable for tortious interference with contract because such termination was neither a wrongful act nor one in excess of defendants' authority and therefore was not legally malicious. **Varner v. Bryan**, 697.

§ 190 (NCI4th). Third-party interference with contractual rights; sufficiency of evidence generally

Plaintiff teacher failed to show that she could make out a prima facie case of malicious interference with contract where she admitted on the face of her complaint that defendant principals had a proper motive for their actions of placing plaintiff in the position of ISS coordinator. **Wagoner v. Elkin City Schools' Bd. of Education**, 579.

COSTS

§ 35 (NCI4th). Attorney's fees in actions against insurance companies

A settlement does not bar a claim for attorney's fees under G.S. 6-21.1. **Benton v. Thomerson**, 293.

The trial court abused its discretion in awarding attorney's fees on the ground that there had been an unwarranted refusal to settle where plaintiff's insurance company settled with defendant within four months of the accident for a reasonable amount and defendant's counsel admitted that he was aware of the settlement and brought a counterclaim in order to get plaintiff to plead the prior settlement as a defense. **Ibid.**

§ 37 (NCI4th). Attorney's fees in other particular actions or proceedings

The trial court erred by vacating an order requiring the State to pay petitioner's attorney fees on the ground that it was entered without authority in that G.S. 6-19.1 requires a party seeking attorney fees under that statute to petition within 30 days following final disposition of the case and petitioner requested attorney fees before final disposition; the 30-day period in the statute is a deadline, not a starting point. **Able Outdoor, Inc. v. Harrelson**, 483.

COURTS

§ 17 (NCI4th). Manner of exercising personal jurisdiction

The trial court erred by denying the motion of third-party Lithonia to dismiss for lack of authority to exercise personal jurisdiction where Lithonia is not a person served in an action pursuant to G.S. 1A-1, Rules 4(j) or 4(j1), never made a general appearance, and is not involved in a counterclaim to an action it brought, so that plaintiff cannot argue that service of a summons is dispensed with under G.S. 1-75.7. **Transtector Systems, Inc. v. Electric Supply, Inc.**, 148.

§ 99 (NCI4th). Transfer to proper division generally

The trial court did not err in denying defendants' motion to transfer this case from the superior court to the district court where defendants' original motion was not in writing as required by statute, and their written motion was not filed within 30 days after they were served as required by the statute. **East Carolina Farm Credit v. Salter**, 394.

§ 145 (NCI4th). Effect of contract provisions specifying applicable law

A North Carolina defendant did not knowingly and intelligently consent to forum selection and consent to jurisdiction clauses giving the courts of New Jersey jurisdiction over a computer lease agreement, and the clauses were thus unenforceable. **Bell-Atlantic Tricon Leasing Corp. v. Johnnie's Garbage Service**, 476.

The trial court did not err by denying defendants' motions to dismiss for lack of jurisdiction where plaintiff and defendants entered into a guaranty agreement concerning a shopping center in Jacksonville, Florida which contained a consent to jurisdiction in North Carolina. **Retail Investors, Inc. v. Henzlik**, 549.

CRIMINAL LAW

§ 133 (NCI4th). Acceptance of guilty plea

Defendant's statements expressing reservations about his guilty pleas after they had been accepted by the trial court were not relevant to a determination as to whether the pleas were properly accepted by the court, and the court properly

CRIMINAL LAW — Continued

accepted defendant's pleas where the court informed defendant of every right listed in G.S. 15A-1022(a) and defendant's responses to the court before it accepted his pleas did not indicate any misunderstanding requiring further inquiry by the court. **State v. Barnett**, 69.

§ 369 (NCI4th). Expression of opinion on evidence; objections by the court

The trial court did not abuse its discretion in a murder prosecution by questioning a witness and sustaining its own objections. **State v. Long**, 765.

§ 433 (NCI4th). Argument and conduct of counsel; defendant as professional criminal, outlaw, or bad person

The trial court erred in a second-degree murder prosecution by allowing the State to comment on defendant's past abusive behavior toward his wife and to characterize him as a "liquor-drinking, dope-smoking, defendant." **State v. Brooks**, 451.

§ 544 (NCI4th). Mistrial; examination or cross-examination of witnesses; reference to prior crimes

The prosecutor's question to defendant's natural daughter as to whether her father had done anything to her did not require a mistrial in a prosecution for first-degree rape and sexual activity by a substitute parent involving defendant's stepdaughters where the court instructed the jury not to make any inference from the question, excused the jury, and admonished the prosecutor to refrain from that line of questioning. **State v. Ballew**, 674.

§ 762 (NCI4th). Definition of "reasonable doubt"; instruction omitting or including phrase "to a moral certainty"

The trial court did not err in second-degree murder prosecution by giving a reasonable doubt instruction in harmony with the instruction approved in *State v. Patterson*, 335 N.C. 437. **State v. Long**, 765.

§ 813 (NCI4th). Instructions on character evidence generally

The trial court properly denied defendant's request to give the pattern instruction on consideration of a witness's character for truthfulness as it related to defendant's pretrial exculpatory statement to the police. **State v. Mustafa**, 240.

§ 965 (NCI4th). Motion for appropriate relief in the appellate division; determination whether to remand

Where the materials before the Court of Appeals are insufficient to justify a ruling on defendant's motion for appropriate relief on the ground of ineffective assistance of counsel, the motion must be remanded to the trial court for the taking of evidence and a determination of the motion. **State v. Barnett**, 69.

§ 1054 (NCI4th). Sentencing hearing; continuance

The trial court did not err in continuing defendant's sentencing hearing for sale of a counterfeit controlled substance to allow the State to obtain a new indictment alleging that he was an habitual felon. **State v. Oakes**, 332.

§ 1062 (NCI4th). Sentencing hearing; scope of matters and evidence considered

The record clearly showed that defendant's sentence was not affected by the discovery of a handcuff key on defendant's person shortly after the jury announced its verdict. **State v. Ballew**, 674.

CRIMINAL LAW – Continued

§ 1122 (NCI4th). Nonstatutory aggravating factors; victim left to die

The trial court erred in finding as an aggravating factor for two second-degree murders that defendant failed to render aid to each victim. **State v. Irby**, 427.

§ 1126 (NCI4th). Nonstatutory aggravating factors; course of criminal conduct; joinable offense

The trial court erred in finding as an aggravating factor for two second-degree murders that there was a pattern or course of violent conduct in shooting at people with a rifle on one or more occasions making defendant a danger to the community and other people. **State v. Irby**, 427.

§ 1143 (NCI4th). Statutory aggravating factors; offense against persons performing official duties generally

Where defendant pled guilty to conspiracy to commit murder, the trial judge properly considered as an aggravating factor that the offense was committed against a law enforcement officer because of the exercise of his official duties, and defendant could not complain that he was charged with conspiracy to commit murder instead of conspiracy to murder a law enforcement officer. **State v. Evans**, 644.

§ 1144 (NCI4th). Statutory aggravating factors; offense against persons performing official duties; same evidence used to support more than one factor

Where a police detective was killed because he was disrupting the drug trade in a certain area and was involved in the prosecutions of some members of the drug group, the trial judge did not improperly use the same evidence to support more than one aggravating factor by finding (1) that the offenses were committed to hinder the lawful exercise of a governmental function or the enforcement of laws and (2) that the offenses were committed against a law enforcement officer because of the exercise of his official duties. **State v. Evans**, 644.

§ 1239 (NCI4th). Statutory mitigating factors under Fair Sentencing Act; strong provocation

The trial court did not err when sentencing defendant for second-degree murder by failing to find as a statutory mitigating factor that defendant had acted under strong provocation. **State v. Long**, 765.

§ 1280 (NCI4th). Habitual offender generally; nature of habitual felon classification

The notice provisions of the Habitual Felon Statute were not violated when the State was allowed to obtain a new indictment alleging habitual felon status after defendant had been convicted of the underlying substantive felony but before he had been sentenced since the defective habitual felon indictment was sufficient notice. **State v. Oakes**, 332.

§ 1283 (NCI4th). Indictment charging defendant as an habitual felon

Defendant's plea of former jeopardy was properly denied where an habitual felon indictment was quashed and a new habitual felon indictment was obtained before judgment was entered on the underlying felony. **State v. Oakes**, 332.

§ 1284 (NCI4th). Ancillary nature of habitual felon indictment

Until judgment was entered upon defendant's conviction of sale of a counterfeit controlled substance, there remained a pending felony prosecution to which a new habitual felon indictment could attach. **State v. Oakes**, 332.

CRIMINAL LAW — Continued

§ 1431 (NCI4th). Concurrent sentences generally; authority of court

The trial court did not err in sentencing defendant to consecutive sentences of life imprisonment for each of two rape convictions and fifteen years for sexual activity by a substitute parent where the trial court found that the only factor in aggravation was that defendant had prior convictions for similar sexual assaults and that there were no mitigating factors. **State v. Ballew**, 674.

§ 1510 (NCI4th). Restitution and reparation; defendant's ability to pay

The trial court erred in conditioning defendant's probation on an amount of restitution that defendant clearly cannot pay where defendant was ordered to pay an embezzlement victim restitution of $208,899.00 at a rate of more than $3,000.00 per month over a five-year probationary period. **State v. Hayes**, 172.

DEATH

§ 49 (NCI4th). Summary judgment generally

The trial court properly granted partial summary judgment on the issue of defendant driver's liability in a wrongful death action where plaintiffs offered defendant's guilty plea to driving under the influence and running a red light. **Camalier v. Jeffries**, 303.

DEEDS

§ 72 (NCI4th). Specific subdivision restrictions; multiple residences

A prior appeal in this action holding that defendants' use of their subdivision lot as a gravel right of way to a parcel outside the subdivision would be a violation of the subdivision restriction limiting use of the lot to single-family residential purposes operated as res judicata, and restrictions as to the outside parcel recorded subsequent to the prior appeal would not correct the violation. **Easterwood v. Burge**, 265.

DISCOVERY AND DEPOSITIONS

§ 7 (NCI4th). Scope of discovery generally

The trial court properly denied plaintiff's motion to compel discovery where plaintiff failed to meet her burden of proving that her request related to information both relevant and necessary to her claims. **Wagoner v. Elkin City Schools' Bd. of Education**, 579.

§ 55 (NCI4th). Motion for order compelling discovery generally

Respondent father was not prejudiced by the trial court's failure in a termination of parental rights proceeding to compel the guardian ad litem to provide a list of services offered to him where respondent obtained that information from DSS. **In re Guynn**, 114.

§ 62 (NCI4th). Sanctions for failure to respond to discovery request

Although plaintiff's responses to discovery were incomplete and evasive and thus constituted failure to answer, sanctions could not be imposed under Rule 37(a)(3) where defendants never filed a motion to compel. **Pugh v. Pugh**, 375.

Where plaintiff failed to respond or object within the Rule 34 time limits to defendants' request for the production of tapes and transcripts, defendants were entitled to move for the imposition of sanctions under Rule 37(d). **Ibid.**

DISCOVERY AND DEPOSITIONS — Continued

Tapes and transcripts in the possession of plaintiff's former and current attorneys were within plaintiff's control and custody so that the trial court could impose sanctions under Rule 37(d) for plaintiff's failure to produce them, and the court properly imposed the sanctions against plaintiff's current attorney where the attorney never informed plaintiff of the need to bring the tapes and transcripts to a deposition. **Ibid.**

DIVORCE AND SEPARATION

§ 111 (NCI4th). The Equitable Distribution Act

The trial court did not err in an equitable distribution action by denying plaintiff's motion to abate the action where his wife died after the judgment of absolute divorce and before the order of equitable distribution. **Tucker v. Miller**, 785.

§ 119 (NCI4th). Classification of property; marital property, generally

The trial court did not err by failing to classify as a marital debt a loan obtained by defendant husband's sister on the day of separation to pay a debt incurred by a corporation owned in part by the marital estate and in part by the husband's two sisters. **Huguelet v. Huguelet**, 533.

§ 129 (NCI4th). Classification of property; pension, retirement, and other deferred compensation rights

The trial court did not err by awarding plaintiff 50 percent of the marital portion of defendant's military pension. **Judkins v. Judkins**, 734.

§ 135 (NCI4th). Court's duty to value property

The evidence in an equitable distribution proceeding supported the trial court's valuation of the household furnishings, marital home, and five lots. **Huguelet v. Huguelet**, 533.

§ 139 (NCI4th). Distribution of marital property; goodwill

The trial court erred in an equitable distribution action by concluding that the goodwill in plaintiff's business was an asset unique to plaintiff and in finding one hundred percent of the goodwill to be a marital asset; the marital portion of the goodwill value of the business could not exceed the marital share of the property rights in the corporation. **Tucker v. Miller**, 785.

§ 142 (NCI4th). Valuation of property; pension and retirement benefits

The Court of Appeals set forth the requirements for evaluating defined benefit pension plans for equitable distribution purposes. **Bishop v. Bishop**, 725.

In an equitable distribution of defendant husband's defined benefit pension, the trial court correctly assumed that defendant ceased working for DuPont on the date of separation, improperly failed to consider any projected "gains or losses" on the portion of the pension which was vested as of the date of separation, and erred in valuing the pension on the basis that defendant would not begin drawing his pension until age 65. **Ibid.**

The evidence supported the trial court's determination that military retirement pay was for a military service related disability and thus was not marital property. **Ibid.**

DIVORCE AND SEPARATION – Continued

§ 143 (NCI4th). Equitable division of property generally; "equitable" and "equal" distinguished

The evidence in an equitable distribution proceeding supported the trial court's conclusion that an unequal division of the marital property would be equitable under the circumstances. **Huguelet v. Huguelet**, 533.

§ 147 (NCI4th). Distribution of marital property; liabilities

The trial court did not err in an equitable distribution action by not determining that a $39,315 contingent debt was marital. **Tucker v. Miller**, 785.

§ 149 (NCI4th). Equitable division of property; distribution factors; alimony or support

The trial court did not err by ordering an unequal division of the marital property in favor of defendant-wife where the court concluded that because the defendant had physical custody of the two children she had a need to occupy the marital residence and that an unequal division was equitable because plaintiff had an income approximately twice the defendant's income. **Barlowe v. Barlowe**, 797.

§ 158 (NCI4th). Other distribution factors

The trial court did not err in an equitable distribution action in its consideration of distribution factors where defendant had died between the judgment of divorce and the equitable distribution order, the court took cognizance of the death in its finding on distribution factor 1, and plaintiff presented no evidence of his needs that might justify an unequal distribution. **Tucker v. Miller**, 785.

§ 159 (NCI4th). Equitable distribution factors; marital misconduct or fault

The Court of Appeals will not recognize a new tort of intentional marital destruction which would allow marital fault or misconduct to be relevant in a proceeding collateral to, but affecting, equitable distribution. **Smith v. Smith**, 410.

§ 161 (NCI4th). Equitable division of property; application of factors in particular cases

The trial court's finding that it had considered all the factors set forth in G.S. 50-20(c), including the earning ability of each party, the custodial parent's need for possession of the marital home, the value of defendant's separate property, and defendant's expectation of additional pension, was sufficient to support its unequal distribution of the marital property. **Judkins v. Judkins**, 734.

§ 164 (NCI4th). Oral agreements dividing property

An order of equitable distribution based upon the parties' stipulation that their property should be equally divided was vacated and remanded where there was no evidence that the terms of the stipulation were reduced to writing. **Aycock v. Aycock**, 834.

§ 176 (NCI4th). Distribution of marital property; necessity for written findings of fact

The trial court did not abuse its discretion in an equitable distribution action in the degree of the unequal division distributed to defendant where the court did not articulate in the judgment the percentage of the marital property that would be distributed to each party, but the percentages to be distributed to each party could be determined from the judgment and it could not be said that the distribution was not the result of a reasoned decision. **Barlowe v. Barlowe**, 797.

§ 180 (NCI4th). Review of equitable distribution

The trial court properly dismissed plaintiff's action against his former wife for unjust enrichment where it was no more than an attempt to attack collaterally the parties' earlier equitable distribution judgment. **Smith v. Smith**, 410.

DIVORCE AND SEPARATION — Continued

§ 181 (NCI4th). Validity and effect of decree of divorce; attack on decree generally

The trial court's announcement in open court of a judgment of absolute divorce did not constitute an entry of judgment under Rule 58, and where no written judgment was prepared until after a second judge had granted defendant's motion to dismiss for lack of service of process, the trial court's subsequent attempted entry of judgment of absolute divorce was null and void, and the second judge's order of dismissal should be given full force and effect. **Bumgardner v. Bumgardner**, 314.

§ 295 (NCI4th). Modification of alimony; right to notice and hearing

The trial court erred by addressing the issue of whether plaintiff waived the alimony provision of a consent order where the proceeding involved only child support and neither party moved for modification of the alimony payments. **Van Nynatten v. Van Nynatten**, 142.

§ 336 (NCI4th). Child custody generally; court's discretion

The "tender years" doctrine is no longer the law in North Carolina. **Westneat v. Westneat**, 247.

§ 345 (NCI4th). Particular considerations in awarding custody; effect of parent's adultery or cohabitation with another

The trial court did not err in a child custody proceeding by finding that the mother was a fit and proper person to have custody of her daughters even though the court also found that the defendant-mother had had sexual relations with the intervenor at the time of the younger daughter's conception and while married to plaintiff. **Surles v. Surles**, 32.

§ 348 (NCI4th). Particular considerations in awarding custody; parent's prior mental or emotional problems

The trial court did not err by conditioning plaintiff's visitation with his minor children on his ability to control his obsessive compulsive behavior when with the children. **Surles v. Surles**, 32.

§ 350 (NCI4th). Particular considerations in awarding custody; miscellaneous

The trial court did not err by awarding custody of two children to the defendant-mother where the mother's current husband had intervened and claimed to be the biological father of one of the children. **Surles v. Surles**, 32.

§ 353 (NCI4th). Sufficiency of findings and evidence to support award of custody to father

The evidence supported the trial court's findings of fact in a child custody proceeding in which primary custody was awarded to the father. **Westneat v. Westneat**, 247.

§ 386 (NCI4th). Child support; effect of separation agreements on right to support

By signing a separation agreement in which he agreed to pay child support to plaintiff for his stepchildren, defendant voluntarily extended his status of in loco parentis and gave the court authority to order that support be paid. **Duffey v. Duffey**, 382.

DIVORCE AND SEPARATION – Continued

§ 408 (NCI4th). Child support; effect of separation agreements; modification of agreed upon support

The trial court erred in holding defendant primarily liable for the child support for his stepchildren after plaintiff agreed in a separation agreement to pay child support for the stepchildren. **Duffey v. Duffey**, 382.

§ 417 (NCI4th). Past due child support vested

Even if the parties orally agreed that defendant's child support payments would be reduced after equitable distribution, this agreement did not constitute a compelling reason justifying an order by the trial court retroactively reducing the child support payments. **Van Nynatten v. Van Nynatten**, 142.

§ 499 (NCI4th). Child custody; convenience of forum

The trial court's order that North Carolina was the most appropriate and convenient forum for the trial of a child custody case was supported by proper findings and conclusions. **Westneat v. Westneat**, 247.

§ 546 (NCI4th). Counsel fees and costs; sufficiency of pleadings

The trial court did not err by awarding defendant attorney fees in a custody action where the request for attorney fees was made by a motion in the cause. **Surles v. Surles**, 32.

§ 552 (NCI4th). Counsel fees and costs; determination of party's ability to pay

The trial court did not abuse its discretion in a child custody action by concluding that plaintiff had the ability to pay an award of attorney fees to defendant. **Surles v. Surles**, 32.

EASEMENTS

§ 54 (NCI4th). Nonsuit or dismissal

The trial court properly granted a dismissal under G.S. 1A-1, Rule 12(b)(6) in an action claiming an easement where plaintiffs, as purchasers under a land installment contract, did not allege a record claim, did not allege or identify with particular certainty an easement previously held by the vendor, and made no allegation as to the identity of the current owner of the property. **Jenkins v. Wilson**, 557.

EJECTMENT

§ 13 (NCI4th). Jurisdiction of district court; original jurisdiction

The district court did not have exclusive jurisdiction over a summary ejectment action but had concurrent original jurisdiction with the superior court. **East Carolina Farm Credit v. Salter**, 394.

§ 21 (NCI4th). Summary judgment

Summary judgment was properly entered in favor of plaintiff where the forecast of evidence showed that plaintiff had terminated defendants' lease and that defendants had attempted to interfere with plaintiff's sale of the property. **East Carolina Farm Credit v. Salter**, 394.

§ 37 (NCI4th). Liability of landlord for wrongful removal of tenant or tenant's property

Where plaintiff tenants' claims for wrongful eviction and trespass arose under G.S. 42-25.6, plaintiffs were precluded from recovering treble damages and addi-

EJECTMENT — Continued

tional attorney's fees for an unfair practice under G.S. 75-1.1 by the provision of G.S. 42-25.9(a) prohibiting treble damages under the Ejectment of Residential Tenants Act. **Stanley v. Moore**, 523.

ENERGY

§ 12 (NCI4th). Assignment of service areas; applicability to municipal supplier

The extension of electric service by defendant city's Public Works Commission to a site the Utilities Commission had assigned to an electric supplier was "within reasonable limitations" within the meaning of G.S. 62-110.2(a)(3). **South River Electric Membership Corp. v. City of Fayetteville**, 401.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 71 (NCI4th). Water pollution; permits

Petitioners were aggrieved parties who were entitled to judicial review of DEHNR's decision to modify respondent city's wastewater treatment plant discharge permit since they were residents of the county who used the river in question for recreational, religious, and other purposes and owned land adjoining the river, and their petition for judicial review was sufficient where they were obviously challenging the agency's failure to perform an environmental assessment before modifying the city's permit. **Save Our Rivers, Inc. v. Town of Highlands**, 716.

EVIDENCE AND WITNESSES

§ 82 (NCI4th). Definition of "relevant evidence"

Statements by respondent in an action to replace him as co-trustee were relevant where they aided the court in understanding the co-trustee's conduct concerning his failure to file accountings and to obtain approval for communications. **Smith v. Underwood**, 45.

§ 84 (NCI4th). Relevancy; relation of evidence to facts in issue

Evidence of defendant's good military record was not relevant to his guilt or innocence in a rape case. **State v. Mustafa**, 240.

§ 120 (NCI4th). Rape victim's sexual behavior generally; purpose of rape shield statute

Evidence of a rape victim's prior consensual relationship with her boyfriend which was ongoing since the 1970's did not amount to a pattern of sexual behavior closely resembling the events in this case and was properly excluded. **State v. Mustafa**, 240.

§ 344 (NCI4th). Other crimes, wrongs, or acts; admissibility to show intent; assault offenses

The trial court erred in a second-degree murder prosecution by allowing the State to cross-examine defendant under G.S. 8C-1, Rule 404(b) regarding domestic violence by defendant against his wife, who was not the victim in this case. Defendant's past violent behavior toward his wife was not relevant to prove his character in relation to intent. **State v. Brooks**, 451.

§ 351 (NCI4th). Other crimes, wrongs, or acts; homicide offenses generally

Evidence of an incident involving defendant five years earlier which was substantially similar to the events occurring in this second-degree murder case was admissible as proof of motive and identity. **State v. Parker**, 216.

EVIDENCE AND WITNESSES — Continued

§ 355 (NCI4th). Other crimes, wrongs, or acts; admissibility to show motive, reason, or purpose; assault

The trial court erred in a second-degree murder prosecution by allowing the State to cross-examine defendant under G.S. 8C-1, Rule 404(b) regarding domestic violence by defendant against his wife, who was not the victim in this case. Defendant's past violent behavior toward his wife was not relevant to prove his character in relation to motive. **State v. Brooks**, 451.

§ 367 (NCI4th). Other crimes, wrongs, or acts; homicide offenses; evidence inadmissible

The trial court in a second-degree murder case erred in admitting evidence of two prior shooting incidents by defendant and his father. **State v. Irby**, 427.

§ 372 (NCI4th). Other crimes, wrongs, or acts; admissibility to show common plan, scheme, or design; rape and sex offenses involving defendant's biological children

Evidence of defendant's rape of one daughter several years prior to his statutory rape of his second daughter was admissible in the prosecution for rape of the second daughter to show common plan or scheme. **State v. Jacob**, 605.

§ 565 (NCI4th). Facts relating to particular types of civil actions; paternity actions

The trial court in a paternity action properly admitted testimony by a urologist that after a vasectomy, recanalization, which is the natural reconnection of the severed ends of the vas, is medically possible, and that the vas can disconnect again without the patient ever knowing it. **Brooks v. Hayes**, 168.

A urologist was properly permitted to testify in a paternity action that the use of a centrifuge to detect sperm is standard practice since this testimony explained how defendant's sterility test which did not use the centrifuge could have failed to reveal the presence of sperm in the samples. **Ibid.**

A urologist's testimony about a surgical procedure that accomplishes the same results as recanalization was irrelevant and improperly admitted in a paternity action where there was no evidence that such an operation had been performed on defendant. **Ibid.**

§ 668 (NCI4th). "Plain error" rule in criminal cases

There was no plain error in a murder prosecution from the use of testimony from an SBI agent regarding statements by witnesses where there was substantial evidence against defendant which in no way depended upon the statements or the agent's testimony as to the contents of those statements. **State v. Demery**, 58.

§ 694 (NCI4th). Offer of proof; necessity for making record

Assignments of error to the exclusion of evidence of the victim's threats in a murder prosecution were overruled where defendant failed to make any offer of proof and the record failed to disclose the significance of the excluded evidence. **State v. Long**, 765.

§ 697 (NCI4th). Offer of proof; form and content of record

A defense counsel's comments were not sufficient to constitute an offer of proof and preserve excluded evidence for appellate review. **State v. Long**, 765.

§ 866 (NCI4th). Hearsay evidence; to explain conduct or actions taken

The trial court did not err in an action for removal of a co-trustee when it allowed into evidence testimony regarding an oral understanding between respondent and two deceased clerks of court. **Smith v. Underwood**, 45.

EVIDENCE AND WITNESSES – Continued

§ 1174 (NCI4th). Admissions and declarations by particular agents; attorneys

Statements by plaintiff's counsel during a summary judgment hearing to the effect that plaintiff was not seeking damages for events occurring more than three years before the complaint was filed did not constitute judicial admissions and were not binding on the plaintiff in the subsequent trial. **Bryant v. Thalhimer Brothers, Inc.**, 1.

§ 1569 (NCI4th). Evidence obtained by searches pursuant to warrant; inadvertent discovery of objects not specified in warrant

The trial court's error in allowing into evidence at defendant's drug trial pornographic photos seized from defendant's residence was harmless. **State v. Cummings**, 368.

§ 1850 (NCI4th). Test for controlled substances

An officer was properly permitted to testify concerning the results of a field test he conducted on the substance purchased from defendant. **State v. Oakes**, 332.

§ 1993 (NCI4th). Evidence inadmissible to vary or contradict terms of writing generally

The trial court should not have considered affidavits as proof that the intent of the parties to insurance contracts was other than that appearing on the face thereof in an action to determine which of two excess insurance clauses applied. **Universal Leaf Tobacco Co. v. Oldham**, 490.

§ 2148 (NCI4th). Opinion testimony by experts generally; when allowed; requirement of relevancy

The trial court in a paternity action erred by permitting plaintiff's genetics and paternity testing experts to express their opinions that defendant is the father of plaintiff's two children. **Brooks v. Hayes**, 168.

§ 2152 (NCI4th). Opinion testimony by experts as to question of law

The trial court properly sustained defendant's objection to an expert witness's affidavit which consisted entirely of legal conclusions. **Wagoner v. Elkin City Schools' Bd. of Education**, 579.

§ 2172 (NCI4th). Basis or predicate for expert's opinion, generally; admissibility of facts on which conclusion is based

An SBI agent's testimony about blood-grouping tests did not violate the hearsay rule in a murder prosecution where the agent relied on statistical information concerning the frequency of blood group factors or characteristics in the North Carolina population which had been compiled by the SBI with blood provided by the Red Cross and blood obtained in criminal cases. **State v. Demery**, 58.

§ 2210 (NCI4th). Existence of bloodstains; opinion as to source

An SBI agent who tested bloodstains found at the crime scene was testifying within his expertise and established a sufficient foundation for the purpose of calculating the incidence of defendant's and a murder victim's blood factors in the population at large. **State v. Demery**, 58.

§ 2616 (NCI4th). Communication induced by marital relationship

The trial court did not err in a prosecution of defendant for the attempted rape of his twelve-year-old stepdaughter by permitting his wife to testify that defendant had admitted to her that he had sexually abused the girl. Defendant's

EVIDENCE AND WITNESSES – *Continued*

confession was driven by his own psychological motivations rather than by any confidence induced by the marital relationship. **State v. Smith**, 827.

§ 2695 (NCI4th). Oral communications with persons since deceased or mentally ill ("Dead Man's" Statute) generally

The Dead Man's Statute, G.S. 8C-1, Rule 601(c), was not applicable in an action to remove a co-trustee where respondent introduced evidence that he had not filed accountings as a result of conversations with two deceased clerks of court. **Smith v. Underwood**, 45.

§ 2847 (NCI4th). Refreshing memory; notes

The trial court did not err in a murder prosecution by allowing the State to use typewritten versions of oral statements given by two witnesses to officers where the witnesses had not reviewed the statements before trial. A statement used to refresh a witness's recollection need not be signed by him or even be his own prior statement. **State v. Demery**, 58.

§ 3045 (NCI4th). Basis for impeachment; assaultive behavior, generally

The trial court erred in a second-degree murder prosecution by allowing the State to cross-examine defendant under G.S. 8C-1, Rule 608(b) regarding domestic violence by defendant against his wife, who was not the victim of the murder. Extrinsic instances of assaultive behavior, standing alone, are not in any way probative of the witness' character for truthfulness or untruthfulness. **State v. Brooks**, 451.

§ 3081 (NCI4th). Basis for impeachment; statements made to officials or investigators

The trial court did not err in a murder prosecution by allowing the State to use typewritten versions of oral statements given by two witnesses to officers where the witnesses had not reviewed the statements before trial. The statements were not used as substantive evidence, but to refresh the witnesses' recollections or to impeach portions of courtroom testimony inconsistent with the statements. **State v. Demery**, 58.

§ 3106 (NCI4th). What amounts to corroboration; inclusion of new facts

Statements by two rape victims were admissible as corroborative evidence even though they included additional facts about other sexual abuse not testified to by the victims. **State v. Ballew**, 674.

EXECUTORS AND ADMINISTRATORS

§ 108 (NCI4th). Year's allowance for survivors; spouse

A postnuptial agreement in which the husband renounced his G.S. 30-1 right to dissent from the wife's will did not forfeit his right to a year's allowance. **Brantley v. Watson**, 234.

FRAUD, DECEIT, AND MISREPRESENTATION

§ 17 (NCI4th). Scienter; intent to deceive

Plaintiff failed to show evidence of intent to deceive where defendant Jaycees sponsored a golf tournament which included a prize for a hole in one on the 17th hole, plaintiff made the hole in one, the Jaycees presented plaintiff with a simulated check and photographs were taken, and plaintiff was later told that there would

FRAUD, DECEIT, AND MISREPRESENTATION – Continued

be no prize because an insurance policy had not been purchased. **Malone v. Topsail Area Jaycees**, 498.

§ 24 (NCI4th). Complaint generally

Plaintiff's complaint did not meet the requirements of particularity with regard to fraud or constructive fraud and were nothing more than claims for negligence. **Sharp v. Teague**, 589.

FRAUDS, STATUTE OF

§ 32 (NCI4th). Pleading

Defendant could not take advantage of the provisions of the statute of frauds by a motion to dismiss for failure to state a claim. **Green v. Harbour**, 280.

FRAUDULENT CONVEYANCES

§ 39 (NCI3d). Bulk transactions; notice to creditors

A sale of a corporation's inventory and equipment was not exempt from the notice to creditors requirement of the bulk transfer laws because all of the proceeds were remitted to a bank which held a security interest in the corporation's assets where the transferor was not in default on the bank obligation. **Sutton Woodworking Machine Co. v. DKLS, Inc.**, 649.

GUARDIANSHIP

§ 97 (NCI4th). Removal of guardian to protect ward's interests

Guardians for an incompetent ward were properly removed where there was a showing of a potential for conflict between the interests of the ward and those of the guardians. **In re Estate of Armfield**, 467.

HOMICIDE

§ 284 (NCI4th). Second-degree murder; sufficiency of evidence generally

The evidence was sufficient to deny defendant's motions for dismissal in a prosecution for second-degree murder. **State v. Demery**, 58.

The evidence was sufficient to support a jury finding that defendant was the perpetrator of the second-degree murder of his former girlfriend. **State v. Parker**, 216.

§ 287 (NCI4th). Second-degree murder; killing during course of altercation, argument, and the like

The State presented substantial evidence of each element of second-degree murder and substantial evidence from which the jury could infer that defendant did not act in self-defense or in defense of his family when he shot the two victims. **State v. Irby**, 427.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 39 (NCI4th). Hospital privileges

G.S. 90-153 does not confer the absolute right on chiropractors practicing within the state to be given hospital privileges in publicly funded institutions. **Cohn v. Wilkes Regional Medical Center**, 275.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS – Continued

The statute giving patients the freedom to choose a qualified provider of health care does not require all public hospitals to admit upon request at least one chiropractor to their staffs. **Ibid.**

In enacting the statute setting out specific criteria a governing board of a hospital is to consider when granting or denying privileges to practice in its hospital to physicians, dentists, and podiatrists, the legislature did not intend to take away the discretion afforded hospital boards to make decisions regarding other health care providers, such as chiropractors. **Ibid.**

The Court's rejection of the "captain of the ship doctrine" in *Harris v. Miller*, 103 N.C. App. 312, did not entitle plaintiff to relief from judgment in his action alleging that defendants racially discriminated against him in revoking his hospital privileges where plaintiff's staff privileges were revoked on the ground that his medical judgment was impaired. **Weston v. Carolina Medicorp, Inc.**, 415.

HUSBAND AND WIFE

§ 26 (NCI4th). Contracts and conveyances between spouses; confidential relationship; undue influence

Plaintiff had no claim against his former wife for breach of fiduciary duty where plaintiff failed to show any agreement or transaction between him and his former wife which would constitute the basis for the breach of fiduciary duty. **Smith v. Smith**, 410.

§ 28 (NCI4th). Contracts and conveyances between spouses, generally; prior law; compliance with statutory formalities

A postnuptial agreement executed between a husband and wife could not be set aside because of the absence of a privy examination of the wife as formerly required by G.S. 52-6 and 52-10. **Brantley v. Watson**, 234.

ILLEGITIMATE CHILDREN

§ 9 (NCI4th). Civil actions to establish paternity; sufficiency of evidence

Plaintiff's evidence was sufficient for the jury in a paternity action, notwithstanding evidence by defendant that he had undergone a successful vasectomy, where a urologist testified about recanalization and DNA test results tended to show that defendant is the children's father. **Brooks v. Hayes**, 168.

INSURANCE

§ 26 (NCI4th). Role and authority of Commissioner of Insurance in relation to rates generally

The Commissioner of Insurance did not exceed the scope of his authority and become personally liable by conditioning approval of a rate increase on a one-year guarantee of rates and anniversary date implementation restrictions. **Golden Rule Insurance Co. v. Long**, 187.

Plaintiff's allegations of political favoritism and discrimination against plaintiff in favor of Blue Cross/Blue Shield were not evidence that the Commissioner acted outside the scope of his authority and became personally liable. **Ibid.**

§ 123 (NCI4th). Effect of policy violating "other insurance" clause of another policy

Insurance coverage provided by Lloyds to protect tobacco from fire loss was rendered excess by coverage provided by INA where both policies contained excess

INSURANCE — Continued

insurance clauses; the INA clause referred to the existence of other valued insurance; the Lloyds policy was not valued insurance; the existence of specific insurance as defined in the Lloyds policy is the event which shuts off Lloyds' liability; and the INA policies fall within the definition of "specific insurance" in the Lloyds policy. **Universal Leaf Tobacco Co. v. Oldham**, 490.

§ 377 (NCI4th). Accident insurance; risk of travel and transportation

A policy providing coverage for accidental death sustained by the insured while a passenger in a conveyance operated by a common carrier did not cover the death of the insured by drowning while white water rafting during a rafting excursion. **Beavers v. Federal Ins. Co.**, 254.

§ 527 (NCI4th). Underinsured motorist coverage generally

An underinsured highway vehicle can include a state-owned vehicle. **Cochran v. N.C. Farm Bureau Mutual Ins. Co.**, 260.

§ 528 (NCI4th). Extent of underinsured motorist coverage

An injured motorist was not entitled to interpolicy stacking of the underinsured motorist benefits under his nonfleet personal automobile policy and his employer's fleet insurance coverage. **Isenhour v. Universal Underwriters Ins. Co.**, 152.

§ 530 (NCI4th). Underinsured motorist coverage; reduction of insurer's liability

An employer who paid workers' compensation benefits to its employee is entitled to a lien on the employer's underinsured motorist benefits received by the employee in an action by the employee against the tortfeasor. **Buckner v. City of Asheville**, 354.

§ 598 (NCI4th). Automobile insurance; effect of lack of permission of vehicle owner

An automobile liability policy's exclusion from coverage of anyone who did not have a reasonable belief that he was entitled to use the covered vehicle was not contrary to the terms of the compulsory motor vehicle liability insurance statute, and the trial court properly found that the driver in this case did not have a reasonable belief that he was entitled to use the insured vehicle and that the policy did not extend coverage to the driver. **Nationwide Mutual Ins. Co. v. Baer**, 517.

§ 690 (NCI4th). Propriety of award of prejudgment interest

Plaintiff was not entitled to prejudgment interest in excess of defendant's underinsured motorist policy limits. **Cochran v. N.C. Farm Bureau Mutual Ins. Co.**, 260.

§ 877 (NCI4th). Burglary and theft insurance; construction of policy

The trial court correctly granted summary judgment for defendant in an action to enforce the terms of an automobile theft insurance policy. The assignment of the mere right to payment after loss in no way broadened the scope of the coverage of insurable risks provided by the policy. **First-Citizens Bank & Tr. Co. v. Universal Underwriters Ins. Co.**, 792.

§ 889 (NCI4th). Professional liability generally

The trial court erred as a matter of law in ruling that the UNC Liability Insurance Trust Fund did not provide medical malpractice insurance for defendant Shoemate when UNC accepted Shoemate as a resident in psychiatry, failed to check his credentials as required by statute, and then allowed him to work as a psychiatric resident and to treat patients for fourteen months. **University of North Carolina v. Shoemate**, 205.

INSURANCE — Continued

Defendant Staton presented a genuine issue of fact as to whether defendant Shoemate was an individual health care practitioner covered under the UNC Liability Insurance Trust Fund where she offered evidence that Shoemate was appointed as a resident in psychiatry and a house staff physician by UNC although he actually had no medical degree, and that UNC permitted Shoemate to be represented as its agent. **Ibid.**

§ 1231 (NCI4th). Fire and homeowner's insurance; sufficiency of evidence generally

The trial court correctly granted summary judgment for defendant in an action on a fire insurance policy where plaintiff failed to comply with a stated condition precedent of the policy in not submitting to an examination under oath because he had already suffered five heart attacks. **Fineberg v. State Farm Fire and Casualty Co.**, 545.

INTENTIONAL INFLICTION OF MENTAL DISTRESS

§ 2 (NCI4th). Sufficiency of claim

Evidence of sexual harassment and retaliation which occurred more than three years prior to the filing of plaintiff's claim against her supervisor and employer for intentional infliction of emotional distress was not barred by the three-year statute of limitations. **Bryant v. Thalhimer Brothers, Inc.**, 1.

Summary judgment was properly entered for defendants on plaintiff school teacher's claim for intentional infliction of emotional distress where defendant school principals' treatment of plaintiff may have insulted her or caused her to suffer indignities but did not amount to conduct which was atrocious and utterly intolerable in a civilized community. **Wagoner v. Elkin City Schools' Bd. of Education**, 579.

The trial court did not err by granting summary judgment for defendant Public Works Commission on a claim arising from sexual harassment where plaintiff failed to show any version of facts from which a reasonable jury could infer that PWC had ratified the sexual harassment of plaintiff. **Phelps v. Vassey**, 132.

§ 3 (NCI4th). Directed verdict

Plaintiff's evidence of sexual harassment and retaliation was sufficient for submission to the jury of plaintiff's claim against her former supervisor for intentional infliction of emotional distress; furthermore, the evidence supported plaintiff's claim that defendant employer ratified the acts of defendant supervisor so that the employer was liable for his actions. **Bryant v. Thalhimer Brothers, Inc.**, 1.

INTOXICATING LIQUOR

§ 59 (NCI4th). Consumption generally; consumption not authorized by permit

Social host liability as announced in *Hart v. Ivey*, 332 N.C. 299, applied retroactively to this case. **Camalier v. Jeffries**, 303.

Summary judgment was properly entered for defendants in an action to recover on the basis of social host liability for the death of plaintiff's intestate who was killed when his vehicle was struck by defendant newspaper employee who consumed alcoholic beverages at a retirement party sponsored by defendant newspaper and defendant editor where there was no evidence that either the newspaper or the editor knew or reasonably should have known that defendant employee was intoxicated at any time while he was at the retirement party. **Ibid.**

INTOXICATING LIQUOR — Continued

Defendant newspaper was purely a social host and not a business host at a retirement party for its editor. **Ibid.**

JUDGES, JUSTICES, AND MAGISTRATES

§ 26 (NCI4th). Disqualification from proceedings generally

The trial judge in a termination of parental rights proceeding did not err by failing to recuse himself where he had conducted an earlier review hearing, concluded that the juveniles should remain in the custody of DSS, and recommended that DSS pursue termination of parental rights. **In re LaRue**, 807.

§ 49 (NCI4th). Magistrates; suspension, removal, and reinstatement

Respondent did not have standing to raise the issue of the legality of the district attorney's presence in a magistrate's removal hearing. **In re Ezzell**, 388.

A Resident Regular Superior Court Judge who appoints a magistrate does not have a personal bias or prejudice as a matter of law so that he must be disqualified from conducting a hearing to remove the magistrate. **Ibid.**

JUDGMENTS

§ 27 (NCI4th). Judgment upon jury verdict rendered in open court

Announcement of judgment in open court did not constitute entry of judgment which was required for jurisdiction to vest in the Court of Appeals. **In re Estate of Walker**, 419.

§ 115 (NCI4th). Tender or offer of judgment generally

A lump sum offer of judgment is permissible under Rule 68. **Aikens v. Ludlum**, 823.

Defendants' offer of judgment "of $10,001.00 for all damages and attorney's fees taxable as costs, together with the remaining costs accrued at the time this offer is filed" was ambiguous as to whether it included only the substantive claim and attorney's fees or whether it was a lump sum offer that also included other costs such as interest, and construing the offer against defendants who drafted it, no lump sum offer was intended. **Ibid.**

§ 351 (NCI4th). Review of findings of fact on appeal

An error in terminology did not prevent the Court of Appeals from accurately deciding the questions before it. **McFarland v. Justus**, 107.

§ 405 (NCI4th). Foreign judgments; attack based on jurisdiction

Defendant North Carolina resident did not have sufficient minimum contacts with New Jersey to give the courts of that state personal jurisdiction over him, and the North Carolina courts were not required to give full faith and credit to a default judgment entered against defendant in New Jersey. **Bell Atlantic Tricon Leasing Corp. v. Johnnie's Garbage Service**, 476.

§ 474 (NCI4th). Grounds for attack; unusual or extraordinary circumstances; justice demands setting aside judgment

The trial court erred by granting DOT relief under G.S. 1A-1, Rule 60(b)(6) where an earlier judgment had awarded petitioner attorney fees against DOT but there was nothing in the record which indicated that DOT made any showing of extraordinary circumstances, that the interests of justice required relief from the earlier order, or that Dot presented a meritorious defense. **Able Outdoor, Inc. v. Harrelson**, 483.

JURY

§ 68 (NCI4th). Necessity of unanimous verdict; stipulation as to majority verdict

Where the parties in an action for intentional infliction of emotional distress stipulated at the beginning of the trial that the trial could proceed with a jury of ten persons if necessary, the trial court did not err in the denial of defendants' motions for a mistrial and a new trial because the verdict was rendered by a ten-person jury after the trial court excused two jurors who had read a newspaper article reporting that the court had allowed defendants' pretrial motion to suppress certain evidence. **Bryant v. Thalhimer Brothers, Inc.**, 1.

LABOR AND EMPLOYMENT

§ 39 (NCI4th). Nature of employment relationship generally

The trial court did not err in finding that defendant employer was entitled to recover from plaintiffs $70,000 representing the fair value of services plaintiffs caused defendant to provide to plaintiffs' company which they operated on the side. **Long v. Vertical Technologies, Inc.**, 598.

§ 55 (NCI4th). Contract provisions as to employee inventions

The trial court erred in granting summary judgment for plaintiff-employer on its first cause of action in a declaratory judgment action in which plaintiff sought to have its employee assign to it ownership of a patent for a quick-aging process for tobacco. **Liggett Group v. Sunas**, 19.

§ 65 (NCI4th). Additional consideration to change contract from at-will employment

The trial court erred by entering summary judgment dismissing a counterclaim for fraudulent misrepresentation where each of the requisite elements was adequately pled by the employee and evidence was offered to support each element. **Liggett Group v. Sunas**, 19.

§ 68 (NCI4th). Wrongful discharge generally

Plaintiff teacher's claim of wrongful discharge was correctly dismissed where plaintiff is a career teacher and not an employee at will. **Wagoner v. Elkin City Schools' Bd. of Education**, 579.

Plaintiffs were not wrongfully terminated where the evidence tended to show that they failed to disclose to defendants all of their activities with regard to use of company property to further the affairs of their own company which they operated on the side. **Long v. Vertical Technologies, Inc.**, 598.

§ 75 (NCI4th). Retaliatory discharge for filing workers' compensation claim

A complaint alleging retaliatory discharge for filing a workers' compensation claim was sufficient to withstand a motion to dismiss under G.S. 1A-1, Rule 12(b)(6). **Conklin v. Carolina Narrow Fabrics Co.**, 542.

§ 90 (NCI4th). Interference with employee's obtaining other employment after termination of employment

Plaintiff's forecast of evidence was insufficient to support her claim against her former employer for malicious interference with her right to enter into an employment contract. **Friel v. Angell Care Inc.**, 505.

The statute prohibiting the blacklisting of discharged employees did not apply where defendant's statements came only upon inquiry from people he believed to be prospective employers of his former employee. **Ibid.**

LABOR AND EMPLOYMENT — Continued

§ 159 (NCI4th). Claimant's disqualification for unemployment benefits due to discharge resulting from misconduct connected with work

The findings of fact supported the Employment Security Commission's conclusions of law that petitioner had violated a company rule against fighting and was disqualified for unemployment benefits. **Fair v. St. Joseph's Hospital**, 159.

§ 170 (NCI4th). Claimant's disqualification for unemployment benefits; judicial review

A petitioner for unemployment compensation failed to properly object to findings in an Employment Security Commission denial of compensation; moreover, the findings were supported by competent evidence and were thus conclusive on appeal. **Fair v. St. Joseph's Hospital**, 159.

§ 216 (NCI4th). Federal Employers' Liability Act; sufficiency of evidence

A genuine issue of fact existed in an action under the F.E.L.A. as to whether defendant railroad should have foreseen that plaintiff signal maintainer might be injured as a result of its failure to provide plaintiff with equipment or assistance to move 300-pound spools of wire. **McKeithan v. CSX Transportation, Inc.**, 818.

LARCENY

§ 24 (NCI4th). Relationship to other crimes; receiving stolen property and possessing stolen property

Defendant could not properly be convicted and sentenced for both larceny and possession of stolen goods where the same pocketbook was involved in both charges. **State v. Barnett**, 69.

LIBEL AND SLANDER

§ 17 (NCI4th). Criticism of public official as privileged; who is "public official"

Plaintiff town manager was a public official for purposes of the review of allegedly defamatory statements made after his termination by defendant town council members. **Varner v. Bryan**, 697.

§ 41 (NCI4th). Summary judgment

The trial court properly entered summary judgment for defendant town council members on plaintiff town manager's claim for defamation based on defendants' statements about possible misuse of public funds to make unauthorized contributions to plaintiff's 401(k) retirement plan. **Varner v. Bryan**, 697.

§ 43 (NCI4th). Sufficiency of evidence of publication; privilege

Where plaintiff asked a friend to call defendant to "check out (her) references," statements made by defendant to the friend could not form the basis of a slander claim. **Friel v. Angell Care Inc.**, 505.

Statements made during a staff meeting regarding plaintiffs' termination of employment were not actionable by reason of qualified privilege. **Long v. Vertical Technologies, Inc.**, 598.

§ 44 (NCI4th). Slander and libel per se; imputations affecting business, trade, or professions, or statements imputing crime

Plaintiff failed to establish a claim for slander per se where her forecast of evidence tended to show that the individual defendant made true statements to plaintiff's prospective employer that he would not rehire plaintiff and that there

LIBEL AND SLANDER – Continued

was an unproven sexual harassment charge when she left defendant company. **Friel v. Angell Care Inc.**, 505.

Statements made during a staff meeting regarding plaintiffs' failure to do business in the best interest of defendant and their misuse of company resources were not actionable per se. **Long v. Vertical Technologies, Inc.**, 598.

LIENS

§ 27 (NCI4th). Action to enforce lien; sale of property generally

Defendant's lien has priority over a deed of trust held by plaintiff where defendant supplied labor and materials to the construction of an apartment project and timely filed a claim of lien pursuant to G.S. 44A-8 and 44A-12. While defendant's claim of lien appears to include questionable items, the judgment granting the lien was not appealed. **Metropolitan Life Insurance Co. v. Rowell**, 779.

LIMITATIONS, REPOSE, AND LACHES

§ 26 (NCI4th). Attorney and accountant malpractice

Even if the continuous representation doctrine applies in North Carolina, it was inapplicable in this case, and the statutes of limitations and repose accrued on the date of the last act of the defendants giving rise to the cause of action and not on the date defendants withdrew as counsel. **Sharp v. Teague**, 589.

MASTER AND SERVANT

§ 49.1 (NCI3d). "Employees" within meaning of Workers' Compensation Act; status of particular persons

A member of the National Guard injured in a jeep accident while returning to his local unit after completing a routine weekend drill at Fort Bragg was an employee of the State who was entitled to workers' compensation for his injuries. **Duncan v. N.C. Dept. of Crime Control and Public Safety**, 184.

§ 56 (NCI3d). Workers' compensation; causal relation between employment and injury

The presumption of compensability was inapplicable where the evidence indicated that decedent died from a subarachnoid hemorrhage. **Gilbert v. Entenmann's, Inc.**, 619.

The evidence supported the Industrial Commission's finding that the physical exertion required to move a heavy desk did not cause deceased employee's ruptured aneurysm. **Ibid.**

§ 69.1 (NCI3d). Meaning of incapacity and disability

Defendants in a workers' compensation action arising from a back injury failed to overcome the presumption that plaintiff's temporary total disability continued until she returned to work at the same wage earned prior to the injury. An employee's release to return to work is not the equivalent of a finding that the employee is able to earn the same wage earned prior to the injury, nor does it automatically deprive an employee of the presumption of disability. **Radica v. Carolina Mills**, 440.

MASTER AND SERVANT — Continued

§ 69.3 (NCI3d). Amount of recovery generally

Where the parties' Form 21 agreement for the payment of compensation to plaintiff was approved by the Industrial Commission, the agreement became a binding award of the Commission. **Martin v. Piedmont Asphalt & Paving Co.**, 121.

§ 75 (NCI3d). Medical and hospital expenses

A workers' compensation action was remanded for a determination of plaintiff's entitlement to medical expenses pursuant to G.S. 97-25 for treatment by her own four doctors. **Radica v. Carolina Mills**, 440.

§ 77 (NCI3d). Modification and review of award

An award of compensation for "necessary" weeks could not be terminated by administrative approval of a Form 24 Application to Stop Compensation filed by the employer or its insurance carrier. **Martin v. Piedmont Asphalt & Paving Co.**, 121.

§ 87 (NCI3d). Claim under Compensation Act as precluding common law action

Summary judgment was properly entered for defendant employer on plaintiff's *Woodson* claim where defendant showed through its pleadings and supporting materials that the injury to plaintiff was accidental, and plaintiff failed to produce any materials to support her claim that her injury resulted from tortious conduct by defendant. **Owens v. W. K. Deal Printing, Inc.**, 324.

§ 89.4 (NCI3d). Distribution of recovery of damages at common law

The trial court did not have jurisdiction under G.S. 97-10.2 to distribute the proceeds of an employer-employee settlement with a tortfeasor where the case against the tortfeasor had not been calendared for trial and no pretrial conference had been held, and where the settlement was sufficient to fully compensate the employer for workers' compensation paid to the employee. **Buckner v. City of Asheville**, 354.

The Industrial Commission was governed by G.S. 97-10.2(f) and not (j) in distributing proceeds of an employer-employee settlement with a tortfeasor. **Ibid.**

§ 94 (NCI3d). Findings of Commission; necessity for specific findings of fact

It was not error for the full Industrial Commission to adopt the deputy commissioner's opinion and award without clarifying whether the fatal subarachnoid hemorrhage was caused by the minor rupture decedent suffered when moving a desk for his employer. **Gilbert v. Entenmann's, Inc.**, 619.

§ 94.1 (NCI3d). Sufficiency of findings of fact; specific instances where findings are incomplete

The Industrial Commission did not make the necessary findings to support its conclusion that an employer was not entitled to monies paid for the employee's rehabilitation on the ground that there was no evidence that the particular services constituted medical treatment or supplies. **Buckner v. City of Asheville**, 354.

§ 96.6 (NCI3d). Conclusiveness of findings of fact in general; specific instances where findings are conclusive or sufficient

The Industrial Commission erred in a workers' compensation case by denying benefits for continuing disability based on plaintiff's failure to show that her work-related injury caused her inability to work where defendant conceded in its appellate brief that there was no dispute that plaintiff was injured at work while pulling a bobbin from a spindle; the record is devoid of evidence that plaintiff's

MASTER AND SERVANT – Continued

injury was caused by any event other than pulling a bobbin from a spindle; and defendant failed to produce expert testimony that the alleged precipitating event could not have caused the injury. **Radica v. Carolina Mills**, 440.

MORTGAGES AND DEEDS OF TRUST

§ 5 (NCI4th). Purchase-money mortgages

Under the doctrine of instantaneous seisin, a deed of trust securing the purchase price of property as well as construction or development loans is superior to a previously existing materialman's lien only to the extent that the deed of trust secures the purchase price of the property. **Dalton Moran Shook Inc. v. Pitt Development Co.**, 707.

A genuine issue of fact existed as to the extent to which a deed of trust secured amounts in addition to the purchase price of the land. **Ibid.**

§ 87 (NCI4th). Foreclosure; place of hearing; findings necessary to authorize sale

The trial court properly disallowed a foreclosure based upon findings that there was no valid debt and no default where the record supports findings that the notes and deed of trust were given based upon the understanding and for the specific consideration that no criminal proceedings would be instituted and such proceedings were subsequently instituted. **In re Foreclosure of Kitchens**, 175.

MUNICIPAL CORPORATIONS

§ 30.11 (NCI3d). Zoning ordinances; specific businesses, structures, or activities

An open air flea market does not come within the definition of "stores and shops conducting retail business" and is not a permitted use in a Neighborhood Trading District. **Moore v. Bd. of Adjustment of City of Kinston**, 181.

Petitioner's use of his property in a Residential Agricultural District for a wood yard does not come within the definition of "forestry," which is a permitted use in this zoning classification. **Ayers v. Bd. of Adjust. for Town of Robersonville**, 528.

§ 30.13 (NCI3d). Zoning; billboards and outdoor advertising signs

Zoning ordinances involving billboard removal after an amortization period do not constitute a taking and are lawful. **Naegele Outdoor Advertising v. City of Winston-Salem**, 758.

Plaintiff's inverse condemnation claim for the taking of its sign properties by enforcement of defendant's zoning ordinance accrued when the ordinance was adopted, and plaintiff's action was barred by the statute of limitations. **Ibid.**

§ 30.21 (NCI3d). Enactment or amendment of zoning ordinances; hearing

Landowners who petitioned for rezoning of their neighborhood from residential to commercial were not denied due process because several of the town commissioners stated before the public hearing that they would vote against rezoning. **Brown v. Town of Davidson**, 553.

§ 30.22 (NCI3d). Zoning ordinances; judgment and sufficiency of evidence to support judgment

Landowners in a predominantly black neighborhood failed to forecast proof of discriminatory intent or purpose required to support their claim of racial discrimination in the denial of their petition to rezone their neighborhood from residential

MUNICIPAL CORPORATIONS — Continued

to commercial where they showed only that similar petitions to rezone were allowed for white landowners on the other end of the street across a lake. **Brown v. Town of Davidson**, 553.

§ 61 (NCI4th). Validity of annexation procedures; application of test in relation to use, size, and population

The trial court properly concluded that an annexation area met the standards of the subdivision test set forth in G.S. 160A-48(c)(3) where figures which existed on the date of the public hearing showed compliance with the statute. **Biltmore Square Assoc. v. City of Asheville**, 459.

§ 117 (NCI4th). Attack on annexation; standing

Petitioners did not have standing to challenge an annexation proceeding as violating the Voting Rights Act where none of them were members of a racial or ethnic minority and none of them were registered to vote within the annexing city. **Biltmore Square Assoc. v. City of Asheville**, 459.

§ 369 (NCI4th). Role and authority of municipal civil service commissions generally

A trial court dismissal of a petition for lack of subject matter jurisdiction was affirmed where plaintiff was a police officer in Asheville who was denied a promotion, the Civil Service Board affirmed the denial, and plaintiff petitioned the court, alleging that he was eligible for promotion rather than that he was entitled to promotion. **O'Donnell v. City of Asheville**, 178.

NEGLIGENCE

§ 19 (NCI4th). Foreseeability; factors to be considered on question of foreseeability of emotional distress arising from concern for another

Plaintiff parents who went to their teenage son's fatal accident scene could not recover against defendant tortfeasor for negligent infliction of emotional distress since it was not reasonably foreseeable that defendant's negligence while driving an automobile would cause decedent's parents to suffer severe emotional distress. **Butz v. Holder**, 156.

§ 51 (NCI4th). Invitees; premises within scope of invitation

Plaintiff was an invitee while upon a neighbor's premises at the neighbor's request to help the neighbor with his boat. **Crane v. Caldwell**, 362.

§ 65 (NCI4th). Duty of care owed by stores and shopping centers

Defendant shopping center had a duty to warn invitees about a depressed water meter cover in an area of defendant's parking lot which was part of an easement granted by defendant to a sanitary district for the installation and maintenance of water lines. **Hartman v. Walkertown Shopping Center**, 632.

§ 95 (NCI4th). Sufficiency of particular evidence; duty of care; degree and standard

Defendants, who evaluated and provided services including residential treatment for Willie M. class members, were entitled to judgment as a matter of law in an action to recover for the wrongful death of plaintiff's intestate who was shot to death during a robbery by a minor who had been certified as a Willie M. class member where there was no dispute that defendants were aware of the killer's propensity for violence but the killer's participation in the Willie M. program was voluntary and defendants thus did not have custody and control of the killer. **King v. Durham County Mental Health Authority**, 341.

NEGLIGENCE — Continued

§ 147 (NCI4th). Contributory negligence as matter of law

Plaintiff was not contributorily negligent as a matter of law when he slipped and fell on wet steps leading to defendant's boat dock. **Crane v. Caldwell,** 362.

OBSTRUCTING JUSTICE

§ 15 (NCI4th). Sufficiency of evidence

There was insufficient evidence of specific intent to support conviction of the Director of Cottage Life at the Governor Morehead School for the Blind for obstruction of justice in failing to report alleged sexual abuse of a student. **State v. Eastman,** 347.

PARENT AND CHILD

§ 109 (NCI4th). Termination of parental rights; mental incapability; dependent child

The trial court's termination of respondent mother's parental rights on the ground that she is incapable of providing proper care and supervision of her child due to mental illness was supported by clear, cogent and convincing evidence. **In re Guynn,** 114.

The DSS is not required to establish that it made diligent efforts to remedy the parents' mental deficiencies and to reunite the family in order to commence a termination of parental rights proceeding based upon mental illness or retardation. **Ibid.**

The evidence in a termination of parental rights hearing did not support the finding that the parents were mentally retarded within the meaning of G.S. 7A-289.32(7) where the parents had IQs of 71 and 72 but the record does not reflect that they exhibited significant defects in adaptive behavior and neither psychologist was willing to classify the parents as retarded, instead using the label borderline. **In re LaRue,** 807.

PLEADINGS

§ 19 (NCI4th). Evidentiary effect of statements in pleadings; admissions in answer

The trial court erred in an action between two insurance companies to determine which excess insurance clause applied by finding that an allegation in INA's counterclaim which referred to other "valued" insurance contained a typographical error and should have referred to other "valid" insurance. Allegations contained in the pleadings of the parties constitute judicial admissions which are binding on the pleader. **Universal Leaf Tobacco Co. v. Oldham,** 490.

§ 61 (NCI4th). Sanctions generally

The trial court did not err in awarding Rule 11 sanctions against plaintiff's attorney where it could reasonably be inferred from plaintiff's filing of a third-party complaint two weeks before trial that the complaint was filed for an improper purpose such as to delay trial or to increase the cost of litigation. **Benton v. Thomerson,** 293.

§ 63 (NCI4th). Imposition of sanctions in particular cases

The trial court did not err in imposing Rule 11 sanctions on defendant for his filing of a motion to dismiss based on lack of service where defendant knew that the motion was not facially plausible because he had made a general ap-

PLEADINGS — Continued

pearance, and he knew that the motion was not well grounded in fact because he failed to disclose all of the relevant facts to his new counsel. **Bumgardner v. Bumgardner**, 314.

§ 364 (NCI4th). Standard in determining motion to amend; discretion of court, generally

There was no abuse of discretion in the denial of a motion to file a second amended complaint in an action arising from the denial of an insurance rate increase where the motion was denied based on plaintiff's failure to exercise due diligence in filing the motion before the eve of trial and the likelihood of further delay and undue prejudice to defendant. **Golden Rule Insurance Co. v. Long**, 187.

PROCESS AND SERVICE

§ 14 (NCI4th). Defects or omissions generally; cure and amendment

A slight irregularity by the inclusion of the "Sheriff of Alamance County" in the directory paragraph of the summons was not fatal where the summons was also directed to defendant city, and the city was properly named as the defendant in the complaint and in the caption of the summons. **Steffey v. Mazza Construction Group**, 538.

§ 26 (NCI4th). Correction of particular defects; misnomer or mistake in name of party

The naming of defendant in the complaint and summons as Kendale Pawn Shop when the legal entity for the pawn shop is KPS, Inc., d/b/a Kendale Pawn Shop was a mere misnomer which defendant waived by answering the complaint and appearing at trial. **Kimbrell's of Sanford v. KPS, Inc.**, 830.

§ 30 (NCI4th). Who may make service; when proper officer not available

A clerk is not required or authorized by Rule 4(h) to appoint a private process server as long as the sheriff is not careless in executing process. **Williams v. Williams**, 226.

The sheriff did not neglect to serve process so as to authorize the clerk to appoint a private process server where the sheriff's deputies attempted on two occasions to serve process at the address provided by plaintiff, and deputies were told by defendant's grandmother that defendant did not live there and she did not know his whereabouts. **Ibid.**

§ 69 (NCI4th). Service on counties, cities, towns, villages and other local public bodies

Defendant city was properly served with process where plaintiffs sent a copy of the summons and complaint by certified mail addressed to the city in care of the city manager, and the receipt was signed by an individual as agent for the addressee. **Steffey v. Mazza Construction Group**, 538.

PUBLIC OFFICERS AND EMPLOYEES

§ 35 (NCI4th). Personal liability generally; negligence

There was insufficient evidence of malice to hold the Insurance Commissioner personally liable for the denial of a rate increase. **Golden Rule Insurance Co. v. Long**, 187.

§ 39 (NCI4th). Criminal liability; sufficiency of evidence

The Director of Cottage Life at the Governor Morehead School for the Blind was merely a State employee and not an official of the State and thus could

PUBLIC OFFICERS AND EMPLOYEES – Continued

not be convicted of the crime of failure to discharge duties under G.S. 14-230 based on his failure to report alleged sexual abuse of a student. **State v. Eastman,** 347.

QUASI CONTRACTS AND RESTITUTION

§ 18 (NCI4th). Unjust enrichment generally

The trial court properly dismissed plaintiff's action against his former wife for unjust enrichment where it was no more than an attempt to attack collaterally the parties' earlier equitable distribution judgment. **Smith v. Smith,** 410.

QUIETING TITLE

§ 9 (NCI4th). Right to maintain action; required interest of plaintiff

The trial court properly entered summary judgment for defendants in an action to quiet title where the action was commenced more than three months before plaintiffs could have acquired an interest in the property by adverse possession. **Foreman v. Sholl,** 282.

§ 17 (NCI4th). Pleadings generally; allegations required

The trial court properly treated plaintiffs' complaint as one seeking to quiet title instead of one in a processioning proceeding where the allegations placed in issue title to a portion of the land in controversy. **Chappell v. Donnelly,** 626.

§ 27 (NCI4th). Sufficiency of evidence generally; summary judgment

Plaintiffs' evidence was insufficient where they offered the deeds in their record title but failed to tender any evidence indicating the on-the-ground location of the disputed boundary lines referenced in those deeds. **Chappell v. Donnelly,** 626.

RAPE AND ALLIED OFFENSES

§ 82 (NCI4th). Sufficiency of evidence; first-degree rape generally

The evidence was sufficient for the jury in a prosecution for first-degree rape of defendant's stepdaughters and sexual activity by a substitute parent. **State v. Ballew,** 674.

§ 190 (NCI4th). Instructions on lesser offenses; second-degree rape involving dangerous or deadly weapons

The trial court did not err in failing to instruct on second-degree rape where all the evidence showed that a knife and a gun were displayed during the crime. **State v. Mustafa,** 240.

RECEIVERS

§ 9 (NCI4th). Appointment of receiver to preserve property pending litigation or appeal

The trial court had no statutory or equitable authority to appoint a receiver pending litigation for a limited partnership which owned an apartment complex and which automatically dissolved upon the bankruptcy of the general partner where the evidence showed that the apartment complex was in excellent financial condition and there was no evidence that the complex or its rents and profits were in danger of being lost or materially injured or impaired. **Williams v. Liggett,** 812.

RULES OF CIVIL PROCEDURE

§ 56 (NCI3d). Summary judgment

The trial court did not err in an action for sexual harassment and emotional distress by refusing to consider affidavits produced for the first time at the summary judgment hearing. **Phelps v. Vassey**, 132.

SCHOOLS

§ 70 (NCI4th). Local school budget generally

An appeal from the trial of a dispute between a board of education and a board of county commissioners as to the amount appropriated to maintain a system of free public schools in the county for the 1992-93 school year is moot where that school year has ended. **Cumberland Co. Bd. of Educ. v. Cumberland Co. Bd. of Comrs.**, 164.

SEARCHES AND SEIZURES

§ 58 (NCI4th). Observation of objects in plain view; reasonable belief that item is contraband or evidence of a crime

The trial court properly refused to suppress photographs of various nude women seized during a search of defendant's residence under a valid warrant for drugs and drug paraphernalia since the officers could properly seize the photographs because they believed the photographs could be connected to a crime involving pornography. **State v. Cummings**, 368.

§ 109 (NCI4th). Hearsay statements of informants; sufficiency of particular affidavits in drug cases

An affidavit contained sufficient information to establish probable cause for issuance of a warrant to search for drugs and drug paraphernalia although defendant contended that the affidavit falsely stated that one informant had given reliable information in the past about drug deals. **State v. Cummings**, 368.

SECURED TRANSACTIONS

§ 62 (NCI4th). Perfection without filing, generally

Plaintiff was entitled to recover from defendant pawn shop a VCR sold to defendant purchaser under a purchase money security agreement where the purchaser immediately pawned the VCR, failed to make further payments, and defaulted on the security agreement. **Kimbrell's of Sanford v. KPS, Inc.**, 830.

STATE

§ 1 (NCI3d). Sovereignty and authority

Sovereign immunity was not waived by the State for an action against the Insurance Commissioner arising from the denial of a rate increase by the purchase of liability insurance because the waiver of immunity extends only to injuries which are specifically covered by the insurance policy. **Golden Rule Insurance Co. v. Long**, 187.

§ 1.1 (NCI3d). Open Meetings Law

A county board of education was required by the Open Meetings Law to deliberate its action to give its members a pay raise at a meeting open to the public. **Jacksonville Daily News Co. v. Onslow County Bd. of Education**, 127.

TAXATION

§ 28.5 (NCI3d). Assessment of additional income tax

The trial court correctly concluded that plaintiff's failure to notify the Secretary of Revenue of changes made by the IRS extended the statute of limitations for assessment. **McFarland v. Justus**, 107.

The trial court did not err by finding that plaintiffs had not made a sale of real property in 1982 and that the proceeds from the condemnation of a portion of a farm constituted income in 1984. **Ibid.**

§ 30 (NCI4th). Exemption of particular properties and uses; charitable purposes

Stipulations that the taxpayer was organized as a nonstock, nonprofit hospital which was open to all citizens and which did not deny emergency treatment to patients unable to pay for their care were sufficient to show that the taxpayer is a charitable hospital pursuant to G.S. 105-278.8. **In re Moses H. Cone Memorial Hospital**, 562.

The Property Tax Commission erred in finding that a hospital's child care center competed directly with commercial day care centers and that the hospital's center was of little or no benefit to the hospital in recruitment. **Ibid.**

A hospital's child care center served a charitable hospital purpose and was thus exempt from ad valorem taxes. **Ibid.**

§ 83 (NCI4th). Present use valuation

The relevant time for determining the eligibility of property for present use valuation under the first prong of G.S. 105-277.3(c) is after the property has been transferred to the new owner, and the forestland in question qualified for present use valuation at the time title was transferred to the taxpayer. **In re Appeal of Davis**, 743.

The four-year ownership requirement of G.S. 105-277.3(b) did not apply to preclude the taxpayer's property from qualifying for present use valuation where the property met the requirements of the alternative method set forth in G.S. 105-277.3(c). **Ibid.**

§ 99 (NCI4th). Property Tax Commission; duties as to appeals from appraisals and assessments

The Guilford County Tax Assessor had no standing to appeal, in either his official or his individual capacity, to the Property Tax Commission, and the Commission had no jurisdiction to hear his appeal. **In re Moses H. Cone Memorial Hospital**, 562.

TRIAL

§ 6 (NCI3d). Stipulations

The trial court did not err in entering an order based on the results of a survey in a trespass action where plaintiffs made a clear and definite agreement with all parties in open court to be bound by the results of a survey conducted by an independent surveyor appointed by the court. **Moore v. Richard West Farms, Inc.**, 137.

§ 27 (NCI4th). Continuances; military service; Soldiers' and Sailors' Civil Relief Act

The trial court's findings of fact supported its denial of defendant's motion for a stay pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940. **Judkins v. Judkins**, 734.

TRIAL — Continued

§ 456 (NCI4th). Issues formulated in the alternative; use of "and/or"

The trial court deprived each defendant of his right to a unanimous and unambiguous verdict by submitting to the jury an issue as to whether each defendant deprived plaintiff of any of her rights under the First "or" Fourteenth Amendments. **Edwards v. Hardin**, 613.

§ 482 (NCI4th). Waiver of right to poll jury

Defendant waived his right to poll the jury where the jury had "dispersed" before defendant requested that the jury be polled. **State v. Ballew**, 674.

TRUSTS

§ 11 (NCI3d). Actions by beneficiaries against trustee

Under G.S. 36A-28, the Court of Appeals was unable to review whether the record contained sufficient evidence to support the trial court's findings of fact in an action to remove a co-trustee. **Smith v. Underwood**, 45.

There was a clear abuse of discretion by the trial court in retaining respondent as a co-trustee. **Ibid.**

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices in general

The trial court properly submitted the issue of unfair and deceptive acts or practices in an action arising from the sale of a boat where there was sufficient evidence for the jury to conclude that defendant seized upon the commercial use exclusion in a bad faith attempt to avoid responsibility for the defective boat. **Barbee v. Atlantic Marine Sales & Service**, 80.

There was ample evidence in the record to support the trial judge's findings and those findings in turn support the award of attorney fees in an action for unfair and deceptive practices arising from the sale of a boat. **Ibid.**

A claim for unfair or deceptive practices arising from the sale of a boat was not barred by the four year statute of limitations of G.S. 75-16.2. **Ibid.**

Plaintiff was allowed a double recovery in an action arising from the sale of a boat where the court's order that defendant, the manufacturer of the boat, indemnify the seller of the boat makes it clear that defendant was being held liable for violation of G.S. 75-1.1 and the breach of warranty. **Ibid.**

The Insurance Commissioner did not exceed his authority and become personally liable by violating the Unfair Trade Practices Act in his conditional approval of a rate increase. **Golden Rule Insurance Co. v. Long**, 187.

Employer-employee relationships do not fall within the scope of G.S. 75-1.1 and the trial court properly entered summary judgment on a counterclaim for unfair and deceptive practices alleging the fraudulent inducement of retirement. **Liggett Group v. Sunas**, 19.

The trial court did not err by granting summary judgment for the Jaycees on an unfair or deceptive practices claim where the Jaycees were not able to pay the prize in a golf tournament they had organized and sponsored because insurance had not been in place as planned. The golf tournament was not a business activity as defined by Chapter 75. **Malone v. Topsail Area Jaycees**, 498.

Defendant Jaycees did not violate G.S. 75-32 by not paying a prize in a golf tournament because that statute specifically governs the use of language that

UNFAIR COMPETITION — Continued

has a tendency to lead a reasonable person to believe he has won a contest or anything of value and plaintiff was the winner of this contest. **Ibid.**

Defendant Jaycees did not violate G.S. 75-13 where they sponsored a golf tournament with a prize for a hole in one on a particular hole, gave plaintiff a simulated check after she made a hole in one, and told her later that they could not pay because insurance had not been in place. This statute does not prevent the described conduct if the recipient has actually contracted for the goods, property, or services which plaintiff did by entering the tournament and hitting the hole in one. **Ibid.**

An action arising from the sale of a truck which blew a piston 8 to 12 miles from defendant's business was remanded where plaintiff alleged in his complaint, presented evidence, and argued to the trial court that defendant's representations were in the nature of warranties, and the trial court's order and award of damages was premised entirely upon the court's determination that defendant's representations constituted unfair or deceptive acts or practices and did not determine if the representations were warranties which were breached. **Mehovic v. Ken Wilson Ford**, 559.

VENDOR AND PURCHASER

§ 8 (NCI3d). Right to damages for breach of contract to convey

Evidence of the actual sales price of a home one year after plaintiffs' alleged breach of a contract to purchase the home was not relevant on the issue of damages. **Chris v. Epstein**, 751.

North Carolina has not adopted the "ultimate price" rule which permits the use of the difference between the ultimate resale price and the contract price as an alternative measure of damages. **Ibid.**

The trial court in an action for breach of a contract to purchase a home properly excluded evidence of costs incurred by the sellers to paint the sheetrock in their garage and to rent furniture for their new home so they could leave the subject home furnished to enhance its appearance since these damages were not within the contemplation of the parties. **Ibid.**

A $20,000 earnest money deposit did not serve as liquidated damages for breach of a contract to purchase a home. **Ibid.**

VENUE

§ 1 (NCI3d). Definition and nature of venue

A North Carolina defendant did not knowingly and intelligently consent to forum selection and consent to jurisdiction clauses giving the courts of New Jersey jurisdiction over a computer lease agreement, and the clauses were thus unenforceable. **Bell Atlantic Tricon Leasing Corp. v. Johnnie's Garbage Service**, 476.

WATERS AND WATERCOURSES

§ 6 (NCI3d). Title and rights in navigable waters, beds, banks, and shores

Grants at issue in this case were void to the extent that they purported to convey a fee simple interest in the lands submerged beneath the navigable waters of the Albemarle Sound. **RJR Technical Co. v. Pratt**, 511.

WATERS AND WATERCOURSES — Continued

Plaintiff owns an exclusive easement in the submerged lands described in the two grants in question for the limited purposes, including fishing, for which such grants were authorized by the General Assembly. **Ibid.**

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