NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 114

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1995

CITE THIS VOLUME

114 N.C. App.

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CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

GUILFORD COUNTY DEPARTMENT OF EMERGENCY SERVICES, GUILFORD COUNTY PLANNING AND DEVELOPMENT DEPARTMENT, GUILFORD COUNTY DEPARTMENT OF HEALTH, AND GUILFORD COUNTY, PLAINTIFFS v. SEABOARD CHEMICAL CORPORATION, AND SCC OF GUILFORD, INC., DEFENDANTS

No. 9318SC419

(Filed 15 March 1994)

1. **Appeal and Error § 209 (NCI4th)— no reference to judgment appealed from—notice of appeal insufficient to vest jurisdiction in Court of Appeals**

Defendant's notice of appeal was insufficient to vest the Court of Appeals with jurisdiction to review the trial court's 3 June 1992 order granting judgment on the pleadings for plaintiffs as to defendant's defenses and counterclaims for estoppel, laches, preemption, waiver, and preexisting, nonconforming use of property, since defendant completely omitted in its notice of appeal any reference to the 3 June 1992 judgment, and it could not be fairly inferred that defendant also intended to appeal from this judgment.

Am Jur 2d, Appeal and Error § 491.

2. Courts § 70 (NCI4th)— counterclaims for taking and inverse condemnation—counterclaims not raised by certiorari—jurisdiction of trial court

The trial court erred in concluding that it lacked subject matter jurisdiction over defendant's counterclaims for taking, inverse condemnation, and violation of 42 U.S.C. § 1983 because defendant did not administratively appeal the denial of the special use permit by writ of certiorari to superior court, since review by writ of certiorari under N.C.G.S. § 153A-340 does not encompass the adjudication of issues of the type raised in the counterclaim, but the superior court did have jurisdiction in an original action to entertain the counterclaims asserted by defendant.

Am Jur 2d, Courts §§ 151 et seq.

3. Eminent Domain § 35 (NCI4th)— county's enforcement of hazardous waste ordinance—other beneficial or productive use of property allowed—no "taking" of property

The trial court did not err in determining that there was no taking in violation of the Fifth or Fourteenth Amendments to the United States Constitution or the law of the land clause of the North Carolina Constitution by plaintiff county in its enforcement of its hazardous waste ordinance, since the government action of denying defendant a special use permit did not deprive defendant of all economically beneficial or productive use of defendant's property; plaintiff's ordinances allowed many uses of defendant's property both before and after its use as a hazardous waste processing site; and the costs of cleaning up the contamination caused by defendant's operations was not a factor in whether there was any economically beneficial or productive use because, even assuming defendant continued to operate a hazardous waste reclamation facility, the contamination was required to be cleaned up.

Am Jur 2d, Eminent Domain §§ 157 et seq.

Supreme Court's views as to what constitutes "taking," within meaning of Fifth Amendment's prohibition against taking of private property for public use without just compensation. 89 L. Ed. 2d 977.

4. Eminent Domain § 35 (NCI4th)— plaintiff's actions not taking of property—adequate state remedy available to defendant—no claim under federal statute

There was no merit to defendant's contention that it had a cause of action under 42 U.S.C. § 1983 because plaintiff county, in denying defendant a hazardous waste permit, deprived it of due process and property rights secured by the Fifth and Fourteenth Amendments to the United States Constitution, since plaintiff's actions did not constitute a taking under the Fifth and Fourteenth Amendments, and there existed adequate state remedies to review the decision of the county for unreasonableness, arbitrariness, and capriciousness.

Am Jur 2d, Eminent Domain §§ 157 et seq.

Supreme Court's views as to what constitutes "taking," within meaning of Fifth Amendment's prohibition against taking of private property for public use without just compensation. 89 L. Ed. 2d 977.

5. Injunctions § 8 (NCI4th)— defendant in bankruptcy—injunction still appropriate

There was no merit to defendant's contention that the trial court erred in granting plaintiffs' request for a permanent injunction because the issue was moot, as defendant was bankrupt and not operating except for closure and post-closure activities, since the court was unaware of the current status of defendant's bankruptcy proceedings, and the court could not say that there was not a sufficient real or immediate interest evidencing an existing controversy justifying the dissolution of the permanent injunction.

Am Jur 2d, Injunctions §§ 39-47.

Appeal by defendants from judgment entered 15 October 1992 in Guilford County Superior Court by Judge Howard R. Greeson, Jr. Heard in the Court of Appeals 2 February 1994.

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

Frazier, Frazier & Mahler, by Harold C. Mahler and Torin L. Fury, for defendant-appellants.

GREENE, Judge.

SCC of Guilford, Inc., formally Seaboard Chemical Corporation, and Seaboard Chemical Corporation (Seaboard), appeal from an order signed 15 October 1992, barring their counterclaims for failing "to petition for review by the Superior Court in the nature of certiorari pursuant to G.S. 153A-340" and granting Guilford County Department of Emergency Services, Guilford County Planning and Development Department, Guilford County Department of Health, and Guilford County's (plaintiffs) request for a permanent injunction, enjoining Seaboard from using property in Guilford County (the County) as a hazardous waste or toxic substance storage facility, treatment facility, transportation facility and/or disposal facility until a special use permit under the County's Hazardous Waste Ordinance (HWO) is obtained or until the HWO is preempted by State or Federal law.

Seaboard, a North Carolina corporation, and its predecessors in interest began operating a hazardous waste reclamation and recovery processing facility in southwestern Guilford County in the 1960's located at all relevant times in an area zoned M-2 (Industrial) which permitted a wide range of manufacturing, trade, utility, and other uses. In the early 1980's, the Federal Government passed the Resource Conservation and Recovery Act (RCRA) which regulated reclamation facilities, and relevant provisions of the North Carolina Waste Management Act became effective soon thereafter. These State and Federal regulations required a two-part federal permitting process, Part A (interim) and Part B (permanent), all to be administered by the State of North Carolina. Seaboard filed for Part A interim status which is a notification requirement for facilities in existence on the date that the rules became effective acknowledging their existence. Seaboard applied for a Part B permanent permit in 1982.

In 1984, the County amended its zoning ordinance by passing the HWO which regulated hazardous waste facilities, including existing businesses, and required existing covered entities, including Seaboard, to obtain a special use permit within one year of 6 September 1984. Seaboard received a letter from James Elza (Elza), Director of the County Planning and Development Department, which states that he "hereby extends the one year and one month limitation for issuance until further review by the county is made." Elza also told Melton Jewell (Jewell), an investor in Seaboard,

that no special use permit was required as long as Seaboard was making a good faith effort toward obtaining its Part B permit.

On 22 April 1987, the County passed the Watershed Critical Area Protection District Ordinance (WCA ordinance) setting forth restrictions on certain activities located in the watershed critical area (WCA) in an effort to protect existing and proposed reservoirs from water quality degradation. The WCA ordinance prohibited the use of "hazardous waste storage or treatment" in the WCA. County ordinance Section 2-8 states that "[i]t is the intent of the ordinance to permit these nonconformities to continue but to discourage their continued use." Therefore, if Seaboard's use of the property was discontinued, it would not be permitted to store or treat hazardous waste within the WCA.

In the fall of 1987, Seaboard wished to build a roof over the containment area at the Seaboard plant. The County Board approved installation of the roof; however, a dispute arose over the location of a firewall within the area covered by the roof. The State Building Code Council settled this dispute, and the County issued Seaboard a building permit on 15 September 1987. Seaboard wished to deviate from the approved design of the firewall, but this request was denied by County officials on 14 October 1988. At this time, the Guilford County Planning Department Director told Seaboard it would have to apply for a special use permit under the HWO. On 5 December 1988, the County Attorney sent Seaboard a letter indicating that Seaboard was in violation of a number of provisions of the Guilford County Fire Code and Building Code and the HWO and that a lawsuit would be filed if it had not complied with the County Ordinances by 5 January 1989. On 16 December 1988, after Seaboard applied for a special use permit, plaintiffs directed Seaboard to apply for waivers from the HWO, which Seaboard did on 29 December 1988. Seaboard was successful in correcting the fire and building code violations, but was not successful in meeting the requirements of the HWO or the State's Part B Permit under RCRA.

On 13 January 1989, plaintiffs filed a complaint in Guilford County Superior Court against Seaboard for alleged violations of the County Fire Code, Building Code, the HWO, and the Part B Permit requirement and a motion for a preliminary injunction restraining Seaboard from further operations until the violations were remedied and a special use permit was obtained. Seaboard

sought and retained several extensions to file answer while it applied for the special use permit.

In late January 1989, the County began its process of hearings, and the County Advisory Board of Environmental Quality made negative recommendations to the County Planning Board. On 10 May 1989, the Planning Board held a public hearing and recommended denial of the special use permit. Following a full quasi-judicial hearing before the Board of County Commissioners on 25 June 1989 and 29 June 1989 and a public hearing on 26 June 1989, the Board of County Commissioners denied Seaboard's requests for waivers from the provisions of the HWO and denied the special use permit on the grounds that the operation of a facility violated the HWO because it was (1) in a watershed; (2) use of the property has resulted in release of hazardous substances onto the land and into the waters located in Guilford County; (3) history of management shows inability to comply with applicable state, federal and county regulations pertaining to public health and safety; and (4) the use violates several provisions of the Guilford County Zoning Ordinance.

On 18 August 1989, Seaboard filed an answer to plaintiffs' complaint and asserted the defenses of preemption, estoppel, preexisting use of property, and waiver and asserted compulsory counterclaims for (1) taking of private property for public use without just compensation; (2) inverse condemnation under N.C. Gen. Stat. § 40A-51; (3) violation of due process; (4) equitable estoppel and laches; and (5) a violation of 42 U.S.C. § 1983. On 15 November 1989, plaintiffs made a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure.

The State formally denied Seaboard a Part B permit on 15 November 1989; therefore, Seaboard was involved in a seven year application process without ever qualifying for the Part B permit. In December 1989, Seaboard filed for bankruptcy under Chapter 11 which was converted to Chapter 7 on 7 February 1990. On 31 January 1992, the Bankruptcy Court transferred the right to prosecute the counterclaims for inverse condemnation against plaintiffs to Jewell and James E. Reittinger (Reittinger).

On 3 June 1992, Judge Albright granted partial judgment on the pleadings for plaintiffs as to the defenses of estoppel, laches, preemption, waiver and preexisting use of property, and the counterclaims of violation of due process, equitable estoppel, and laches, but denied plaintiffs' motion under Rule 12(c) as to Seaboard's

counterclaims for a taking of private property for public use without just compensation, inverse condemnation pursuant to N.C. Gen. Stat. § 40A-51, and the 42 U.S.C. § 1983 claim. The case was tried before the Honorable Howard R. Greeson, Jr. at the 7 September 1992 Guilford County Superior Court civil session.

Seaboard's expert, John M. McCracken (McCracken), who is in the real estate appraisal and consulting business, testified that the value of Seaboard's property, if it did not have contamination, was $700,000.00, that "the property had . . . [no] other viable uses" besides a waste disposal business "due to the nature of the surrounding area," and that "[t]he other uses were not economically feasible after June 30, 1989 because of . . . the contamination that existed on the property." McCracken also stated that "if you take all of the contamination out of the picture, one would expect M-2 property in Guilford County in this type and location [as Seaboard's property] to sell for between $20,000.00 and $29,000.00 per acre," but "because the cost of cleanup exceeds any reasonable value of the property for any use other than as a hazardous waste facility," "the Seaboard property, other than as a hazardous waste facility, has a value of zero dollars an acre." McCracken, however, did not explore what the value of Seaboard's property might have been to the City of High Point as a nonhazardous recyclable facility.

William Meyer (Meyer), Division Director for the Division of Solid Waste Management at the Department of Environment, Health and Natural Resources for the State of North Carolina, testified for Seaboard. He stated that "[t]he groundwater at Seaboard is grossly contaminated," "the State found materials that are toxic organics that were 1,000 times higher than the concentration allowed in drinking water," "it might cost several million dollars to clean up the groundwater at the Seaboard Chemical site," "[t]his groundwater would be required to [be] cleaned up whether or not Seaboard remained in operation," and "even if you left . . . [the Seaboard site] as a hazardous waste facility, you would still have to remediate that superficial area to the extent that workers on the site would not be unduly exposed due to the concentrations you leave." Meyer also stated that "[i]f Seaboard had been issued the Special Use Permit by the County, Seaboard would still be required to clean up the site, including the groundwater, in order to keep using it as a hazardous waste facility." He explained that "[p]art of the denial letter in 1989 was to put Seaboard on notice that it was required to submit a post-closure and corrective action

permit application. What Seaboard was denied was an operational permit. Seaboard was still required to clean up the groundwater and to decontaminate the closed site." In addition, the State decided that the generators that used Seaboard's sites "will proceed to clean the site up, using the generators' funds to sufficiently clean the site up, decontaminate it and address the groundwater contamination problem." "The hazardous waste rules themselves require that the site be decontaminated to the extent that, for whatever in-use you choose, it makes a standard that will protect the in-use."

Elza testified for plaintiffs that Seaboard's property was zoned M-2 so that there were 54 permitted uses in 1988, 1989, 1990 and 1991 under the ordinance effective until 31 December 1991, and there were 150 permitted uses of Seaboard's property under the present ordinance. Elza also stated that "[a] bakery is an allowable use under Seaboard's property. The contamination of the site does not have to do with whether or not the use can be put on that site, if you put a bakery there." He also stated that "Seaboard could also have applied for a new Special Use Permit under different conditions after a year, which Seaboard did not do."

By judgment dated 15 October 1992, the trial court concluded that Seaboard's counterclaims were not barred by the statute of limitations and the assignment of Seaboard's inverse condemnation claims to Jewell and Reittinger were not invalid under North Carolina law. The trial court also held it lacked jurisdiction to consider Seaboard's counterclaims because it had not administratively appealed the denial of the special use permit under HWO by writ of certiorari to Superior Court and if it had jurisdiction over the counterclaims, then no taking occurred by plaintiffs' actions in enforcing the HWO, and the evidence did not support counterclaims for inverse condemnation or a 42 U.S.C. § 1983 action. The trial court entered a permanent prohibitory injunction against use of Seaboard's site as "a hazardous waste or toxic substance storage facility, treatment facility, transportation facility and/or disposal facility" unless the special use permit required by the HWO is first obtained. Seaboard's notice of appeal dated 16 November 1992 stated that "Seaboard . . . give[s] Notice of Appeal . . . from the Judgment entered on October 15, 1992 . . . ."

The issues presented are whether (I) Seaboard's notice of appeal was sufficient to vest this Court with jurisdiction to review

the 3 June 1992 order granting judgment on the pleadings for plaintiffs as to Seaboard's defenses and counterclaims for estoppel, laches, preemption, waiver, and preexisting, nonconforming use of property; (II) the trial court erred in concluding that it lacked subject matter jurisdiction over Seaboard's counterclaims; (III) plaintiffs' actions in enforcing the HWO constituted a "regulatory taking" of private property in violation of the 5th and 14th Amendments to the United States Constitution, the "law of the land" clause of the North Carolina Constitution, and 42 U.S.C. § 1983; and (IV) the trial court erred in granting plaintiffs' request for a permanent injunction.

I

[1] "Proper notice of appeal requires that a party 'shall designate the judgment or order from which appeal is taken . . .'." N.C.R. App. P. 3(d) (1993); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990), and this Court cannot waive the jurisdictional requirements of Rule 3 if they have not been met. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 101 L. Ed. 2d 285, 291 (1988); *Von Ramm*, 99 N.C. App. at 156, 392 S.E.2d at 424. "[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." *Smith v. Independent Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979) (emphasis added).

In this case, because Seaboard completely omitted in its notice of appeal any reference to the 3 June 1992 judgment granting a partial judgment on the pleadings in favor of plaintiffs on Seaboard's defenses and counterclaims of estoppel, laches, preemption, waiver, and preexisting, nonconforming use of property, it cannot be "fairly inferred" that Seaboard also intended to appeal from this judgment. As such, this Court only has jurisdiction to review the appeal of the trial court's 15 October 1992 order. *See Von Ramm*, 99 N.C. App. at 157, 392 S.E.2d at 425 (notice of appeal from order denying motion to set aside earlier child support order referred only to denial to set aside and did not present underlying judgment for review); *Chapparal Supply v. Bell*, 76 N.C. App. 119, 331 S.E.2d 735 (1985) (appeal of denial of Rule 60 motion to set aside entry of summary judgment did not include appeal of underlying sum-

mary judgment); *Brooks, Comm'r of Labor v. Gooden*, 69 N.C. App. 701, 318 S.E.2d 348 (1984) (notice of appeal from judgment of contempt did not infer intent to appeal from subsequent judgment dismissing counterclaim).

II

[2] Under N.C. Gen. Stat. § 153A-340, every decision of a county board of commissioners to issue or deny a special use permit "shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C.G.S. § 153A-340 (1991). Plaintiffs argue in their brief that because Seaboard failed to raise the issues of taking, inverse condemnation, and violation of 42 U.S.C. § 1983 by certiorari pursuant to Section 153A-340, they are estopped from raising such issues in the superior court. We disagree.

The scope of review for a court reviewing a decision under Section 153A-340 includes:

(1) Reviewing the record for errors in law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Concrete Co. v. Board of Comm'rs, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980) (scope of review under Section 160A-388(e) for town decisions on conditional use permits which contains identical language to Section 153A-340). Thus, review pursuant to writ of certiorari under Section 153A-340 does not encompass the adjudication of issues of the type raised in the counterclaim, that is, whether the denial of the special use permit constitutes a taking without the payment of just compensation, inverse condemnation or a violation of 42 U.S.C. § 1983. *See Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990) (petition for writ of certiorari to review decision of town denying subdivision

application improperly joined with cause of action alleging constitutional violations pursuant to 42 U.S.C. §§ 1983 and 1988, and N.C.G.S. § 40A-8); *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985) (issue of whether zoning ordinance was unconstitutional as to plaintiff not properly before this Court because Board only had authority to grant or deny permit, and superior court, and this Court, had statutory power only to review issue of whether variance was properly denied).

Accordingly, the superior court would not have had jurisdiction to adjudicate the counterclaims asserted by Seaboard had they been raised by certiorari pursuant to Section 153A-340. The superior court, however, does have jurisdiction in an original action to entertain the counterclaims asserted by Seaboard. N.C.G.S. § 7A-240 (1989). For these reasons, the trial court erred in determining that it lacked subject matter jurisdiction over Seaboard's counterclaims.

III

Although the trial court erred in determining that it lacked subject matter jurisdiction to entertain Seaboard's counterclaims, we agree that plaintiffs' enforcement of the HWO did not constitute a "regulatory taking" of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution, the "law of the land" clause of the North Carolina Constitution, and 42 U.S.C. § 1983.

A. Seaboard's Claims under the Fifth and Fourteenth Amendments to the United States Constitution and the "Law of the Land" Clause of the North Carolina Constitution

[3] Although the North Carolina Constitution does not expressly prohibit the taking of private property for public use without payment of just compensation, our Supreme Court has considered this fundamental right as part of the "law of the land" clause in article I, section 19 of our Constitution. *Armstrong v. Armstrong*, 85 N.C. App. 93, 97-98, 354 S.E.2d 350, 353 (1987), *rev'd on other grounds*, 322 N.C. 396, 368 S.E.2d 595 (1988). We must therefore determine whether, under the "ends-means" test employed by our Courts, the particular exercise of police power by the government, i.e., Guilford County's enforcing the HWO, was legitimate, whether the means chosen to regulate are reasonable, and "whether the ordinance was invalid because the interference with the plaintiffs' use of the property amounted to a taking." *Finch v. City of Durham*,

325 N.C. 352, 363, 384 S.E.2d 8, 14, *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989); *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261-62, 302 S.E.2d 204, 208 (1983).

Because the legitimacy of the County ordinance and its relation to the public health and welfare are not contested, we need only address whether the ordinance is invalid because it constitutes a taking. Our North Carolina cases discuss whether or not action constitutes a taking in terms of whether the owner is left with any "practical use" and "reasonable use" of his property. *Finch*, 325 N.C. at 366, 384 S.E.2d at 15. The federal court interpretations of the federal Fifth and Fourteenth Amendments "due process of law" hold that a regulatory taking occurs only if the government action deprives the owner of all economically beneficial or productive use. *Lucas v. South Carolina Coastal Council*, --- U.S. ---, ---, 120 L. Ed. 2d 798, 815 (1992). We find that these tests are consistent and therefore analyze Seaboard's state and federal constitutional claims together. *See Finch*, 325 N.C. at 366, 384 S.E.2d at 15.

In this case, the government action of denying Seaboard a special use permit did not deprive Seaboard of "all economically beneficial or productive use." Guilford County's ordinances allowed many uses of Seaboard's property both before and after its use as a hazardous waste processing site. The costs of cleaning up the contamination caused by Seaboard's operations is not a factor in whether there is any "economically beneficial or productive use" because even assuming Seaboard continued to operate a hazardous waste reclamation facility, the contamination is required to be cleaned up. Seaboard was required to clean up ground and groundwater contamination under State and Federal laws whether or not it was in operation. Therefore, not all the loss in value of Seaboard's property resulted from the County's denial of a special use permit. Thus, the trial court did not err in determining that there was no taking in violation of the Fifth or Fourteenth Amendments to the United States Constitution or the "law of the land" clause of the North Carolina Constitution by the County in its enforcement of the HWO. Because we have determined that there was no "taking," the evidence does not support a claim under N.C. Gen. Stat. § 40A-51 for inverse condemnation since that statute requires a "taking." N.C.G.S. § 40A-51 (1984).

B. Seaboard's Section 1983 Claim

[4] Seaboard also argues it has a cause of action under 42 U.S.C. § 1983 because "Guilford County . . . deprived . . . [Seaboard] of due process and property rights secured by the Fifth and Fourteenth Amendments to the United States Constitution . . . because utilization of the property as a chemical treatment facility is the only reasonable, practical and viable use of the property," and because "[p]laintiffs' actions requiring sudden closure of Seaboard's facility are unreasonable, arbitrary and capricious." We disagree.

Because we have determined that the County's actions did not constitute a taking under the Fifth and Fourteenth Amendments to the United States Constitution, it necessarily follows that Seaboard does not have a Section 1983 action based on actions of the County in denying Seaboard any "reasonable, practical and viable use of the property." Furthermore, because there existed adequate state remedies to review the decision of the County for unreasonableness, arbitrariness and capriciousness, there does not exist a claim under Section 1983 on this basis. *See Parratt v. Taylor*, 451 U.S. 527, 538-39, 68 L. Ed. 2d 420, 430-31 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327, 88 L. Ed. 2d 661 (1986); *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified en banc*, 545 F.2d 565, *cert. denied*, 435 U.S. 932, 55 L. Ed. 2d 529 (1978) ("the existence of an adequate state remedy . . . avoids the conclusion that there has been any constitutional deprivation of property without due process of law").

IV

[5] Seaboard next contends that the trial court erred in granting plaintiffs' request for a permanent injunction because the issue is moot as "Seaboard is now bankrupt and not currently operating except for closure and post-closure activities," and because the WCA ordinance now prohibits Seaboard from operating a hazardous waste facility at all because it ceased operation of a nonconforming use. We disagree.

A case is not moot where there is a "sufficient real or immediate interest evidencing an existing controversy," or a reasonable likelihood that plaintiffs would again suffer deprivation of certain rights. *Southwood Ass'n, Ltd. v. Wallace*, 89 N.C. App. 327, 329, 365 S.E.2d 700, 701 (1988); *Honig v. Doe*, 484 U.S. 305, 317-18, 98 L. Ed. 2d 686, 703 (1988).

Seaboard declared bankruptcy in December 1989, and its Chapter 11 Bankruptcy was converted to Chapter 7 Bankruptcy in January 1990. Because we are unaware of the current status of Seaboard's bankruptcy proceedings, we are not prepared to say that there is not a "sufficient real or immediate interest evidencing an existing controversy" justifying the dissolution of the permanent injunction. Furthermore, although the WCA may now prohibit Seaboard from storing or treating hazardous waste, the injunction issued by the trial court encompassed more than those two uses and prohibited use as a transportation or disposal facility for hazardous waste or toxic substances, establishing a "sufficient real or immediate interest evidencing an existing controversy." Therefore, the trial court did not err in granting plaintiffs' request for a permanent injunction prohibiting the operation of a hazardous waste facility on Seaboard's property until such time as Seaboard obtains a special use permit.

For these reasons, the trial court erred in determining that Seaboard's counterclaims were barred for failure to petition for writ of certiorari in the superior court pursuant to Section 153A-340. The trial court, however, did not err in determining that plaintiffs' actions did not constitute a taking or a violation of 42 U.S.C. § 1983 and in granting plaintiffs' request for a permanent injunction.

Affirmed in part, reversed in part.

Judges COZORT and ORR concur.

WILLIAM ROBERT COLLINS, PLAINTIFF-APPELLANT v. CSX TRANSPORTATION, INC., T. W. CULPEPPER, SEABOARD SYSTEM RAILROAD, INC., JOHN DOE RAILROAD COMPANIES, JOHN DOE RAILROAD OPERATOR, M. O. WILLIAMS, AND D. W. HARDY, DEFENDANT-APPELLEES

No. 9216SC420

(Filed 15 March 1994)

1. Railroads § 2 (NCI4th)— crossing signals—federal preemption—common law duty not preempted

The trial court erred in an action arising from a collision between a train and an automobile at a crossing by granting

defendant's motion *in limine* to exclude all evidence relating to defendant railroad's duty to signalize the crossing on the basis of federal preemption. The U.S. Supreme Court has recently held in *CSX Transportation v. Easterwood*, 123 L.Ed.2d 387, that a railroad's tort law duty to signalize railroad crossings is preempted only to the extent certain federal Code sections have application. Those sections concern railroad signalization where federal funds participate in the installation of warning devices; in this case, there is no indication that federal funds were used in connection with the grade crossing.

Am Jur 2d, Railroads §§ 361-379.

2. Pleadings § 26 (NCI4th)— affirmative defense—not specially pled—gamesmanship—principles of professionalism

Although federal preemption was otherwise held to be inapplicable, and there was no determination that defendants and their counsel had engaged in gamesmanship, there were grounds for concern where defendants did not specially plead federal preemption in a railroad crossing negligence case, discovery indicated that defendants were relying only on contributory negligence, and defendants raised federal preemption in a motion *in limine* to exclude evidence that defendant railroad had a duty to signalize the crossing five days before trial. Gamesmanship and actions designed to minimize adequate notice to one's adversary have no place within the principles of professionalism governing the conduct of participants in litigation.

Am Jur 2d, Pleading §§ 152 et seq.

3. Railroads § 31 (NCI4th)— crossing—duty to signalize—not gross negligence

The trial court did not err in a railroad crossing case by withholding a gross negligence instruction, and there was no prejudice from the exclusion of evidence of defendant's duty to install signals at the crossing, where, assuming that the conditions at the crossing rendered it extrahazardous, the failure to implement more extensive signalization in this case did not rise to the level of gross negligence. The fact that a crossing is extrahazardous ordinarily dictates only the necessity for certain types of warnings; the finder of fact must examine the danger presented by the crossing in order to

discern the level and type of warnings required. The circumstances here are more analogous to a typical rural grade crossing and are notably similar to other cases wherein only the issue of ordinary negligence was submitted.

Am Jur 2d, Railroads §§ 508-513.

Appeal by plaintiff from judgment and orders rendered 20 November 1991 and from order filed 20 December 1991 by Judge Wiley F. Bowen in Robeson County Superior Court. Heard in the Court of Appeals 31 March 1993.

Rand, Finch & Gregory, P.A., by Thomas Henry Finch, Jr., for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by John C. Millberg and Frank J. Gordon, for defendant-appellees.

JOHN, Judge.

In this personal injury action, plaintiff appeals a judgment in favor of defendants based upon a jury verdict finding him contributorily negligent. He contends the trial court erred by (1) granting defendants' motion *in limine* to exclude certain evidence; (2) refusing to submit the issue of defendants' gross negligence to the jury; and (3) permitting defendants, post-verdict, to amend their pleadings to allege an affirmative defense. While we find one of plaintiff's arguments persuasive, we nonetheless hold the trial court committed no prejudicial error.

At approximately 9:20 a.m. on 12 November 1986, plaintiff was operating his pick-up truck on a roadway near the town of Rennert, North Carolina, at the location of an intersecting rural railroad crossing. The truck and a freight train operated by defendant CSX Railroad collided, causing plaintiff extensive bodily injury. It is uncontroverted that the train crossing was marked only by a crossbuck warning sign; there were no flashing lights, pavement markings or other warning signals.

Plaintiff's evidence tended to show the weather was rainy and foggy at the time of the accident and that these inclement conditions, coupled with foliage growing near the tracks, obscured his view of the oncoming train. Plaintiff testified he saw the reflection of the train's headlights immediately before impact. However,

neither plaintiff nor a motorist following his truck heard the train sound a warning signal.

Defendants' evidence indicated there were no significant visual obstructions in the immediate vicinity of the crossing. Cross-examination of plaintiff's expert witness in traffic safety further revealed that a motorist within 75' of the crossing would have had a virtually unlimited view of any oncoming train even if the tracks were overgrown with foliage as contended by plaintiff.

Two CSX employees on the train at the time of the accident testified for defendants. According to defendant locomotive engineer T. W. Culpepper, the train was traveling at the authorized speed limit of 70 m.p.h. at the time of the accident, and he was blowing the whistle, ringing the bell, and burning the headlight as the train approached the crossing. Brakeman David W. Hardy also stated the whistle was sounded. In addition, both men testified Culpepper made an emergency brake application in an attempt to avoid the accident.

Ms. Barbara Burnette, who lived near the accident site, stated she heard the train whistle blowing immediately before the accident. A State Trooper who investigated the collision indicated he specifically looked for visual obstructions and that both plaintiff and the locomotive engineer had unobstructed views of the crossing.

The trial court submitted the issues of negligence, contributory negligence and damages to the jury. The jury found defendant negligent and plaintiff contributorily negligent and the trial court entered judgment in favor of defendants.

The crux of plaintiff's appeal is his contention that the railroad crossing in question was "extrahazardous" and that defendant railroad failed to take adequate precautions to diminish this danger. Therefore, plaintiff insists, defendant railroad was *grossly negligent* and the trial court erred by refusing to charge the jury on this theory of liability.

I. *Federal preemption*

[1] Plaintiff's argument rests, in large part, upon the railroad being charged with an affirmative duty to signalize the crossing at issue. On the day of trial, the trial court granted defendants' motion *in limine*, filed five days previously, to exclude all evidence

relating to "any allegations that the [defendant] railroad had a duty to signalize the crossing in question." During the hearing on this motion, defendants argued the railroad's common law duty to signalize the crossing had been preempted by federal law, specifically by the "Federal Railroad Safety Act of 1970," 45 U.S.C. §§ 421-447 (1992). The trial court agreed and allowed the motion. We now examine that ruling.

Whether or not federal legislation preempts comparable state law ordinarily is resolved by ascertaining congressional intent; state law is preempted if Congress intended to do so. *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 L.Ed.2d 65, 74 (1990). Preemption occurs in three circumstances. *First*, where Congress has explicitly provided that state law is preempted. *Id.* at 79, 110 L.Ed.2d at 74. *Second*, in the absence of express language, where Congress has intended the federal government should exclusively occupy a particular field. *Id.* Such intent can be inferred where there exists:

> a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Id. at 79, 110 L.Ed.2d at 74 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed.2d 1447, 1459 (1947)). *Third*, State law is preempted to the extent it actually conflicts with federal law. *English*, 496 U.S. at 79, 110 L.Ed.2d at 74.

Our law places a duty upon railroads "to give to users of the highway warning, appropriate to the location and circumstances, that a railroad crossing lies ahead." *Cox v. Gallamore*, 267 N.C. 537, 541, 148 S.E.2d 616, 619 (1966); *see also* N.C.G.S. § 62-224 (1989). Where the crossing is "extrahazardous," active or mechanical warnings may be required. *See Dixon v. CSX Transp., Inc.*, 990 F.2d 1440, 1449, 1453, *cert. denied*, --- U.S. ---, 126 L.Ed.2d 252 (1993). " '[M]echanical warnings ordinarily are required only at crossings so dangerous that prudent persons cannot use them with safety unless extraordinary protective means are used.' " *Price v. Seaboard R.R.*, 274 N.C. 32, 46, 161 S.E.2d 590, 600 (1968) (quoting 74 C.J.S. *Railroads* § 727(a)).

The Federal Government has, however, entered the field of railroad crossing safety by virtue of the "Federal Railroad Safety Act of 1970" (the Act). 45 U.S.C. § 433 (1992). Section 434 of the Act specifically addresses the question of federal preemption and provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434. Since passage of the Act, several federal regulations have been promulgated which concern railroad crossing safety; these include: 23 C.F.R. §§ 646 pt. B, 655 pt. F, and 924 (1993).

This Court has held the foregoing federal legislation does not completely preempt the field of railroad safety and therefore North Carolina may "continue to exercise safety jurisdiction over local safety hazards." *State ex rel. Utilities Comm'n. v. Seaboard Coast Line R.R.*, 62 N.C. App. 631, 640, 303 S.E.2d 549, 555, *disc. review denied and appeal dismissed*, 309 N.C. 324, 307 S.E.2d 168 (1983). While *Seaboard Coast* did not concern the *signalization of railroad crossings*—a topic explicitly covered by the federal regulatory scheme—we nevertheless hold this common-law duty was also not preempted.

Recently, the U.S. Supreme Court held a railroad's tort law (state) duty to signalize railroad crossings is preempted *only to the extent either 23 C.F.R. §§ 646.214(b)(3) or (4) has application. CSX Transp. Inc., v. Easterwood*, --- U.S. ---, 123 L.Ed. 2d 387 (1993). Briefly summarized, these Code sections concern railroad crossing signalization where "*federal funds* participate in the installation of warning devices." *Easterwood*, --- U.S. ---, 123 L.Ed.2d at 401. In the case *sub judice*, there is no indication federal funds were used in connection with the grade crossing at issue. Accord-

ingly, the trial court erred by granting defendants' motion *in limine* (thereby excluding all evidence relating to defendant railroad's duty to signalize the crossing) on the basis of federal preemption.

[2] We note plaintiff has also argued that the type of federal preemption at issue constituted an affirmative defense. *See Johnson v. Armored Transport of California, Inc.*, 813 F.2d 1041, 1043-44 (1987) (A "choice-of-forum" preemption argument concerns subject matter jurisdiction and is therefore non-waiveable; however, a preemption argument involving only "choice-of-law" must be asserted as an affirmative defense). Ordinarily, an affirmative defense which is not specially pled is waived. *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989).

Because defendants did not specially plead federal preemption, plaintiff contends this "defense" was waived and therefore the trial court was without authority to consider preemption when it was raised in defendants' motion *in limine*. Plaintiff also vigorously argues the court erred by allowing defendants to amend their pleadings to add this "affirmative defense" after the jury's verdict. According to plaintiff, discovery indicated defendants were relying upon but one affirmative defense: the contributory negligence of plaintiff. It was therefore impermissible, plaintiff continues, to allow the addition of a new affirmative defense after the jury's verdict, particularly since plaintiff first received notice of this defense only 5 days before trial.

We agree that the timing and sequence of the motion *in limine* and motion to amend are grounds for concern, particularly in light of defendants' limited responses during discovery. Under these circumstances, plaintiff's implicit contention that defendants employed deliberate dilatory tactics under the guise of "litigation strategy" is hardly surprising. While emphasizing that we do not here determine defendants and their counsel to have engaged in such maneuvering, we nonetheless underscore that "gamesmanship" and actions designed to minimize adequate notice to one's adversary have no place within the principles of professionalism governing the conduct of participants in litigation. *See Willoughby v. Wilkins*, 65 N.C. App. 626, 641, 310 S.E.2d 90, 99-100 (1983), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 697-98 (1984) (emphasis of the discovery process is on expeditious handling of information, *not on gamesmanship*); *see also* Model Code of Professional Responsibility, Rule 3.2 cmt. (1983) (Dilatory practices should not be used

"merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress."). However, because we have already determined federal preemption was inapplicable to the case *sub judice*, we need not address further plaintiff's arguments concerning federal preemption as an affirmative defense.

II. *Gross negligence*

[3] Although the trial court erred by excluding evidence of the railroad's duty to signalize the crossing, a new trial is required only if plaintiff suffered prejudice. *Dep't of Transp. v. Craine*, 89 N.C. App. 223, 226, 365 S.E.2d 694, 697, *disc. review denied*, 322 N.C. 479, 370 S.E.2d 221 (1988). Plaintiff suffered no prejudice on the issue of defendants' *negligence* because the jury, even absent the excluded evidence, found for plaintiff on that issue; the jury did not reach the damages issue because it found plaintiff contributorily negligent. Nevertheless, plaintiff contends the excluded evidence, combined with other evidence admitted at trial, warranted a jury instruction on the issue of defendant railroad's *gross negligence*. According to plaintiff, had the issue been submitted and the jury determined defendant to have been grossly negligent, plaintiff's (ordinary) contributory negligence would not have barred recovery.

It is well settled that contributory negligence will not bar recovery where the defendant is guilty of willful or wanton negligence. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 648, 423 S.E.2d 72, 74 (1992). Assuming without deciding that a contributorily negligent plaintiff can recover from a grossly negligent defendant, *compare Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988) (equating gross negligence with "wanton conduct . . .") with *Morgan v. Cavalier Acquisition Corp.*, 111 N.C. App. 520, 536, 432 S.E.2d 915, 924 (recognizing a distinction between gross negligence and "willful and wanton conduct"), *disc. review denied*, 335 N.C. 238, 439 S.E.2d 149 (1993), we find no error in the trial court's withholding of the gross negligence instruction. The evidence in the case *sub judice* did not warrant such an instruction.

In a civil action, the trial court is under a duty to charge the jury on all substantial features of the case. *Adams v. Mills*, 312 N.C. 181, 186, 322 S.E.2d 164, 168 (1984). If a party argues that an opponent's acts or omissions constitute a particular claim

for relief, " 'the trial court must submit the issue with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim . . . .' " *Id.* at 186-87, 322 S.E.2d at 169 (quoting *Cockrell v. Cromartie Transport Co.*, 295 N.C. 444, 449, 245 S.E.2d 497, 500 (1978)).

Plaintiff argues defendant's gross negligence should have been submitted to the jury because the crossing was "extrahazardous" and required at least some type of mechanical warning device. He relies heavily upon a single decision of this Court.

Before we examine that previous decision and its application to the case *sub judice*, we note the failure to signalize an "extrahazardous" crossing properly does not automatically amount to gross negligence. Instead, the fact that a crossing is extrahazardous ordinarily dictates only the necessity for certain types of warnings. *See Dixon v. CSX Transp., Inc.*, 990 F.2d 1440, 1449, 1453 (1993) (Where the crossing is "extrahazardous," mechanical warnings may be required.); *Price v. Seaboard R.R.*, 274 N.C. 32, 45-46, 161 S.E.2d 590, 600 (1968) (Mechanical warnings are ordinarily required only where the crossing is so dangerous that a prudent person cannot use it unless there are extraordinary protective devices.). As stated by our Supreme Court:

> [W]here there are circumstances of more than ordinary danger and where the surroundings are such as to render the crossing peculiarly and unusually hazardous to those who have a right to traverse it, a question of fact is raised for the determination of the jury whether under the circumstances the operator of the railroad has exercised due care in providing reasonable protection for those who use the crossing, and whether the degree of care which the operator of the railroad is required to exercise to avoid injury at grade crossings imposes the duty to provide safety devices at the crossing.
>
> * * * *
>
> It is a question of due care under the circumstances. The railroad company must use such reasonable care and precaution as ordinary prudence would indicate. Where the conditions existing at or about the crossing are such as to render the crossing dangerous and hazardous . . . it becomes a question for the jury whether the degree of care which the railroad

> company is required to exercise to avoid injuries at crossings imposes the duty to provide additional safety devices.

Caldwell v. Southern Ry. Co., 218 N.C. 63, 69-70, 10 S.E.2d 680, 683-84 (1940) (citations omitted).

Under the aforementioned cases, the finder of fact thus first examines the danger presented by the crossing in order to discern what level and type of warnings are required. If the crossing is especially dangerous or hazardous, mechanical signals may be needed. Thereafter, the trier of fact turns to an examination of the defendant's culpability based on its failure to provide the warnings appropriate under the existing conditions and circumstances. Furthermore, while issues of negligence are most frequently jury questions, our examination of "duty to signalize" decisions reveals that generally these cases involve only issues of ordinary negligence—regardless of the "hazardousness" of the crossing. *See, e.g., Caldwell*, 218 N.C. 63, 10 S.E.2d 680; *Harper v. Seaboard Ry. Co.*, 211 N.C. 398, 190 S.E. 750 (1937); *Finch v. North Carolina R.R.*, 195 N.C. 190, 141 S.E. 550 (1928); and *Blum v. Southern Ry. Co.*, 187 N.C. 640, 122 S.E. 562 (1924). As our Supreme Court has pointed out:

> A railroad company is not an insurer of the safety of travelers, and it is not required to maintain a foolproof crossing or a crossing where no injury is possible. In general, a railroad company is only liable for a defect or condition [at] . . . a public crossing which is caused by its negligence . . . .

Price, 274 N.C. at 39, 161 S.E.2d at 595.

In the case *sub judice*, the evidence, viewed in the light most favorable to plaintiff, reveals the following: the accident occurred on the morning of a rainy day at a rural crossing. There were two parallel train tracks, marked only by a cross-buck warning sign. Foliage growing near the tracks obscured the view somewhat, although a motorist within 75′ of the crossing had essentially an unobstructed view down the tracks. On the average, 23 trains per day passed over these tracks. A moderate number of automobiles (approximately 370 per day) used the rural road although it is unclear whether this number traversed the crossing. The train was burning its headlights, traveling at the maximum speed limit of 70 m.p.h., and, according to plaintiff, failed to sound its horn.

Plaintiff also offered expert opinion testimony that this crossing was extrahazardous and mechanical warning devices were needed.

Assuming *arguendo* that the conditions of the crossing at issue rendered it "extrahazardous," we hold defendant's failure to implement more extensive signalization did not rise to the level of "gross negligence." Plaintiffs argument to the contrary relies heavily upon *Robinson v. Seaboard System R.R.*, 87 N.C. App. 512, 361 S.E.2d 909 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988), wherein this Court held an instruction on *willful and wanton negligence* was supported by the evidence. In *Robinson*, railroad employees, in knowing violation of their company's internal safety procedures, left boxcars parked on a storage track within 30' of a crossing within the Raleigh city limits. Although the train crossing was not a public one, railroad authorities were aware the crossing was in use. They further acknowledged that placement of boxcars in such close proximity to a crossing created a dangerous situation. *Robinson*, 87 N.C. App. at 521-22, 361 S.E.2d at 915.

The case *sub judice* may readily be distinguished from *Robinson*. Plaintiff's accident occurred on a rural road with much greater visibility; defendants did not actively place any obstructions near the tracks; and no evidence indicated knowledge on the part of defendants of any special danger presented by this rail crossing. Furthermore, there is no evidence the train conductor's acts or omissions rose to a heightened level of culpability. Even though plaintiff alleges *gross negligence* (as opposed to *willful and wanton negligence* at issue in *Robinson*), his argument fails. The circumstances depicted are more analogous to a typical rural grade crossing, and are notably similar to other cases wherein only the issue of "ordinary" negligence was submitted. *See Harper*, 211 N.C. 398, 190 S.E. 750; *Finch*, 195 N.C. 190, 141 S.E. 550. Accordingly, even if defendants' gross negligence were held to overcome plaintiff's contributory negligence (and we expressly decline to decide that issue), there is not a sufficient basis in the evidence to support an instruction on gross negligence.

No error.

Judges Eagles and Martin concur.

BOBBY CARL SHEPPARD, PLAINTIFF v. ZEP MANUFACTURING COMPANY, NATIONAL SERVICE INDUSTRIES, INC., AND CAMILLE GRIFFIN, DEFENDANTS

No. 9330SC227

(Filed 15 March 1994)

1. **Negligence § 22 (NCI4th) — demonstration of cleaning product — employee injured — no directed verdict for manufacturer of product**

The trial court properly denied defendant's motion for a directed verdict and properly failed to give requested instructions in a negligence action where defendant Zep Manufacturing demonstrated one of its products on-site at Champion; Champion employees directed defendant's sales representative to an area where there was less traffic; defendant's representative applied the chemical to the floor; the product needed to remain on the floor for approximately thirty minutes after application; that area of the plant was hot and noisy, so the representative and the Champion employee went to an office; defendant's representative left a bucket and mop in the area as a warning; there were no other warnings or barriers; plaintiff, another Champion employee, walked through the area, fell, and suffered burns on his arm and face; and defendant contended that it could not be held liable for Champion's negligence in failing to warn its employees of a dangerous condition which it created. The risk of harm from the dangerous chemical was unduly great and a jury could reasonably conclude that defendant was not entitled to rely on the inadequate actions or representations of plaintiff's employer in order to evade liability for plaintiff's injuries.

Am Jur 2d, Negligence §§ 492, 591 et seq.

2. **Master and Servant § 89.4 (NCI3d) — employee burned in cleaner demonstration — action by employee against manufacturer of product — instructions — joint liability**

The trial court did not err in a negligence action by a Champion employee against defendants, which had demonstrated a chemical cleaning product in a Champion facility, by instructing the jury that if the negligent acts of the agents of Champion and defendant manufacturer concurred or joined together to produce the claimed injury, then the conduct of each is a

proximate cause of plaintiff's injuries and defendants and Champion would be jointly and severally liable for all the damages suffered. Although defendants argue that the instruction was prejudicial in that the jury was led to believe that Champion (which was not a defendant) would share equally in any damages assessed against defendants, it is well established that the term jointly and severally implies that one tortfeasor could pay for all of plaintiff's damages. Additionally, the instruction did not ask the jury to apportion the amount of damages between defendants and Champion and the third issue specifically asked the jury the amount, if any, plaintiff was entitled to recover of the defendants. N.C.G.S. § 97-10.2.

Am Jur 2d, Master and Servant § 397.

Appeal by defendants from judgment signed 8 October 1992 by Judge Forrest A. Ferrell in Haywood County Superior Court. Heard in the Court of Appeals 8 December 1993.

Defendant National Service Industries, Inc., (hereinafter "National") is the parent corporation of its unincorporated division, defendant Zep Manufacturing Company (hereinafter "Zep Manufacturing"). Camille Griffin, defendant Zep Manufacturing's "outside sales representative," was preparing an on-site demonstration of defendant Zep Manufacturing's chemical cleaning product at the premises of Champion International Corporation (hereinafter "Champion") on 26 April 1989. On 26 August 1991, plaintiff, an employee of Champion, filed a complaint against defendants seeking recovery for injuries he received when he was burned on his arm and face after slipping and falling into the chemicals.

The facts pertinent to this appeal are as follows: sometime during March 1989, Champion and Zep Manufacturing made plans for an on-site demonstration of Zep Formula 1365, a chemical product that removes epoxy floor finishes. On 26 April 1989, Ms. Griffin went to carry out a demonstration of the chemical product at Champion's shop, which was also plaintiff's workplace.

Jack J. Swanger, Champion's manager of support operations, testified as follows: on 26 April 1989, Charlie Neal, manager of plant services, told him (Mr. Swanger) that Ms. Griffin "want[ed] to do a trial area." Mr. Swanger took Ms. Griffin to the "extruder department." They went to the office of Claude Rogers, Champion's production manager and Mr. Swanger's "boss." Mr. Swanger asked

Mr. Rogers where the test should be performed. Mr. Rogers replied " 'Go over here behind the guardrail where there's no traffic.' " The area was used for drying polyesters. The yellow guardrails were meant "to keep people, jitneys, any kind of traffic, out of this area. . . . because [the] dryers are very hot when in use. . . . [T]he only people we knew was [sic] going to be in that area are people that worked in this area."

Ms. Griffin testified as follows: Mr. Swanger selected the site and "suggested that we approach the area that's outlined, and he said to put the product down on the inside of the guardrail. He pointed out the specific area where the demo was to be done, because he felt that it was safer there. That there would be less traffic, so on and so forth. Because he understood that it was going to have to be down for about twenty to thirty minutes. And this was his choice and where he wanted it put down." For purposes of showing its effectiveness during the demonstration, the chemical product needed to be applied to the floor and left on the floor for approximately 30 minutes prior to the demonstration. Ms. Griffin testified that after placing the chemical liquid on the floor of the shop, she was the only person who set up a warning, which consisted of a mop or broom and a one gallon container at one end of the demonstration area. Mr. Swanger testified that "it was so noisy, we couldn't talk, so that's when we stepped into my office." Ms. Griffin testified that upon leaving the demonstration area she placed the bottle and the mop or broom "across the one entrance to the demo area strictly because I had put a product on the floor, and I was just leaving the area, and I personally wanted to draw somebody's attention to the fact that there was something on the floor. . . . It was not meant as a barricade, strictly as a visual to draw their attention."

Mr. Swanger testified that he did not set up a warning sign or barricade because "I didn't know what we were fooling with. I didn't know a thing about it, nor was it explained. . . . Well, my boss and I felt like it was in a place that there really wasn't a need for it." Ms. Griffin testified that when she first met Mr. Swanger, "[w]e spoke briefly about what was going to come down, because he was not aware of the demonstration. He was just brought in on spur of the minute and asked to supervise this."

During this time, plaintiff was operating a shredder approximately one hundred yards away from the area. When the shredder

became clogged, he needed to go to the roof to repair the problem. On his way, while Ms. Griffin and Mr. Swanger were in the office away from the demonstration area, plaintiff entered the area where the corrosive chemical was on the floor. Plaintiff slipped and fell in the chemical liquid; the skin on his face and on one of his arms made contact with the liquid. Plaintiff testified that he did not see the liquid on the floor, that there was no sign, barricade, or tape warning, and that no person was present in the area to warn of the potential danger. Plaintiff testified that he saw the mop and bucket but that these items were usually at that location. He testified that the place where the accident occurred was at "the normal way of going" through that part of the shop. As a result of the burns, plaintiff had to undergo the surgical removal of dead skin on his arm and suffered *inter alia* permanent and photosensitive scars to his arm and face.

The chemical product's 2 February 1989 "Material Safety Data Sheet and Safe Handling and Disposal Information" warned *inter alia* that the chemical was "corrosive on contact" and that "contact with liquid can cause immediate tissue damage or destruction to skin, eyes (can cause blindness), or upper respiratory tract. . . . SPECIAL PRECAUTIONS . . . Keep product away from skin and eyes." Ms. Griffin testified that she wore nytral gloves when applying the product. The "material safety data sheet" stated that the chemical product's "hazardous decomposition" contained "carbon dioxide, carbon monoxide, hydrogen chloride, and small amounts of phosgene & chlorine gas." Ms. Griffin testified that "[a]ll of our material data safety sheets and product information that adhered to the product itself states [sic] how it is to be applied and all precautionaries [sic] and so on and so forth. So, I already knew all that." Ms. Griffin testified that she was unsure of whether she gave the "material safety data sheet" to the shop supervisor or placed it on someone's desk at the office.

The trial was held on 28 September 1992. Defendants' motion for a directed verdict at the close of plaintiff's evidence was denied by the trial court. The jury found as follows:

1. Was the plaintiff injured by the negligence of the defendants?

   Answer: Yes.

2. Did the plaintiff, through his own negligence, contribute to his injuries?

Answer: No.

3. What amount, if any, is plaintiff entitled to recover of the defendants?

Answer: $25,000.00

4. Did the negligence of Champion International Corporation, if any, join and concur with the negligence of the defendants in causing the plaintiff's injuries?

Answer: Yes.

Defendants appeal.

Holt, Bonfoey, Brown & Queen, PA, by Richlyn D. Holt and Frank G. Queen, for plaintiff-appellee.

Van Winkle, Buck, All, Starnes and Davis, P.A., by Phillip J. Smith and Michelle Rippon, for defendant-appellants.

EAGLES, Judge.

Defendants bring forward three assignments of error. After a careful review of the record, transcript and briefs, we find no error.

I.

[1] In their first two assignments of error, defendants argue that: 1) they are entitled to a directed verdict because "defendants cannot be held liable for the employer's [Champion's] negligence in failing to warn its [Champion's] employees of a dangerous condition which it created," and; 2) the "trial court erred in failing to instruct the jury that if the defendants were fully assured that because of the location of the demonstration no warnings were necessary, then the defendants owed no further duty to the plaintiff." We disagree with both of defendants' contentions.

Regarding the standard of review of a defendant's motion for directed verdict, this Court has stated:

> "A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff." *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1978). In determining whether a trial judge's ruling on defendant's motion for a directed verdict was proper, "plaintiffs' evidence must be taken as true and all the evidence

> must be considered in the light most favorable to the plaintiffs, giving plaintiffs the benefit of every reasonable inference." *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 365 S.E.2d 621 (1988). "A directed verdict is improper unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Id.* With these principles as our guide, we must determine whether the plaintiff's evidence, when considered in the light most favorable to plaintiff, was legally sufficient to withstand defendant's motion for a directed verdict as to any of its claims.

B. B. Walker Co. v. Burns International Security Services, 108 N.C. App. 562, 564-65, 424 S.E.2d 172, 173-74, *disc. rev. denied*, 333 N.C. 536, 429 S.E.2d 552 (1993). To establish a claim of negligence sufficient to survive defendants' motion for directed verdict,

> the plaintiff must introduce evidence tending to show that (1) defendant failed to exercise proper care in the performance of a duty owed to plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances as they existed. *Jordan v. Jones*, 314 N.C. 106, 331 S.E.2d 662 (1985).

Rose v. Steen Cleaning, Inc., 104 N.C. App. 539, 541, 410 S.E.2d 221, 222 (1991). *See also Talian v. City of Charlotte*, 98 N.C. App. 281, 283, 390 S.E.2d 737, 739, *aff'd per curiam*, 327 N.C. 629, 398 S.E.2d 330 (1990). Additionally, here we are presented with alleged negligence arising from defendants' handling of a dangerous chemical liquid, for which there was a "material safety data sheet" enumerating its many hazards, including hazards to the human skin upon contact with the chemical liquid. Regarding the events immediately preceding plaintiff's slip and fall, Ms. Griffin testified as follows:

> Q: So he [Mr. Swanger] selected the site?
>
> A: That's right. It's his house, and he showed me where to put it down so to speak.
>
> Q: Okay. What happened next?
>
> A: We did. I got down there and put the product down on the floor, and it was either a 3×3 or 4×4 square. I tried to keep it neatly and in order, because when my demo worked

as I hoped it would, I wanted to show them a very definite difference. So, I put it down in this area that he pointed out. . . .

. . . .

Q: . . . . After you applied the formula and stood up, what took place next?

A: I told him again that we—that this was going to have to sit there for twenty to thirty minutes. It was warm in the plant, and he [Mr. Swanger] stated, "Let's go back to the office where it's air conditioned to get out of the heat."

Q: At the time that you stood up and you and he had that conversation, did you see anyone else in the plant at that time?

A: No, I didn't—not in the area that I was in, no.

Q: What did you do when he said "Let's go back to the office where it's air conditioned?"

A: Well, at that point, I realized that we were going to leave the area. And just because it's my normal way of doing a demo, I took the bottle, and I can't remember whether it was—it was a long handled either broom or mop—I can't remember which. And I just sort of laid them laid across the one entrance to the demo area strictly because I had put a product on the floor, and I was just leaving the area, and I personally wanted to draw somebody's attention to the fact that there was something on the floor.

. . . .

Q: So, one could still travel through that area?

A: Yeah. It was not meant as a barricade, strictly as a visual to draw their attention.

. . . .

Q: How long were you gone?

A: Twenty to thirty minutes.

Q: Could you see the area from his office?

A: I couldn't. He had a window that looked out over to that area, but my seat was with my back to the window. From

his desk, he faced the window. But I never looked out the window so I couldn't tell you what could be seen out the window.

Plaintiff testified that he did not see the liquid on the floor, that no person was present in the area to warn of the potential danger, and that there was no barricade, sign, or tape warning.

Professors Prosser and Keeton have noted that "where the risk of harm is unduly great, it is not reasonable care to rely upon the responsibility of others." W. P. Keeton, Ed., *Prosser and Keeton on Torts*, at 204 (5th Ed. 1984). Here, we conclude that the risk of harm from the dangerous chemical was unduly great and that under these circumstances a jury could reasonably conclude that defendants were not entitled to rely on the inadequate actions or representations of plaintiff's employer in order to evade liability for plaintiff's injuries. While it is possible that a potential buyer's specific conduct or representations could insulate a seller from total liability in a sales demonstration, we hold that on this record no evidence exists to compel such a finding here for purposes of directed verdict. We particularly note that there was no express contract of indemnity between defendants and the employer. G.S. 97-10.2(e). When viewed in the light most favorable to plaintiff as nonmovant, we conclude that the issue of defendants' negligence was a question for the jury and that the trial court properly denied defendants' motion for a directed verdict. Further, we conclude that the trial court did not err in failing to give the requested instruction. Accordingly, these assignments of error fail.

II.

[2] In their third assignment of error, defendants argue that the trial court erred by instructing the jury "that Champion [plaintiff's employer] would be jointly and severally liable for all damages suffered by the plaintiff" and that this instruction "was contrary to the law, misleading, and constituted prejudicial error." (Emphasis in original.) We find no prejudicial error.

Under the Workers' Compensation Act, G.S. 97-10.2 provides:

> (a) The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party." The respec-

tive rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

(b) The employee, or his personal representative if he be dead, shall have the exclusive right to proceed to enforce the liability of the third party by appropriate proceedings if such proceedings are instituted not later than 12 months after the date of injury or death, whichever is later. During said 12-month period, and at any time thereafter if summons is issued against the third party during said 12-month period, the employee or his personal representative shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below.

(c) If settlement is not made and summons is not issued within said 12-month period, and if employer shall have filed with the Industrial Commission a written admission of liability for the benefits provided by this Chapter, then either the employee or the employer shall have the right to proceed to enforce the liability of the third party by appropriate proceedings; either shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below. Provided that 60 days before the expiration of the period fixed by the applicable statute of limitations if neither the employee nor the employer shall have settled with or instituted proceedings against the third party, all such rights shall revert to the employee or his personal representative.

(d) The person in whom the right to bring such proceeding or make settlement is vested shall, during the continuation thereof, also have the exclusive right to make settlement with the third party and the release of the person having the right shall fully acquit and discharge the third party except as provided by (h) below. A proceeding so instituted by the person having the right shall be brought in the name of the employee or his personal representative and the employer or the insurance carrier shall not be a necessary or proper party thereto.

If the employee or his personal representative shall refuse to cooperate with the employer by being the party plaintiff, then the action shall be brought in the name of the employer and the employee or his personal representative shall be made a party plaintiff or party defendant by order of court.

(e) The amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff. If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury. If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee or his personal representative free of any claim by the employer and the third party shall have no further right by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee. In the event that the court becomes aware that there is an express contract of indemnity between the employer and the third party the court may in the interest of justice exclude the employer from the trial of the claim

against the third party and may meet the issue of the actionable negligence of the employer to the jury in a separate hearing.

The instruction to which defendants assign error provided as follows:

> Thus, if the negligent act or omission of the agent of the defendant, National Services Incorporated, and of the agent of Champion International Corporation, concurred or joined together to produce the claimed injury, then the conduct of each is a proximate cause of plaintiff's injury and they, defendants, and Champion International Corporation would be jointly and severally liable for all the damages suffered.

Plaintiff argues that "[w]hile the instruction resembles the joint tortfeasor instruction, it in fact makes no explicit reference to such a relationship." However, we conclude that plaintiff's contention is subject to contradiction since the trial court's instruction provided that if the agents' negligent acts "concurred or joined together to produce the claimed injury, then the conduct of each is a proximate cause of plaintiff's injury and they, defendants, and Champion International Corporation *would be jointly and severally liable for all the damages suffered.*" (Emphasis added.) Defendants argue that the instruction was prejudicial in that "the jury was led to believe that Champion would share equally in any damages assessed against the defendants." However, it is well established that the term "jointly and severally" implies that one tortfeasor could pay for all of plaintiff's damages: it only opens the *potential for contribution* in a subsequent suit brought by the indemnifying tortfeasor against the other tortfeasor. Additionally, we note that the instruction did not ask the jury to apportion the amount of damages between defendants and Champion. We further note that the third issue specifically asked the jury "[w]hat amount, if any, is plaintiff entitled to recover of the *defendants*?" (Emphasis added.) We conclude that any error arising from the trial court's instruction was harmless. G.S. 1A-1, Rule 61. Accordingly, this assignment of error fails.

III.

For the reasons stated, we find no error in the trial below.

No error.

Chief Judge ARNOLD and Judge WELLS concur.

CLYDE E. ROWE, JR., AND DONNA GRANT ROWE v. JOHN THOMAS WALKER, C. NORMAN WALKER, AND SHIRLEY WALKER KENNEDY

No. 929SC918

(Filed 15 March 1994)

1. **Registration and Probate § 88 (NCI4th)— superiority of interest in land—N.C. as pure race state—purchaser for value not required to be innocent purchaser**

North Carolina is a "pure race" jurisdiction in which the first to record an interest in land holds an interest superior to all other purchasers for value, regardless of actual or constructive notice as to other, unrecorded conveyances, and North Carolina does not require that a purchaser for valuable consideration be an "innocent purchaser"; therefore, because defendants' easement which traversed both Orange and Person Counties was properly recorded in Orange County, plaintiffs had constructive notice of it over their Orange County property, but because the easement was not recorded in Person County, plaintiffs had no notice and the easement did not encumber their Person County property.

Am Jur 2d, Records and Recording Laws §§ 102 et seq.

2. **Easements § 40 (NCI4th)— easement across two counties—easement valid in one county—inability to locate easement in one county or other**

Because defendants' roadway easement was valid only in Orange and not in Person County, defendants could be compensated for breach of a dam over which the roadway passed only if the dam lay in Orange County; however, because the border between the counties has never been surveyed, defendants stipulated that it could not be determined in which county the easement was located, and defendants thus failed to carry their burden of establishing that their easement was valid at the point it crossed over the dam.

Am Jur 2d, Easements and Licenses §§ 64-67.

Location of easement of way created by grant which does not specify location. 24 ALR4th 1053.

Locating easement of way created by necessity. 36 ALR4th 769.

Judge JOHN dissenting.

Appeal by plaintiff from judgment entered 26 March 1992 by Judge Robert H. Hobgood in Person County Superior Court. Heard in the Court of Appeals 2 September 1993.

Manning, Fulton & Skinner, P.A., by John I. Mabe, Jr. and Alison R. Cayton, for plaintiffs-appellants.

Brown & Bunch, by Charles Gordon Brown and Scott D. Zimmerman, for defendants-appellees.

WYNN, Judge.

In January 1970 Jack and Martha Chavis owned a 70.06 acre tract of farmland. Most of the tract lies in southern Person County, but approximately 7.7 acres lie in northern Orange County. On 19 January 1970, Clyde and Mary Walker (defendants' predecessors in title) acquired an approximately fifty-acre tract of property in Orange County, adjoining the Chavises' land to the south. Shortly thereafter, the Chavises granted the Walkers a twenty-foot wide easement across the Chavises' property to allow the Walkers to use a farm road providing access from the north through Person County to the Walkers' Orange County farmland. The easement was recorded in the Orange County Registry on 23 January 1970. Although a significant portion of the easement lies in Person County, it was not registered there at that time.

On 28 December 1979 the Chavises sold their land to Charles and Linda Hall. On 2 October 1987, plaintiffs purchased the land from the Halls. Plaintiffs promptly registered the deed in both Orange County and Person County.

The easement roadway passed over a dam in the vicinity of the Orange/Person county border. In October 1987, in order to drain a small pond, plaintiffs breached this dam, thereby destroying use of the road and use of the easement at that point. Defendants asked plaintiffs to rebuild the dam. Plaintiffs refused.

On 6 July 1988 defendants recorded their easement in Person County.

On 20 October 1988, defendant Norman Walker and others undertook reconstruction of the dam. On 21 December 1988, plaintiffs instituted this proceeding to enjoin defendants and their invitees from using the easement. Plaintiffs also sought an order quieting title to the portion of the property covered by the easement. Defendants counterclaimed for costs expended in repairing the dam.

The trial court concluded that defendants had a valid easement across both the Orange County and Person County portions of plaintiffs' property and awarded defendants $1650.00 with interest in compensation for repairs to the dam.

I.

[1] N.C. Gen. Stat. § 47-27 provides that in order to be valid against a purchaser for valuable consideration, a deed of easement must be recorded in the county where the land affected is located:

> All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights-of-way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated.
>
> . . .
>
> No deed, agreement for right-of-way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies.

N.C. Gen. Stat. § 47-27 (1984). *See also* Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 369 (3d ed. 1988). Recordation in one county has "no effect beyond the borders of that county." *Allen v. Roanoke R.R. & Lumber Co.*, 171 N.C. 339, 341, 88 S.E. 492, 493 (1916). Therefore, where a property interest spans more than one county, it is only effective against other claimants in the counties in which it has been recorded. Because defendants' easement was not duly recorded in Person County at the time plaintiffs recorded their deed there, the easement was not valid against plaintiffs in Person County. "If a conveyance is not recorded by a grantee, it is considered absolutely void with respect to purchasers for value or lien creditors of the same grantor who record their conveyances or docket their liens." *Webster's Real Estate Law in North Carolina* § 369.

North Carolina is a "pure race" jurisdiction, in which the first to record an interest in land holds an interest superior to all other purchasers for value, regardless of actual or constructive notice as to other, unrecorded conveyances. "Where a grantor conveys the same property to two different purchasers, the first purchaser to record his deed wins the 'race to the Register of Deeds' Office' and thereby defeats the other's claim to the property, even if he has actual notice of the conveyance to the other purchaser." *Hill v. Pinelawn Memorial Park, Inc.*, 304 N.C. 159, 163, 282 S.E.2d 779, 782 (1981); *Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E.2d 769 (1965). Since defendants failed to register their grant of easement in Person County before plaintiffs registered their deed there, plaintiffs won the "race to the courthouse," and their interest supersedes the later-recorded interest claimed by defendants.

The trial court's conclusion that defendants' easement was valid in Person County was based on an erroneous belief that our law requires a purchaser for valuable consideration to be an "innocent purchaser." The court reasoned that because there were references to the easement within plaintiffs' chain of title, plaintiffs were on constructive notice as to its course through their Person County property. The court stated that buyers with constructive notice did not hold the status of innocent purchasers for valuable consideration. It concluded that therefore, even though defendants' easement had not been recorded, it was valid against these plaintiffs.

North Carolina does not require that a purchaser for valuable consideration be an "innocent purchaser." A "purchaser for value" or a "purchaser for valuable consideration" is defined by our case law simply as one who has paid a valuable consideration for the execution of an instrument of conveyance. *Sansom v. Warren*, 215 N.C. 432, 2 S.E.2d 459 (1939). Plaintiffs meet this definition and thus are purchasers for valuable consideration protected by § 47-27.

Constructive notice *is* relevant in determining priority of interests where duly recorded. Once an interest has been recorded, future claimants are considered to have notice of it and to take subject to it. *Waldrop v. Town of Brevard*, 233 N.C. 26, 62 S.E.2d 512 (1950); *Yount v. Lowe*, 288 N.C. 90, 215 S.E.2d 563 (1975). Because defendants' easement was properly recorded in Orange County, plaintiffs had constructive notice of it over their Orange County property. We affirm the trial court's conclusion that the

portion of defendants' easement over the Orange County property is valid against plaintiffs.

As for the portion of the easement over the Person County property, we reverse the trial court as a matter of law and remand for an order instituting plaintiffs' requested injunctive relief and quieting title to the Person County property in favor of plaintiffs.

II.

[2] Plaintiffs also contest the trial court's finding that defendants' easement ran over the dam that was breached, thus entitling defendants to $1650.00 for costs expended to repair the dam.

The trial court's finding relied on its conclusion that defendants' entire easement was valid. However, we hold that because the easement was valid only in Orange County, defendants can only be compensated if the dam lies in Orange County.

The parties in this action agree that it cannot be determined whether the dam in fact lies in Orange County. Although the dam is located in the vicinity of the Orange/Person county border, it cannot be determined which county it is in because the border has never been accurately surveyed.

Person County was created in 1791 when Caswell County was divided into two halves, Caswell County to the west, and Person County to the east. Caswell County itself had been created from Orange County in 1771. The General Assembly prescribed the Caswell County boundaries as follows:

> . . . North of a Point Twelve Miles due North of Hillsborough, and bounded as follows, to-wit, Beginning at the aforesaid Point, running thence due East to Granville County Line, thence North along Granville County Line to the Virginia Line, thence West along the Virginia Line to Guilford County Line, thence South along Guilford County Line to a Point due West of the Beginning, thence due East to the Beginning . . . .

Laws of North Carolina 1777, ch. XVII, published in *The State Records of North Carolina* (Walter Clark ed., 1905). However, the Orange/Caswell dividing line was never surveyed or mapped. Thus, the Orange/Person line cannot be accurately determined. The legal dividing line between Orange and Caswell/Person still commences at a point twelve miles due north of Hillsborough, a point whose location may never be known because of the virtual im-

possibility of replicating survey conditions of 1777, but a point that nonetheless is the only one presently recognized at law. The power to create, abolish, enlarge or diminish the boundaries of a county is vested exclusively in the legislature. *See Moore v. Board of Educ. of Iredell County*, 212 N.C. 499, 193 S.E. 732 (1937); *Swain County v. Sheppard*, 35 N.C. App. 391, 241 S.E.2d 525 (1978); N.C. Const. art. VII, § 1. Until the legislature commissions an accurate survey of the boundary, we cannot determine which county the dam is in and therefore whether defendants' easement passes over it.

As the pleading party, defendants have the burden of establishing that their easement is valid at the point that it crosses over the dam. *Wells v. Clayton*, 236 N.C. 102, 72 S.E.2d 16 (1952). Defendants cannot prove that the dam lies in Orange County; in fact, they have stipulated that the county in which it is located cannot be determined. Defendants therefore fail to carry their evidentiary burden, and we reverse accordingly.

For the reasons discussed herein, the judgment of the trial court is reversed.

Reversed and remanded.

Judge JOHNSON concurs.

Judge JOHN dissents in a separate opinion.

Judge JOHN dissenting.

I believe the trial court correctly concluded that plaintiffs, as a result of recordation of the easement in Orange County, were chargeable with constructive notice of the existence and entire course of that easement. In addition, contrary to the majority's assertion, I also believe our law requires that "purchasers for value," in order to claim protection under N.C. Gen. Stat. § 47-27 (1984), must indeed be "innocent." *See Hill v. Memorial Park*, 304 N.C. 159, 165, 282 S.E.2d 779, 783 (1981) (N.C. recording statutes "do[ ] not protect all purchasers, but only *innocent* purchasers for value") (emphasis added) (citations omitted); *see also Green v. Miller*, 161 N.C. 25, 31, 76 S.E. 505, 508 (1912) (purchaser *without notice* of right or interest of third party, who pays full and fair price at time of purchase or before notice, takes property free from right

of third party "because he is regarded as an innocent purchaser . . . . It is a perfectly just rule, and it would be strange if the law were otherwise.") (Emphasis added). Thus plaintiffs, having constructive notice the easement was located in Orange and Person counties, were not "innocent" purchasers of the land in question and therefore took title subject to the easement in both counties. Accordingly, I respectfully submit the trial court ruled properly and vote to affirm the court's order in its entirety.

The purpose of North Carolina's recording statutes is to "provide a single reliable means for purchasers to determine the state of the title to real estate," *Stegall v. Robinson*, 81 N.C. App. 617, 619, 344 S.E.2d 803, 804 (citations omitted), *disc. review denied*, 317 N.C. 714, 347 S.E.2d 456 (1986), and to provide record notice "upon the absence of which a prospective innocent purchaser may rely." *Whitehurst v. Abbott*, 225 N.C. 1, 5, 33 S.E.2d 129, 132 (1945). However, these statutes do "not protect all purchasers, but only *innocent* purchasers for value." *Hill*, 304 N.C. at 165, 282 S.E.2d at 783 (emphasis added); *see also Morehead v. Harris*, 262 N.C. 330, 338, 340-42, 137 S.E.2d 174, 182, 183-85 (1964).

As a consequence of the statutes:

> [a] purchaser of land is charged with notice of every description, recital, reference and reservation in deeds or muniments in *his* grantors' chain of title, and . . . if the facts disclosed in such chain or [sic] title are sufficient to put the purchaser on inquiry, he will be charged with notice of what a proper inquiry would have disclosed.

Hughes v. Highway Comm., 275 N.C. 121, 130, 165 S.E.2d 321, 327 (1969) (emphasis added) (citation omitted). "A purchaser . . . has constructive notice of all duly recorded documents that a proper examination of the title should reveal," *Stegall*, 81 N.C. App. at 619, 344 S.E.2d at 804 (citation omitted), and such notice suffices to deprive a purchaser of "innocence" with respect to such documents. *See Hill*, 304 N.C. at 165, 282 S.E.2d at 783; *see also Butler v. Winston*, 223 N.C. 421, 427, 27 S.E.2d 124, 127 (1943). This principle of constructive notice implied from proper registration has long been recognized and relied upon by our courts. *See, e.g., Clark v. R.R.*, 192 N.C. 280, 283, 135 S.E. 26, 27 (1926).

G.S. § 47-27, set out in the majority opinion, requires registration of easements in order for an interest in land claimed thereunder

to be effective as against "purchaser[s] for a valuable consideration." To defeat defendants' claim to an easement, therefore, plaintiffs must be within the class of persons the registration statutes are designed to protect—"innocent purchasers for value," *Hill*, 304 N.C. at 165, 282 S.E.2d at 783; that is, purchasers whose proper examination of the appropriate chain of title would reveal no "duly recorded documents" evidencing interests in the property adverse to their own. *Stegall*, 81 N.C. App. at 619, 344 S.E.2d at 804. Unlike the majority, I do not believe plaintiffs meet the test.

The deeds from Jack and Martha Chavis to the Halls, and in turn from the Halls to plaintiffs, both specifically referred to the land as being located in Person *and* Orange counties. Plaintiffs properly registered their deed in both counties, signifying their awareness of two recorded chains of title.

A proper, thorough title search by plaintiffs would have included "running the chain of title" to ascertain all previous owners of the land, and thereafter investigating all the "out" conveyances by each owner. *See generally* Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* §§ 458 to 463, at 601-23, § 490, at 670 (3d ed. 1988). This would have been accomplished by utilizing the Grantee and Grantor Indexes maintained in both counties. These indexes refer the title-searcher to specific pages of separate volumes wherein copies of documents reflecting the listed transactions may be found. *Id.* § 460, at 608. This is significant because checking a grantor's out-conveyances involves more than merely glancing at the brief description of the property in the Grantor Index—"[t]he *recorded instruments themselves* should be looked at . . . ." *Id.* § 463 at 622-23.

While this latter requirement of detailed examination of collateral deeds has been criticized, *see Stegall*, 81 N.C. App. at 620-21, 344 S.E.2d at 805-06, it is derived from admonitions adopted by our courts. *See Reed v. Elmore*, 246 N.C. 221, 230-32, 98 S.E.2d 360, 366-68 (1957). This Court followed and amplified *Reed* in *Stegall v. Robinson*, stating:

> *Reed* stands for the rule that in title examination when checking the grantor's out conveyances it is not enough to merely insure that the subject property was not conveyed out previously. The title examiner must *read* the prior conveyances to determine that they do not contain restrictions applicable to the use of the subject property.

Stegall, 81 N.C. App. at 620, 344 S.E.2d at 805. In addition, we recently had occasion to observe that "*Reed* remains good law today." *Gregory v. Floyd*, 112 N.C. App. 470, 476, 435 S.E.2d 808, 812 (1993). Again, "[t]he law contemplates that a purchaser of land will examine each recorded deed and other instrument in his chain of title and charges him with notice of every fact affecting his title which an accurate examination of the title would disclose." *Waters v. Phosphate Corp.*, 310 N.C. 438, 441-42, 312 S.E.2d 428, 432 (1984) (citation omitted).

Plaintiffs impliedly concede they were required to examine the record chain of title in both counties wherein the tract of land in question is located. They further concede that, by virtue of prior registration of the easement in Orange County, they were put on constructive notice of the existence of the easement as to that county. Under the foregoing authorities, I respectfully submit, plaintiffs are further charged with constructive notice of the duly recorded out-conveyance by which the easement was created *including the contents* thereof. " 'The deed was notice to them of all it contained; otherwise, the purpose of the recording acts would be frustrated.' " *Stegall*, 81 N.C. App. at 620, 344 S.E.2d at 805 (quoting with approval *Finley v. Glenn*, 154 A. 299, 301 (Pa. 1931)). If plaintiffs had properly conducted the required title examination in Orange County, they would have discovered not only conveyance of an easement to the Walkers. They would also have found the extent and course of that easement unambiguously described in the deed of conveyance and thus ascertained, at least upon "prudent" inquiry pursued "with reasonable diligence," *Highway Comm. v. Wortman*, 4 N.C. App. 546, 552, 167 S.E.2d 462, 466 (1969) (quoting *Jones v. Warren*, 274 N.C. 166, 173, 161 S.E.2d 467, 472 (1968)), its location in *both* Orange and Person counties.

Because plaintiffs had constructive notice of the entire course of the easement derived from the recorded instrument in Orange County, they took title subject to the easement in both counties, wherever the boundary line between them might be located. When a grantor burdens his property by written conveyance which appears in his chain of title, a subsequent purchaser from that grantor has constructive notice of that burden in the chain of title and takes subject thereto. *Reed*, 246 N.C. at 230, 98 S.E.2d at 366-67; *Waters*, 310 N.C. at 441-42, 312 S.E.2d at 432.

Under the limited circumstances of this case, therefore, I would approve the trial court's determination that "plaintiffs' constructive notice of the existence and course of the Walker easement did not stop at the Person County line; constructive notice is notice for all purposes and not fictionally discontinued or suspended by a county line which intersects a single parcel of land." Therefore, I vote to affirm the court's ruling that plaintiffs, being chargeable with constructive notice of the existence and course of the easement in both Orange and Person counties, were thus not "innocent" purchasers for a valuable consideration and were not entitled to rely upon G.S. § 47-27.

CYNTHIA RAYFIELD TATE, AND CAROL T. TAYLOR, PLAINTIFFS v. ARTHUR L. CHRISTY, DEFENDANT

No. 9327SC331

(Filed 15 March 1994)

Automobiles and Other Vehicles § 528 (NCI4th)— defendant crossing center line—road slippery from rain—submission of negligence issue to jury proper

In an action to recover for injuries sustained in an automobile accident, the evidence did not show negligence *per se* by defendant but presented an issue of negligence for the jury where it tended to show that defendant crossed the center line and struck plaintiffs in their lane of travel, but there was also evidence that defendant was driving under the speed limit, was driving a car which was in good repair with good tire tread, and crossed the center line because of roads made slippery by rain rather than because of his own negligence. N.C.G.S. § 20-146.

Am Jur 2d, Automobiles and Highway Traffic § 769.

Judge ORR dissenting.

Appeal by plaintiffs from judgment entered 22 October 1992 and order entered 15 December 1992 by Judge Zoro N. Guice in Gaston County Superior Court. Heard in the Court of Appeals 14 January 1994.

James, McElroy & Diehl, P.A., by G. Russell Kornegay, III, and Richard B. Fennell, for plaintiff appellant, Cynthia Rayfield Tate; and Tim L. Harris & Associates, by Jerry N. Ragan, for plaintiff appellant, Carol T. Taylor.

Stott, Hollowell, Palmer & Windham, by Martha Raymond Holmes, for defendant appellee.

COZORT, Judge.

Plaintiffs appeal the trial court's judgment reflecting a jury verdict finding that plaintiffs' injuries resulting from an automobile collision were not caused by defendant's negligence. Plaintiffs additionally appeal the denial of their motions for judgment notwithstanding the verdict and for a new trial. We find no error.

Plaintiffs filed this cause of action on 1 July 1991 to recover damages for injuries they received when the automobile in which they were riding was struck by defendant's vehicle. The evidence presented at trial tends to show that, on 11 October 1990, at approximately 1:15 p.m., Cynthia Tate, and her mother, Carol Taylor, were driving south on Helton Road in Gaston County, North Carolina. Defendant was also driving on Helton Road, heading in a northerly direction. As plaintiffs and defendant approached a curve in opposite directions, Ms. Tate noticed that defendant was across the yellow line and coming toward her in her lane of travel. Ms. Taylor also testified at trial that she observed defendant's automobile over the double yellow line. Ms. Tate attempted to steer her car out of the way, but she was unable to avoid a collision. Defendant's vehicle struck Tate's car, damaging both the front and side of the passenger's side, and the front of the driver's side of the automobile.

Trooper Kersey, the investigating officer at the scene, measured skid marks from defendant's vehicle which began twenty-six feet from the point of impact. The skid marks crossed the center line prior to the point of impact. Trooper Kersey noted the road was in good condition, but that it had been raining on the day of the accident. Defendant told Trooper Kersey that "slick roads" was a cause of the accident, and that he had been travelling below the posted speed limit of 55 miles per hour.

At the close of the evidence, both plaintiffs and defendant moved for a directed verdict. The trial court denied defendant's

motion and reserved ruling on plaintiffs' motion. The issue of whether plaintiffs were injured by defendant's negligence was sent to the jury. The jury returned a verdict finding that plaintiffs were not injured by the defendant's negligence. The trial court thereupon entered judgment based on the verdict and denied all post trial motions.

Plaintiffs argue the trial court should have directed a verdict in their favor as to defendant's negligence, or granted their motion for a judgment notwithstanding the verdict (JNOV), since defendant could not demonstrate that his violation of N.C. Gen. Stat. § 20-146, requiring a driver to drive on the right side of the road, was not negligence *per se*. Defendant contends the plaintiffs' own evidence was sufficient for a jury to find that he was not liable, because Trooper Kersey presented evidence tending to show the defendant was on the opposite side of the road from a cause other than his own negligence. We agree with defendant and find no error.

A directed verdict motion pursuant to N.C.R. Civ. P. 50 tests whether the evidence is sufficient to submit the case to the jury in support of a verdict for the nonmoving party. *Dunbar v. City of Lumberton*, 105 N.C. App. 701, 703, 414 S.E.2d 387, 388 (1992). A motion for judgment notwithstanding the verdict (JNOV) under Rule 50(b) of the North Carolina Rules of Civil Procedure is essentially a renewal of a motion for a directed verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985). The test governing the sufficiency of the evidence on a motion for JNOV is the same as the test used on motions for directed verdicts. *Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984). Therefore, if a directed verdict should have been granted, JNOV should be granted. *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337. As stated previously, we must determine whether the evidence, when viewed in the light most favorable to the nonmovant, giving the nonmovant the benefit of every reasonable inference, was sufficient to go to the jury. *Id.* at 369, 329 S.E.2d at 337-38.

Here, the evidence presented at trial did not establish conclusively that defendant was negligent as a matter of law. It is undisputed the defendant violated N.C. Gen. Stat. § 20-146 (1993), which provides that "[u]pon all [highways] of sufficient width a vehicle shall be driven upon the right half of the highway . . . ." Where a plaintiff puts on evidence tending to show the

collision occurred when defendant was driving left of center of the highway, the burden shifts to defendant to produce evidence that he was on the wrong side of the road from a cause other than his own negligence. Otherwise, defendant's violation of N.C. Gen. Stat. § 20-146 amounts to negligence *per se*. *See Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 250, 258 S.E.2d 334, 337 (1979). In *Chantos*, the North Carolina Supreme Court stated:

> While defendant in the instant case stipulated that the car he was operating crossed over the median into the southbound lane and collided with [plaintiff], he also offered evidence tending to show that he was in the southbound lane from a cause other than his own negligence. Therefore, a jury question was presented and the trial court properly denied plaintiff's motion for a directed verdict on the first issue.

Id. at 250-51, 258 S.E.2d at 337.

In this case, defendant presented evidence tending to show he crossed into plaintiffs' lane of travel from a cause other than his own negligence. Trooper Kersey testified that defendant was travelling under the speed limit and was operating a vehicle in good condition having tires with good tread. The evidence also demonstrated the road was slippery due to rainy weather. Thus, there was evidence before the court tending to show that defendant crossed the double yellow line due to a cause other than his own negligence. Accordingly, the issue of whether a cause other than defendant's negligence forced him into the other lane was a proper issue for the jury's determination. *See Anderson v. Webb*, 267 N.C. 745, 148 S.E.2d 846 (1966). Because reasonable minds could have differed on the question of what caused defendant to move into the other lane, the jury was in the best position to reconcile the evidence and to make such a determination. Accordingly, we find the trial court did not err in denying plaintiffs' motion for a directed verdict and for JNOV.

Plaintiffs further contend the trial court erred in failing to grant their motion for a new trial. Our standard of reviewing a motion for a new trial pursuant to N.C.R. Civ. P. 59 is an abuse of discretion standard. *Bryant*, 313 N.C. at 380-81, 329 S.E.2d at 343-44. We find no manifest abuse of discretion by the trial court in the present case; plaintiffs' assignment of error is thus overruled.

Finally, plaintiffs argue the trial court erred in granting defendant's motion *in limine* which excluded evidence of a citation received by defendant following the accident. We have reviewed the record and find no evidence as to any citation received by defendant or disposition of a traffic citation. This assignment of error is overruled.

No error.

Judge GREENE concurs.

Judge ORR dissents.

Judge ORR dissenting.

I agree with the majority that when plaintiffs put on evidence tending to show that the collision occurred while defendant was driving left of center of the highway, the burden shifted to defendant to produce evidence that he was on the wrong side of the road from a cause other than his own negligence. I respectfully dissent, however, from the majority's decision that defendant in the present case succeeded in carrying his burden.

Defendant argues, and the majority agrees, that plaintiffs' evidence that the road was slick, that defendant's tires were not slick, that defendant's car was in good condition, and that defendant was traveling under the speed limit was sufficient to tend to show that defendant "was on the wrong side of the road from a cause other than his own negligence." I disagree.

Our laws require that a motorist "operate his vehicle with due caution and circumspection, with due regard for the rights and safety of others, and at such speed and in such manner as will not endanger or be likely to endanger the lives or property of others." *Williams v. Henderson*, 230 N.C. 707, 708, 55 S.E.2d 462, 463 (1949). Inclement weather does not relieve a motorist of the duty to exercise due care, for under this duty, motorists are required to operate their vehicles in a reasonably prudent manner for the conditions then existing. *See, e.g., Kolman v. Silbert*, 219 N.C. 134, 125 S.E.2d 915 (1941); *Hoke v. Atlantic Greyhound Corp.*, 226 N.C. 692, 40 S.E.2d 345 (1946).

> [W]hen the plaintiff relies on the violation of a motor vehicle traffic regulation as the basis of his action . . ., unless otherwise

> provided in the statute, the common law rule of ordinary care does not apply. The statute prescribes the standard, and the standard fixed by the Legislature is absolute. . . . Proof of the breach of the statute is proof of negligence. In essence, that is the meaning of *per se*.
>
> The violator is liable if injury or damage proximately results, irrespective of how careful or prudent he has been in other respects.

Aldridge v. Hasty, 240 N.C. 353, 360, 82 S.E.2d 331, 338 (1954).

The majority relies upon *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 258 S.E.2d 334 (1979) in support of their conclusion that defendant carried his burden of producing evidence that he was on the wrong side of the road from a cause other than his own negligence. *Chantos* is not, however, controlling.

In *Chantos*, the plaintiff's evidence tended to show that Charles McDonald was traveling south on North Boulevard in Raleigh, that defendant was driving north on this same road, that defendant's car left the northbound lane, went across a concrete median eight inches high into the southbound lane and hit McDonald's car head on at or near a bridge, that at the time of the collision it was raining, and that defendant's tires were slick. Evidence favorable to defendant tended to show that shortly before the collision, defendant drove onto the parking lot of a shopping center and, before reentering the boulevard, he came to a complete stop at the north entrance of the parking lot. Defendant then drove onto the boulevard and proceeded north. At the time defendant entered the bridge, the bridge was covered with water and a new coat of asphalt had been recently applied.

On direct examination, defendant testified that the bridge was 75 to 100 yards north of the shopping center exit where he entered the boulevard from a completely stopped position. Further, defendant testified that he gradually increased his speed and moved over into the left northbound lane, that when he entered upon the bridge, he was traveling about 25 m.p.h., the speed limit being 45 m.p.h., and that he began to skid or spin immediately after going upon the bridge. During cross-examination,

> defendant steadfastly reaffirmed his statement that he was driving approximately 25 m.p.h.—30 m.p.h. at the most. He further stated that while he was not sure whether he observed

> the speedometer, he based his opinion as to speed on the cautiousness with which he entered the boulevard, the "climatic situation", the fact that he did not accelerate very fast, the short distance he had traveled, and his impression that "the terrain around me was not flashing by". He also stated that while he knew his friend David Williams had "burned the rubber" on the [car defendant was driving], he did not know that the tires were slick.

Id. at 249-50, 258 S.E.2d at 336. Based on this evidence, our Supreme Court concluded, "[w]hile defendant . . . stipulated that the car he was operating crossed over the median into the southbound lane and collided with McDonald, he also offered evidence tending to show that he was in the southbound lane from a cause other than his own negligence." *Id.* at 250, 258 S.E.2d at 337. Based on this conclusion, the Court held that a jury question was presented on the issue of defendant's negligence.

In the present case, unlike in *Chantos*, the defendant did not testify or present any direct evidence on liability other than the cross-examination of Trooper Kersey, in which the following testimony was elicited:

> [Counsel for defendant:] And based on your conversation with [defendant] he told you that he was traveling north and going at a speed greatly less than the speed limit; is that right?
>
> [Trooper Kersey:] Yes, ma'am. He told me [he] was going below the posted speed limit; that's correct.
>
> [Counsel for defendant:] And the posted speed limit was fifty-five miles an hour?
>
> [Trooper Kersey:] Yes, ma'am.
>
> [Counsel for defendant:] Do you have an indication on your report as to whether there were any defects in the vehicles?
>
> [Trooper Kersey:] Yes, ma'am.
>
> [Counsel for defendant:] And you have Number Eight written down for [defendant's] vehicle . . . ?
>
> [Trooper Kersey:] Yes, ma'am.
>
> [Counsel for defendant:] And that means there were no vehicle defects?

[Trooper Kersey:] That I detected that day, yes, ma'am, that's correct.

. . .

[Counsel for defendant:] There was nothing wrong with [defendant's] tires that you saw?

[Trooper Kersey:] That's correct. Everything that I observed about his vehicle as far as the laws that govern this state they were in accordance to those laws.

[Counsel for defendant:] And based on what [defendant] told you was it your understanding that slick roads was one of the causes of the accident, wasn't it?

[Trooper Kersey:] That's correct, yes, ma'am. As a matter of fact that's what he told me and that was my opinion.

Without more substantive evidence as to why or how the "slick road" caused the accident, I find no support in our law to relieve defendant of his responsibility of driving on the right side of the road, nor to allow a jury to speculate as to what happened.

Thus, absent evidence of a sudden emergency or other circumstances that caused defendant to drive left of the center line, I would conclude that defendant's failure to keep his vehicle in the proper lane of travel constituted negligence *per se*, and hold that the trial court erred in denying plaintiffs' motion for a directed verdict and judgment notwithstanding the verdict as to defendant's negligence. Accordingly, I would reverse the judgment of the trial court and remand the case for entry of a judgment of negligence against defendant and a new trial on the issue of damages.

HOMER BUFFALOE v. PATRICIA HART AND LOWELL THOMAS HART

No. 939SC430

(Filed 15 March 1994)

1. Sales § 4 (NCI4th)— oral contract—check without defendant's signature—contract unenforceable

Because the requirement of N.C.G.S. § 25-2-201(1) that the writing be signed by the party against whom enforcement

is sought or by his authorized agent or broker was absent from a check written by plaintiff to defendant as partial payment for bulk tobacco barns, the alleged oral contract between plaintiff and defendants was unenforceable under that statute.

Am Jur 2d, Sales §§ 180 et seq.

2. **Sales § 54 (NCI4th) — purchase of tobacco barns — sufficiency of evidence of existence of contract**

In an action for breach of contract, evidence that plaintiff told several people about purchasing tobacco barns from defendants, reimbursed defendants for insurance on the barns, paid for improvements, took possession, enlisted the aid of an auctioneer and the newspaper to sell the barns, received deposits from three buyers, and delivered a $5,000 partial payment check to defendants which was not returned for four days was sufficient to support the jury's conclusion that there was a contract between the parties, that plaintiff accepted the tobacco barns under the terms and conditions of the contract and that defendants accepted a payment for the barns under the terms and conditions of the contract. N.C.G.S. § 25-2-201(3).

Am Jur 2d, Sales §§ 623 et seq.

Appeal by defendants from judgments entered 1 October 1992 and 15 December 1992 in Franklin County Superior Court by Judge Henry W. Hight, Jr. Heard in the Court of Appeals 4 February 1994.

Davis, Sturges & Tomlinson, by Charles M. Davis, for plaintiff-appellee.

Norman & Gardner, by Larry E. Norman, for defendant-appellants.

GREENE, Judge.

Patricia Hart and Lowell Thomas Hart (defendants) appeal from the trial court's denial of their motions for directed verdict and judgment notwithstanding the verdict in this action brought by Homer Buffaloe (plaintiff) for breach of contract.

Plaintiff filed a complaint for breach of contract and damages in Franklin County Superior Court on 13 November 1989. Defendants, in their answers, denied the existence of the contract and

contended the alleged contract was unenforceable because it violated the statute of frauds. The case was tried with a jury during the 28 September 1992 term of Franklin County Superior Court. Plaintiff presented evidence that tended to show that he is a tobacco farmer in Franklin County, North Carolina, has known defendants for about ten years and rented tobacco from them in 1988 and 1989. Plaintiff rented from defendants, pursuant to an oral agreement, five "roanoke box [tobacco] barns" (the barns) located on their farm for use in his tobacco farming operations during the 1988 farming year. The agreement with defendants for rental of the tobacco and the barns was not reduced to writing and was based on a "handshake, oral" agreement. Plaintiff stated, "I had bought some equipment prior to then, and we always done it on a handshake agreement, cash basis. That's the way it was." Defendants agreed to provide insurance coverage for the barns in 1988. On 20 October 1988, plaintiff paid the $2,000.00 rent owed for the barns and the $992.64 owed to Patricia Hart (Mrs. Hart) for the tobacco rent.

Plaintiff began negotiating with defendants several days later about purchasing the barns. Plaintiff offered to pay $20,000.00 for the five barns in annual installments of $5,000.00 over a four year period, but did not offer any interest payments. The offer was made in Mrs. Hart's front yard with only defendants and plaintiff present. Defendants accepted the offer, and both parties shook hands. Plaintiff already had possession of the barns under the rental agreement. Plaintiff did not remove the barns from defendants' land because he agreed to farm their land in 1989 with tobacco he rented from defendants.

On 3 January 1989, plaintiff applied for a loan with Production Credit Association in order to pay for the barns. He informed Lowell Thomas Hart (Mr. Hart) that he would pay for all the barns if the loan came through. Mr. Hart responded that it "would be fine with us." On the financial statement portion of the application, he listed the barns, but his loan was denied. Plaintiff and Mr. Hart then reconfirmed that plaintiff was to pay four yearly installments of $5,000.00 for the barns. Because he was unsuccessful in obtaining insurance coverage for the barns, defendants agreed to provide insurance for the five barns for 1989 if plaintiff would reimburse them for the cost. On 20 October 1989, plaintiff promptly reimbursed defendants in full for the insurance coverage. Plaintiff testified that "[a]fter I bought the barns was the only time I agreed

to pay insurance" and when he rented the barns in 1988, Mrs. Hart "was supposed to pay" the insurance.

During the 1989 tobacco farming season, plaintiff decided to sell the barns and placed a "for sale" ad which expired 23 October 1989 under farm equipment saying "five roanoke box barns, gas, [plaintiff's] phone number" in *The News and Observer*. The ad ran two lines for four days and resulted in several calls, including contact with Ashley P. Mohorn (Mr. Mohorn), Ronald E. Stainback (Mr. Stainback), and Lawrence Elliot (Mr. Elliot). Plaintiff received a $500.00 check dated 22 October 1989 as a down payment from Mr. Mohorn for two of the barns after quoting a price of $8,000.00 each. Mr. Stainback met with plaintiff, informed him that he would take two barns, and Mr. Elliot would take one. Mr. Stainback wrote plaintiff a check for $1,000.00 dated 25 October 1989, representing a deposit on the three barns.

Mrs. Hart called plaintiff in the fall of 1989 and asked if he could "straighten up with her," and he "told her it would be in the next two or three days" and that he was going to sell the barns. She responded that would "be fine with her." On the morning of 22 or 23 October 1989, plaintiff delivered a check in person to her for the first $5,000.00 due defendants. The payment was in the form of plaintiff's personal check number 1468, dated 23 October 1989, payable to Patricia Hart, signed by plaintiff, and with written words on the "for" line indicating the check was for payment for the five barns. When plaintiff gave her the check, she asked him if he wanted a receipt, but he said "no, the check would be the receipt." The next night after plaintiff delivered the check, she called him and told him "she didn't want to sell [him] the barns; she'd already sold them" to somebody else. Plaintiff received a letter, postmarked 26 October 1989, with the check in it. "She had torn . . . [the check] so bad you couldn't hardly put it back together," and "had tore off [plaintiff's] name—tore off her name, the 'for' line, and the date." Plaintiff was able to piece the check back together to see his signature and the five thousand dollars. He later discovered that defendants sold the five barns to "the same guys" plaintiff had agreed to sell them to.

Randy Baker (Baker) testified that plaintiff told him he had bought the barns and had him repair boxes on the barns. Plaintiff paid Baker for this work. J.R. Fowler, Jr. testified that plaintiff

told him he had bought the five barns in 1989, was going to pay five thousand dollars a year until they were paid for, was going to sell them, and had run an ad in the paper. Jack Stone (Stone), an auctioneer for the State of North Carolina, testified that "[plaintiff] approached me and said that he had some bulk barns," "said that he had purchased the barns," and "asked if [Stone] could sell them." Stone received a $41,000.00 check for the five barns and held it in escrow until he could inform plaintiff; however, plaintiff told Stone "he thought he already had them sold." After Stone informed plaintiff to let him know if he had already sold the barns, "[plaintiff] calls back and said that the lady had backed out on him and he couldn't sell the barns to nobody 'til he got this straight." At the close of plaintiff's evidence, defendants moved for a directed verdict which was denied.

Defendants presented evidence tending to show that "[plaintiff] agreed to pay [Mr. Hart] twenty thousand dollars for the five barns, and he agreed to pay it over a four year period of time"; however, plaintiff later called Mr. Hart and wished to make a new arrangement in that plaintiff would secure a loan and pay for the barns all at one time. When the loan was not approved, plaintiff contacted Mr. Hart and "wanted to know if he could continue the rental agreement that he had had the previous year." When Mr. Hart's wife told him that plaintiff "had come over and brought the rent check, and left the five thousand dollars as an enticement to buy the barns, [he] told her that it just wasn't sufficient considering the fact that there had been a tremendous acreage increase in the tobacco poundage." He instructed Mrs. Hart to call plaintiff and "tell him we weren't interested." His wife tore up the check, put it in an envelope, and mailed it to plaintiff. At the close of all the evidence, defendants moved for a directed verdict which was denied.

The jury answered the questions submitted to them as follows:

> WAS THERE A CONTRACT BETWEEN THE PLAINTIFF, HOMER BUFFALOE, AND THE DEFENDANTS, LOWELL THOMAS HART AND PATRICIA HART?
>
> ANSWER: YES

. . . .

IF SO, DID HOMER BUFFALOE ACCEPT THE TOBACCO BARNS UNDER THE TERMS AND CONDITIONS OF THE CONTRACT?

ANSWER: YES

. . . .

IF THERE WAS A CONTRACT, DID PATRICIA HART AND LOWELL THOMAS HART ACCEPT A PAYMENT FOR THE TOBACCO BARNS UNDER THE TERMS AND CONDITIONS OF THE CONTRACT?

ANSWER: YES

. . . .

IF THERE WAS A CONTRACT, DID LOWELL THOMAS HART AND PATRICIA HART BREACH THIS CONTRACT?

ANSWER: YES

. . . .

WAS THERE A RENTAL CONTRACT FOR THE TOBACCO BARNS FOR THE YEAR 1989 BETWEEN THE PLAINTIFF, HOMER BUFFALOE, AND THE DEFENDANTS, LOWELL THOMAS HART AND PATRICIA HART?

ANSWER: NO

The jury awarded plaintiff damages of $21,000.00. Defendants filed a motion for judgment notwithstanding the verdict which was denied.

The issues presented are whether (I) a personal check signed by plaintiff, describing the property involved and containing an amount representing partial payment is sufficient to constitute a writing under the statute of frauds; and (II) there is substantial relevant evidence that plaintiff "accepted" the barns and defendants "accepted" plaintiff's check, taking the contract out of the statute of frauds.

Because the barns, the subject of this dispute, are "goods" within the meaning of the Uniform Commercial Code, N.C.G.S. § 25-2-105 (1986), and because the price for the barns is at least

$500.00, the provisions of N.C. Gen. Stat. § 25-2-201 apply. The relevant provisions of this section are:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> . . . .
>
> (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
>
> . . . .
>
> (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (G.S. 25-2-606).

N.C.G.S. § 25-2-201(1), (3)(c) (1986).

I

[1] Defendants argue in their brief that the check delivered by plaintiff to Mrs. Hart fails to meet the requirements of N.C. Gen. Stat. § 25-2-201(1), commonly referred to as a statute of frauds, because the check "was not negotiated or endorsed by the Defendants and therefore the signature of the Defendants did not appear on the check." A check may constitute a writing sufficient to satisfy the requirements of Section 25-2-201(1) provided it (1) contains a writing sufficient to indicate a contract of sale between the parties; (2) is signed by the party or his authorized agent against whom enforcement is sought; and (3) states a quantity. *See* N.C.G.S. § 25-2-201 official cmt.; *Harper v. Battle*, 180 N.C. 375, 376, 104 S.E. 658, 659 (1920) (check collected by defendant with her written endorsement thereon, in which property is described as "Watts Street House" is sufficient writing within statute of frauds); *Burriss v. Starr*, 165 N.C. 657, 661, 81 S.E. 929, 931 (1914) (note drawn up by defendant, signed by plaintiff, not sufficient to satisfy statute

of frauds because it did not obligate defendant to perform); *Arthur Linton Corbin, Corbin on Contracts* § 508, at 734 (1950).

The only writing in this case is a personal check which, although specifying the quantity of "five barns" on the "for" line, addressed to Patricia Hart, signed by plaintiff, and containing an amount of $5,000.00, is not sufficient to satisfy Section 25-2-201. Defendants, the parties "against whom enforcement is sought," did not endorse the check, and therefore, their handwriting does not appear anywhere on the check. In fact, the name of defendant, Mr. Hart, is totally absent from the check. Therefore, because the requirement of Section 25-2-201(1) that the writing be "signed by the party against whom enforcement is sought or by his authorized agent or broker" is absent from the check, the alleged oral contract between plaintiff and defendants is unenforceable under that section. *See Manyon v. Graser*, 411 N.Y.S.2d 746 (1978) (check for $100 on which was stated "deposit on purchase of nine-foot strip" which was not endorsed and letter stating "not feasible to sell property" were not sufficient memoranda to take oral agreement to sell land out of statute of frauds).

II

[2] Defendants further argue that the part performance exception in Section 25-2-201(3)(c) does not apply because "there was no overt action by the plaintiff, purported buyer, in fact no change from the rental period and therefore no basis for a finding of part performance," "[t]here is no overt action of the Defendants in giving up possession of the tobacco barns," and "the delivery of the check by the Plaintiff to the Defendant, Patricia Hart, did not constitute partial payment of the contract because the check was never accepted legally by the Defendants." We disagree.

To qualify under Section 25-2-201(3)(c), the seller must deliver the goods and have them accepted by the buyer. "Acceptance must be voluntary and unconditional" and may "be inferred from the buyer's conduct in taking physical possession of the goods or some part of them." *Howse v. Crumb*, 352 P.2d 285, 288 (Colo. 1960). The official comment to Section 25-2-201 explains that for the buyer, he is required to deliver "something . . . that is accepted by the seller as such performance. Thus, part payment may be made by money or check, accepted by the seller." N.C.G.S. § 25-2-201 official cmt. Under this standard, Section 25-2-201(3)(c) presents questions of fact, which are questions for the jury, on the issue of acceptance.

See Sass v. Thomas, 90 N.C. App. 719, 724, 370 S.E.2d 73, 76 (1988); *Coffman v. Fleming*, 226 S.W. 67 (Mo. App. 1920), *aff'd*, 256 S.W. 731 (Mo. 1923) (question of whether plaintiff accepted check as part payment one of fact to be determined by jury).

In this case, the evidence, in the light most favorable to plaintiff, establishes that plaintiff told several people about purchasing the barns, reimbursed defendants for insurance on the barns, paid for improvements, took possession, enlisted the aid of an auctioneer and the paper to sell the barns, and received deposits from three buyers on the barns. The evidence, in the light most favorable to plaintiff, also establishes that plaintiff delivered a check for $5,000.00 on 22 October 1989 to defendants, and the check was not returned to plaintiff until 26 October 1989. Under the standards for deciding motions for directed verdict and judgment notwithstanding the verdict, *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 513-14, 428 S.E.2d 238, 242 (1993), this evidence represents substantial relevant evidence that a reasonable mind might accept as adequate to support the conclusions reached by the jury that there was a "contract between the plaintiff, Homer Buffaloe, and the defendants," plaintiff "accept[ed] the tobacco barns under the terms and conditions of the contract," and defendants "accept[ed] a payment for the tobacco barns under the terms and conditions of the contract." *See Kaufman v. Solomon*, 524 F.2d 501 (3d Cir. 1975) (whether possession by seller of check from buyer for 30 days is "acceptance" poses issue for resolution by fact finder); *Fournier v. Burby*, 148 A.2d 362 (Vt. 1959) (enforceable contract where plaintiff delivered check to defendant on 21 July 1957 and defendant returned it unendorsed by letter postmarked 6 August 1957); *Maryatt v. Hubbard*, 205 P.2d 623 (Wash. 1949) (enforceable contract where plaintiff delivered check to defendant on 23 December 1946 and defendant marked through her endorsement on check and returned it to plaintiff on 17 January 1947); *Miller v. Wooters*, 476 N.E.2d 11 (Ill. App. 1985) (oral contract within exception to statute of frauds where buyer gave check to seller in payment for truck even though buyer stopped payment on check the next day). Therefore, the trial court did not err in denying defendants' motions for directed verdict or motion for judgment notwithstanding the verdict.

No error.

Judges COZORT and ORR concur

CHARLES BRIAN GUNTER AND MARTINA ANDERSON, PLAINTIFFS/APPELLANTS v. ANTHONY D. ANDERS, ALLEN EDWARDS, DAVID A. MARTIN, TERRI MOSLEY, AND SURRY COUNTY BOARD OF EDUCATION, DEFENDANTS/APPELLEES

No. 9317SC236

(Filed 15 March 1994)

1. Pleadings § 367 (NCI4th)— failure to amend complaint in timely fashion—denial of motion to amend—no error

The trial court did not err in denying plaintiffs' motion to amend their complaint to allege that defendant board of education had purchased liability insurance since plaintiffs were put on notice both during the first filing of their complaint and the second filing of their complaint that defendant board had purchased liability insurance; plaintiffs had ample time to amend their complaint to allege the purchase of this insurance, nearly two and one-half years, but failed to do so until the motions hearing when defendants moved to dismiss the action based on plaintiffs' failure to so plead; and there was nothing in the record to show why plaintiffs were delayed in making this motion.

Am Jur 2d, Pleading §§ 310, 311, 314.

2. Schools § 172 (NCI4th)— injury on school property—failure to allege procurement of liability insurance by board of education—failure of complaint to state cause of action

In an action to recover for personal injuries which occurred on school property, plaintiffs' complaint failed to state a cause of action as to defendant board of education where plaintiffs failed to allege in their complaint that defendant board waived its immunity by the procurement of liability insurance to cover alleged negligence or tort.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 59, 60, 662-664.

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

3. Schools § 200 (NCI4th)— injury on school property—district superintendent as public officer—failure to plead specific allegations

The trial court in a negligence action properly dismissed plaintiffs' complaint against defendant school district superintendent, since the superintendent was a public officer who could be held personally liable only if it was alleged and proved that his action or failure to act was corrupt or malicious or outside the scope of his duties, and plaintiffs failed to so plead.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 662-664.

Modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher learning. 33 ALR3d 703.

4. Schools § 200 (NCI4th)— injury on school property—principal covered by governmental immunity—failure to plead specific allegations

In an action to recover for personal injuries sustained by plaintiff when he was struck by an automobile on school property, the trial court properly dismissed plaintiffs' claims against defendant school principal, since, pursuant to *Beatty v. Charlotte-Mecklenburg Bd. of Education*, 99 N.C. App. 753, the principal was covered by governmental immunity, and since plaintiffs failed to plead that the principal's acts or failure to act were corrupt, malicious, in bad faith, or outside the scope of his authority.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 662-664.

Modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher learning. 33 ALR3d 703.

Appeal by plaintiffs from judgment entered 17 December 1992 by Judge James C. Davis in Surry County Superior Court. Heard in the Court of Appeals 9 December 1993.

Lewis & Daggett, P. A., by Michael Lewis, and Edwards & Kirby, by John R. Edwards, for plaintiffs-appellants.

Petree Stockton, by Richard J. Keshian and Edwin W. Bowden, for defendants-appellees.

JOHNSON, Judge.

Plaintiff Charles Brian Gunter (Gunter) was a student at North Surry High School when he was hit by an automobile driven by defendant Anthony Anders. Gunter was hit while he was crossing a driveway on the school campus. Gunter's injuries as a result of this accident included the amputation of his left arm.

Following is a synopsis of the events leading up to this accident: During the morning of 8 December 1988, Gunter was in a physical education class instructed by Terri Mosley (a defendant herein). As was their custom, Gunter and his classmates ran from the locker room, where they dressed, and headed toward the physical education field. This path took them across a driveway which divides the school campus. This driveway ran by a wall which prevented drivers and pedestrians from seeing each other. As Gunter and his classmates ran across this driveway, Gunter was struck by defendant Anders' car.

The school principal, Allen Edwards (a defendant herein), had ordered students to move their cars from a parking lot on the campus so that the parking lot could be paved. Neither Gunter nor Mosley were aware of this.

Two months before this accident occurred, another student had been struck by a car at the same location on the high school campus. No steps had been taken to prevent another accident from occurring after this first accident.

Plaintiffs initially filed a complaint on 18 April 1990 against defendants Anthony Anders, Billy Jean Anders and Surry County Board of Education (Board). Plaintiffs' complaint failed to allege that defendant Board had purchased liability insurance, thereby waiving governmental immunity. On 5 July 1990, plaintiff was put on notice that defendant Board had purchased liability insurance. Plaintiffs thereafter filed three motions to amend their complaint, adding allegations of negligence on the part of the Board, principal Edwards and superintendent David A. Martin. Plaintiffs also filed two separate motions to amend their complaint to include new party defendants. On 11 March 1991, plaintiffs voluntarily dismissed their complaint, pursuant to North Carolina General Statutes § 1A-1, Rule 41 (1990).

On 9 March 1992 plaintiffs filed a second complaint, asserting negligence, negligence per se, negligent infliction of emotional distress

and gross negligence against defendant Anthony Anders and defendants Edwards, Martin, Mosley and the Board (hereafter, school defendants); plaintiff mother alleged loss of services of her son. School defendants filed answers and cross-claims. Defendant Anders filed a motion for summary judgment; school defendants filed in their answer a motion to dismiss, pursuant to North Carolina General Statutes § 1A-1, Rule 12(b)(6) (1990). The motion to dismiss was based in part on plaintiffs' failure to allege that defendant Board had purchased liability insurance, thereby waiving governmental immunity. Plaintiffs once again were put on notice that defendant Board had purchased a policy of insurance, covering claims for compensatory damages arising out of any alleged negligence in the general aggregate limit of $1,000,000.

These motions came on for hearing on 14 December 1992 at which time plaintiffs moved to amend their complaint, pursuant to North Carolina General Statutes § 1A-1, Rule 15 (1990), to allege "that the defendants Edwards, Martin, Mosley and Surry County Board of Education had procured liability insurance to cover negligent or tortious conduct and that said defendants have thereby waived their immunity for tort liability to that extent." The trial court denied the motion to amend, denied defendant Anders' motion for summary judgment, and granted school defendants' motion to dismiss. The trial court certified the order for appeal pursuant to North Carolina General Statutes § 1A-1, Rule 54(b) (1990). Plaintiffs filed timely notice of appeal to this Court.

We initially note that this is an interlocutory appeal as the trial court's summary judgment order did not determine the entire controversy between 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). However, the trial judge certified the order for appeal pursuant to North Carolina General Statutes § 1A-1, Rule 54(b), "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." *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). An interlocutory order may also be appealed under North Carolina General Statutes § 1-277 (1983) and North Carolina General Statues § 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 769, 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). Therefore, this interlocutory appeal is properly before this Court.

[1] Plaintiffs first argue that the trial court erred in denying plaintiffs' motion to amend their complaint at the 14 December 1992 hearing on defendants' motions to dismiss, because "leave was not freely given as justice so required." We note that "[w]here the granting or denial of a motion to amend is within the discretion of the trial court, it will not be overturned absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Borg-Warner Acceptance Corp. v. Johnston*, 107 N.C. App. 174, 178, 419 S.E.2d 195, 197 (1992), *disc. review denied*, 333 N.C. 254, 424 S.E.2d 918 (1993).

The record indicates that plaintiffs were put on notice both during the first filing of their complaint and the second filing of their complaint that defendant Board had purchased liability insurance. Plaintiffs had ample time to amend their complaint to allege the purchase of this insurance, nearly two and a half years, and failed to do so until the motions hearing when defendants moved to dismiss the action based on plaintiffs' failure to so plead. Because there is nothing in the record to show why plaintiffs were delayed in making this motion, we find no abuse of discretion by the trial court in denying plaintiffs' motion to amend their complaint at the 14 December 1992 hearing on defendants' motions to dismiss.

[2] Plaintiff further contends that the trial court erred in dismissing the complaint as the complaint stated claims upon which relief could be granted. North Carolina General Statutes § 1A-1, Rule 12(b)(6). We first address this argument as to defendant Board.

"A county or city board of education is a governmental agency, and therefore may not be liable in a tort action except insofar as it has duly waived its immunity from tort liability pursuant to statutory authority." *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 22-23, 348 S.E.2d 524, 526 (1986). North Carolina General Statutes § 115C-42 (1991) states in pertinent part:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.
>
> . . .
>
> The local board of education shall determine what liabilities and what officers, agents and employees shall be covered by any insurance purchased pursuant to this section.

"[I]n the absence of an allegation in the complaint in a tort action against a . . . board of education, to the effect that such board has waived its immunity by the procurement of liability insurance to cover such alleged negligence or tort, or that such board has waived its immunity as authorized in G.S. 115-53, such complaint does not state a cause of action." *Fields v. Board of Education*, 251 N.C. 699, 701, 111 S.E.2d 910, 912 (1960). (*See also Clary v. Board of Education*, 286 N.C. 525, 529, 212 S.E.2d 160, 163 (1975), where the Court noted that the plaintiff amended its complaint to allege that the defendant school board had procured liability insurance, thereby waiving its immunity for tort liability; the Court, citing *Fields*, said that "[t]his allegation alleged facts prerequisite to recovery by plaintiff. In the absence thereof, demurrers to the complaint would have been sustained.")

Because plaintiffs herein failed to allege in their complaint that defendant Board waived its immunity by the procurement of liability insurance to cover alleged negligence or tort, plaintiffs' complaint fails to state a cause of action as to defendant Board. We proceed to address plaintiffs' argument as to the remaining school defendants, Martin, Edwards and Mosley.

The general rule is that government officers and employees may be held personally liable for their torts; however,

> [w]hen a government worker is sued in his individual capacity, our courts have distinguished between whether the worker

> is an officer or an employee when assessing liability. Public officers are shielded from liability unless their actions are corrupt or malicious. . . . The basic distinctions between officer and employee center upon whether the worker's position was created by the constitution or laws of the state, and upon whether the position's duties are discretionary or merely ministerial. . . .
>
> [P]ositions of public office are generally created by legislation and have fixed public duties and responsibilities prescribed by law. Officers typically must take an oath of office, and are usually vested with a measure of discretion.

EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resources, 108 N.C. App. 24, 28-29, 422 S.E.2d 338, 341-42 (1992) (citations omitted). "Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are 'absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.' " *Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990), *quoting Jensen v. S.C. Dept. of Social Services*, 297 S.C. 323, 377 S.E.2d 102 (1988), *aff'd by* 304 S.C. 195, 403 S.E.2d 615 (1991). *See generally* Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts* § 19.42.40—19.42.45 (1991).

[3] Therefore, we must determine whether Martin, the school district superintendent, and Edwards, the school principal, are public officers. North Carolina General Statutes § 115C-271 (1991) sets out the selection of school superintendents in North Carolina, and North Carolina General Statutes § 115C-272 (Cum. Supp. 1993) contains the requirement for the oath of office which superintendents must take before entering upon the duties of the office. Clearly, the superintendent of a school system must perform discretionary acts requiring personal deliberation, decision and judgment.

We note that plaintiffs failed to plead that defendant Martin's acts or failure to act were corrupt, malicious, in bad faith or outside the scope of his authority:

> It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule

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

Smith v. Hefner, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952) (emphasis added) (citations omitted). Because plaintiffs failed to plead that defendant Martin's acts or failure to act were corrupt, malicious, in bad faith or outside the scope of his authority, plaintiffs' claim as to defendant Martin was properly dismissed. *See also Columbus County Auto Auction v. Aycock Auction Co.*, 90 N.C. App. 439, 368 S.E.2d 888 (1988).

[4] We now examine the trial court's dismissal of plaintiffs' claims against Edwards, the school principal. In *Beatty v. Charlotte-Mecklenburg Bd. of Education*, 99 N.C. App. 753, 394 S.E.2d 242 (1990), our Court held that where the plaintiff student was struck by a car and the liability insurance policy which the school board had purchased did not apply, the defendants board of education and school principal were covered by governmental immunity. Therefore, following the holding from *Beatty*, and because plaintiffs failed to plead that defendant Edwards' acts or failure to act were corrupt, malicious, in bad faith or outside the scope of his authority, plaintiffs' claim as to defendant Edwards was properly dismissed.

Finally, we address the trial court's dismissal of plaintiffs' cause of action as to defendant Mosley, the teacher. We note that plaintiffs' complaint does not state how any act or omission on Mosley's part contributed to the accident in the instant case. In fact, as plaintiffs point out in their brief, Mosley was not even on notice that cars were being moved on campus at the time the accident occurred. We find the trial court properly dismissed plaintiffs' cause of action as to defendant Mosley.

The decision of the trial court is affirmed.

Judges MARTIN and McCRODDEN concur.

ALBERT D. BURWELL, EMPLOYEE, PLAINTIFF v. WINN-DIXIE RALEIGH, INC., EMPLOYER; SELF-INSURED (CRAWFORD & CO.), DEFENDANT

No. 9310IC503

(Filed 15 March 1994)

Master and Servant § 72 (NCI3d)— workers' compensation—jobs identified as suitable by defendant employer—plaintiff capable of earning wages—entitlement to compensation for partial disability only

The Industrial Commission did not err in awarding plaintiff benefits for a permanent partial disability rather than benefits for a permanent total disability where there was sufficient evidence to support the finding that plaintiff was capable of obtaining one of the jobs identified by defendant employer as being available within plaintiff's locality and suited to his skills, education, and physical ability, and plaintiff was thus capable of earning wages. N.C.G.S. §§ 97-30, 97-31(23).

Am Jur 2d, Workers' Compensation § 381.

Appeal by plaintiff from Opinion and Award for the Full Commission filed 10 November 1992. Heard in the Court of Appeals 10 February 1994.

Frank W. Ballance, Jr. and Associates, P.A., by Frank W. Ballance, Jr., for plaintiff-appellant.

Patterson, Dilthey, Clay & Bryson, by Richard B. Conely, Sr., for defendant-appellee.

GREENE, Judge.

Albert D. Burwell (plaintiff) appeals from Opinion and Award for the Full Commission filed 10 November 1992.

On 26 May 1987, plaintiff, a then thirty-four-year-old high school graduate, injured his back while working as the frozen foods manager at a Winn-Dixie (defendant-employer) store in Louisburg.

Plaintiff's back did not respond to treatment and on 17 July 1987, Dr. Sukri Vanichkachorn performed a bilateral laminectomy on plaintiff, for a condition which Dr. Vanichkachorn diagnosed as a herniated disk at the L4-L5 level.

On 10 September 1987, Dr. Robert Price operated on plaintiff, performing a L5-S1 partial hemilaminectomy and a secondary left L4-L5 hemilaminectomy with a diskectomy and facetectomy. In laymen's terms, Dr. Price removed a disk and a part of the hole that the nerve goes out of as it exits through the bone at the L5 level. Dr. Price performed a second operation on plaintiff, performing a complete laminectomy of L4 and L5 with a bilateral L4-L5 and L5-S1 nerve root exploration. This operation consisted of removing the posterior part of the bone that surrounds the spinal canal at the L4-L5 and the L5-S1 levels and of opening up the nerves as they went through the holes in the bone to make sure nothing was pressing on them. Dr. Price continued to treat plaintiff until April 1989. During this time period, plaintiff continued to complain of pain in the left leg, foot and back, limited mobility of his back and leg, constant pain, and stiffness of his left leg and numbness in his left foot.

Prior to his employment with defendant-employer, plaintiff had worked for five years as a route salesman, delivering vending machines and snack goods to customers. He had also worked for one year as a garbage collector for the City of Norlina earning approximately $4.00 per hour, and for one and one-half years for Faucet Enterprises in Henderson where he filled furnaces with glass for the purpose of spinning fabric for filters.

Plaintiff testified that he has been unable to return to his job with defendant-employer since the date of his injury, that he has been unable to work or earn wages in any other job since that time, and that he does not believe he can work anywhere now because he cannot sit or stand for any length of time and he has problems walking. Plaintiff also testified that he continued to experience a constant "stabbing" pain in the lower part of his back and radiating down his left leg. Plaintiff testified that the surgeries had not done much to decrease his pain and that his physical condition had remained unchanged since June of 1989.

Dr. Price testified that in his opinion plaintiff was employable with limitations, specifically, plaintiff could work in a job that did not require lifting over twenty pounds, long-term sitting, a great deal of bending, or standing in one place continuously. Dr. Price further stated that plaintiff "could be employed in any job where he was allowed to do some sitting, some standing, some walking,

and didn't—and was not required to do heavy lifting." Dr. Price rated plaintiff's disability as a 38.5% permanent partial disability.

Dr. Lee Whitehurst, who examined plaintiff on 31 August 1989, testified that based upon his examination of plaintiff, he believed plaintiff to be employable in a job that did not require prolonged bending or stooping or lifting unassisted more than thirty-five pounds. Dr. Whitehurst rated plaintiff's disability as a 15% permanent partial disability.

Mr. George Lentz, a vocational consultant, testified by deposition that he had conducted a labor market survey to determine what jobs were available within a thirty-five to fifty mile radius of plaintiff's home. Mr. Lentz used the medical restrictions imposed by Dr. Price and Dr. Whitehurst, was aware that plaintiff was a high school graduate, and knew of plaintiff's vocational skills and his age. Mr. Lentz, taking into account these facts, identified available jobs that plaintiff was capable of performing. Those jobs included press operator, cashier at a retail store, assistant manager at the same retail store, group home manager, mobile home salesman, cashier at a large retail store, telemarketer, security guard, and insurance salesman. He stated that he had reviewed the results of tests given to plaintiff by Ms. Beverly Fetty which revealed that plaintiff could read at a 6.4 grade level and perform mathematical computations at the fourth grade level, and that the results of those tests did not change his opinion that plaintiff was capable of performing each of the above-mentioned jobs.

Ms. Fetty, a vocational evaluator at Raleigh Vocational Center, testified that she had conducted a vocational rehabilitation assessment of plaintiff on 14 August 1990. She stated that based upon the results of various achievement and aptitude tests taken by plaintiff, that he had a reading comprehension grade level of 6.4 and a beginning fourth grade mathematic level. In response to a question as to what jobs she had located "that . . . [plaintiff] could do," Ms. Fetty answered that "based on the computer searches" and after "identifying [plaintiff's] aptitudes and using the medical information for limitations no jobs were identified." Ms. Fetty stated

> although it is apparent from the test results that plaintiff has skills which are of a reasonable nature on the job, in light of his observed physical incapacity, such as sitting five minutes and standing five minutes, on a [sic] alternating schedule,

it was concluded that he is not able to perform work at this time, based on his present condition as we saw it.

Under questioning by defendant's counsel, Ms. Fetty stated that her opinion plaintiff "cannot work is not based on the medical records," but rather on his "aptitudes as well as his inability to sit or stand for five minutes, longer than five minutes either way." Ms. Kathryn F. Lamm, who also worked as a vocational evaluator for Raleigh Vocational Center, but who had never actually had contact with plaintiff, by deposition testified that given plaintiff's "tested skill levels" and that plaintiff "was unable to either sit or stand for periods of greater than five minutes . . ., we [she and Ms. Fetty] could not identify jobs which he would be capable of completing in the competitive market, and therefore it was our conclusion that competitive employment is not a feasible goal for him."

The Commission found the following relevant facts:

11. As a result of the injury of 26 May 1987, his multiple surgeries and physical limitations, plaintiff is not capable of performing the job he held with defendant-employer, nor is he capable of returning to the kind of work he had performed prior to working for defendant-employer. However, he is capable of engaging in light work which does not involve lifting over 20 pounds, long term sitting, frequent bending, or prolonged standing in one place. He is able to read and write and has experience working in a managerial position where he had to order merchandise. There is no evidence that he cannot add, subtract or make change.

12. Plaintiff has not attempted to return to work of any kind since 26 May 1987.

13. As a result of the injury of 26 May 1987, plaintiff retains a 30 percent permanent partial disability to his back.

14. As a result of the injury of 26 May 1987, plaintiff has been since 2 June 1989 partially incapable of earning the same wages in other employment. He retains the capacity (since 2 June 1989) to work as a security guard, night watchman, checker at a truck terminal, sewing machine operator, telemarketer, and cashier at a large retail chain store. All of these jobs are available in plaintiff's locality.

15. Plaintiff has since 2 June 1989 retained the capacity to earn an average weekly wage of $170.00 ($4.25 per hour for a 40 hour week).

The Commission entered an award for plaintiff which provided, in pertinent part, as follows:

2. Defendant shall pay plaintiff permanent partial disability benefits at the rate of $185.34 for a period of 90 weeks.

The issue presented is whether there is sufficient evidence to support the finding that plaintiff was capable of obtaining one of the available jobs identified by defendant-employer.

Plaintiff argues that the Commission erred by awarding him benefits for a permanent partial disability under N.C. Gen. Stat. § 97-31(23) rather than benefits for a permanent total disability under N.C. Gen. Stat. § 97-30, because defendant-employer failed to refute plaintiff's evidence that he was totally disabled.

A claimant who asserts that he is entitled to compensation under N.C. Gen. Stat. § 97-29 has the burden of proving that he is, as a result of the injury arising out of and in the course of his employment, totally unable to "earn wages which . . . [he] was receiving at the time [of injury] in the same or any other employment." *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 553 (1991). If the claimant presents substantial evidence that he is incapable of earning wages, the employer has the burden of producing evidence to rebut the claimant's evidence. This requires the employer to "come forward with evidence to show not only that suitable jobs are available, *but also that the plaintiff is capable of getting one*, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Medical Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990) (emphasis added); *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 400-01, 368 S.E.2d 388, 390, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). A "suitable" job is one the claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience. *See Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984) (discussing burden of employer in context of Longshoreman's and Harbor Worker's Compensation Act). An employee is "capable of getting" a job if "there exists a reasonable

likelihood . . . that he would be hired if he diligently sought the job." *Id.* It is not necessary, as plaintiff seems to suggest, that the employer show that some employer has specifically offered plaintiff a job. If the employer produces evidence that there are suitable jobs available which the claimant is capable of getting, the claimant has the burden of producing evidence that either contests the availability of other jobs or his suitability for those jobs, or establishes that he has unsuccessfully sought the employment opportunities located by his employer. *Tyndall*, 102 N.C. App. at 732, 403 S.E.2d at 551.

In this case, there is no dispute that plaintiff presented substantial evidence that he was unable, as a result of injuries sustained in the course and scope of his employment with defendant-employer, to earn any wages in the same or other employment. The defendant-employer presented evidence that there were several available suitable jobs within plaintiff's "locality." Plaintiff argues that he is physically incapable of performing any job and even if he were capable, that there is no evidence that he is "capable of getting" any of the jobs found by the defendant-employer.

In this case, although there is some conflict in the evidence, there was competent evidence from Mr. Lentz that plaintiff, taking into account his age, education, physical limitations, and vocational skills, was capable of performing certain jobs that were available "within a thirty-five to fifty mile radius" of his home. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982) (findings of the Commission are binding on appeal if supported by competent evidence). This evidence is sufficient to satisfy the defendant-employer's burden of showing that there existed a reasonable likelihood that plaintiff would be hired if he diligently sought employment in the jobs found by the defendant-employer. *See Tyndall*, 102 N.C. App. at 729, 403 S.E.2d at 550 (evidence that "jobs were available in the immediate area for persons with the experience of [c]laimant" held sufficient to satisfy employer's burden).

Although plaintiff did offer evidence to refute the evidence of Mr. Lentz, the Commission chose instead to believe Mr. Lentz's testimony. *Matthews v. Petroleum Tank Serv., Inc.*, 108 N.C. App. 259, 264, 423 S.E.2d 532, 535 (1992) (Commission is the sole judge of the credibility of witnesses). Accordingly, the Commission did not err in concluding that plaintiff was capable of earning wages

and was therefore entitled only to compensation for permanent partial disability compensation rather than for permanent total disability under N.C. Gen. Stat. § 97-29.

Three of the five remaining assignments of error argued by the plaintiff relate to the sufficiency of the evidence to support the findings made by the Commission. We have reviewed each of the questioned findings and determine that there was competent evidence to support each finding. We have reviewed and reject plaintiff's remaining two assignments claiming that the Commission erred in failing to make findings of fact concerning plaintiff's pain.

Affirmed.

Judges COZORT and ORR concur.

CROWELL CONSTRUCTORS, INC., PETITIONER v. STATE OF NORTH CAROLINA, EX REL., WILLIAM W. COBEY, JR., SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, RESPONDENT

No. 9212SC1267

(Filed 15 March 1994)

1. **Costs § 37 (NCI4th)— petition for attorney's fees—failure to serve supporting affidavit contemporaneously—respondent not prejudiced**

Although petitioner's failure to serve its supporting affidavit with its petition for attorney's fees violated the technical requirements of N.C.G.S. § 1A-1, Rule 6(d), respondent was not prejudiced, since the petition stated the basis for petitioner's request and provided an itemized listing of the legal expenses petitioner claimed it incurred; respondent had ample notice of the petition for attorney's fees and was given time to prepare a brief contesting the amount of fees petitioner claimed; and the trial court accepted respondent's arguments regarding specific fees claimed by petitioner and accordingly reduced the amount of fees it finally awarded.

Am Jur 2d, Costs §§ 79-86.

2. Costs § 37 (NCI4th)— attorney's fees—claim of impropriety based on case subsequently vacated on appeal—award of attorney's fees proper

There was no merit to respondent's contention that the trial court should have denied the petition for attorney's fees pursuant to N.C.G.S. § 6-19.1 because respondent had substantial justification for pressing its claim against petitioner and there were special circumstances which made the award of attorney's fees unjust in this case, since the sole support for respondent's contentions was the conclusion of the Court of Appeals in *Crowell Constructors, Inc. v. State ex rel. Cobey*, 105 N.C. App. 191, but that opinion was vacated by the Supreme Court and was therefore void.

Am Jur 2d, Costs §§ 79-86.

3. Costs § 37— attorney's fees—amount of fee improper

The trial court erred in the amount of attorney's fees it awarded when it inadvertently included certain fees which were incurred before a civil penalty assessment, and the court had stated that it was disallowing all fees incurred before the civil penalty assessment.

Am Jur 2d, Costs §§ 79-86.

Appeal by respondent from judgment entered 17 August 1992 by Judge Coy E. Brewer, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 27 October 1993.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins and Anne Mayo Evans, for the petitioner-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Kathryn Jones Cooper, for the respondent-appellant.

WYNN, Judge.

The question in this case is whether petitioner is entitled to attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1. The trial court granted petitioner attorney's fees. Except as modified, we affirm.

On 27 March 1987, respondent, the Department of Environment, Health, and Natural Resources (DEHNR) (then named Department of Natural Resources and Community Development) assessed

petitioner Crowell Constructors, Inc. a civil penalty of $10,000 for two incidents of mining without a permit. The North Carolina Mining Commission affirmed this decision and penalty.

Petitioner then appealed to the superior court and Judge George R. Greene reversed the Mining Commission's decision. DEHNR appealed to this Court which reversed Judge Greene's decision in *Crowell Constructors, Inc. v. State ex rel. Cobey*, 99 N.C. App. 431, 393 S.E.2d 312 (1990). Thereafter, petitioner appealed to the North Carolina Supreme Court which vacated the decision of this Court in *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 402 S.E.2d 407 (1991) because the record on appeal did not contain the notice of appeal required by Rule 3 of the Rules of Appellate Procedure and thus this Court did not have jurisdiction over the appeal.

Following the Supreme Court's decision, petitioner filed a petition for attorney's fees in superior court pursuant to N.C. Gen. Stat. § 6-19.1. After a hearing, the trial court granted petitioner attorney's fees in the amount of $16,529.20. DEHNR appeals.

I.

[1] DEHNR first contends that the trial court erred in awarding petitioner attorney's fees because petitioner did not follow the procedural requirements of N.C. Gen. Stat. § 6-19.1. DEHNR asserts that since petitioner did not file an affidavit with its petition for attorney's fees, it failed to comply with the statute's requirements. We disagree.

N.C. Gen. Stat. § 6-19.1 reads as follows 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 that there are no special circumstances that would make the award of attorney's fees unjust.

> The party shall petition for the 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).

The petition for attorney's fees is a motion under Rule 7(b)(1) of the Rules of Civil Procedure. *Tay v. Flaherty*, 100 N.C. App. 51, 394 S.E.2d 217, *disc. rev. denied*, 327 N.C. 643, 399 S.E.2d 132 (1990). Under Rule 6(d), "[w]hen a motion is supported by affidavit, the affidavit shall be served with the motion." N.C. Gen. Stat. § 1A-1, Rule 6(d) (1990). DEHNR, relying on *Nationwide Mut. Ins. Co. v. Chantos*, 21 N.C. App. 129, 203 S.E.2d 421 (1974), argues that petitioner's motion for attorney's fees and the supporting affidavit should have been served simultaneously.

In *Chantos*, this Court held that supporting affidavits to a Rule 56 motion for summary judgment "should be filed and served sufficiently in advance of the hearing to permit opposing affidavits to be filed prior to the day of the hearing." *Chantos*, 21 N.C. App. at 130, 203 S.E. 2d at 423. The defendant in *Chantos* offered affidavits in support of his motion for summary judgment the day of the hearing. The Court in *Chantos* noted that Rule 6(b) gives the trial court discretion to order the time within which to file and serve the affidavits, but that there must be a request for enlargement of time or a showing of excusable neglect. *Id.* at 131, 203 S.E.2d at 423.

In *Gillis v. Whitley's Discount Auto Sales, Inc.*, 70 N.C. App. 270, 319 S.E.2d 661 (1984), the plaintiff in an action to disaffirm a minor's contract, filed an affidavit on the same day as the hearing of the summary judgment motion. The plaintiff did not request an enlargement of time to file the affidavit. This Court, after citing *Chantos*, noted that while the plaintiff failed to comply with the technical requirements of Rule 6(d), there was no prejudice to the defendant by admitting the affidavit. *Gillis*, 70 N.C. App. at 277, 319 S.E.2d at 665.

In the instant case, petitioner filed its petition for attorney's fees on 6 May 1991 and then filed its supporting affidavit on 25 March 1992. Although petitioner's failure to serve its supporting affidavit with its petition for attorney's fees violated the technical requirements of Rule 6(d), nevertheless, we find that DEHNR was

not prejudiced. *See Gillis*, 70 N.C. App. at 277, 319 S.E.2d at 665. The petition stated the basis for petitioner's request for attorney's fees. The supporting affidavit merely reiterated the basis for petitioner's request and provided an itemized listing of the legal expenses petitioner claimed it incurred. DEHNR had ample notice of the petition for attorney's fees and was given time to prepare a brief contesting the amount of fees petitioner claimed. The record reveals that the trial court accepted DEHNR's arguments regarding specific fees claimed by petitioner and accordingly reduced the amount of fees it finally awarded. We therefore conclude DEHNR was not prejudiced by petitioner's failure to comply with Rule 6(d) and this assignment of error is overruled. *Cf. Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 341 S.E.2d 61 (1986) (Trial court did not err in admitting an affidavit filed in support of a summary judgment motion on the day of the hearing when the affidavit was supplemental to earlier affidavits).

II.

[2] DEHNR's next two assignments of error argue that the trial court should have denied the petition for attorney's fees because DEHNR had substantial justification for pressing its claim against Crowell and that there were special circumstances which make the award of attorney's fees unjust in this case. We disagree.

In *S.E.T.A. UNC-CH, Inc. v. Huffines*, 107 N.C. App. 440, 420 S.E.2d 674 (1992), this Court explained the requirements for awarding attorney's fees under N.C. Gen. Stat. §§ 6-19.1 and 6-19.2.

> Three criteria must exist before a trial judge can exercise statutory discretion under either N.C.G.S. § 6-19.1 or § 6-19.2. First, the party moving for attorney's fees must be a "prevailing party." Second, the court must find that the agency acted without substantial justification; and finally the court must find there are no special circumstances making a fee award unjust.

Huffines, 107 N.C. App. at 443, 420 S.E.2d at 676 (citations omitted). *See also Whiteco Industries, Inc. v. Harrelson*, 111 N.C. App. 815, 434 S.E.2d 229 (1993); *Whiteco Industries, Inc. v. Harrington*, 111 N.C. App. 839, 434 S.E.2d 234 (1993).

The question of whether the agency acted without substantial justification is a conclusion of law. *Harrelson*, 111 N.C. App. at 819, 434 S.E.2d at 232. Substantial justification is defined as justifica-

tion " 'to a degree that could satisfy a reasonable person.' " *Tay*, 100 N.C. App. at 56, 394 S.E.2d at 219 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565, 101 L. Ed. 2d 490, 504 (1988)). The burden is on the party against whom attorney's fees were assessed to show substantial justification for its action. *Harrelson*, 111 N.C. App. at 819, 434 S.E.2d at 232.

In the instant case, since summary judgment was granted against DEHNR, petitioner is the prevailing party. *See House v. Hillhaven, Inc.*, 105 N.C. App. 191, 412 S.E.2d 893, *disc. rev. denied*, 331 N.C. 284, 417 S.E.2d 251 (1992). DEHNR contends this Court's conclusion in *Crowell Constructors, Inc. v. State ex rel. Cobey*, 99 N.C. App. 431, 393 S.E.2d 312, *vacated and remanded*, 328 N.C. 563, 402 S.E.2d 407 (1991) that DEHNR properly sanctioned Crowell for mining without a permit is evidence that DEHNR had substantial justification for its action. DEHNR also relies upon this decision to support its contention that there were special circumstances which make the award of attorney's fees unjust in this case. The opinion DEHNR relies upon, however, was vacated by the Supreme Court on the grounds that since the record on appeal did not contain a notice of appeal as required by N.C.R. App. P. 3 this Court had no jurisdiction to hear the case. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 402 S.E.2d 407 (1991). "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964); *Hopkins v. Hopkins*, 8 N.C. App. 162, 174 S.E.2d 103 (1970). Thus, the prior decision by this Court in *Crowell* is void. Therefore, since the sole support for DEHNR's argument is a nullity, DEHNR has not met its burden of showing substantial justification for its action nor shown that there are special circumstances making the award of attorney's fees unjust.

In addition, Judge Greene concluded that there was no competent, material, or substantial evidence in the record that petitioner violated the Mining Act. Since DEHNR failed to properly perfect an appeal from this conclusion, it is the law of the case and binding on appeal. *North Carolina Nat'l Bank v. Barbee*, 260 N.C. 106, 131 S.E.2d 666 (1963); *Duffer v. Royal Dodge, Inc.*, 51 N.C. App. 129, 275 S.E.2d 206 (1981); *Carpenter v. Carpenter*, 25 N.C. App. 235, 212 S.E.2d 911, *cert. denied*, 287 N.C. 465, 215 S.E.2d 623 (1975). Therefore, we conclude DEHNR has not met its burden of showing substantial justification for its action nor shown that there are

special circumstances making the award of attorney's fees unjust in this case. These assignments of error are overruled.

III.

[3] DEHNR finally contends the trial court erred in the amount of attorney's fees it awarded. We agree. In its judgment, the trial court found:

> 9. Crowell's attorney submitted an affidavit of attorney's fees in the amount of $24,038.20 for which it now seeks reimbursement from . . . [DEHNR]. However, some of the fees included in that total involve fees incurred prior to the March 27, 1987 civil penalty assessment which was the subject matter of the underlying lawsuit. These fees are disallowed. Thus, Crowell is entitled to reimbursement of only $16,529.20 for attorney's fees.

After reviewing the record, we conclude that the trial court inadvertently included $1,910 in fees which were incurred before the civil penalty assessment. Since the trial court stated it was disallowing all fees incurred before the civil penalty assessment, we modify the trial court's order accordingly. Therefore, Crowell is entitled to $14,619.20 for attorney's fees.

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

Modified and affirmed.

Judges LEWIS and McCRODDEN concur.

IN RE: ESTATE OF STANFORD ALLEN NEISEN; LARRY NORMAN, EXECUTOR; LINDA JOHNSON, CLAIMANT AND BENEFICIARY, APPELLANT; SHERRI NEISEN FAIRCLOTH AND JEFF LAWRENCE NEISEN, BENEFICIARIES AND HEIRS, APPELLEES

No. 939SC320

(Filed 15 March 1994)

1. **Executors and Administrators § 130 (NCI4th)— claim against estate rejected—no agreement to refer—claim not properly referred to clerk of court**

There was no merit to claimant's contention that she properly referred her claim against decedent's estate as provided in N.C.G.S. § 28A-19-15, since the statute provides that the personal representative of an estate and a claimant may enter into a written agreement to refer the matter in controversy, but the representative's letter to claimant in this case suggesting that she file a notice of hearing with the clerk of court did not amount to such an agreement.

Am Jur 2d, Executors and Administrators §§ 684 et seq.

2. **Executors and Administrators § 1 (NCI4th)— claim against estate rejected—only way to preserve claim provided by statute—no jurisdiction of clerk of court**

Since N.C.G.S. § 28A-19-16 clearly provides that the only way to preserve a claim against an estate which has been rejected by the personal representative is by commencing an action within three months of the notice of rejection of the claim, the trial court did not err in concluding that the clerk of court had no jurisdiction to hear the appeal from the claimant whose claim had been denied by the personal representative of decedent's estate; furthermore, the clerk had no jurisdiction to hear claims which are justiciable matters of a civil nature, original jurisdiction over which is vested in the trial division, and the claim in this case was just such a claim.

Am Jur 2d, Executors and Administrators §§ 94 et seq.

Appeal by claimant and beneficiary from order entered 18 December 1992 by Judge Henry W. Hight, Jr. in Franklin County Superior Court. Heard in the Court of Appeals 13 January 1994.

Everette Noland for claimant and beneficiary-appellant, Linda Johnson.

Warren, Perry, Anthony and Cook, by John K. Cook, for beneficiaries and heirs-appellees, Sherri Neisen Faircloth and Jeff Lawrence Neisen.

LEWIS, Judge.

Stanford Allen Neisen, a resident of Franklin County, died on 24 January 1991. He left a will which was admitted to probate in common form in Franklin County that same day. The will named Larry Norman as executor and provided specific bequests to the decedent's five children, leaving the residue to Linda Johnson ("claimant"). On 13 August 1991, claimant, who was not represented by counsel, filed a claim against the estate seeking in excess of $1,500,000.00 for, *inter alia*, services rendered and emotional damages. As shown in the 90-Day Inventory, the estate contained $98,582.31 in total assets. On 22 January 1992, the executor wrote claimant a letter in which he allowed just under $15,000.00 of the claim and denied the rest. He also advised her that if she was not satisfied, she could file a "notice of hearing" with the Clerk of Court of Franklin County. On 3 February 1992, claimant requested such a hearing. At the hearing before the Clerk, two of the decedent's five children ("beneficiaries"), through their attorney, objected to the Clerk's authority to hold the hearing. The Clerk then continued the hearing to 23 April 1992.

At the hearing, the Clerk heard evidence from claimant on two parts of her claim that were denied by the executor—services rendered and cash advanced. The Clerk then ordered that the estate pay to claimant $98,280.00 for services rendered and $26,000.00 for cash advanced, those amounts being in addition to the approximately $15,000.00 allowed by the executor. Beneficiaries appealed the order to Judge Hight, the Superior Court Judge Presiding, pursuant to N.C.G.S. § 1-272.

After a hearing, Judge Hight concluded that a claimant whose claim has been denied by the personal representative must follow the procedure set out in N.C.G.S. § 28A-19-16. That is, upon receiving notice of the personal representative's denial of the claim, the claimant must commence an action for the recovery of her claim within the next three months or be forever barred from maintaining an action on the claim. We note that prior to the hearing before

Judge Hight, claimant commenced such an action, on 11 May 1992, and that case is currently pending in Franklin County Superior Court. Judge Hight further concluded that Clerks of Court have no jurisdiction to hear appeals from those whose claims have been denied. Judge Hight then vacated the Clerk's order and remanded the administration of the estate to the Clerk for further proceedings consistent with the superior court order. It is from Judge Hight's order that claimant appeals.

N.C.G.S. § 28A-19-16 provides:

> If a claim is presented to and rejected by the personal representative or collector, and not referred as provided in G.S. 28A-19-15, the claimant must, within three months, after due notice in writing of such rejection, or after some part of the claim becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon.

N.C.G.S. § 28A-19-16 (1984). Claimant's argument on appeal is twofold. Claimant first argues that she properly referred her claim as provided in N.C.G.S. § 28A-19-15, and, therefore, she has complied with the statutory requirements. Alternatively, claimant contends that even if she did not properly refer her claim, the Clerk of Court, as ex-officio Judge of Probate, had jurisdiction to hear the claim.

[1] As to her first argument, claimant contends that after her claim was denied by the executor, she complied with the referral procedure set out in section 28A-19-15. That statute provides in pertinent part:

> If the personal representative doubts the justness of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy, whether the same be of a legal or equitable nature, to one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been ordered in an action. Such agreement to refer, and the award thereupon, shall be filed in the clerk's office where the letters were granted, and shall be a lawful voucher for the personal representative.

N.C.G.S. § 28A-19-15 (1984).

To determine whether there was a referral of the claim, we must first examine the writings on which claimant bases her argument. After the executor received claimant's claim letter, the executor wrote the claimant, denying the majority of the claim and further stating: "If this amount is not acceptable to you then I would suggest that you obtain legal representation and file a notice of hearing with the Clerk of Court of Franklin County. It appears to me that at this time this is the only reasonable position I can take with regards to your claim." In response to this letter, claimant filed a motion in the superior court which stated in part: "On January 22, 1992, I received a notice from Larry E. Norman executor of said estate denying part of my claim. Based on the above I hereby request a hearing before the Clerk of Superior Court to determine my entire claim against the above estate."

The statute provides that the personal representative "may enter into an agreement, in writing, with the claimant, to refer the matter . . . to one or more disinterested persons . . . ." N.C.G.S. § 28A-19-15. The executor's letter to claimant merely stated that he "would suggest" that claimant "file a notice of hearing with the Clerk of Court." This language does not show that there was any agreement, much less an agreement to refer the matter. And, claimant's subsequent motion does not establish that there was an agreement; rather, it merely shows that claimant followed the executor's suggestion. Because we find that there was no agreement to refer the matter, we need not decide whether the Clerk of Court is a proper referee under the statute.

[2] Claimant's second argument is that Judge Hight erred in concluding that section 28A-19-16 provides the only procedure for the resolution of a denied claim and that the Clerk of Court has no jurisdiction to hear an appeal from an estate claimant whose claim has been denied by the personal representative. Section 28A-19-16 provides that a claimant whose claim has been denied by the personal representative, and which claim is not referred to a third party for resolution, "must, within three months, after due notice in writing of such rejection, . . . commence an action for the recovery thereof, or be forever barred from maintaining an action thereon." Rule 3 of the North Carolina Rules of Civil Procedure is entitled "Commencement of action" and provides: "A civil action is commenced by filing a complaint with the court [or by the issuance of a summons under certain circumstances]." N.C.G.S. § 1A-1, Rule 3 (1990). Section 28A-19-16 clearly provides that the only way to

preserve a rejected claim is by commencing an action, i.e., filing a complaint, within three months of the notice of rejection. Thus, Judge Hight did not err in concluding that the statute provides the only procedure for the resolution of a rejected claim.

Furthermore, the Clerk of Court has no jurisdiction to hear claims which are " 'justiciable matters of a civil nature,' original general jurisdiction over which is vested in the trial division. G.S. 7A-240." *Ingle v. Allen*, 53 N.C. App. 627, 628-29, 281 S.E.2d 406, 407 (1981). The claim in the present case is just such a claim. Thus, Judge Hight correctly concluded that the Clerk had no jurisdiction to hear claimant's claim.

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

Affirmed.

Judges Johnson and Eagles concur.

IN THE MATTER OF THE PROPOSED FORECLOSURE OF DEED OF TRUST EXECUTED BY DANNIE McDUFFIE AND WIFE, MARY McDUFFIE, IN AN ORIGINAL AMOUNT OF $21,000 DATED FEBRUARY 17, 1983, RECORDED IN BOOK 3266, PAGE 0798 GUILFORD COUNTY REGISTRY, J. RUFUS FARRIOR, SBUSTITUTE TRUSTEE

No. 9318SC406

(Filed 15 March 1994)

Mortgages and Deeds of Trust § 104 (NCI4th)— foreclosure sale— higher bid mistakenly entered—purchaser bound by mistake

The trial court did not err in refusing to relieve the mortgagee of its bid at a foreclosure sale where the trustee mistakenly entered a higher bid than the mortgagee authorized, but the debtors were justified in believing that the mortgagee had conferred upon the trustee the power to bind it to the higher bid; the trustee acted within the scope of his apparent authority as the mortgagee's agent; and the mortgagee was bound on the resulting contract despite the alleged mistaken bid because the mistake was not mutual and was in no way contributed to by the debtors.

Am Jur 2d, Mortgages §§ 702 et seq., 727 et seq.

Appeal by Mutual Savings and Loan Association from judgment signed 11 December 1992 in Guilford County Superior Court by Judge Lester P. Martin, Jr. Heard in the Court of Appeals 2 February 1994.

Dannie and Mary R. McDuffie are the record owners of two tracts of real property located in Guilford County. On 8 December 1972, the McDuffies conveyed property located at 1501 Woodbriar Avenue by deed of trust to American Federal Savings and Loan Association (American) to secure a debt owed American, and, on 13 August 1973, the McDuffies conveyed property located at 808 Lowdermilk Street by deed of trust to American to secure a debt owed American. On 17 February 1983, the McDuffies executed a second deed of trust on both the Woodbriar and Lowdermilk properties in favor of American to secure a note in the amount of $21,000. Mutual Savings and Loan Association (Mutual) is the successor corporation to American.

Summit Enterprises, Incorporated (Summit) purchased the Woodbriar property on 18 April 1986 and the Lowdermilk property on 19 April 1986 and assumed the indebtedness secured by the deeds of trust on each property. On 9 February 1990, Summit conveyed the Woodbriar property to Milton H. Hall and his wife, Ruth P. Hall, who paid off the first deed of trust on the property. The only remaining encumbrance on the Woodbriar property was the 1983 deed of trust held by Mutual.

On 2 July 1992, petitioner, J. Rufus Farrior, the substitute trustee of the 1983 deed of trust executed by the McDuffies, filed a petition to commence foreclosure proceedings on the Woodbriar and Lowdermilk properties. On 10 August 1992, the Assistant Clerk of Guilford County Superior Court entered an order authorizing petitioner to give notice of foreclosure and conduct a foreclosure sale of the Woodbriar and Lowdermilk properties. Following a petition by the Halls, on 24 August 1992, Judge C. Preston Cornelius entered an *ex parte* restraining order against petitioner, Summit, and the Clerk of Guilford County Superior Court which prohibited any action in furtherance of the foreclosure on the Woodbriar property. On 11 September 1992, Judge Cornelius entered a consent order which modified the order authorizing the foreclosure of the Woodbriar and Lowdermilk properties by requiring that the Lowdermilk property be sold before the Woodbriar property. Petitioner conducted a foreclosure sale of the Lowdermilk property on 14

September 1992, and placed, on behalf of Mutual, a bid in the amount of $43,361.17 which was the only bid at the foreclosure sale. On 16 September 1992, petitioner filed a motion to withdraw the bid. On 6 October 1992, the Halls filed a motion to compel petitioner to file a preliminary report of sale as required by G.S. § 45-21.26(a). On 8 October 1992, the Assistant Clerk of Guilford County Superior Court entered an order granting the Halls' motion and compelling petitioner to file a preliminary report of sale in the amount of $43,361.17. On 11 December 1992, Judge Martin entered final judgment affirming the assistant clerk's order, denying petitioner's motion to withdraw the bid, and granting the Halls' motion. Mutual appeals.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Reid L. Phillips and Mack Sperling, for appellant Mutual Savings & Loan Association.

Tuggle Duggins & Meschan, P.A., by John R. Barlow, II and William R. Sage, for respondents-appellees Milton H. Hall and Ruth P. Hall.

WELLS, Judge.

Mutual argues that the trial court erred by ordering petitioner to file a report of sale of the Lowdermilk property in the amount of $43,361.17 and denying petitioner's motion to withdraw the bid. Mutual contends that the trial court erred in finding and concluding that the bid made by petitioner was an authorized bid and in denying petitioner's motion to withdraw the bid. We disagree.

In the exercise of equitable jurisdiction, our courts have the power to relieve a purchaser at a foreclosure sale when there is an irregularity in the sale combined with a grossly inadequate or grossly inflated bid. *Glass Co. v. Forbes*, 258 N.C. 426, 128 S.E.2d 875 (1963). Equity can relieve a contracting party of his mistakenly assumed obligation. *In re Foreclosure of Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 364 S.E.2d 223, *rev. denied*, 322 N.C. 480, 370 S.E.2d 222 (1988).

In deed of trust relationships, the trustee is a disinterested third party acting as the agent of both the debtor and the creditor. *Mills v. Building & Loan Assoc.*, 216 N.C. 664, 6 S.E.2d 549 (1940). When petitioner placed the bid on behalf of Mutual, petitioner was acting as the agent of Mutual. *See Elkes v. Trustee Corp.*,

209 N.C. 832, 184 S.E. 826 (1936) (trustee can bid on property on behalf of the lender, and purchase by lender is valid absent a showing of lack of good faith). When Mutual's bid was accepted as the last and highest, a contract was formed. *In re Foreclosure of Allan & Warmbold Constr. Co., supra.* "The principal is liable upon a contract duly made by his agent with a third person . . . when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority." *Research Corp. v. Hardware Co.*, 263 N.C. 718, 140 S.E.2d 416 (1965). An authorized act means that "the act was such as was incident to the performance of the duties entrusted to the agent . . . even though in opposition to his express and positive orders." *West v. Woolworth Co.*, 215 N.C. 211, 1 S.E.2d 546 (1939). A principal cannot restrict his liability for acts of his agent within the scope of his apparent authority by limitations which persons dealing with the agent have no notice. *Research Corp., supra.* The determination of a principal's liability must be based on what authority the third person, in the exercise of reasonable care, was justified in believing that the principal had conferred upon his agent. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974).

In determining what is equitable, we examine the following facts. Before the 11 September 1992 consent order, Mutual provided petitioner with a bid to be placed on its behalf on the Lowdermilk and Woodbriar properties in an amount sufficient to extinguish the debt secured by the 1983 deed of trust. After the consent order requiring Mutual to proceed first against the Lowdermilk property was entered, petitioner was instructed by Mutual to place a nominal bid on the Lowdermilk property. Petitioner then left for vacation and did not return until the night before the sale. Petitioner requested all beneficiaries on behalf of whom he was making bids to deliver their bids in writing to his office on the morning of the foreclosure sale. On 14 September 1992, the day of the foreclosure sale, Mutual delivered to petitioner's office manager a letter requesting that petitioner enter a bid on behalf of Mutual on the Lowdermilk property in the amount of $1000.00. This letter never came to the attention of petitioner. Consequently, petitioner entered a bid on behalf of Mutual in the amount of $43,361.17. Mutual makes no contention that the foreclosure sale was not in accordance with the law. Although Mutual contends that it will suffer a loss of between $20,000 to $40,000 if it is required to

purchase the Lowdermilk property for the amount mistakenly bid by petitioner, Mutual calculated this loss based on the value which C. Edmund Fairley, president and city executive for the Greensboro office of Mutual, thought the property would be worth. The property was never formally appraised after 1983, and Mr. Fairley based his valuation on a visual inspection he made from his car. The record fails to disclose that the fair market value of the Lowdermilk property is significantly less than the bid entered by petitioner. Other than petitioner, only the attorneys for the Halls and Summit were present at the foreclosure sale. These individuals were unaware of the limitation sought to be imposed on the power of petitioner by the letter delivered to petitioner's office on the day of the sale.

Under these circumstances, we are of the opinion that the Halls were justified in believing that Mutual had conferred upon petitioner the power to bind it by a bid of $43,361.17 on the Lowdermilk property. Petitioner acted within the scope of his apparent authority, and Mutual is bound on the resulting contract despite the alleged mistaken bid because "ordinarily a mistake, in order to furnish a ground for equitable relief must be mutual; and as a general rule relief will be denied where the party against whom it is sought was ignorant that the party was acting under a mistake and the former's conduct in no way contributed thereto." *Financial Services v. Capitol Funds*, 288 N.C. 122, 217 S.E.2d 551 (1975).

Affirmed.

Judges JOHN and McCRODDEN concur.

IN RE NICHOLSON AND FORD

[114 N.C. App. 91 (1994)]

IN THE MATTER OF ASHLEY NICHOLSON, D.O.B. 12/10/87

IN THE MATTER OF TIFFANY LIZZIE FORD, D.O.B. 02/27/92

No. 9310DC257

(Filed 15 March 1994)

Parent and Child § 99 (NCI4th)— neglected juvenile—abuse of sibling—relevant, but not conclusive

The trial court did not abuse its discretion in dismissing a Department of Social Services petition alleging Ashley Nicholson to be a neglected juvenile where Ashley's half-brother had died due to shaken baby syndrome; her mother and step-father had been arrested for manslaughter but returned home; a half-sister, Tiffany Ford, was born; Ashley's step-father pled guilty to involuntary manslaughter and charges were dismissed against her mother; there was no evidence of abuse of Ashley by either parent; Ashley was three and a half years old and Tiffany three months old when DSS filed its petition; shaken-baby syndrome is most deadly to infants under six months of age; and the court determined that Tiffany was at risk but that Ashley was not and dismissed the petition as to Ashley. While it is clear from N.C.G.S. § 7A-517(21) that evidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile, the statute does not require the removal of all other children from the home once a child has either died or been subjected to sexual or severe physical abuse.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 24, 29.

Appeal by Wake County Department of Social Services from order entered 10 November 1992, signed 14 December 1992, by Judge Joyce A. Hamilton in Wake County District Court. Heard in the Court of Appeals 6 January 1994.

Anne W. Brill, Assistant Wake County Attorney, for Wake County Department of Social Services, petitioner-appellant.

Kevin Leon Byrd for Lois Ford, respondent-appellee.

Lou A. Newman, Wake County Guardian ad Litem Program, for Guardian ad Litem Suprena Jones, respondent-appellee.

LEWIS, Judge.

By this appeal the Wake County Department of Social Services (hereinafter "DSS") challenges the trial court's dismissal of a petition alleging Ashley Nicholson to be a neglected juvenile. Ashley is the daughter of respondent Lois Ford and the step-daughter of respondent Michael Ford.

The events leading up to this case began with the November 1990 death of Ashley's half-brother, Nicholas Ford, due to shaken-baby syndrome. In June 1991, Michael and Lois Ford were arrested on charges of manslaughter for the death of Nicholas. Ashley was placed with a relative until Lois Ford was released from jail in mid-June 1991, when Ashley returned home. One month later Michael Ford was released from jail. When DSS discovered that Michael Ford had returned home, it determined that Ashley was at risk. After unsuccessful attempts to formulate a protective plan with Lois Ford, DSS filed a petition in July 1991 alleging that Ashley was a neglected juvenile.

Tiffany Lizzie Ford, Ashley's half-sister, was born in February 1992, after Nicholas' death but before any adjudication as to DSS' petition regarding Ashley. When DSS learned of Tiffany's existence, it filed a petition, in June 1992, alleging Tiffany to be neglected also. On 24 March 1992 Michael Ford pled guilty to involuntary manslaughter, and the charges against Lois Ford were dismissed.

The district court held hearings on the petitions regarding both Ashley and Tiffany in October and November 1992. The evidence offered showed that Ashley and her mother had lived with Michael Ford since Ashley was one month old, and that Michael Ford was her primary caretaker. Lois Ford expressed no hesitation in allowing her husband to care for Ashley, explaining that Michael's plea to involuntary manslaughter meant only that Nicholas' death was accidental and Michael wanted to avoid prison. Both Lois and Michael Ford disagreed with expert medical testimony that Nicholas' death was caused by some sort of blunt trauma in addition to shaken-baby syndrome.

The court dismissed DSS' petition as to Ashley, but found neglect as to Tiffany. The court noted that there was no evidence of abuse of Ashley by either parent and that Ashley was three and a half years old when DSS filed its petition. Tiffany, however, was only three months old when DSS filed its petition. The court

noted that shaken-baby syndrome is most deadly to infants under six months of age. Thus, the court determined that although Tiffany was at risk for that type of abuse because of her age, Ashley was not. DSS now appeals the court's determination regarding Ashley, arguing that the evidence was sufficient to establish neglect.

DSS first points out that evidence of abuse of one sibling can constitute sufficient evidence of neglect of another. According to the statutory definition of a neglected juvenile,

> [i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of abuse or neglect or lives in a home where another juvenile has been subjected to sexual abuse or severe physical abuse by an adult who regularly lives in the home.

N.C.G.S. § 7A-517(21) (Cum. Supp. 1993). By citing cases from other jurisdictions, DSS develops the argument that the fact of abuse of one child should mandate a finding of neglect of any remaining children in the home. DSS also points out that, under North Carolina law, risk of neglect is an important factor in determining whether a child is a neglected juvenile. *In re Evans*, 81 N.C. App. 449, 344 S.E.2d 325 (1986). DSS notes that at the time of the court's adjudication, both Michael and Lois Ford were charged with manslaughter, and both rejected the medical conclusions as to the cause of Nicholas' death. Furthermore, Lois Ford testified that she felt comfortable with Michael as Ashley's caretaker. DSS emphasizes that, once an abused child is removed from a home, any remaining children may be subject to abuse. *See In re Abeena H. and Melik K.*, 316 N.Y.S.2d 16 (1970).

DSS further contends that Ashley was in no less danger than Tiffany, who was removed from the home. Although shaken-baby syndrome is most harmful to infants under six months of age, and Ashley was three and a half years old at the time of DSS' petition, DSS contends that Ashley is at risk because the medical evidence established that Nicholas' injuries were the result of a "substantial degree of force." Ashley therefore lived in an environment injurious to her welfare. *See* § 7A-517(21). Moreover, although Michael Ford had only been charged with manslaughter at the time DSS filed its petition, by the time of the adjudication, he had been convicted of involuntary manslaughter.

It is clear from section 7A-517(21) that evidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile. However, it is also clear that the statute does not mandate the result requested by DSS. It does not require the removal of all other children from the home once a child has either died or been subjected to sexual or severe physical abuse. Rather, the statute affords the trial judge some discretion in determining the weight to be given such evidence. We believe the trial court in the case at hand complied with the statute and considered the evidence as a relevant factor in determining whether Ashley was a neglected juvenile. In reaching its decision, the court set forth the facts surrounding Nicholas' death, and noted that there is no threat of shaken-baby syndrome as to Ashley, and that there is no evidence that Ashley was ever abused.

We conclude that the trial court did not abuse its discretion in dismissing DSS' petition as to Ashley Nicholson.

Affirmed.

Judges ORR and JOHN concur.

JIM PRIDGEN, EVELYN SMITH, AND ALLEN McCALL v. SHORELINE DISTRIBUTORS, INC., J. LAWRENCE LONG, ED KIRKLAND, DOUGLAS M. JACKSON, MORRIS ALLEN, BETTY COLVILLE, AND BILLY BRYAN

No. 9316DC357

(Filed 15 March 1994)

Fraud, Deceit, and Misrepresentation § 38 (NCI4th)— sale of business—fraudulent concealment

In an action to recover the balance due from the sale of plaintiffs' business to defendants, the evidence was sufficient to be submitted to the jury on the issue of fraudulent concealment by plaintiffs of a material fact where it tended to show that plaintiffs represented to defendants that they would sell the business and its assets including their rights to certain franchise agreements; plaintiffs in fact did not have any exclusive franchise agreements; the business's relationship with certain suppliers was troubled by past debts and deficien-

cies which were not disclosed to defendants; plaintiffs assured defendants that their business was in good financial condition when, in fact, the business had been operating at a loss; and plaintiffs promised to deliver all books and records of the business, but failed to do so.

Am Jur 2d, Fraud and Deceit §§ 468 et seq.

Appeal by plaintiffs from judgment entered 29 September 1992 by Judge J. Stanley Carmical in Robeson County District Court. Heard in the Court of Appeals 31 January 1994.

On 30 September 1987, plaintiffs, the owners of Shoreline Distributors, Inc., entered into an agreement to sell which provided for the sale of the business and its assets, including its inventory and rights under certain purported "franchise agreements." The agreement provided that the business would be conveyed to buyers, including Larry Long and other unnamed individuals. On 9 October 1987, the parties closed and the business was conveyed to J. Lawrence Long, Ed Kirkland, Douglas M. Jackson, Morris Allen, Betty Colville, and Billy Bryan (hereinafter defendants). The buyers paid $30,000 at the signing of the agreement, $5,000 at closing, and gave the sellers a $30,000 note for the balance of the $65,000 purchase price.

Defendants failed to pay the entire amount of the $30,000 promissory note. On 9 March 1989, plaintiffs brought this action to collect the balance due on the note of approximately $23,000. Defendants filed a counterclaim against plaintiffs alleging fraudulent concealment and a crossclaim against defendant Long alleging fraudulent concealment. Defendants later amended their counterclaim to allege fraud and an unfair and deceptive trade practice.

At trial, the trial court directed a verdict against defendants for the amount due on the purchase money promissory note of $22,693.77, plus interest.

The jury found that defendant Long was not acting as the agent of plaintiffs and had not committed any fraudulent acts. The jury further found that defendants were "induced to purchase the corporation, Shoreline Distributors, Inc., and its assets, by the fraudulent concealment by the plaintiffs of the status of distributorship agreements" and were damaged by plaintiffs in the amount of $63,560.67. The trial court entered an order allowing treble

damages after finding an unfair and deceptive trade practice. The court then entered judgment on the jury verdict.

Plaintiffs filed a motion for a new trial, motion for judgment notwithstanding the verdict, and a motion for relief from the judgment on the grounds of excusable neglect. These motions were denied. Plaintiffs appeal.

Herbert H. Thorp; W. Osborne Lee, Jr.; and J. Gates Harris, for plaintiffs-appellants.

Page & Page, P.A., by Richmond H. Page; and Bowen & Byerly, by Woodberry L. Bowen, for defendants-appellees.

WELLS, Judge.

Plaintiffs bring forward several assignments of error for our review. Plaintiffs contend, *inter alia*, that defendants did not present sufficient evidence for the jury to consider the issue of fraudulent concealment by plaintiffs of a material fact and that the trial court should have reduced the damages awarded defendants for fraud by the balance due on the purchase money promissory note.

Plaintiffs first argue that the trial court erred by allowing the jury to consider the issue of fraudulent concealment by the plaintiffs of a material fact because there was not sufficient evidence to support such a claim; therefore, plaintiffs' motion for directed verdict on that issue should have been granted. We find no merit to this contention.

The purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for the nonmoving party. *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E.2d 193 (1982). In considering a motion for a directed verdict, the evidence must be considered in the light most favorable to the nonmoving party, and the nonmovant is entitled to the benefit of all reasonable inferences. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977). The motion for directed verdict should be denied if there is more than a scintilla of evidence supporting each element of the nonmovant's case. *Broyhill v. Coppage*, 79 N.C. App. 221, 339 S.E.2d 32 (1986).

Defendants (nonmovants) presented evidence that plaintiffs fraudulently failed to disclose to them the status and nature of the distributorship agreements of Shoreline. Defendants' evidence

tended to show that in their agreement to sell, plaintiffs represented to defendants that they would sell the business and its assets, including their rights to the franchise agreements which Shoreline had with "Five Star Seals" and "Flex-A-Seal." The evidence showed that, in fact, plaintiffs did not have any exclusive franchise agreements, they did not have any formal agreement with Flex-A-Seal, they did not have a right to sell in some of the territories they claimed to hold exclusively, and Shoreline's relationship with Flex-A-Seal and Five Star was troubled by past debts and deficiencies which were not disclosed to defendants.

Defendants' evidence also showed that plaintiffs assured defendants that Shoreline was in good financial condition and promised to deliver to defendants all books and records of the corporation at closing. The evidence further showed that plaintiffs failed to deliver certain documents to defendants which showed that Shoreline had been operating at a loss.

Here there was ample evidence from which the jury could infer that plaintiffs fraudulently concealed relevant facts from defendants. We therefore hold that the evidence in this case was sufficient to permit the jury to decide whether plaintiffs were guilty of fraudulent concealment. This argument is overruled.

Plaintiffs argue that the trial court should have reduced the damages awarded defendants for fraud by the balance due on the purchase money promissory note. We cannot agree.

We first note that plaintiffs did not seek any such relief from the trial court. We next note that plaintiffs have not provided any factual support for this argument. The record is clear that the damages awarded defendants by the jury were supported by the evidence, and finally, the trial court's judgment awarded recovery of the balance due on the note to plaintiffs. This argument is overruled.

We have carefully reviewed plaintiffs' remaining arguments and find them to be without merit.

No error.

Judges JOHN and McCRODDEN concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. JIMMY WAYNE IDOL, SR.; KONRAD K. FISH, TRUSTEE; BEN SIRMONS, TRUSTEE; MABEL S. HIATT, BENEFICIARY AND ASSIGNEE; CECIL STANLEY LITTLE AND WIFE, PATRICIA J. LITTLE, LESSEES, DEFENDANTS

No. 9318SC478

(Filed 15 March 1994)

Landlord and Tenant § 36 (NCI4th)— partial taking of leased premises by eminent domain—no grounds for terminating lease

The Department of Transportation's condemnation of .84 acres of a four-acre tract and the resulting demolition of the building used by the lessees as a convenience store did not provide legal grounds for the lessor to terminate the lease under a provision allowing cancellation of the lease if the leased premises are rendered untenable by a casualty, since the lessees could continue to use the remainder of the property to operate a convenience store.

Am Jur 2d, Cancellation of Instruments § 7.

Appeal by defendant Jimmy Wayne Idol, Sr. from judgment entered 11 January 1993 in Guilford County Superior Court by Judge Howard R. Greeson, Jr. Heard in the Court of Appeals 9 February 1994.

On 27 April 1976, Mrs. Clarence V. Idol, Sr., the lessor, entered into a ten-year written lease with defendants Cecil and Patricia Little (hereinafter the lessees). The subject of the lease is approximately four acres of real property, a building, and equipment contained in the building. The property is located at the intersection of West Wendover Avenue and Guilford-Jamestown Road in Guilford County. The lessees have remained in possession of the property since 1 May 1976 by exercising their options to renew the lease for additional five-year terms. *See Idol v. Little*, 100 N.C. App. 442, 396 S.E.2d 632 (1992) (holding that option to renew lease was not void for failure to state amount of rent to be paid upon exercise of the option). Defendant Jimmy Wayne Idol, Sr. (hereinafter the lessor) succeeded to the interests of Mrs. Clarence V. Idol, Sr.

On 7 July 1992, the North Carolina Department of Transportation, in the exercise of its power of eminent domain, condemned for public use approximately .84 acres of the four-acre tract leased to the lessees. As a result of the condemnation, the building used

by the lessees to operate a Sav-Way convenience store was demolished. At the condemnation proceeding, the lessor and lessees each moved for summary judgment on the validity of the lease after the condemnation. Pursuant to its authority under G.S. § 136-108 to resolve all issues other than damages, the trial court determined that the partial taking by the Department of Transportation did not provide legal grounds for the lessor to terminate the lease. Defendant-lessor Idol appeals.

Turner, Rollins, Rollins & Clark, by Clyde T. Rollins, for defendants-appellees Cecil S. Little and Patricia J. Little.

Frazier, Frazier & Mahler, by Ben Sirmons, for defendant-appellant Jimmy Wayne Idol, Sr.

WELLS, Judge.

Lessor argues that because the terms of the lease are ambiguous, the trial court erred in determining the meaning of the contract as a matter of law and in granting lessees' summary judgment motion. We disagree.

The lease provides in pertinent part:

> THAT subject to the terms and conditions hereinafter set forth lessor does hereby let and lease unto lessees and lessees do hereby accept as tenant of lessor a certain parcel of land, together with a storebuilding and certain equipment therein, in Guilford County, North Carolina, located on the southwest corner of the intersection of West Wendover Avenue (formerly Red Road) and the Guilford-Jamestown Road, Known as Idol's Crossroad. The leased Premises shall be the Southwest corner of the intersection of West Wendover Avenue and Guilford-Jamestown Road, Guilford County, Friendship Township, presently containing approximately four (4) acres.
>
> * * * *
>
> (8) DAMAGE BY FIRE OR OTHER CASUALTY—If the leased premises are rendered untenable by fire or other casualty, the lessor shall have the option to repair the leased premises or cancel this lease and have no further responsibilities to repair or renovate the premises. If the lessor repairs or renovates the premises following such casualty, the lessees shall have no responsibility to pay the rent previously agreed

on until such time as they may take possession of the premises following such repair or renovation.

Lessor asserts that the term "leased premises" contained in the lease is ambiguous, and when it is considered in light of all the evidence, the intent of the parties is that "leased premises" means "leased building," therefore entitling lessor to cancel the lease. Lessees assert that they may continue to use the remainder of the property to operate a convenience store.

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56. When a motion for summary judgment is granted, the questions for determination on appeal are, whether on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *Smith v. Smith*, 65 N.C. App. 139, 308 S.E.2d 504 (1983). A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court. *Cleland v. Children's Home*, 64 N.C. App. 153, 306 S.E.2d 587 (1983). On the other hand, if the agreement is ambiguous, then interpretation of the contract is for the jury. *Id.*

Since the lease in this case does not contain a provision which affords lessor the option to cancel the lease in the event of a taking by eminent domain, we do not address the issue of whether a partial taking by the State would terminate lessee's leasehold interest in light of such a provision. Instead, we consider the terms of the lease to be plain, unambiguous, and dispositive on the question of the continued validity of the lease. The terms of the lease provide that the "leased premises" is four acres of real property, a building, and equipment contained in the building. The casualty provision of the lease applies to the "leased premises," and the taking by the Department of Transportation has not rendered the "leased premises" untenable because there remains sufficient real property for lessees to continue operating a convenience store. Lessor may not contend for an interpretation of the agreement which varies from its plain and unambiguous language on the ground that the lease does not express his intent. *Blue Jeans Corp. v. Pinkerton, Inc.*, 51 N.C. App. 137, 275 S.E.2d 209 (1981).

There is no dispute as to whether lessor has any obligation to replace the building or fixtures. The only question decided below is whether, under the terms of the lease, lessees are entitled to continued occupancy of the remaining land. We hold that they are.

Accordingly, the judgment of the trial court is

Affirmed.

Judges JOHN and McCRODDEN concur.

STATE OF NORTH CAROLINA v. CLOYD ALAN STAFFORD, JR.

No. 9318SC508

(Filed 15 March 1994)

Automobiles and Other Vehicles § 818.1 (NCI4th); Criminal Law § 135 (NCI4th)— habitual impaired driving—admissibility of prior convictions—collateral attack on prior convictions impermissible

The trial court properly denied defendant's motion to suppress the evidence of his prior DWI convictions in a prosecution for habitual impaired driving, though defendant alleged that court records failed to show that defendant was represented by counsel when he entered guilty pleas in those prior cases and they therefore did not comply with *Boykin v. Alabama*, 395 U.S. 238, since defendant could not *collaterally* attack the validity of his DWI convictions.

Am Jur 2d, Automobiles and Highway Traffic §§ 296-310; Criminal Law §§ 469-472.

Appeal by defendant from judgment entered 4 March 1993 by Judge Steve Allen in Guilford County Superior Court. Heard in the Court of Appeals 11 January 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Lisa M. Miles, Assistant Public Defender, Eighteenth Judicial District, for defendant-appellant.

JOHNSON, Judge.

Defendant Cloyd Alan Stafford, Jr. was convicted in Guilford County Superior Court of habitual impaired driving pursuant to North Carolina General Statutes § 20-138.5 (1993) on 4 March 1993. This statute, enacted in 1990, reads in pertinent part that "[a] person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense."

As predicates for this charge, the indictments alleged that defendant had been convicted of driving while impaired (DWI) on three occasions since 1986. Each of the previous convictions occurred in Guilford County. The files maintained by the Guilford County Clerk of Court indicated that in two of the cases, defendant was not represented by counsel, that he pled guilty to the offenses, and that judgments were entered against him based on his pleas.

Prior to trial, defendant moved to suppress the prior convictions on the grounds that they were invalid under *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274 (1969), and could not, therefore, be used against him in a subsequent proceeding. The trial court denied this motion and defendant was found guilty by jury trial of DWI. During the habitual phase of the trial, defendant again objected to the State's use of the convictions; the trial court overruled defendant's objection. Defendant then pled guilty to habitual impaired driving, specifically reserving the right to appeal the *Boykin* issue. Judgment was entered, and defendant gave notice of appeal to this Court.

Defendant's sole argument on appeal is that the trial court erred in denying defendant's motion to suppress the use of prior convictions where the court records failed to show that the convictions complied with *Boykin v. Alabama.*

In *Boykin v. Alabama*, the United States Supreme Court overturned a guilty plea for lack of sufficient showing in the record that the trial court had made the defendant aware of the constitutional consequences of his plea. The defendant in *Boykin* pled guilty to five charges of common law robbery and was sentenced to death; the court determined that the record was insufficient to show that the defendant knowingly entered his pleas even though he was represented by counsel at the time.

Following *Boykin*, "panels of the North Carolina Court of Appeals . . . held consistently that, notwithstanding a defendant who is represented by counsel enters a plea of guilty or a plea of *nolo contendere*, it must appear affirmatively in the record that he did so voluntarily and understandingly." *State v. Ford*, 281 N.C. 62, 65, 187 S.E.2d 741, 743 (1972); *State v. Ratliff*, 14 N.C. App. 275, 188 S.E.2d 14 (1972). North Carolina General Statutes § 15A-1022 (Cum. Supp. 1993), which requires superior court judges to address defendants personally and to inform defendants of certain consequences of guilty pleas, was enacted in 1973 in response to *Boykin*.

In the case *sub judice*, however, we are asked to apply *Boykin* to a collateral attack; i.e., defendant argues that if the prior DWI convictions were not valid pursuant to *Boykin*, they cannot be used to convict defendant of the offense of habitual impaired driving. Defendant cites many North Carolina cases to bolster his position; however, these cases all involve *direct* attacks on the prior convictions. *State v. Harris*, 10 N.C. App. 553, 180 S.E.2d 29 (1971) is one such example, where the defendant had two guilty pleas, the latter of the two serving as the basis for an order revoking the defendant's probation and found to not comply with *Boykin*.

We examine *State v. Noles*, 12 N.C. App. 676, 184 S.E.2d 409 (1971). In *Noles*, the defendant entered a plea of guilty and was convicted of a charge of uttering a worthless check. The defendant received a suspended sentence; one requirement of the suspended sentence was that the defendant not violate any laws of North Carolina for the next five years. Five months later, the defendant entered a plea of guilty to another charge of uttering a worthless check; the next month, he was arrested for having violated the probation terms of the first conviction. Defendant appealed the activation of his suspended sentence on *Boykin* grounds. Our Court said:

> Defendant . . . attack[s] the validity of the warrant upon which he was originally tried and the resulting judgment . . . because there was no affirmative showing on the record that the defendant entered a plea of guilty understandingly and voluntarily. The defendant cites [*Harris*] as authority for his proposition, but the cases can be distinguished. Both cases involve appeals from an order activating suspended sentences and in both the contention was that guilty pleas not in compliance with [*Boykin*] were entered. In *Harris* the defendant directly attacked the

> validity of the later judgment which was the basis for the activation of his original suspended sentence. In the present case, however, the defendant tries to attack collaterally the validity of the original judgment, where his sentence was suspended, in an appeal from the revocation of that suspension. It is here that the similarity ends and the difference lies. When appealing from an order activating a suspended sentence, inquiries are permissible only to determine whether there is evidence to support a finding of a breach of the conditions of the suspension, or whether the condition which has been broken is invalid because it is unreasonable or is imposed for an unreasonable length of time. . . . Questioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is, we believe, an impermissible collateral attack. The proper procedure which provides the defendant adequate opportunity for adjudication of claimed deprivations of constitutional rights is under the Post-Conviction Hearing Act[.]

Id. at 678, 184 S.E.2d at 410 (citations omitted). We find on our facts, as in *Noles*, that defendant may not collaterally attack the validity of his prior DWI convictions.

Defendant cites *Parke v. Raley*, --- U.S. ---, 121 L.Ed.2d 391 (1992), a recent United States Supreme Court case dealing with *Boykin*. *Parke* upheld a Kentucky state court procedure which shifted the burden to the defendant to establish the invalidity of a conviction under *Boykin* once the state had proved its existence; the Kentucky procedure involved a collateral attack upon a prior conviction during a recidivism proceeding. However, we note that in *Parke* the Supreme Court did not extend the presumptive invalidity of *Boykin* to the collateral attack, stating "[t]o import *Boykin's* presumption of invalidity into this very different context would, in our view, improperly ignore another presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights." *Id.* at ---, 121 L.Ed.2d at 404 (citations omitted).

In the case *sub judice*, because we find that defendant may not collaterally attack the validity of his prior DWI convictions, we find the trial court properly denied defendant's motion to suppress the evidence of his prior DWI convictions.

The decision of the trial court is affirmed.

Judges EAGLES and LEWIS concur.

BAXTER C. CRANE, JR. AND WIFE, CEANNE J. CRANE, PLAINTIFFS v. BOBBY MACBRYAN GREEN AND DANIEL JOSEPH MADDALENA, DEFENDANTS

No. 9324SC548

(Filed 15 March 1994)

Judgments § 139 (NCI4th)— consent judgment—actions to clear title and for trespass—not enforceable by contempt

A consent judgment in actions for clear title and for trespass was not an order enforceable through the contempt powers of the court where the judgment was merely a recital of the parties' agreement and not an adjudication of rights. The judgment on its face does not reflect a determination by the court of either issues of fact or conclusions of law presented by the case before it. N.C.G.S. § 5A-21.

Am Jur 2d, Judgments § 1085.

Appeal by defendants from order signed 10 March 1993 in Avery County Superior Court by Judge Charles C. Lamm, Jr. Heard in the Court of Appeals 2 March 1994.

Plaintiffs are the developers of the Lost Cove Estates, 13 lots of real property located in Avery County. Defendants own lots 1, 7, 8 and 9 and a portion of lot 2. With the exception of lots 5 and 6, plaintiffs own the remaining lots. On 17 November 1989, plaintiffs filed this action against defendants seeking to clear title to property allegedly owned by plaintiffs. Plaintiffs also sought to recover damages against defendants for slander of title and trespass. This action was resolved by a consent agreement and order filed 8 October 1990 and signed by plaintiffs, defendants and Judge Judson D. DeRamus, Jr.

On 17 February 1993, plaintiffs filed a motion for a show cause order seeking to hold defendants in civil contempt for violating the order of 8 October 1990. Plaintiffs allege that by the terms of that judgment they are entitled to access to lot 2 and that

defendants blocked access to lot 2 by erecting a gate across the subdivision road. By order entered 10 March 1993, Judge Lamm found defendants to be in civil contempt of court because they erected a gate over the subdivision road. Defendants appeal from this order.

No brief for plaintiffs-appellees.

Allman Spry Humphreys Leggett & Howington, P.A., by David C. Smith, for defendants-appellants.

WELLS, Judge.

Defendants contend that the trial court erred by holding them in contempt of court because the order which the trial court found defendants to have violated was not an order of the court enforceable through the contempt powers of the court. We agree.

Failure to comply with an order of the court is enforceable through the contempt powers of our courts. N.C. Gen. Stat. § 5A-21 (1986 & Supp. 1993). A person found in civil contempt may appeal in the manner provided by G.S. § 7A-27. N.C. Gen. Stat. § 5A-24.

The general rule is that a consent judgment is the contract of the parties entered upon the record with the sanction of the court. *Armstrong v. Insurance Co.*, 249 N.C. 352, 106 S.E.2d 515 (1959). The sole exception to this rule is in the area of domestic relations law where all alimony and support agreements approved by the court are treated as court-ordered judgments. *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983). In the ordinary case, when a court merely approves the agreement of the parties and sets it out in the judgment, a judicial determination is obviated, *Armstrong, supra*, and the judgment is nothing more than a contract which is enforceable only by means of an action for breach of contract. *Walters, supra.*

On its face the judgment on which the trial court based its contempt order does not reflect a determination by the trial court of either issues of fact or conclusions of law presented by the case before it. The judgment contains no findings of fact and no conclusions of law. The introduction to the judgment clearly states the basis for the entry:

> THIS MATTER coming on before the undersigned Superior Court Judge at the October 8, 1990 Civil Session of the Avery

County Superior Court, and it appearing to the Court that the parties, acting through their attorneys and pro se respectively, have agreed to resolve all matters pertaining to the above-captioned action as set forth below.

THEREFORE, IT IS HEREBY, ORDERED, ADJUDGED AND DECREED:

The introductory paragraph is followed by eight double spaced typewritten pages reflecting the stipulations and agreements of the parties. Following the last ordering paragraph, the judgment concludes with the signatures of defendants Green and Maddalena acting *pro se*, plaintiffs, the attorney for plaintiffs, and Judge DeRamus.

Viewed from its four corners, it is clear that the order of 8 October 1990 is merely a recital of the parties' agreement and not an adjudication of rights. *Armstrong, supra; McRary v. McRary*, 228 N.C. 714, 47 S.E.2d 27 (1948). Consequently, the consent judgment is not an order enforceable through the contempt powers of the court.

For the reasons stated, the order entered by the trial court on 10 March 1993 is

Reversed.

Judges ORR and WYNN concur.

VIRGINIA STIREWALT (GRIFFIN), PLAINTIFF v. JOHN O. STIREWALT, DEFENDANT

No. 9320DC270

(Filed 15 March 1994)

Divorce and Separation § 172 (NCI4th)— equitable distribution—assertion of claim—not sufficient

An order of equitable distribution was reversed where plaintiff's complaint in an action for divorce from bed and board asserted a claim for child support, temporary alimony, permanent alimony, the possession and use of certain property,

and that defendant be ordered to maintain all marital assets in their present condition, but clearly made no application for equitable distribution, and defendant's pleadings likewise failed to assert a claim for equitable distribution. Equitable distribution is not automatic and a party seeking equitable distribution must specifically apply for it. N.C.G.S. § 50-21(a).

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Appeal by defendant from judgment entered 22 July 1992 by Judge Ronald W. Burris in Stanly County District Court. Heard in the Court of Appeals 10 January 1994.

The evidence at trial tended to show that plaintiff and defendant were married on 26 September 1948 and lived together as husband and wife until 4 October 1988. On 17 February 1989, plaintiff-wife filed a complaint for divorce from bed and board, alimony, child support and child custody. On 22 March 1990, an absolute divorce was entered. In July of 1992 a judgment of equitable distribution was entered. From that order, defendant appeals.

No brief was filed for plaintiff-appellee.

Everette Noland for defendant-appellant.

WELLS, Judge.

The primary and dispositive question raised by defendant-husband in his appeal is whether either party to this action sufficiently asserted a claim for equitable distribution such that the trial court properly entered a judgment of equitable distribution. We hold that neither party asserted such a claim and therefore reverse the trial court's order of equitable distribution.

N.C. Gen. Stat. § 50-20(a) states that "[u]pon application of a party, the court . . . shall provide for an equitable distribution of the marital property between the parties. . . ." (Emphasis supplied.) The courts of our State recognize that equitable distribution is a property right. *Wilson v. Wilson*, 73 N.C. App. 96, 325 S.E.2d 668, *disc. rev. denied*, 314 N.C. 121, 332 S.E.2d 490 (1985). A married person is entitled to proceed with an action for equitable distribution upon divorce if it is properly applied for and not otherwise

waived. *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987). However, equitable distribution is not automatic, and a party seeking equitable distribution must specifically apply for it. *Id.* G.S. § 50-21(a) provides that:

> At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f). (Emphasis supplied.)

Defendant-husband contends that neither he nor plaintiff-wife asserted a claim for equitable distribution; therefore, the trial court was without jurisdiction to enter such a judgment. After carefully examining the record before us, we must agree.

In this action for divorce from bed and board, plaintiff's complaint asserted a claim for child support, temporary alimony and permanent alimony. Additionally in her complaint, plaintiff requested: (1) to remain in the dwelling in which she and her child resided, (2) the possession and use of the personal property located in that dwelling, (3) the possession and use of a 1976 Ford Mustang automobile, and (4) attorney's fees. In the prayer for relief, plaintiff requested that defendant be ordered to maintain in their present condition all marital assets in his possession and control, including the homes owned by the parties, as well as the furnishings and personal property located in the homes. This complaint clearly makes no application for and states no claim for equitable distribution.

By his answer, defendant prayed that plaintiff's complaint be dismissed, that plaintiff have and recover nothing of defendant, and that all issues triable by a jury be tried by a jury. Thus, defendant's pleadings likewise fail to assert a claim for equitable distribution.

The trial court found and concluded in its judgment that plaintiff's complaint raised the issue of equitable distribution and defendant's answer also asked that equitable distribution of the marital property be determined by the court. The record before us clearly shows this finding and conclusion to be erroneous.

Since neither party made application or stated a claim for equitable distribution prior to the judgment of absolute divorce,

the trial court lacked the authority to enter such a judgment. G.S. § 50-11(e). For this reason, we reverse the district court's order of equitable distribution.

In light of our holding, we find it unnecessary to reach defendant's remaining assignments of error.

Reversed.

Judges JOHN and McCRODDEN concur.

COUNTY OF LENOIR, CITY OF KINSTON v. WILLIAM H. MOORE, JR., ET AL

No. 928DC1291

(Filed 5 April 1994)

Taxation §§ 143, 205 (NCI4th)— State lien for unpaid sales taxes— priority of lien for subsequent ad valorem taxes

A State tax lien for unpaid sales taxes does not have priority over local ad valorem tax liens which arise from a property owner's failure to pay real estate taxes in the years subsequent to the year in which the State tax lien was docketed, notwithstanding the proviso of N.C.G.S. § 105-356(a)(1) stating that the first lien priority for local ad valorem taxes is "[s]ubject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes," since (1) this statute does not refer explicitly to a particular statute in the Revenue Act; (2) local ad valorem tax liens do not qualify as "other recorded specific liens" under the proviso of N.C.G.S. § 105-241 of the Revenue Act which gives priority to properly docketed State tax liens "as against duly recorded mortgages, deeds of trust and other specific liens, as to real estate" when the statutory construction rule of *ejusdem generis* is applied; (3) ad valorem tax liens arise by operation of law; and (4) administrative agencies have recognized the priority of local ad valorem tax liens over State tax liens for many years.

Am Jur 2d, State and Local Taxation §§ 891 et seq.

Judge ORR dissenting.

Appeal by the North Carolina Department of Revenue from judgment signed 8 September 1992 by Judge J. Patrick Exum in Lenoir County District Court. Heard in the Court of Appeals 28 October 1993.

On 27 August 1991, plaintiffs County of Lenoir and City of Kinston instituted a foreclosure action pursuant to G.S. 105-374 because of the failure of defendant William H. Moore, Jr., to pay local ad valorem taxes for the years 1982 through 1990 on real property located in the City of Kinston in Lenoir County. Several other lienholders claimed an interest in the property and were named as defendants in the complaint. On 4 October 1991, defendant North Carolina Department of Revenue (hereinafter "NCDR") filed its answer, stating that there was a "State tax lien [for State sales taxes owed by Mr. Moore] docketed 26 August 1985 in its favor for $38,787.40 . . . . [T]he lien docketed 26 August 1985, by operation of N.C.G.S. 105-356, 105-242(c), and 105-241 constitutes a first lien and is accorded priority over all subsequent liens by operation of law." Subsequently, defendants United States of America and Sears, Roebuck and Company each filed an answer. The other defendants did not respond to the complaint, and plaintiffs obtained a default judgment against these defendants.

On 5 March 1992, plaintiffs filed a motion for summary judgment pursuant to G.S. 1A-1, Rule 56 against the remaining defendants. On 3 September 1992, defendant NCDR filed a motion for summary judgment. Plaintiffs and defendant NCDR stipulated that there was no genuine issue as to any material fact and that the court should enter summary judgment for one party or the other as a matter of law. Defendant NCDR conceded that any local ad valorem tax lien attaching to Mr. Moore's property prior to 26 August 1985 had priority over the State tax lien. Defendant NCDR contended that the State tax lien had priority over any local ad valorem tax lien attaching to Mr. Moore's property after 26 August 1985. On 8 September 1992, the trial court denied defendant NCDR's motion for summary judgment and granted plaintiffs' motion for summary judgment against defendants NCDR, the United States of America, and Sears Roebuck and Company, holding that plaintiffs had a first and prior lien on the real estate. The trial court further ordered that

> [a]ll of the right, title and interest to the real estate of each of the defendants is hereby barred and forever foreclosed,

except as to their right to participate in the distribution of any surplus that may result from the sale herein authorized in accordance with their relative claims thereto, and except as to the right of the United States of America to redeem the real estate within 120 days of the date of the sale as provided in 28 U.S.C. Section 2410(c).

Defendant NCDR appeals.

Griffin & Griffin, by Robert W. Griffin, for plaintiff-appellees.

Attorney General Michael F. Easley, by Associate Attorney General Christopher E. Allen, for defendant-appellant.

EAGLES, Judge.

Defendant North Carolina Department of Revenue brings forward three assignments of error. After careful consideration of the record and briefs, we affirm.

Defendant NCDR argues that "[t]he trial court erred as a matter of law in awarding summary judgment to plaintiffs and entering its order finding that plaintiffs possessed a first and prior lien on taxpayers' property for tax years 1986 through 1990, thereby barring defendant's interest, because defendant's lien was superior for such years." We disagree.

This case of first impression presents the issue of whether a State tax lien has priority over local ad valorem tax liens which arose from a property owner's failure to pay real estate taxes in the years subsequent to the year in which the State tax lien was docketed. Here, defendant NCDR concedes the priority of the 1982-1985 local ad valorem tax liens. *See* G.S. 105-355(a) ("the lien for taxes levied on a parcel of real property shall attach to the parcel taxed on the date as of which property is to be listed under G.S. 105-285"); G.S. 105-285(a) ("All property subject to ad valorem taxation shall be listed annually"); G.S. 105-285(d) ("The ownership of real property shall be determined annually as of January 1"). However, defendant NCDR asserts that the State tax lien has priority over the 1986-1990 local ad valorem tax liens, which arose subsequent to the docketing of the 26 August 1985 State tax lien.

In discerning our General Assembly's intent, we commence our inquiry with an analysis of the statutory framework within which the issue must be decided. First, we proceed with an ex-

amination of the relevant portions of the Revenue Act, G.S. 105-1-G.S. 105-270, and the Machinery Act, G.S. 105-271-G.S. 105-395.1. In the Machinery Act, G.S. 105-356 provides:

> (a) On Real Property.—The lien of taxes imposed on real and personal property shall attach to real property at the time prescribed in G.S. 105-355(a). The priority of that lien shall be determined in accordance with the following rules:
>
> (1) Subject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes, the lien of taxes imposed under the provisions of this Subchapter shall be superior to all other liens, assessments, charges, rights, and claims of any and every kind in and to the real property to which the lien for taxes attaches regardless of the claimant and regardless of whether acquired prior or subsequent to the attachment of the lien for taxes.
>
> (2) The liens of taxes of all taxing units shall be of equal dignity.
>
> (3) The priority of the lien for taxes shall not be affected by transfer of title to the real property after the lien has attached, nor shall it be affected by the death, receivership, or bankruptcy of the owner of the real property to which the lien attaches.

G.S. 105-356 (1992) (emphasis added). Defendant NCDR contends that the proviso appearing in G.S. 105-356(a)(1) (underlined *supra*) refers to G.S. 105-241 of the Revenue Act, which at all times relevant to this action provided:

> . . . State, county, and municipal taxes levied for any and all purposes pursuant to this Subchapter shall be for the fiscal year of the State in which they become due, except as otherwise provided, and the lien of such taxes shall attach annually to all real estate of the taxpayer within the State on the date that such taxes are due and payable, and said lien shall continue until such taxes, with any interest, penalty, and costs which shall accrue thereon, shall have been paid. . . .
>
> Provided, however, that the lien of State taxes shall not be enforceable as against bona fide purchasers for value, and as against duly recorded mortgages, deeds of trust and other recorded specific liens, as to real estate, except upon docketing,

> of a certificate of tax liability or a judgment in the office of the clerk of the superior court of the county wherein the real estate is situated, and as to personalty, except upon a levy upon such property under an execution or a tax warrant, and the priority of the State's tax lien against property in the hands of bona fide purchasers for value, and as against duly recorded mortgages, deeds of trust and other recorded specific liens, shall be determined by reference to the date and time of docketing of judgment or certificate of tax liability or the levy under execution or tax warrant. Provided further, that in the event any taxpayer shall execute an assignment for the benefit of creditors, or if receivership, a creditor's bill or other insolvency proceedings are instituted against any taxpayer indebted in the State on account of any taxes levied by the State, the lien of State taxes shall attach to any and all property of such taxpayer or of such insolvent's estate as of the date and time of the execution of the assignment for the benefit of creditors or of the institution of proceedings herein mentioned and shall be subject only to prior recorded specific liens and reasonable costs of administration. Notwithstanding the provisions of this paragraph, the provisions contained in G.S. 105-164.38 shall remain in full force and effect with respect to the lien of sales taxes.
>
> The provisions of this section shall not have the effect of releasing any lien for State taxes imposed by other law, nor shall they have the effect of postponing the payment of the said State taxes or depriving the said State taxes of any priority in order of payment provided in any other statute under which payment of the said taxes may be required.

G.S. 105-241 (1992) (emphasis added). *See* G.S. 105-242(c).

Priority is the central issue here. The Revenue Act, in G.S. 105-241, affords priority to properly docketed State tax liens "as against duly recorded mortgages, deeds of trust and other recorded specific liens, as to real estate . . . ." Recognizing the well established rule of statutory construction that "[w]hen the language of a statute is clear and without ambiguity, 'there is no room for judicial construction,' and the statute must be given effect in accordance with its plain and definite meaning," *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (citation omitted), we particularly note that this rule is inapplicable

here because the quoted provision of G.S. 105-241, *supra*, makes no express reference to the tax liens of the State's political subdivisions and the proviso in G.S. 105-356(a)(1) fails to refer explicitly to a particular statute in the Revenue Act.

> [W]hen a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, and the courts will interpret the language to give effect to the legislative intent. As this Court said in *State v. Partlow*, 91 N.C. 550 (1884), the legislative intent ". . . is to be ascertained by appropriate means and *indicia*, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in *pari materia*, the preamble, the title, and other like means. . . ." Other *indicia* considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption, earlier statutes on the same subject, the common law as it was understood at the time of the enactment of the statute, and previous interpretations of the same or similar statutes.
>
> Finally, it is a well settled rule of statutory construction that, where a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded. Where possible "the language of a statute will be interpreted so as to avoid an absurd consequence. . . ."

In Re Banks, 295 N.C. 236, 239-40, 244 S.E.2d 386, 389 (1978) (citations omitted). Defendant NCDR contends that it is to be presumed that local ad valorem tax liens qualify as "other recorded specific liens" under G.S. 105-241 because of the proviso which appears in G.S. 105-356(a)(1). Initially, we note that although the proviso currently appearing in G.S. 105-356(a)(1) was originally enacted in 1939, *see* 1939 N.C. Public Laws, c. 310, s. 1704(a)(2), N.C. Code of 1939 § 7971(213)(a)(2), G.S. 105-376(a)(2) (Michie 1943), the quoted provision upon which defendant NCDR relies did not exist at that time in G.S. 105-241. (The quoted provision in G.S. 105-241 was not enacted until 1949. *See* 1949 N.C. Sess. Laws, c. 392, s. 6.)

In addressing defendant NCDR's contention, we interpret the general phrase "other recorded specific liens" in relation to the express terms which precede it according to the dictates of *ejusdem generis*, a well established rule of statutory construction providing that " 'where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including *only things of the same kind, character and nature* as those specifically enumerated.' " *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970) (citations omitted) (emphasis added). *See also State v. Craig*, 176 N.C. 740, 744, 97 S.E. 400, 401 (1918) ("when particular and specific words or acts, the subject of a statute, are followed by general words, the latter must as a rule be confined to acts and things of the same kind").

Here, the terms immediately preceding the phrase "other recorded specific liens" in G.S. 105-241 are "duly recorded mortgages" and "deeds of trust." These two items giving rise to liens are usually, if not exclusively, obtained by *private* lenders of capital as security for an underlying debt. On the other hand, real property ad valorem taxes are inherently public in character: they are statutorily authorized taxes raised to serve the needs of the community as a whole. *See Saluda v. Polk County*, 207 N.C. 180, 185, 176 S.E. 298, 301 (1934) (distinguishing between "mortgages, deeds of trust, etc., on the property" from "governmental taxes" in interpreting priority under statute). In accordance with the dictates of *ejusdem generis*, we conclude that local ad valorem tax liens do not fall within the scope of "other recorded specific liens" as that phrase is used in G.S. 105-241. *Cf. Davidson County v. City of High Point*, 85 N.C. App. 26, 39-40, 354 S.E.2d 280, 288, *modified and aff'd*, 321 N.C. 252, 362 S.E.2d 553 (1987) (holding that the phrase "trade, industry, residence, or other purposes" as used in G.S. 153A-340 relates to "private property" and the phrase "other purposes" is not to be broadened to include the use of land by a municipality for a public enterprise listed in G.S. 160A-311); *Askew v. Kopp*, 330 S.W.2d 882, 888 (Mo. 1960) (holding that the words "trade, industry, residence or other purposes" relate to private property uses and should not be construed to include governmental uses).

As further support for this interpretation, we particularly note that within the very statute upon which defendant NCDR asserts its right to priority, G.S. 105-241, the first paragraph refers to

certain taxes specifically by name as "county, and municipal taxes," in addition to referring to "the lien of such taxes." Given this degree of specificity found earlier in the statute (G.S. 105-241) and the principles of *ejusdem generis*, we conclude that the General Assembly did not intend to include liens for local ad valorem taxes, a critical source of county and municipal revenue, as part of the items falling within the catchall phrase "other recorded specific liens" in G.S. 105-241. Additionally, we note that in the Machinery Act our General Assembly has expressly recognized the "first lien" priority to be afforded local ad valorem tax liens by its recommended wording of documents entitled "orders of collection" which are issued under seal by local governing bodies:

> Before delivering the tax receipts to the tax collector in any year, the board of county commissioners or municipal governing body shall adopt and enter in its minutes an order directing the tax collector to collect the taxes charged in the tax records and receipts. A copy of this order shall be delivered to the tax collector at the time the tax receipts are delivered to him, but the failure to do so shall not affect the tax collector's rights and duties to employ the means of collecting taxes provided by this Subchapter. The order of collection shall have the force and effect of a judgment and execution against the taxpayers' real and personal property and shall be drawn in substantially the following form:
>
> State of North Carolina
>
> County (or City or Town) of.....
>
> To the Tax Collector of the County (or City or Town) of .....:
>
> You are hereby authorized, empowered, and commanded to collect the taxes set forth in the tax records filed in the office of ..... and in the tax receipts herewith delivered to you, in the amounts and from the taxpayers likewise therein set forth. Such taxes are hereby declared to be a first lien upon all real property of the respective taxpayers in the County (or City or Town) of ....., and this order shall be a full and sufficient authority to direct, require, and enable you to levy on and sell any real or personal property of such taxpayers, for and on account thereof, in accordance with law.

Witness my hand and official seal, this ..... day of ....., 19...

..... (Seal)

Chairman, Board of Commissioners of ..... County

(Mayor, City (or Town) of .....)

Attest:

.....

Clerk of Board of Commissioners of ..... County (Clerk of the City (or Town) of .....)

G.S. 105-321(b) (1992) (emphasis added). *See also* N.C. Code of 1939 § 7971(158); G.S. 105-325 (Michie 1943). G.S. 105-321(b), *supra*, is the *only* statute in Chapter 105 in which the phrase "first lien" appears.

We find further support for our holding by virtue of the very nature of local ad valorem tax liens, which arise simply by operation of law, without any other action by the taxing authority. *See generally, Black's Law Dictionary, Sixth Ed.* 1092 (West 1990) (defining the term "operation of law" as "the manner in which rights, and sometimes liabilities, devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or co-operation of the party himself"); *cf. Bowen v. Darden*, 241 N.C. 11, 13, 84 S.E.2d 289, 291 (1954) ("a trust by operation of law is raised by rule or presumption of law based on acts or conduct, rather than on direct expression of intention"); *Carpenter v. Tony E. Hawley, Contractors*, 53 N.C. App. 715, 721, 281 S.E.2d 783, 787, *disc. review denied and appeal dismissed*, 304 N.C. 587, 289 S.E.2d 564 (1981); *Atkins v. Burden*, 31 N.C. App. 660, 665, 230 S.E.2d 594, 597 (1976), *disc. review denied*, 291 N.C. 710, 232 S.E.2d 202 (1977); *Brown v. Guthery*, 190 N.C. 822, 824, 130 S.E. 836, 837 (1925). Unlike the State tax lien presented here, a local ad valorem tax lien arises as of the date the real property is *listed. Service Co. v. Dunford*, 18 N.C. App. 641, 643, 197 S.E.2d 626, 628 (1973); G.S. 105-355(a); G.S. 105-356(a); G.S. 105-285. *Compare* G.S. 105-241 (necessity of *docketing* a certificate of tax liability or a judgment as a prerequisite to the enforceability of State tax lien); G.S. 105-242(c) ("said tax shall become a lien on realty only from the date of the docketing of such certificate in the office

of the clerk of the superior court"). *See generally, Sykes v. Clayton, Comr. of Revenue*, 274 N.C. 398, 403-04, 163 S.E.2d 775, 779 (1968) (distinguishing between real property ad valorem taxes and sales taxes); *Williams v. General Finance Corp. of Atlanta*, 98 Ga. App. 31, 35, 104 S.E.2d 649, 653 (1958).

In sum, notwithstanding G.S. 105-356's proviso stating "[s]ubject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes," we hold that a local ad valorem tax lien is superior to *all* other liens, including State tax liens, "regardless of the claimant and regardless of whether acquired prior or subsequent to the attachment of the lien for taxes." G.S. 105-356(a)(1). *See generally Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975) ("where a literal reading of a statute 'will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded' " (citation omitted)); *In Re Mitchell-Carolina Corp.*, 67 N.C. App. 450, 452-53, 313 S.E.2d 816, 818, *disc. review denied*, 311 N.C. 401, 319 S.E.2d 272 (1984). In the absence of specific statutory language, we will not engraft upon G.S. 105-241 and G.S. 105-356 an undue restriction defeating the priority of local ad valorem tax liens. *Lockwood v. McCaskill*, 261 N.C. 754, 758, 136 S.E.2d 67, 69 (1964) (" 'A proviso should be construed together with the enacting clause or body of the act, with a view to giving effect to each and to carrying out the intention of the legislature as manifested in the entire act and acts *in pari materia*. A strict but reasonable construction is to be given to the proviso so as to take out of the enacting clause only those cases which are fairly within the terms of the proviso.' 82 C.J.S., Statutes 381(b)(1)"); *Robbins v. Charlotte*, 241 N.C. 197, 200, 84 S.E.2d 814, 816-17 (1954).

Finally, plaintiffs argue that "[a]t trial defendant [NCDR] further conceded that the State had always conceded that local property taxes were entitled to first priority, at least since Chapter 105 (Taxation) (G.S. 105-1 *et seq.*) was written in the 1930's." Defendant NCDR has failed to refute this contention. Our Supreme Court has stated that "[a]n administrative interpretation of a tax statute which has continued over a long period of time with the silent acquiescence of the Legislature should be given consideration in the construction of the statute." *Yacht Co. v. High, Commissioner of Revenue*, 265 N.C. 653, 658, 144 S.E.2d 821, 825 (1965) (*citing Knitting Mills v. Gill*, 228 N.C. 764, 47 S.E.2d 240 (1948)). *See*

also Comr. of Insurance v. Automobile Rate Office, 294 N.C. 60, 241 S.E.2d 324 (1978); *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E.2d 200 (1973). Given our application of the rules of statutory construction, our interpretation of legislative intent, and the historical administrative interpretation of G.S. 105-241 and G.S. 105-356 spanning over one-half of a century, we conclude that if State tax liens are to receive priority over local ad valorem tax liens, there must be an express amendment to the statutes by our General Assembly.

Accordingly, we affirm the trial court's 8 September 1992 judgment.

Affirmed.

Judge COZORT concurs.

Judge ORR dissents.

Judge ORR dissenting.

The issue before this Court is whether a county's or municipality's ad valorem tax lien arising under the Machinery Act has priority over a docketed State tax lien on the same real property arising under the Revenue Act as a matter of law. While the majority presents a compelling argument to support plaintiffs' position in this case, I must respectfully dissent on the grounds that the legislative language and intent is clear.

"The law governing statutory construction is well-settled. When the language of a statute is clear and without ambiguity, 'there is no room for judicial construction,' and the statute must be given effect in accordance with its plain and definite meaning." *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984). "Where words in a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning." *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984).

The purpose of the Machinery Act, N.C. Gen. Stat. § 105-271 to -395.1, "is to provide the machinery for the listing, appraisal, and assessment of property and the levy and collection of taxes on property by counties and municipalities." N.C. Gen. Stat. § 105-272. Pursuant to N.C. Gen. Stat. § 105-355(a):

> Regardless of the time at which liability for a tax for a given fiscal year may arise or the exact amount thereof be determined, the lien for taxes levied on a parcel of real property *shall attach to the parcel taxed on the date as of which property is to be listed under G.S. 105-285* . . . .

(Emphasis added.) Under N.C. Gen. Stat. § 105-285, "All property subject to ad valorem taxation shall be listed annually." Under the Machinery Act, therefore, ad valorem tax liens attach to the parcel taxed on the date the property is listed, which property must be listed annually. Thus, on the date the property is listed, an ad valorem tax lien against the property arises by operation of law, and a taxing unit may bring a foreclosure action pursuant to N.C. Gen. Stat. § 105-374.

In order to determine the effect enforcement of ad valorem tax liens has on other liens on the property, N.C. Gen. Stat. § 105-356 sets out the priority of tax liens arising under the Machinery Act. N.C. Gen. Stat. § 105-356 states:

> (a) On Real Property.—The lien of taxes imposed on real and personal property shall attach to real property at the time prescribed in G.S. 105-355(a). The priority of that lien shall be determined in accordance with the following rules:
>
> > (1) *Subject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes*, the lien of taxes imposed under the provisions of this Subchapter shall be superior to *all other liens, assessments, charges, rights, and claims of any and every kind in and to the real property to which the lien for taxes attaches regardless of the claimant and regardless of whether acquired prior or subsequent to the attachment of the lien for taxes.*
> >
> > . . . .

(Emphasis added.) Thus, pursuant to the plain language of N.C. Gen. Stat. § 105-356, the rule of priority for ad valorem tax liens is that once an ad valorem tax lien arising under the Machinery Act attaches to real property, this lien has priority over *all other liens* on the real property, regardless of whether the other liens were acquired prior to or subsequent to the attachment of the ad valorem tax lien. This rule is, however, "subject to" the provisions of the Revenue Act prescribing priority of State tax liens.

N.C. Gen. Stat. § 105-241 is the only provision of the Revenue Act which prescribes the priority of State tax liens. At the time of this action, N.C. Gen. Stat. § 105-241 stated:

> State, county, and municipal taxes levied for any and all purposes pursuant to this Subchapter shall be for the fiscal year of the State in which they become due, except as otherwise provided, and the lien of such taxes shall attach annually to all real estate of the taxpayer within the State on the date that such taxes are due and payable . . . .
>
> Provided, however, that the lien of State taxes shall not be enforceable as against bona fide purchasers for value, and *as against duly recorded mortgages, deeds of trust and other recorded specific liens, as to real estate, except upon docketing of a certificate of tax liability or a judgment in the office of the clerk of the superior court of the county wherein the real estate is situated*, and as to personalty, except upon a levy upon such property under an execution or a tax warrant, *and the priority of the State's tax lien against property* in the hands of bona fide purchasers for value, and *as against duly recorded mortgages, deeds of trust and other recorded specific liens*, shall be determined by reference to the date and time of docketing of judgment or certificate of tax liability or the levy under execution or tax warrant.

(Emphasis added.) (Amendment effective 1 August 1993 rewrote this statute.) As to priority solely over other liens, by the plain language of N.C. Gen Stat. § 105-241, at the time of this action, the Revenue Act gave docketed State tax liens priority over "duly recorded mortgages, deeds of trust and other recorded specific liens" that are recorded after the date and time the State tax lien was docketed.

Ad valorem tax liens are not classified as "deeds of trust" or "recorded mortgages." Thus, in order to determine whether docketed State tax liens have priority over ad valorem tax liens it must be determined whether the Legislature intended to include ad valorem tax liens in the term "other recorded specific liens" under the Revenue Act. Ad valorem tax liens, as counsel for plaintiffs concedes, are specific liens; thus, the sole issue is whether the Legislature intended to classify ad valorem tax liens as "recorded" liens under the Revenue Act.

Black's Law Dictionary defines "record", "[t]o commit to writing," "to make an official note of, to write, transcribe, or enter in a book or on parchment, for the purpose of preserving authentic evidence of . . . ." The American Heritage Dictionary defines "record", "[t]o register or indicate."

Chapter 105 of the General Statutes requires that each year, every county and tax-levying municipality prepare a record containing the total assessed value of each taxpayer's real property listed for taxation and the ad valorem taxes due on such property. Pursuant to N.C. Gen. Stat. § 105-319 (1992):

> (a) For each year there *shall* be prepared for each county and tax-levying municipality a scroll (showing property valuations) and a tax book (showing the amount of taxes due) or a combined record (showing both property valuation and taxes due). . . .
>
> . . .
>
> (c) The tax records *shall* show at least the following information:
>
> . . .
>
> (4) The total assessed value of each taxpayer's real . . . property listed for unit-wide purposes.
>
> (5) The amount of *ad valorem tax due* by each taxpayer for unit-wide purposes.
>
> . . .
>
> (7) The total assessed value of each taxpayer's real . . . property listed for taxation in any special district or subdivision of the unit.
>
> (8) The amount of *ad valorem tax due* by each taxpayer to any special district or subdivision of the unit.

(Emphasis added.) Further, the "[c]ounty tax records shall be filed in the office of the assessor unless the board of county commissioners shall require them to be filed in some other *public* office of the county. City and town tax records shall be filed in some

public office of the municipality designated by the governing body of the city or town." N.C. Gen. Stat. § 105-321(a) (1992) (emphasis added). Under this subchapter, "tax records" means "the scroll, tax book, and combined record." N.C. Gen. Stat. § 105-319(a) (1992).

Thus, although the ad valorem tax lien arises by operation of law, the county or municipality where the real property is listed must keep a yearly written record of the amount of ad valorem taxes due on such property, and this record must be filed with a public office so that the amount of ad valorem taxes due on the real property is public knowledge. The fact that the ad valorem tax lien arises by operation of law does not negate the fact that the amount of the lien is a matter of public record. I believe that this written indication of the ad valorem tax due on the property is sufficient to classify these taxes as "recorded" taxes and that the Legislature intended for ad valorem tax liens to be classified as "other recorded specific liens."

Further, if the Legislature did not intend to include ad valorem tax liens under the language, "other recorded specific liens," then the language found in the Machinery Act stating that the priority of ad valorem tax liens is "subject to" the provisions of the Revenue Act prescribing State tax lien priority would be "empty" in its application. "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).

Thus, I would conclude that docketed State tax liens have priority over ad valorem tax liens that attach to the property subsequent to the date of docketing of the State tax lien. *See* N.C. Gen. Stat. § 105-241 (1992).

In the present case, NCDR's lien is a docketed State tax lien arising under the Revenue Act, and plaintiffs' lien at issue is for ad valorem taxes due on the same property attaching after the date NCDR's lien was docketed. I would conclude that NCDR's duly docketed State tax lien has priority over the ad valorem taxes that attached to the property subsequent to the docketing of NCDR's lien as a matter of law.

While plaintiffs have ably argued, and the majority finds support for, the practical reasons sustaining plaintiffs' position, including the practice over many years of giving the ad valorem

tax liens priority, those arguments and changes should be addressed by the Legislature. Accordingly, I would reverse the order of the trial court granting plaintiffs' motion for summary judgment and remand this case for entry of judgment for the defendants.

DEBORAH ANN FOX, PLAINTIFF v. JAMES RUSSELL FOX, DEFENDANT

No. 9226DC340

(Filed 5 April 1994)

1. **Divorce and Separation § 132 (NCI4th)— equitable distribution —business assets—post-separation appreciation**

The trial court erred in an equitable distribution action in distributing property consisting of shares in Accent Mobile Homes personally owned by defendant and shares owned through a profit sharing plan where the trial court's judgment properly recited that post-separation appreciation is a distributional factor; plaintiff was awarded one-half of the appreciation through an "adjustive credit" applied in calculating plaintiff's share of the marital property; and, despite the conclusion that an equal division would be equitable, plaintiff received approximately 66% of the marital estate. Post-separation appreciation is not marital property and cannot be distributed by the court, but is a distributional factor which the court must consider; however, under *Gum v. Gum*, 107 N.C. App. 734, the court may not simply divide and distribute the amount of post-separation increase. On remand, a conclusion that an equal division of marital property would not be equitable would be within the discretion of the court and is the appropriate means to take into consideration the increase in value of marital assets after the date of separation.

Am Jur 2d, Divorce and Separation §§ 901, 902.

2. **Trial § 140 (NCI4th)— equitable distribution—valuation of property—stipulations—binding**

Stipulations in an equitable distribution action that the parties would be bound by the valuations of assets by a particular CPA were binding where there was a written pretrial equitable distribution order which recited the agreement but

which was not signed or otherwise acknowledged by the parties, and there was a second set of stipulations on the day of trial at which time the court examined the parties concerning the terms of the agreement. While the first agreement standing alone cannot be binding, the stipulations became binding at trial when all appropriate inquiries were made and the parties acknowledged their assent and understanding.

Am Jur 2d, Stipulations §§ 8, 9.

3. **Trial § 140 (NCI4th)— equitable distribution—valuation of property—stipulations**

Defendant could not argue in an equitable distribution action that a CPA's valuation of assets was based upon incompetent evidence where defendant's stipulation at trial, made with full knowledge of the facts, removed the pertinent valuations, including their evidentiary bases, from the field of evidence. Because the action was remanded on other grounds and the trial court will be obliged to find new date-of-trial values, the stipulations regarding the use of this particular CPA to calculate post-separation matters are without effect; the parties had agreed to exact valuations given by the CPA and known to the parties at the time the stipulations became effective. However, the date the parties separated remains constant and the date-of-separation values remain the same.

Am Jur 2d, Stipulations §§ 8, 9.

4. **Divorce and Separation § 147 (NCI4th)— equitable distribution—debt—personal guaranty**

The trial court did not err in an equitable distribution action which was remanded on other grounds by finding that the only marital debt was the mortgage on the former marital home and that defendant had no debts or liabilities other than those owing plaintiff and the minor child where defendant contended that the court failed to take into consideration defendant's personal guaranty of certain business debts incurred prior to the separation. There is no mention of the alleged debt in the record save defendant's testimony and the trial judge as the sole arbiter of credibility may reject the testimony of any witness in whole or in part. Upon remand, the parties will be entitled to present evidence of their current financial condition, but defendant is not entitled to present further

evidence regarding the classification of any personal guaranty as marital debt.

Am Jur 2d, Divorce and Separation §§ 870 et seq., 937 et seq.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

5. Divorce and Separation § 144 (NCI4th)— equitable distribution evidence of distribution factors—evidence on remand

When evidence of a particular distributional factor is introduced, the trial court must consider the fact and make an appropriate finding of fact. Furthermore, on remand, it would serve no purpose to admit additional evidence of factors static in nature; however, the trial court should allow new evidence as to any factor if the existence, non-existence, or quantum thereof is likely to have changed by the time of the new hearing.

Am Jur 2d, Divorce and Separation §§ 870 et seq., 937 et seq.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

6. Appeal and Error § 341 (NCI4th)— equitable distribution—valuation of marital home—assignment of error

Defendant in an equitable distribution action abandoned any argument that the valuation of the marital home was improper where defendant alluded to an error in the valuation of the marital home in his assignment of error, made an oblique reference to the valuation in his argument, and did not assign error to the court's finding concerning the sale price of the home and the parties' stipulation as to its value.

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

Divorce: equitable distribution doctrine. 41 ALR4TH 481.

7. Divorce and Separation § 535 (NCI4th)— equitable distribution—costs—findings

There is no authority for the assertion that the trial court in an equitable distribution action must specifically describe each amount when awarding costs.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Appeal by defendant from judgment entered 31 October 1991 by Judge L. Stanley Brown in Mecklenburg County District Court. Heard in the Court of Appeals 9 March 1993.

Robinson, Bradshaw & Hinson, P.A., by Martin L. Brackett, Jr. and John B. Garver, III, for plaintiff-appellee.

Hicks, Hodge and Cranford, P.A., by Edward P. Hausle, for defendant-appellant.

JOHN, Judge.

In this equitable distribution action, defendant husband brings forward eleven arguments relating to: (1) valuation and classification of particular assets; (2) award of a "distributive credit" to plaintiff; (3) division of assets; (4) assessment of costs; and (5) designation of the court's 31 October 1991 order as a Qualified Domestic Relations Order.

The parties were married 31 May 1975 and separated 27 August 1989. On 20 August 1990, plaintiff wife filed the present action requesting, *inter alia*, equitable distribution. The parties divorced 3 December 1990. On 31 October 1991, the trial court entered the equitable distribution judgment and the Qualified Domestic Relations Order which are the subjects of the present appeal. Other facts necessary to an understanding of the issues will be presented within the text of this opinion.

I. *The Accent Assets*

Defendant's primary contention is that the trial court erred in its treatment of the parties' interest in the stock and profit-sharing plan of Accent Mobile Homes, Inc. (Accent). We agree.

The parties' interest in Accent was derived through a complicated series of business transactions. During most of the marriage, defendant was employed by A-1 Mobile Homes (A-1) and participated in its profit sharing plan (the A-1 Plan). Upon defendant's leaving A-1 in late 1988, his total vested plan balance was $478,481.55. In January 1989, he withdrew $29,308.30 from the A-1 Plan in order to create and capitalize Accent Mobile Homes, Inc. (Accent); thereafter he established Accent's Profit-Sharing Plan and Trust (the Accent Plan). As the result of several transactions, the A-1 Plan assets were "rolled" into the Accent Plan. As trustee

of this new plan, defendant periodically directed it to purchase Accent stock, providing the growing company with needed capital.

As of the *date of separation*, Accent had issued 175,000 shares of stock, 25,000 personally owned by defendant and the remainder by the Accent plan. *After separation*, defendant "rolled" all remaining A-1 funds into the Accent Plan which used these "new" funds to acquire additional Accent stock. Accordingly, *by the time of trial*, the Accent Plan owned 380,738 shares of Accent stock.

The parties entered into a series of stipulations regarding the aforementioned assets, including agreeing to be bound by the pertinent valuations of T. Randy Whitt, CPA. Utilizing Whitt's report, the trial court derived the following *date-of-separation* values:

1. $329,499.06—Liquid assets in both profit sharing plans.
2. $ 27,350.00—Defendant's Accent stock.
3. $164,150.00—Accent stock owned by Accent plan.

$520,999.06—Total

The court found the following to be the *date-of-trial* values:

1. $ 53,000.00—Liquid assets in Accent plan.
2. $ 41,714.00—Defendant's Accent Stock.
3. $635,286.00—Accent stock owned by Accent plan

$730,000.00—Total

Initially, we note the *questions* preceding defendant's arguments in his brief often address only *the Accent stock* and do not mention the *Accent plan*. While not specifically required, the better practice under our Appellate Rules is for each question clearly and concisely to address the matters argued thereunder, *i.e.*, the argument in the brief should correspond to the question presented, so as to avoid needless confusion. *See* N.C.R. App. P. 28(b); *cf. State v. Purdie*, 93 N.C. App. 269, 278, 377 S.E.2d 789, 794 (1989) (the argument in the brief should correspond to the assignment of error). Nonetheless, regardless of any shortcomings in his brief, we elect to examine the merits of defendant's arguments. *See* N.C.R. App. P. 2.

A. *Classification*

[1] Defendant maintains the post-separation appreciation of the Accent assets was, in essence, treated by the trial court as marital property and that one-half was awarded to plaintiff. We believe this contention has merit.

Post-separation appreciation of a marital asset is not marital property and therefore cannot be distributed by the trial court. *Gum v. Gum*, 107 N.C. App. 734, 737-38, 421 S.E.2d 788, 790 (1992). Instead, such appreciation is a distributional factor which the court must consider in resolving what division of the marital property would be equitable. N.C.G.S. § 50-20(c)(11a) or (c)(12) (1987); *Chandler v. Chandler*, 108 N.C. App. 66, 68-69, 422 S.E.2d 587, 589 (1992); *Gum v. Gum*, 107 N.C. App. at 737-38, 421 S.E.2d at 790; *Truesdale v. Truesdale*, 89 N.C. App. 445, 448-49, 366 S.E.2d 512, 514-15 (1988). As stated by this Court in *Gum*:

> *Rather than distributing the sums representing the [post-separation] appreciation*, the trial court must consider the existence of this appreciation, determine to whose benefit the increase in value will accrue, and then consider that benefit when determining whether an equal or unequal distribution of the marital estate would be equitable.

Gum, 107 N.C. App. at 738, 421 S.E.2d at 790. (emphasis added). Thus if the trial court, after considering the post-separation appreciation (and any other statutory factors supported by the evidence), determines that an equal division of the marital assets would not be equitable, it may order an unequal distribution. *Smith v. Smith*, 111 N.C. App. 460, 505, 433 S.E.2d 196, 223, *disc. review denied*, 335 N.C. 177, 438 S.E.2d 202 (1993). However, under *Gum*, it may not simply divide and distribute the amount of post-separation increase.

In the case *sub judice*, the trial court's judgment properly recites that post-separation appreciation of the Accent assets is a "distributional factor." Nonetheless, plaintiff was awarded one-half of this appreciation through what the trial court termed an "adjustive credit" which was thereafter applied in calculating plaintiff's share of the marital property. Such an award is contrary to the holding in *Gum* quoted above, and is in disregard of our warning in *Truesdale* rejecting the "notion . . . that it is harmless error to distribute such appreciation so long as it is

distributed in the same ratio deemed equitable under Section 50-20(c) . . . ." *Truesdale*, 89 N.C. App. at 449, 366 S.E.2d at 515. Further, no stipulation authorized the trial court to act in this manner. *See Byrd v. Owens*, 86 N.C. App. 418, 421-22, 358 S.E.2d 102, 105 (1987).

Moreover, it is apparent the court's error affected the final judgment. The total marital estate was valued at $638,250.59, and the trial court concluded that "[a]n equal division of the marital property is equitable." Nevertheless, after application of the "adjustive credit," plaintiff received $423,625.76 (approximately 66% of the marital estate). Such an award, in the face of the court's conclusion that an equal division would be equitable, constituted an abuse of discretion. *See Smith*, 111 N.C. App. at 470-71, 505, 433 S.E.2d at 203, 223. Accordingly, we must vacate that portion of the judgment concerning what constitutes an equitable division of the marital estate as well as the final distribution of the marital property; we remand this cause to the trial court for redetermination of an equitable distribution of the parties' marital property and for entry of a new judgment. *Id.* at 505, 433 S.E.2d at 223.

As in *Smith*, we recognize that after properly considering the post-separation appreciation of the Accent assets as a distributional factor, the trial court may conclude that an equal division of the marital property would not be equitable. *See Smith*, 111 N.C. App. at 505-506, 433 S.E.2d at 223. "That would certainly be permissible and within the discretion of the trial court and is the appropriate means by which to take into consideration the increase in value of marital assets occurring after the date of separation." *Id.*

B. *Valuation*

[2] Despite the parties' previously noted stipulations (whereby they purportedly agreed to be bound by the pertinent valuations of T. Randy Whitt, CPA), defendant nonetheless insists there are two reasons the values placed upon the Accent assets are erroneous. *First*, he maintains the parties stipulated only to date-of-separation values and not to date-of-trial values. *Second*, he contends the date-of-separation values were based upon incompetent evidence.

Both arguments concern the effect given to the parties' stipulations. Stipulations are judicial admissions which, unless limited as to time or application, continue in full force *for the duration of the controversy. In re Annexation Ordinance*, 296 N.C. 1, 14, 249

S.E.2d 698, 706 (1978). Our Courts acknowledge stipulations may save substantial time and cost, but will not extend the operation thereof beyond the limits set by the parties. *Rickert v. Rickert*, 282 N.C. 373, 380, 193 S.E.2d 79, 83 (1972). Therefore, in determining the scope of a stipulation, we must examine the circumstances existing at the time of the agreement and adopt a reasonable construction with a view towards effecting the intent of the parties. *Id.*

In equitable distribution actions, our courts favor *written stipulations* which are duly executed and acknowledged by the parties. *See McIntosh v. McIntosh*, 74 N.C. App. 554, 556, 328 S.E.2d 600, 602 (1985). *Oral stipulations*, however, are binding if the record affirmatively demonstrates: (1) the trial court read the stipulation terms to the parties, and (2) the parties understood the effects of their agreement. *Id.; Eubanks v. Eubanks*, 109 N.C. App. 127, 130, 425 S.E.2d 742, 744 (1993).

In the case *sub judice*, there exist two purported sets of "stipulations." The first is contained in a written pre-trial equitable distribution order entered 13 February 1991 which recites that the parties agreed to be bound by the CPA's valuation of the Accent assets. Standing alone, this alleged agreement cannot be binding as it was neither signed nor otherwise acknowledged by the parties. *See Eubanks*, 109 N.C. App. at 130, 425 S.E.2d at 744.

The second set of stipulations occurred on the day of trial at which time the court examined the parties concerning the terms of agreement stated in the earlier pre-trial order. The record reflects that all appropriate inquiries were made and that the parties acknowledged their assent and understanding. At this point, therefore, the stipulations became binding upon both plaintiff and defendant. Moreover, our examination of the transcript reveals the court examined the parties concerning their consent to *both* date-of-separation and date-of-trial values placed upon the Accent assets by the CPA. Hence, defendant's initial assertion that the agreement did not encompass date-of-trial valuations is unavailing.

[3] Defendant's second valuation argument addresses the date-of-separation values of the Accent assets. Defendant acknowledges he agreed to be bound by the CPA's valuations concerning these matters. Nevertheless, he contends the findings and conclusions regarding these values must be vacated because the CPA's calculations were based upon incompetent evidence. However, assuming

arguendo the CPA relied upon incompetent evidence, defendant's argument is without merit.

The record affirmatively discloses that defendant stipulated to the date-of-separation valuation of the Accent assets. A stipulation is not itself evidence, rather it "removes the admitted fact from the field of evidence by formally conceding its existence." 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 198, at 23 (4th ed. 1993). Since defendant had access to the CPA's report prior to the time his stipulations became binding, he cannot now complain of any irregularities in that report. His stipulation at trial, made with full knowledge of the facts, removed the pertinent valuations (including their evidentiary bases) "from the field of evidence."

We observe that remand will have no effect on the date-of-separation valuations. Because the date the parties separated remains constant, the date of separation values also remain the same. Defendant's opportunity to contest the CPA's date-of-separation valuations was waived by his stipulation to those values. In essence, defendant has already had his proverbial "bite at the apple." Allowing him a second opportunity to contest the CPA's valuations would serve only to protract litigation and clog the trial court with issues which should have been resolved at the original hearing. *Cf. Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990).

Conversely, because we are remanding, the trial court will be obliged to find new date-of-trial values. Furthermore, upon remand the stipulations regarding the use of this particular CPA to calculate post-separation matters are without effect. At the time the stipulations became effective (the day of trial), the parties knew the exact valuations given by the CPA. Accordingly, the parties agreed to only those values—not to any new valuations which will be required on remand. *See McIntosh*, 74 N.C. App. at 556, 328 S.E.2d at 602 (The parties should fully understand the terms of their agreement.).

II. *Debts*

[4] Regarding the parties' debts, the trial court found the only marital debt to be the mortgage on the former marital home, and further determined defendant had no debts or liabilities other than those owing plaintiff and the minor child. According to defendant, these findings of fact are unsupported by the evidence because

the trial court failed to take into consideration defendant's personal guaranty of certain Accent business debts which were incurred prior to the date of separation.

Debts, as well as assets, must be classified as marital or separate property. *Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987). If marital, the debt must be valued and distributed just as a marital asset. A marital debt is defined as one:

> incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties . . . . 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.

Huguelet v. Huguelet, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994) (citations omitted). The party seeking to classify a debt as marital has the burden of proof. *Byrd*, 86 N.C. App. at 424, 358 S.E.2d at 106. Separate debt, meanwhile, cannot be distributed. Instead the trial court must value separate debt and consider it as a factor under N.C.G.S. § 50-20(c)(1) (1987) when dividing the marital property. *Id.*

A personal guaranty may well pose significant valuation problems due to the contingent nature of the "debt." Nevertheless, the trial court must also classify and value a personal guaranty if the parties *present sufficient evidence as to the debt's existence and value. Byrd*, 86 N.C. App. at 424, 358 S.E.2d at 106; *cf. Albritton v. Albritton*, 109 N.C. App. 36, 40-41, 426 S.E.2d 80, 83-84 (1993) (trial court did not have to make a finding as to the husband's pension plan where no evidence was presented regarding the value of the plan).

In the case *sub judice*, there was no error because defendant failed to meet his evidentiary burden. We have reviewed the affidavits and other evidence of record and find no mention of this alleged debt save for defendant's testimony. He asserted the guaranty was (1) incurred prior to separation and (2) originally in the name of both of the parties, but was unsure as to the exact value of this contingent liability although he proffered an opinion it would be "in excess of $250,000." The trial judge is the sole arbiter of credibility and may reject the testimony of any witness in whole or in part. *See General Specialties Co. v. Teer Co.*, 41 N.C. App.

273, 275, 254 S.E.2d 658, 660 (1979). Furthermore, defendant's testimony on this matter was presented with reference to Plaintiff's Exhibit no. 3 which, from our review, was not included in the record on appeal. This Court cannot examine questions concerning documents which are not contained in the record on appeal. *See Loeb v. Loeb*, 72 N.C. App. 205, 218, 324 S.E.2d 33, 42, *disc. review denied*, 313 N.C. 508, 329 S.E.2d 393 (1985). Accordingly, the trial court did not err in failing to consider in its judgment the guaranty debt asserted by defendant.

Upon remand, the parties are entitled to present evidence of their post-separation (current) financial situation, including any debts which they possess. If sufficient evidence is presented as to the existence and valuation of any separate debt, then the trial court should consider such debt as a factor in deciding what constitutes an equitable division of the marital property. N.C.G.S. § 50-20(c)(1) (1987). However, on remand defendant is *not* entitled to present further evidence as regards classifying any personal guaranty as marital debt. Similar to the circumstance concerning his stipulation to date of separation values, defendant had ample opportunity previously to present such evidence and meet his burden of proof, yet failed to do so. *See Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990).

III. *Remaining distributional factors*

[5] Defendant's third and fifth arguments both pertain to alleged deficiencies in the judgment regarding certain distributional factors listed in G.S. § 50-20(c). Because we are remanding for a new hearing due to the erroneous treatment of post-separation appreciation, we deem it unnecessary to examine the alleged inadequacies regarding other factors. On remand, after proper consideration of any post-separation appreciation and in light of the passage of time, the trial court may likely accord different weight to these distributional factors. *See Smith v. Smith*, 111 N.C. App. 460, 500, 433 S.E.2d 196, 220 (1993) (the weight to be given a particular factor is committed to the sound discretion of the trial court). We take this occasion to reiterate, however, that when evidence of a particular distributional factor is introduced, the court must consider the factor and make an appropriate finding of fact with regard to it. *Freeman v. Freeman*, 107 N.C. App. 644, 656, 421 S.E.2d 623, 629 (1992).

We further observe that on remand, the trial court is not required to admit new evidence as to all distributional factors. It would serve no purpose to admit additional evidence of factors static in nature, *i.e.*, those which are established at the date of separation or which otherwise remain unchanged at the time of a new equitable distribution hearing. The opportunity to present evidence as to any static distributional factors has passed. The trial court, however, should allow new evidence as to any factor if the existence, non-existence, or quantum thereof is likely to have changed by the time of the new hearing. *Cf. Smith*, 111 N.C. App. at 517, 433 S.E.2d at 230 (On remand, the trial court was directed to consider new evidence only "as the court finds necessary to correct the errors identified herein.").

[6] In reference to defendant's argument no. 3, we also note that he makes an oblique reference to the valuation of the marital home, asserting that "[t]he only evidence concerning the value of the marital home was the price for which it sold one year after . . . separation." Although his assignment of error no. 29 arguably alludes to an error in the valuation of the marital home, defendant makes no contention within argument no. 3 that this valuation was improper. Furthermore, in its findings of fact, the trial court determined the marital home sold for $31,471.11 and that "the parties have stipulated that to be the date of separation net fair market value of this asset." No error was assigned to this finding of fact. Under these circumstances, defendant has abandoned any argument that the valuation of the marital home was improper. *See Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991) (appellate review is limited to issues presented by an assignment of error in the record on appeal); *Wachovia Bank & Trust Co. v. Southeast Airmotive*, 91 N.C. App. 417, 419, 371 S.E.2d 768, 769 (1988) (appellant waives an assignment of error which is not discussed in his brief), *disc. review denied*, 323 N.C. 706, 377 S.E.2d 230 (1989).

IV. *Costs*

[7] Defendant next contends the trial court erred by assessing the costs of this action against him, insisting the court's order was deficient in failing specifically to describe each individual cost. This argument is devoid of merit.

The right to tax costs did not exist at common law; therefore they are awarded only pursuant to statutory authority. *Brandenburg Land Co. v. Champion Intern. Corp.*, 107 N.C. App. 102, 103,

418 S.E.2d 526, 528 (1992). N.C.G.S. § 6-20 (1986), the primary statute providing for allowance of costs, invests the trial court with broad discretion to assess costs and we may reverse its order only upon an abuse of that discretion. *See Wade v. Wade*, 72 N.C. App. 372, 384, 325 S.E.2d 260, 271, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

It is generally recognized that expert witness' fees are not "costs" unless the expert has been subpoenaed. *Brandenburg*, 107 N.C. App. at 104, 418 S.E.2d at 528. In the case *sub judice*, there is no dispute as to expert witness fees because the parties agreed to an equal division of these fees. As regards the remaining costs of this action, defendant cites no authority and we find none for his assertion that the trial court's order must specifically describe each amount. Furthermore, at the present juncture it is inappropriate for us to examine whether the trial court's assessment of costs amounted to an abuse of discretion. On remand, after proper consideration of all relevant distributional factors and the passage of time, the trial court may consider a different cost assessment appropriate. The award of trial costs in any forthcoming judgment, however, should take into account the costs of both the hearing from which it results as well as the previous proceeding. As to appellate costs, we direct that each party bear the cost of their own brief and remaining costs be assessed against the parties in equal amounts. *See* N.C.R. App. P. 35(a).

V. *QDRO*

Defendant next argues the trial court erred by entering the Qualified Domestic Relations Order (QDRO) which accompanied the judgment of equitable distribution. According to defendant, the purported QDRO is, in fact, not a QDRO because, *inter alia*, the plan administrator (of a plan in which defendant is trustee and sole participant) has determined the order not to be a QDRO. Defendant relies on *Sippe v. Sippe*, 101 N.C. App. 194, 398 S.E.2d 895 (1990), *disc. review denied*, 329 N.C. 271, 407 S.E.2d 840 (1991), as support for his contention. In *Sippe*, we held the plan administrator must make the *initial determination* whether a domestic relations order is a QDRO. *Sippe*, 101 N.C. App. at 198-99, 398 S.E.2d at 898. However, because our decision vacates, in part, the equitable distribution judgment upon which this order is based, we must also vacate the court's order denominated a QDRO. It is therefore unnecessary to examine defendant's allegations in this regard further.

Disposition

In summary, we hold erroneous only the treatment of post-separation appreciation and thus vacate both the QDRO and that portion of the judgment addressing what constitutes an equitable distribution of the marital assets and the consequent award thereof. On remand, the trial court should enter a new judgment consistent with this opinion, relying upon the existing record (since a full-blown trial is unnecessary) and receiving additional evidence and entertaining argument only as necessary to correct the errors identified herein. *See Smith*, 111 N.C. App. at 517, 433 S.E.2d at 230.

Affirmed in part, vacated in part, and remanded.

Judges JOHNSON and LEWIS concur.

SHIRLEY A. SIDNEY v. CYRIL A. ALLEN, M.D., RALEIGH MEDICAL ASSOCIATES, AND WAKE COUNTY HOSPITAL SYSTEM, INC.

No. 9310SC568

(Filed 5 April 1994)

1. Limitations, Repose, and Laches § 24 (NCI4th)— medical malpractice—continued course of treatment—claim barred by statute of repose

Plaintiff's forecast of evidence was insufficient to show that defendant doctor treated her during her 25 November 1988 hospital stay for the condition created by the doctor's failure to administer radiation therapy to plaintiff in 1982, and summary judgment was properly entered for defendants on the ground that plaintiff's medical malpractice action was barred by the four-year statute of repose set forth in N.C.G.S. § 1-15(c), where plaintiff filed her complaint on 20 November 1992; defendants presented affidavits by the doctor and by a hospital records technician that the doctor did not provide care or treatment to plaintiff after 21 October 1988; and plaintiff presented evidence that the 25 November 1988 hospital record listed defendant doctor's name as her personal physician and that, although she did not see defendant doctor during this hospital stay, she received a Medicare statement indicating

that he billed her for services when he was called in by the hospital for advice, but plaintiff's evidence did not reveal the date of the services allegedly rendered by defendant doctor, when he was called by the hospital, or whether the services he rendered related to plaintiff's condition created in 1982.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 320.

When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner. 80 ALR2d 368.

2. **Estoppel § 19 (NCI4th)— estoppel to plead statutes of repose and limitation—concealment of facts—knowledge by plaintiff**

Defendants were not estopped from pleading the statutes of repose and limitation in plaintiff's medical malpractice action on the ground that defendants delayed furnishing her medical records to her attorney and thus concealed information from her where plaintiff had knowledge of the facts she claims were concealed from her, and any delay by defendants in supplying plaintiff's medical records was not a cause for the delay in filing her complaint.

Am Jur 2d, Limitation of Actions §§ 431 et seq.; Physicians, Surgeons, and Other Healers § 322.

Judge JOHNSON dissenting.

Appeal by plaintiff from order and judgment entered 10 March 1993 in Wake County Superior Court by Judge Henry W. Hight, Jr. Heard in the Court of Appeals 2 March 1994.

Carol M. Schiller for plaintiff-appellant.

Young Moore Henderson & Alvis, P.A., by David P. Sousa, for defendant-appellees Cyril A. Allen, M.D. and Raleigh Medical Associates.

Poyner & Spruill, by Samuel O. Southern and Robert O. Crawford, III, for defendant-appellee Wake County Hospital System, Inc.

GREENE, Judge.

Shirley A. Sidney (plaintiff) appeals from a 10 March 1993 judgment granting Cyril A. Allen, Raleigh Medical Associates, and

Wake County Hospital System, Inc.'s (defendants) motion for summary judgment based on the statutes of limitation and of repose in this medical malpractice action.

On 20 November 1992, plaintiff filed a complaint against defendants in Wake County Superior Court alleging that Dr. Cyril A. Allen (Dr. Allen) was negligent in 1982 by failing to properly treat plaintiff, inform her of treatment choices, inform the consulting physician of his choice of denying treatment, record the basis for denying treatment, follow up on her medical status, correct the misimpression plaintiff had received combined chemotherapy and radiation treatment, and diagnose her continuing symptoms. Plaintiff also alleges that the other defendants failed to properly supervise Dr. Allen and to track medical records. Plaintiff alleged that during her 25 November 1988 admission to Wake Medical Center (the Hospital), the hospital facility operated by defendant Wake County Hospital System, Inc. (the Hospital System), the medical staff "consulted . . . Cyril A. Allen, M.D., concerning the Plaintiff's medical status and care, and that [he] failed to accurately advise the Plaintiff or the other medical staff on her medical status and treatment." The Hospital System made a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on 29 January 1993 on the grounds that the plaintiff's claims were barred by the applicable statutes of limitation and repose. Plaintiff made a motion for partial summary judgment on the issue of the statute of limitation.

The evidence, in the light most favorable to plaintiff, *Patterson v. Reid*, 10 N.C. App. 22, 28, 178 S.E.2d 1, 5 (1970) (evidence must be considered in light most favorable to non-movant in summary judgment hearing), shows that in 1982, plaintiff was diagnosed with Hodgkin's Disease and was given chemotherapy at the Hospital by Dr. Allen, who requested a recommendation from a radiation oncologist. Dr. Kenneth Zeitler (Dr. Zeitler), a radiation oncologist, recommended radiation therapy in 1982; however, Dr. Allen did not treat plaintiff with radiation therapy. He saw plaintiff for follow-up treatment at his office at the Raleigh Medical Associates (RMA) and at the Hospital through 21 October 1988. The Hodgkin's Disease totally disabled plaintiff who could not re-enter the workforce.

Plaintiff was admitted to the Hospital on 25 November 1988 for a number of medical problems, including probable polymyositis, rhabdomyolysis, vitamin B-12 deficiency and anemia, urinary tract

infection, and restrictive lung disease. The attending physician was Dr. David H. Gremillion. In 1991, she was referred by a nephrologist for a CT scan which revealed recurrence of Hodgkin's Disease for which plaintiff underwent chemotherapy and radiation therapy, recommended by Dr. Zeitler on 31 March 1992.

On 31 March 1992, Dr. Robert Ornitz informed plaintiff that Dr. Zeitler had recommended radiation therapy to Dr. Allen in 1982 which plaintiff never received. By letters dated 3 August 1992, 25 August 1992, 9 September 1992, and 13 October 1992 and addressed to the office manager of Dr. Allen, counsel for plaintiff requested a copy of the medical records of plaintiff. On 27 August 1992, plaintiff received a copy of her medical records from the Hospital System. Dr. Allen mailed plaintiff's medical records to her counsel on 24 October 1992, but the records did not include any record of medical treatment by Dr. Allen on 21 October 1988. On 1 February 1993, plaintiff's counsel received another copy of plaintiff's records from the Hospital.

In support of the Hospital System's motion for summary judgment, Dr. Allen stated in his affidavit that "[a]t no time since October 21, 1988, have I or [RMA] provided any care or treatment to the plaintiff nor been consulted concerning the care and treatment of the plaintiff for any reason or purpose." Martha Strickland (Ms. Strickland), Assistant Director of Medical Records for the Hospital and certified as an Accredited Records Technician, stated in her affidavit that plaintiff was admitted on 25 November 1988, and "[t]here is no documentation in the records of any care or treatment of [plaintiff] as a patient by Dr. Cyril A. Allen at any time after her discharge from Wake Medical Center on or about September 25, 1982, including [plaintiff]'s November 25, 1988, admission, except on October 21, 1988, when Dr. Allen sent [plaintiff] to Wake Medical Center as a 'referred out-patient.' "

Plaintiff, in opposition to the Hospital System's motion, stated in her affidavit that when she was admitted to the Hospital on 25 November 1988, "the doctors asked [her] questions about who [her] doctor was for Hodgkin's Disease." She stated "[d]uring my hospitalization in November, 1988, . . . I do not remember seeing Dr. Allen, but I do remember getting a Medicare statement with his name on it for the services that he rendered when he was called in by Wake Medical Center for advice." Plaintiff's patient

record for her hospitalization on 25 November 1988 lists "C. Allen" as her personal physician.

On 10 March 1993, the trial judge signed an order granting defendants' motion for summary judgment on the grounds that the plaintiff's claims are barred by the statutes of limitation and repose. After plaintiff moved pursuant to Rule 60 of the North Carolina Rules of Civil Procedure to correct the 10 March 1993 order and judgment, an amended order and judgment was signed 18 March 1993 and reflected the granting of defendants' motion for summary judgment and the denial of plaintiff's motion for partial summary judgment.

The issues presented are whether (I) Dr. Allen treated plaintiff on 25 November 1988 for the condition created by the alleged failure of Dr. Allen to administer radiation treatment to plaintiff in 1982; and (II) defendants are equitably estopped from asserting the defenses of the statute of limitation and the statute of repose.

I

Plaintiff argues that her claims are not barred by the statutes of limitation and repose and that summary judgment on this basis was error. We disagree.

N.C. Gen. Stat. § 1-15(c), containing the relevant statutes of limitation and repose, consists of substantive and procedural components. The substantive component is known as the statute of repose which provides "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 procedural component is known as a statute of limitation which provides that a cause of action for malpractice is "deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action." *Id.; 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). With an exception for injuries not readily apparent, three years is the period of limitation for medical malpractice. N.C.G.S. § 1-15(c).

Because the complaint was filed on 20 November 1992, plaintiff's claim is barred by the statute of repose unless the "last act" of the defendants "giving rise" to this cause of action occurred on or after 19 November 1988. It is not disputed that the last

alleged negligent act of the defendants giving rise to this cause of action occurred in 1982 when Dr. Allen allegedly failed to treat plaintiff with radiation therapy. Under the continuing course of treatment doctrine, however, if Dr. Allen subsequently treated plaintiff for the particular condition created by his alleged earlier act of negligence, that date of treatment is the "last act" within the meaning of Section 1-15(c). *Stallings*, 99 N.C. App. at 714, 394 S.E.2d at 215. Treatment within the meaning of *Stallings* includes both affirmative acts and omissions. *Id.* at 715, 394 S.E.2d at 216.

[1] Assuming that treatment from 1982 until 1985 and again in 1988 after a three year gap constitutes a continuing course of treatment, the question is whether Dr. Allen treated plaintiff on 25 November 1988, the only date plaintiff claims Dr. Allen treated her within the four years prior to the filing of the complaint.

Defendants, who moved for summary judgment, produced the affidavits of Dr. Allen and Ms. Strickland establishing that Dr. Allen did not provide any care or treatment, nor was he consulted, concerning plaintiff's treatment for any reason or purpose after 21 October 1988. This evidence satisfies defendants' burden of proving that summary judgment for them is justified, in that the statute of repose bars plaintiff's claims. *See Clark v. Brown*, 99 N.C. App. 255, 260, 393 S.E.2d 134, 136-37, *disc. rev. denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). The burden then was on plaintiff to "set forth specific facts showing that there is a genuine issue for trial." *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). Plaintiff's evidence is that during her hospitalization on 25 November 1988 she did "not remember seeing Dr. Allen" but that she did receive a medicare statement with Dr. Allen's name on it "for the service that he rendered when he was called in by [the Hospital] for advice." Plaintiff's evidence does not reveal the date of the service allegedly rendered by Dr. Allen, when he was allegedly called by the Hospital, or whether the "service rendered" was related to the condition created as a result of the alleged negligent act in 1982. Although the 25 November 1988 hospital records presented by plaintiff list Dr. Allen's name as plaintiff's personal physician, there is no indication in those records that he was consulted or treated plaintiff on that day.

In evaluating whether plaintiff's evidence raises a genuine issue for trial, plaintiff, as the non-movant, must be given the benefit of all reasonably drawn inferences. *Collingwood v. G.E. Real Estate*

Equities, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). The mere possibility, however, "that a factual dispute may exist, without more, is an insufficient basis upon which to justify denial of a motion for summary judgment." *Posey v. Skyline Corp.*, 702 F.2d 102, 106 (7th Cir.), *cert. denied*, 464 U.S. 960, 78 L. Ed. 2d 336 (1983); *Dendy v. Watkins*, 288 N.C. 447, 455, 219 S.E.2d 214, 219 (1975). In determining whether the non-movant has satisfied her burden, "it is helpful to refer to the theory underlying a motion for directed verdict." *Dendy*, 288 N.C. at 452, 219 S.E.2d at 217. "[I]f it is clear that a verdict would be directed for the movant [based] on [all] the evidence presented at the hearing on the motion for summary judgment, the motion for summary judgment may properly be granted." *Id.*

In this case, plaintiff's evidence merely suggests that a question of fact *may* exist as to whether Dr. Allen treated her on 25 November 1988 for her condition that was created by Dr. Allen's alleged negligence in 1982. The evidence is not, however, such that a "reasonable mind might accept [it] as adequate to support [such] a conclusion." *See Hines v. Arnold*, 103 N.C. App. 31, 34, 404 S.E.2d 179, 181 (1991) (describing evidence necessary to defeat motion for directed verdict). Plaintiff, therefore, has failed in her burden of showing that there are genuine issues for trial and summary judgment for defendants was appropriate.

In so holding, we reject plaintiff's argument that summary judgment should have been denied on the grounds that the affidavits of Dr. Allen and Ms. Strickland are not credible. Plaintiff claims that because Dr. Allen and Ms. Strickland have an interest in the case, their testimony is "inherently suspect." We disagree. An interested witness's testimony is "inherently suspect" only if the testimony offered "concern[s] facts peculiarly within the knowledge of the witness." *Holley v. Burroughs Wellcome Co.*, 74 N.C. App. 736, 744, 330 S.E.2d 228, 234 (1985), *aff'd*, 318 N.C. 352, 348 S.E.2d 772 (1986). In this case, the matters stated in the affidavits are not "peculiarly within the knowledge of the witness[es]."

We do not address the denial of plaintiff's motion for partial summary judgment as it is a nonappealable interlocutory order that does not affect a substantial right. *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. rev. denied*, 315 N.C. 183, 337 S.E.2d 856 (1985).

II

[2] In the alternative, plaintiff argues that defendants are estopped from pleading the statutes of limitation and repose because they "concealed relevant facts concerning the Plaintiff's medical treatment." We disagree.

Estoppel is a recognized defense to the statutes of limitation and repose, *Blizzard Bldg. Supply v. Smith*, 77 N.C. App. 594, 595, 335 S.E.2d 762, 763 (1985), *cert. denied*, 315 N.C. 389, 339 S.E.2d 410 (1986), and must be established by the greater weight of the evidence. *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989). It is not, however, available to a party, including this plaintiff, who has knowledge of the very facts she claims were wrongfully concealed from her. *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990). In this case, plaintiff became aware, on 31 March 1992, that Dr. Zeitler had recommended radiation treatment in 1982. This is the very information plaintiff claims was concealed from her by the defendants until after 21 October 1992. Thus, any delay by defendants in supplying plaintiff's medical records to her attorney was not a cause for the delay in the filing of the complaint, and plaintiff has failed in her burden of proof. Therefore, defendants are not estopped to assert the defenses of the statutes of limitation and repose.

Affirmed.

Judge JOHN concurs.

Judge JOHNSON dissents with separate opinion.

Judge JOHNSON dissenting.

I respectfully dissent and vote to reverse on the basis that a forecast of the evidence presents a genuine issue of material fact as to whether Dr. Allen engaged in a continued course of treatment to plaintiff through 25 November 1988. It is undisputed that plaintiff was admitted to Wake Medical Center on 25 November 1988, where she orally gave her medical history, including the history of her Hodgkin's Disease, to the attending physicians. When asked who was her attending physician for her Hodgkin's Disease, plaintiff identified defendant Dr. Allen. The medical records of

Wake Medical Center further verify that Dr. Allen was identified as her treating physician and note the time of day (in military hours) he was contacted concerning plaintiff's care on 25 November 1988. Defendants argue that this forecast of evidence does not show that Dr. Allen was asked about plaintiff's Hodgkin's Disease when he was contacted. It is reasonable to assume that he was not contacted by the physicians to discuss the weather, but instead to discuss the health condition of plaintiff, including her Hodgkin's Disease. This is bolstered by the forecast of evidence that, thereafter, plaintiff received a Medicare statement reflecting that Dr. Allen had billed for the services he rendered upon being consulted for an evaluation of plaintiff's condition on 25 November 1988.

I believe this forecast of evidence is such that "a reasonable mind might accept [it] as adequate to support a conclusion [that Dr. Allen treated plaintiff on 25 November 1988 for her condition that was created by his alleged negligence in 1982]." *See Hines v. Arnold*, 103 N.C. App. 31, 34, 404 S.E.2d 179, 181 (1991) (evidence necessary to defeat motion for directed verdict). Therefore, plaintiff's action is not time barred.

WILLIAM G. DELLINGER, PETITIONER v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION; THE CHARLOTTE-MECKLENBURG PLANNING COMMISSION; MARTIN R. CRAMPTON, JR., ANNE J. McCLURE, SARA SPENCER AND JOHN H. TABOR, RESPONDENTS

No. 9326SC541

(Filed 5 April 1994)

Municipal Corporations § 30.10 (NCI3d)— disapproval of subdivision site plan—requirement of right-of-way reservation—planning commission's failure to follow subdivision ordinance

Respondent planning commission's denial of petitioner's subdivision site plan for an apartment complex was not supported by substantial evidence where the site plan was disapproved because it failed to reserve a right-of-way for a proposed thoroughfare, but the planning commission and its staff failed to follow procedures in the subdivision ordinance by requiring reservation of the right-of-way without finding (1) that the reservation does not result in the deprivation

of a reasonable use of the original tract, and (2) that the reservation is either reasonably related to the traffic generated by the proposed subdivision or use of the remaining land, or the impact of the reservation is mitigated by measures provided in the ordinance. N.C.G.S. § 160A-372.

Am Jur 2d, Zoning and Planning §§ 32, 564.

Validity and construction of regulations as to subdivision maps or plats. 11 ALR2d 524.

Appeal by respondents from order and judgment signed 29 March 1993 in Mecklenburg County Superior Court by Judge Forrest A. Ferrell. Heard in the Court of Appeals 2 March 1994.

Petitioner is the record owner of 15.39 acres of undeveloped land in Mecklenburg County. The property is bounded by Sugar Creek Road on the west and Mallard Creek Road on the east. Nevins Road runs west and meets Sugar Creek Road at a right angle. On 7 February 1992, petitioner submitted an application and site plan for multi-family development of the property to the Charlotte-Mecklenburg Planning Commission staff (hereinafter the planning staff). Petitioner's proposed development, Derita Apartments, consists of 240 one and two-bedroom units in 15 buildings on 14.51 acres of the property. Petitioner's plan proposes no new public streets but relies on private driveways to manage traffic within the development. Petitioner's plan contains one entrance from Sugar Creek Road and one entrance from Mallard Creek Road.

The Charlotte-Mecklenburg Thoroughfare Plan, adopted in 1988, shows Nevins Road Extension connecting Nevins Road to Mallard Creek Road and crossing petitioner's property lengthwise. Nevins Road Extension is classified as a class IV minor arterial thoroughfare. If property to be developed lies in the path of a minor thoroughfare, Charlotte subdivision ordinances require the owner to dedicate a right-of-way 70 feet in width and setback the buildings 40 feet from both sides of the road. Dedication of a right-of-way 70 feet wide would cover 2.43 acres of petitioner's property, and the setback requirement would take another 2.55 acres of the property. The site plan submitted by petitioner would place nine of the fifteen buildings directly in the path of the Nevins Road Extension.

On 24 March 1992, the planning staff denied petitioner's application because the proposed site plan failed to comply with

Charlotte Zoning Ordinance § 9.303(19)(c) and the Charlotte-Mecklenburg Thoroughfare Plan. The planning staff further concluded that petitioner's plan failed to meet the requirements of G.S. §§ 136-66.2 and 160A-372. Petitioner appealed the decision of the planning staff to the Charlotte-Mecklenburg Planning Commission on the grounds that a dedication of a right-of-way 70 feet in width deprived petitioner of a reasonable use of the property, constituted a taking without compensation, and was unnecessary to serve the traffic generated by the development. A three-member committee of the Charlotte-Mecklenburg Planning Commission (hereinafter the Commission) conducted a quasi-judicial hearing at which both petitioner and the planning staff were represented by counsel. The Commission considered oral arguments, heard from eight witnesses, and accepted 43 exhibits. The Commission addressed three issues: (1) whether the planning staff erred in applying the city's zoning and subdivision ordinances; (2) whether the planning staff denied petitioner's site plan because he failed to meet the requirement of a compulsory dedication of a 70-foot right-of-way; and (3) whether petitioner was deprived of a reasonable use of the tract. On 27 July 1992, the Commission made findings of fact and conclusions of law and affirmed the planning staff's denial of petitioner's application. On 3 September 1992, petitioner filed a petition for writ of certiorari with the superior court. Judge Marvin K. Gray issued a writ of certiorari. On 29 March 1993, Judge Ferrell entered judgment reversing the decision of the Charlotte-Mecklenburg Planning Commission. Respondent appeals.

Horack, Talley, Pharr & Lowndes, P.A., by Neil C. Williams, for petitioner-appellee.

Office of the City Attorney, by Senior Assistant City Attorney David M. Smith, for respondents-appellants.

WELLS, Judge.

In reviewing the errors raised by petitioner's writ of certiorari, the question before the trial court, which sits as a court of appellate review, was whether the decision of the Charlotte-Mecklenburg Planning Commission was based upon findings of fact which were supported by competent evidence and whether such findings supported its conclusions. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655, *cert. denied*, 496 U.S. 931, 110 L.Ed.2d 651 (1990). So long as the Commission's decision is supported by substantial

evidence in the record and is not arbitrary, the Commission's decision must be affirmed. *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986).

On the issue of whether the planning staff erred in applying the city's zoning and subdivision ordinances, the Commission concluded that petitioner's site plan failed to give "consideration to the adopted Thoroughfare Plan and ordinance regulations pertaining to the extension of an existing street, traffic circulation needs, and anticipated traffic volumes, but petitioner submitted a site plan that had objectives completely in opposition to the adopted Thoroughfare Plan." On the issue of whether the planning staff denied petitioner's site plan because he failed to meet the requirement of a compulsory dedication of a 70-foot right-of-way, the Commission concluded that the planning staff denied petitioner's site plan because the site plan ignored the adopted Thoroughfare Plan, Charlotte Zoning Ordinance § 9.303(19)(c), and Charlotte Subdivision Ordinance § 6.200(1) and (3). On the issue of whether petitioner was deprived of a reasonable use of the tract, the Commission concluded that there was more than one possible alignment of the right-of-way and that petitioner could benefit by applying for a number of variances. Based on its findings of fact and conclusions, the Commission determined that the planning staff did not erroneously apply the zoning and subdivision ordinances and properly denied petitioner's site plan.

On writ of certiorari to the superior court, Judge Ferrell entered the following judgment:

> The Court is of the opinion that this matter is ripe for adjudication and that the decision of the Committee of the Charlotte-Mecklenburg Planning Commission is not supported by substantial evidence in the whole record, constitutes a taking of Petitioner's property without compensation in violation of Article 1, § 19, of the North Carolina Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, and exceeds the Respondents' statutory authority.
>
> NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Committee's decision to deny Petitioner's final site plan is reversed and this cause is remanded to the Committee of the Charlotte-Mecklenburg Planning Commission for the entry of an order approving Petitioner's concept for a multi-family project utilizing a private drives/parking lot design so

long as the multi-family project with the private drives/parking lot design meets the minimum standards of the City Code.

Respondents argue that the trial court erred in reversing the Commission's decision to deny petitioner's site plan because substantial evidence in the record supports the Commission's findings and conclusions. We disagree.

Pursuant to G.S. § 160A-372, a subdivision control ordinance may provide for the dedication of rights-of-way. Section 136-66.10, entitled "Dedication of right-of-way under local ordinances," provides in pertinent part:

> (a) Whenever a tract of land located within the territorial jurisdiction of a city or county's zoning or subdivision control ordinance or any other land use control ordinance authorized by local act is proposed for subdivision or for use pursuant to a zoning or building permit, and a portion of it is embraced within a corridor for a street or highway on a plan established and adopted pursuant to G.S. § 136-66.2, a city or county zoning or subdivision ordinance may provide for the dedication of right-of-way within that corridor pursuant to any applicable legal authority, or:
>
> > (1) A city or county may require an applicant for subdivision plat approval or for a special use permit, conditional use permit, or special exception, or for any other permission pursuant to a land use control ordinance authorized by local act to dedicate for street or highway purpose, the right-of-way within such corridor if the city or county allows the applicant to transfer density credits attributable to the dedicated right-of-way to contiguous land owned by the applicant. No dedication of right-of-way shall be required pursuant to this subdivision unless the board or agency granting final subdivision plat approval or the special use permit, conditional use permit, special exception, or permission shall find, prior to the grant, that the dedication does not result in the deprivation of a reasonable use of the original tract and that the dedication is either reasonably related to the traffic generated by the proposed subdivision or use of the remaining land or the impact of the dedication is mitigated by measures provided in the local ordinance.

The planning staff and the Commission based their denials of petitioner's site plan in part on Charlotte Zoning Ordinance § 9.303(19) which provides in pertinent part:

> (a) The site plan must be designed giving adequate consideration to the following factors:
>
> (i) The size and shape of the tract.
>
> (ii) The topography and necessary grading.
>
> (iii) The reasonable preservation of the natural features of the land and vegetation.
>
> (iv) The size and relationship of buildings.
>
> (v) The character of/or relationship to adjoining properties.
>
> . . .
>
> (c) All portions of every residential building will be located within 400 feet of a public street or private street which furnishes direct access to a residential building. Determination of whether interior roads will be public streets or private streets, or a combination of public streets and private streets will be made by the Planning Director in consultation with the Charlotte Department of Transportation and Engineering Department. In reaching that decision, consideration should be given to the following:
>
> (i) Adopted major thoroughfare plan;
>
> (ii) Existing and proposed neighborhood streets and circulation needs;
>
> (iii) The relationship of the site to adjoining lands;
>
> (iv) The size and shape of the tract to be developed;
>
> (v) The number of dwelling units to ultimately be constructed on the tract and on adjoining lands; and
>
> (vi) Anticipated traffic volumes.
>
> The determination of whether interior roads will be public or private will consider only the minimum needs of the public for public streets and will recognize the privacy, security and safety advantages of private streets;

The requirement that petitioner dedicate a right-of-way is contained in Charlotte Subdivision Ordinance § 8.110 which provides in pertinent part:

> Class IV (Minor Arterial) Right-of-way—Developer is responsible for the dedication of up to 70 feet (35 feet each side of the centerline) . . . .
>
> . . .
>
> No dedication or reservation of right-of-way for a street or highway within a corridor for a street or highway on a plan established and adopted pursuant to N.C.G.S. 136-66.2 for a street or highway that is included in the Department of Transportation's "Transportation Improvement Program" will be required by the provisions of this ordinance unless and until the planning staff has determined and certified in writing (1) that the dedication or reservation does not result in the deprivation of a reasonable use of the original tract and (2) that the dedication or reservation is either reasonably related to the traffic generated by the proposed subdivision or use of the remaining land, or the impact of the dedication or reservation is mitigated by measures provided in this Ordinance. For these purposes the term "original tract" will mean all contiguous land owned by the applicant. The ability of the applicant to transfer density credits attributable to the dedicated right-of-way to contiguous land owned by the applicant is deemed to be a measure which mitigates the impact of the dedication or reservation.

G.S. § 160A-372 clearly authorizes a city "to require a developer to take future as well as present road development into account when designing a subdivision" and such a requirement "is not necessarily tantamount to compulsory dedication. Rather, such a requirement might legitimately compel a developer to anticipate planned road development in some logical manner when designing a proposed subdivision." *Batch, supra.* Although relied upon by the planning staff and the Commission in denying petitioner's site plan, Charlotte Zoning Ordinance § 9.303(19) does not require petitioner to dedicate a right-of-way. Section (a) of § 9.303(19) addresses the considerations a developer must give when designing a site plan but does not list the Thoroughfare Plan as one. Section (c) addresses the considerations the Planning Director, the Charlotte Department of Transportation, and the Engineering Department

should make when determining whether roads will be public or private and lists the Thoroughfare Plan as one consideration. This provision does not require a developer to dedicate a right-of-way. Charlotte Subdivision Ordinance § 8.110 is the provision requiring a developer to dedicate a right-of-way up to 70 feet wide. This requirement is not without limitation however. G.S. § 136-66.10 (ratified and effective on 7 August 1987 and not applicable in *Batch*) and Subdivision Ordinance § 8.110 limit the exercise of such authority by prohibiting dedication unless the Commission's planning staff finds that the dedication does not result in the deprivation of a reasonable use of the original tract and that the dedication is either reasonably related to the traffic generated by the proposed subdivision or use of the remaining land or the impact of the dedication is mitigated by measures provided in the local ordinance.

The planning staff's review comments, which accompanied a letter from Mr. Keith H. MacVean, site plan administrator for the Charlotte-Mecklenburg Planning Commission, denying approval of petitioner's site plan, were as follows:

> Denial of Proposed, Partial Private Drive/Parking Lot Pursuant to Code § 9.303(19)(c)
>
> Code § 9.303(19)(c), which pertains to a planned multi-family development, requires that every residential building will be located within 400 feet of a street, public or private. Code § 9.303(c) further provides that the planning director in consultation with the Charlotte Department of Transportation and Charlotte Engineering Department shall determine whether the street shall be public or private or a combination of both.
>
> Three (3) of the six (6) standards stated in Code § 9.303(19)(c) are applicable to the Derita Apartments' Site Plan:
>
> (1) the adopted Thoroughfare Plan ("Plan"),
>
> (2) the existing and proposed neighborhood streets and circulation needs, and
>
> (3) the anticipated traffic volumes.
>
> After consultation with the City's Engineering Department and the City's Department of Transportation, the following findings have been made about the existing neighborhood streets and the Plan:

(1) Presently, to travel from Nevin[s] Road to Mallard Creek Road requires the driver to turn right off of Nevin[s] Road onto Sugar Creek Road and, then, to turn left off of Sugar Creek Road to Mallard Creek Road.

(2) The Plan designates Nevin[s] Road and the connection to Mallard Creek Road ("Nevin[s] Road Extension") as minor thoroughfares.

(3) The Plan requires a direct, route connection from Nevin[s] Road to Mallard Creek Road which would allow for a direct flow of traffic.

(4) The Plan shows that Auten Road, Griers Grove Road, Cindy Lane, and the Cindy Lane Extension are to connect to Nevin[s] Road and the Nevin[s] Road Extension to provide a direct thoroughfare route from Brookshire Boulevard (NC 16) to Mallard Creek Road (Major Thoroughfare).

(5) The Plan shows that this thoroughfare is approximately 2.5 miles north of Interstate 85 and is the only thoroughfare in this corridor that parallels Interstate 85 and connects Brookshire Boulevard (NC 16) with the planned outerbelt (I-485) over a distance of approximately 22.5 miles.

(6) The Plan shows that the existing Mallard Creek/Sugar Creek intersection will be eliminated and, located further south of Nevin[s] Road, there shall be a new, direct connection between Mallard Creek Road and Graham Street.

The proposed site plan street fails to comply with the standards of § 9.303(19)(c) and with the Plan:

(1) The site plan shows approximately one-third (1/3) of a private drive, off of Nevin[s] Road, then, approximately one-third (1/3) for a parking lot area and a final, approximately one-third (1/3) private drive connecting to Mallard Creek Road.

(2) The two (2) private drive segments allow off-street parking immediately off of them and would result in vehicles backing into the two drives impeding traffic.

(3) The speed limit for the private drives would be approximately fifteen (15) miles an hour and probably about ten (10) miles per hour through the parking lot, while the proposed

minor thoroughfare right-of-way would have a posted speed limit of approximately thirty-five (35) miles per hour.

(4) The proposed private drives/parking lot will perpetuate the circuitous vehicular pattern, requiring traffic from Nevin[s] Road to turn right off of Nevin[s] Road onto Sugar Creek Road and, then, left off of Sugar Creek Road in order to get onto Mallard Creek Road.

(5) The proposed private drives/parking lot will not allow for a direct connection between Nevin[s] Road and Mallard Creek Road as shown on the Plan.

(6) The private drives/parking lot will not create a circumferential right-of-way as shown on the Plan.

(7) When the present Mallard Creek Road connection to Sugar Creek Road is moved further south from Nevin[s] Road to connect to Graham Street, then circulation from Nevin[s] Road to Mallard Creek Road will be worsened by the applicant's proposed private drives/parking lot.

Based on the findings stated above, the applicant's proposed private drives/parking lot does not meet the standards of Code § 9.303(19)(c) nor the Thoroughfare Plan.

Further, the private drives/parking lot does not meet the requirements of N.C.G.S. § 136-66.2 which authorizes the City to adopt a comprehensive plan based on anticipated vehicular traffic taking into consideration patterns of land development in providing for the safe and effective use of streets. The private drives/parking lot is not consistent with N.C.G.S. § 160A-372 which gives the City the authority under the Subdivision Ordinance to provide for the orderly growth and development of the City and to take into consideration the distribution of traffic in a manner that will avoid congestion and will create conditions essential to public safety and the general welfare.

The foregoing comments clearly reveal that the Commission's planning staff failed to comply with the requirements of Charlotte Subdivision Ordinance § 8.110. In light of this failure, the Commission exceeded its authority in affirming the decision of the planning staff. Because the planning staff failed to follow the procedures specified by Subdivision Ordinance § 8.110, we hold that the evidence

before the Commission did not support its decision to deny approval of petitioner's site plan. *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E.2d 379, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980) (holding that the task of a court reviewing a decision on the application for a conditional use permit included reviewing the record for errors of law and insuring that procedures specified by statute and ordinance were followed). Therefore, Judge Ferrell properly determined that the Commission's decision was not supported by substantial evidence.

Accordingly, the judgment appealed from is

Affirmed.

Judges ORR and WYNN concur.

STATE OF NORTH CAROLINA v. GREGORY CLEMENT CAPPS

No. 9312SC463

(Filed 5 April 1994)

1. Evidence and Witnesses § 427 (NCI4th)— suggestiveness of showup identifications—no likelihood of misidentification

"Showup" identification procedures in which three witnesses observed defendant while he was sitting in a police car, coupled with statements made by officers to two of the witnesses that they had a suspect, that he had changed clothes, and that he no longer had a mustache, were unnecessarily suggestive. However, under the totality of the circumstances there was no substantial likelihood of misidentification and the identification of defendant by each witness was sufficiently reliable to be admissible where each witness observed defendant as he fled from the scene of an armed robbery; each witness indicated a high degree of attention to the appearance of the man they observed; the witnesses' descriptions of the perpetrator varied from defendant's appearance only because defendant had shaved his mustache and changed clothes between the time the witnesses observed him and his apprehension by the police; the identifications by all three witnesses

occurred within an hour after the robbery; and the three witnesses were all unequivocal in their identifications of defendant.

Am Jur 2d, Evidence § 371.6.

Admissibility of evidence of showup identification as affected by allegedly suggestive showup procedures. 39 ALR3d 791.

2. **Evidence and Witnesses § 654 (NCI4th)— pretrial identifications—denial of motion to suppress—some findings based on trial evidence—absence of prejudice**

In an armed robbery prosecution in which the trial court denied defendant's motion to suppress pretrial identifications after a *voir dire* hearing but did not make written findings and conclusions until after the presentation of the evidence at trial, defendant was not prejudiced by the fact that the trial court based some of its findings on evidence heard at trial rather than at the *voir dire* hearing where ample evidence was presented at the *voir dire* hearing that fully supported the trial court's conclusion that there was no substantial likelihood of misidentification by the witnesses.

Am Jur 2d, Motions, Rules and Orders § 25.

On writ of certiorari from judgment entered 2 November 1990 by Judge J. Milton Read, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 1 November 1993.

Attorney General Michael F. Easley, by Assistant Attorney General Sueanna P. Sumpter, for the State.

John G. Humphrey, II, for defendant appellant.

COZORT, Judge.

The main issue presented by this appeal is whether the trial court erred by denying defendant's motion to suppress identification evidence. We find the identification procedure used by police, a "showup," was unduly suggestive. We also find, however, that under the totality of the circumstances present here, the identification of each witness was sufficiently reliable to be admissible. Defendant was charged with robbery with a firearm in violation of N.C. Gen. Stat. § 14-87 (1993). Prior to trial, defendant moved

to suppress certain pre-trial identification evidence. Following a *voir dire* hearing, the trial court denied defendant's motion. Following the presentation of all evidence at trial, the trial court entered an order making findings of fact which are summarized as follows:

At about 8:15 a.m. on 27 October 1989, Ryan's Family Steak House was robbed by a man wielding a handgun. Trevar Alexis, an employee of the restaurant, could not identify the perpetrator. At about 8:30 or 8:45 a.m., David Wrenn, an employee of a business located near the restaurant, saw a man running across the lot with another man chasing him. Wrenn had a clear view of the man and pursued him in his automobile. Wrenn saw the man come out of some bushes, approach a house, and knock on the door. The man left the house and got into a blue Chevrolet with a South Carolina license plate. Wrenn pulled in behind the car and clearly saw the man's face in the rearview mirror. Wrenn returned to his business and gave police information regarding the blue Chevrolet and its license plate. Wrenn described the man "as having a mustache, mole on his face, dark skin, and black hair, a Puerto Rican or Mexican descent, and wearing dark clothing, a jacket, a shirt, and bluejeans [sic]."

When the police returned later they told Wrenn that they had stopped someone. They also told him that the man did not have a mustache but that they had "the guy." Wrenn was taken to a police car in which defendant was sitting. He recognized a car nearby as the one he had seen earlier. Although defendant did not have a mustache, Wrenn identified him as the man who ran through the parking lot of his business, came out of some bushes, knocked on a door, and got into a blue car with a South Carolina license plate.

Richard Todd, employed by the same nearby business as Wrenn, saw someone running by the building with a bag in his hand on 27 October 1989 at about 8:30 a.m. Todd heard someone say, "I've been robbed." The man stopped and looked inside the window of Todd's business. The man then continued running and jumped a fence. Todd pursued the man on foot and watched as the man stopped, looked at him, and took off his jacket. The man had dropped a bag, and Todd picked it up and gave it to Trevar Alexis. About fifty minutes later, the police approached Todd. He described the man "as being five feet nine inches tall, to five feet eleven inches

tall, weighed between a hundred and sixty and a hundred and seventy pounds, dark complexion, heavy mustache and black hair."

A police officer later approached Todd and asked whether he could identify the subject. Todd replied that he could, and the officer took him to where defendant was in custody. The officer told Todd that the man in custody did not have on the same clothes and that his mustache was gone. Todd observed that defendant did not have a mustache and his hair was slicked back. The officer told Todd, "I think he has shaved." Todd identified defendant as being the man he saw run by his business, look in his window, jump a fence, and stop to take off his jacket when pursued. He also identified some clothing as that worn by defendant when he saw him earlier.

Heidi Boggs noticed that a blue car with a South Carolina license plate was parked by her driveway on the night of 26 October 1989. Sometime after 8:00 a.m. on 27 October 1989 a man knocked on Boggs' door. She went to the door and asked him if she could help him. He stepped back and said, "Never mind." She noticed that the man had dark hair and was wearing dark clothes, but she did not notice whether he had a mustache. She saw David Wrenn in a car behind the man's car. Police later asked her if she could identify the man she had seen, and Boggs said that she could. When Boggs saw defendant sitting in the police car, she recognized him as the man who had been on her porch that morning.

Officer Scott Burgess investigated the armed robbery of Ryan's Family Steak House on 27 October 1989. When he arrived at the scene, another officer was taking a statement from Trevar Alexis. Alexis described the assailant as being a male with a dark complexion, possibly Hispanic, wearing a heavy jacket, a green shirt, and some sort of camouflage mask with eye holes cut out. Alexis had seen the man running south on Raeford Road. At about 9:15 a.m., Burgess proceeded to an intersection where other officers had a blue car stopped. The officers were placing defendant in the back of a police car. Defendant was wearing a T-shirt, a navy blue baseball cap, and was clean-shaven. In defendant's car, officers found a heavy jacket lined with camouflage material. Both David Wrenn and Richard Todd identified defendant as the man they had seen earlier in the day. Heidi Boggs identified defendant as the man she had seen earlier after observing defendant's driver's

license. Trevar Alexis could not identify defendant as the perpetrator, but he said the clothes looked the same or similar.

An open shaving kit containing a portable rechargeable electric razor was found in the front seat of defendant's car. The razor contained thick dark hairs inside. Defendant's hair was wet and his face clean-shaven when he was apprehended, but his upper lip was pale compared to the rest of his face. There were also tiny spots of blood on his upper lip.

Based upon the findings of fact, the trial court concluded as follows:

> 1. The identification of the accused by the witnesses, Wrenn, Todd and Boggs, is not inherently incredible, given all the circumstances of the witnesses' ability to view the accused at the time of the crime. The credibility of the identification evidence is for the jury to weigh.
>
> 2. The pretrial identification procedure, the showup involving the Defendant, were not so impermissibly suggestive as to violate the Defendant's right to due process of law.
>
> 3. That this pretrial identification procedure involving the Defendant, even if impermissibly suggestive was reliable and was not productive of a substantial likelihood of misidentification, given the totality of circumstances surrounding this pretrial identification procedure, in that:
>
> a. The witnesses' opportunity to view the accused and observe the physical characteristics of the accused was ample and sufficient to gain a reliable impression of the accused immediately after the time of the crime;
>
> b. Each of these witnesses' degree of attention was strong and focused on the accused during the time the witnesses viewed the accused immediately after the crime;
>
> c. The witnesses' description of the accused given to the police shortly after the crime was reasonably accurate and matched the main physical characteristics of the accused.
>
> d. Each of the witnesses' level of certainty that the accused was the same person the witnesses observed immediately after this crime was firm was [*sic*] unequivocal.

e. That the time lapse between the crime an [*sic*] the pretrial identification procedure was not so long as to significantly diminish the witnesses' ability to make a strong and reliable identification of the perpetrator.

f. All other circumstances and events surrounding the crime and the pretrial identification procedure supporting the conclusion that the identification testimony by these witnesses possess sufficient aspect [*sic*] of reliability.

During trial, the State presented substantially the same evidence as presented during the *voir dire* hearing. David Wrenn, Richard Todd, and Heidi Boggs each testified that defendant was the man they had seen on the morning of 27 October 1989. The trial court ruled that the in-court identification testimony was of independent origin and was not tainted by any pretrial identification procedure. Trevar Alexis additionally testified at trial that on the morning of 27 October 1989, he was confronted by a man with a gun who demanded money. The man fled from the restaurant carrying a bag containing money.

The jury found defendant guilty as charged. From a judgment imposing a sentence of fourteen years in prison, defendant appeals.

[1] Defendant first argues that the trial court erred by denying his motion to suppress the identification testimony of witnesses Wrenn, Todd, and Boggs. Specifically, defendant contends the showups used during the pretrial identification procedure were unduly suggestive and resulted in the substantial likelihood of misidentification. We disagree.

Both the United States Supreme Court and our Supreme Court "have criticized the 'practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup . . . .' " *State v. Oliver*, 302 N.C. 28, 44, 274 S.E.2d 183, 194 (1981) (quoting *Stovall v. Denno*, 388 U.S. 293, 302, 18 L.Ed.2d 1199, 1206 (1967)). "[S]uch a procedure, sometimes referred to as a 'showup,' may be 'inherently suggestive' because the witness 'would likely assume that the police had brought [him] to view persons whom they suspected might be the guilty parties.' " *Id.* at 45, 274 S.E.2d at 194 (quoting *State v. Matthews*, 295 N.C. 265, 285-86, 245 S.E.2d 727, 739 (1978), *cert. denied*, 439 U.S. 1128, 59 L.Ed.2d 90 (1979)).

Identification evidence must be suppressed if the facts show the pretrial identification procedures were so suggestive as to create

a very substantial likelihood of irreparable misidentification. *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985). The determination of this question involves a two-step process: "First, the Court must determine whether the pretrial identification procedures were unnecessarily suggestive. If the answer to this question is affirmative, the court then must determine whether the unnecessarily suggestive procedures were so impermissibly suggestive that they resulted in a substantial likelihood of irreparable misidentification." *State v. Fisher*, 321 N.C. 19, 23, 361 S.E.2d 551, 553 (1987).

The likelihood of irreparable misidentification depends on the totality of the circumstances. *Id.* Factors to be considered in this determination include:

> (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

State v. Harris, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983).

In this case, the three witnesses identified defendant as the man they had seen earlier in the day. During the identifications, defendant was sitting alone in the back of a police car. A police officer told David Wrenn that someone had been stopped but that the man did not have a mustache. The officer further stated that they had "the guy." Richard Todd was told by police that they had a man in custody but that he had on different clothes and that his mustache was gone. An officer told Todd that he thought the man had shaved. Heidi Boggs identified defendant after viewing his driver's license which was sitting on top of a car she believed she had seen earlier.

The identification procedures the officers chose, coupled with the statements made to two of the witnesses to the effect that they had a suspect, that he had changed clothes, and that he no longer had a mustache, were unduly suggestive. *See State v. Richardson*, 328 N.C. 505, 402 S.E.2d 401 (1991). Nevertheless, under the totality of the circumstances the identification by each witness was sufficiently reliable to be admissible.

Wrenn saw defendant as he ran past him. Wrenn also saw defendant's face in the rearview mirror of his car. Wrenn testified

that he focused on defendant as he ran by. Wrenn's description of the perpetrator was substantially similar to that of defendant. The only differences were that defendant had no mustache and his hair was wet. Wrenn was unequivocal in his identification of defendant only about thirty minutes after he first saw the perpetrator.

Todd observed the perpetrator from about five feet away as he looked into a window from the outside. Todd also observed the perpetrator from about thirty-five or forty feet as he stopped to take off his jacket. As a result of the perpetrator looking into the window, Todd went outside to investigate. It is apparent from Todd's actions that he paid attention to the man looking into the window. Todd's description of the perpetrator varied from that of defendant only in that defendant did not have a mustache and had on different clothing. Todd testified that he saw the clothing defendant had been wearing in a bag and that it appeared defendant was freshly shaven. Todd was unequivocal in his identification of defendant as the perpetrator about one hour after he first saw the man looking into his window.

Boggs observed the perpetrator when he came to her door. She testified that she looked at his face "really good." Boggs did not remember whether the perpetrator had a mustache, but she did remember that he had dark hair and dark clothes. Boggs was unequivocal in her identification of defendant as the perpetrator about thirty minutes after she saw him.

Considering the totality of these circumstances, we conclude that the effect of the suggestive identification procedure was insufficient to tip the scales against defendant. The witnesses had substantial opportunity to view defendant; the witnesses indicated a high degree of attention; any discrepancies in the descriptions were explainable; the identifications were certain; and the identifications followed within an hour of the initial sightings. For these reasons, there was not a substantial likelihood of misidentification. The trial court did not err by admitting the out-of-court identifications.

Furthermore, we hold that the in-court identifications made by the witnesses were properly admitted. The trial court did not err by finding that the in-court identifications were of independent origin.

[2] Defendant also argues that the trial court's order denying his motion to suppress contained findings of fact not supported by evidence presented during the *voir dire* hearing. Specifically, defendant contends the trial court erred by basing some of its findings on evidence heard at trial rather than at the *voir dire* hearing.

The trial court denied defendant's motion to suppress immediately after holding a *voir dire* hearing, but the trial court did not make findings of fact in writing until after the presentation of evidence at trial. The trial court is not required to make findings and conclusions at the time of the ruling. *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984). Furthermore, defendant has failed to show any prejudice resulting from the trial court's delay in making written findings and conclusions.

Defendant contends there was no evidence presented at the *voir dire* hearing to support the trial court's written findings (1) that Wrenn saw the perpetrator get into a car with South Carolina license plate FST752, (2) that the car which defendant was driving at the time he was stopped had South Carolina license plate FST752, and (3) that there was an electric razor in defendant's car. The trial court may have based some of its findings of fact on evidence presented only during the trial. However, there was no prejudicial error in light of the ample evidence presented during the *voir dire* hearing that fully supported the trial court's conclusion that there was no substantial likelihood of irreparable misidentification by the witnesses. *See State v. Steppe*, 19 N.C. App. 63, 198 S.E.2d 84, *appeal dismissed and cert. denied*, 284 N.C. 123, 199 S.E.2d 662 (1973).

No error.

Judges ORR and LEWIS concur.

STATE OF NORTH CAROLINA v. AARON DEMETRIUS BAYNES

No. 9318SC162

(Filed 5 April 1994)

1. **Constitutional Law § 309 (NCI4th)— second-degree murder—closing argument—concession of guilt to manslaughter—effectiveness of assistance of counsel**

A second-degree murder prosecution was remanded for an evidentiary hearing as to whether defendant allowed his attorney to argue that he was guilty of involuntary manslaughter but not murder where defendant was charged with murder and multiple counts of felony child abuse, his attorney contended in closing arguments that he was not guilty of second-degree murder but was guilty of involuntary manslaughter, and it could not be determined from the record whether defendant had given his consent.

Am Jur 2d, Criminal Law §§ 752, 985-987.

2. **Homicide § 417 (NCI4th)— second-degree murder—child abuse—Pattern Jury Instruction**

Defendant's contention that the Pattern Jury Instruction given to the jury in a second-degree murder prosecution arising from child abuse impermissibly shifted the burden of proof to defendant was overruled.

Am Jur 2d, Homicide § 508.

Judge COZORT concurring in part and dissenting in part.

Appeal by defendant from judgments entered 30 January 1992 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 19 October 1993.

The defendant was indicted for one count of murder in connection with the death of Faith Williamson, the daughter of the defendant's live-in girlfriend. He was also charged with six counts of felony child abuse in connection with injuries allegedly inflicted upon Josephine Jones, age nine, John Jones, age ten, Edward Jones, age twelve, Bradley Williamson, age four, Hope Williamson, Faith's twin sister, age two, and Faith, also age two.

The defendant's girlfriend, Michelle Williamson, was the mother of Bradley, Faith and Hope. She was the half-sister and primary caretaker of the older children, whose mother and stepfather had been killed in an automobile accident. The defendant and Ms. Williamson also had an infant, Cree. All seven children lived with the couple at their home in Greensboro, North Carolina.

On 1 March 1991, rescue personnel were called to the home of the defendant in response to a report that a child was choking due to food lodged in the mouth. The child, Faith, was taken to Moses Cone Memorial Hospital where she was seen by Dr. Martha Sharpless in the emergency room. At that time the child was in cardiac arrest and moribund. Dr. Sharpless observed that Faith was severely dehydrated and emaciated. She bore both older scars and healing lesions about her body. The doctor also observed cigarette burns on her body and rope burns on her ankles. There was no evidence of choking; her condition looked more like "some very serious, overwhelming, central nervous system catastrophe, like some type of blow to the head." Dr. Sharpless diagnosed Faith as an example of Battered Child Syndrome. The child died approximately thirty hours later.

Trial was held in Guilford County Superior Court on 27 January 1992. The State's evidence included testimony from the doctors who had treated Faith and her sister Hope, Dr. Sharpless, who saw Faith in the emergency room, and Dr. Butts, the medical examiner who performed the autopsy on Faith. Dr. Butts testified that the injuries he found on the child's body were all typical of Battered Child Syndrome, in that they were in such locations and were the type of injuries that would not have occurred by accident. He further testified that the cause of death was a combination of all the injuries,

> the old injuries that had affected her brain, the fresh hemorrhage that was present on the brain, the dehydration that was apparent when she first presented to the Emergency Room, that is she was missing a lot of fluids, that all of these combined, caused her to have an arrest, cardiorespiratory arrest for her heart and lungs to stop working.

The State also presented the testimony of the older children who lived in the home. All of the children described various punishments given to them and their siblings by the defendant. Edward, the eldest child, testified that the defendant had denied

Faith water and food, and that he tied up her hands and legs on a number of occasions. He testified that the defendant made Faith stand in the corner with soiled panties on her head to punish her for wetting herself. As to his own treatment, Edward testified that the defendant would deprive him of food or make him run up and down the stairs for punishment. He also stated that the defendant made him and his little brother maintain a "pushup" position for hours as punishment.

Nicole Jones and John Jones, ages ten and eleven, also offered testimony. Nicole testified that the defendant tied Faith's feet together and hung her upside down in the closet. John testified that he had been punished by restriction to his room for two years. He had also been required to hold a pushup position and run the stairs.

Bradley, the next youngest to the twins at five years, testified that the defendant had thrown Faith in a box on the morning she was taken to the hospital. He testified that Faith knew two words, "stop" and "water." He testified that he had seen the defendant burn Faith with cigarettes. All the children testified to food and water deprivation and other cruel punishments.

The children's testimony was supported by neighbors and family members. Ms. Geneva McIntyre also corroborated the children's testimony at trial. Ms. McIntyre interviewed the children after the defendant's arrest. During those interviews, the children told her of repeated beatings, punishments, and restrictions. They also told her that if they reported the incidents to anyone, they would be punished even more severely.

The defendant pled not guilty to all offenses and offered no evidence. The jury found the defendant guilty of one count of second-degree murder, five counts of felony child abuse, and one count of misdemeanor child abuse. He was sentenced to life in prison for the murder conviction and consecutive terms ranging from three to ten years for the child abuse convictions. The defendant appeals from the jury's verdict and the entry of judgments.

Attorney General Michael F. Easley, by Assistant Attorney General Ellen B. Scouten, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

ORR, Judge.

The defendant raises two issues on appeal. He argues that his constitutional right to effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 19, 23 and 24 of the North Carolina Constitution has been violated by the statements made to the jury by defense counsel during closing arguments. He further argues that the Pattern Jury Instructions on Battered Child Syndrome unconstitutionally relieved the State of its burden of proving the elements of the crime beyond a reasonable doubt.

I.

[1] The defendant first contends that he was denied effective assistance of counsel when his attorney conceded his guilt of the lesser included offense of involuntary manslaughter in closing arguments. Since we are unable to discern from the record whether the defendant did in fact consent to the statements of his attorney during closing argument to the jury, we remand for an evidentiary hearing to determine whether the defendant allowed his attorney to make the argument at issue here.

The typical test for ineffective assistance of counsel is the same under both the federal and state constitutions. "A defendant is entitled to relief if he can show both (1) that his counsel's performance fell below an objective standard of reasonableness, and (2) that his counsel's deficient representation was so serious as to deprive him of a fair trial." *State v. Thomas*, 329 N.C. 423, 439, 407 S.E.2d 141, 151 (1991), *quoting State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985); *see also Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). However, as the defendant points out, in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), the North Carolina Supreme Court held that a violation of a defendant's Sixth Amendment right to counsel was shown where defense counsel, without the defendant's consent, admitted the defendant's guilt, and recommended that jurors convict him of manslaughter rather than murder. "[A]ny concession of a client's guilt absent a consent by defendant to do so constitutes ineffective assistance of counsel *per se*." *State v. McDowell*, 329 N.C. 363, 386, 407 S.E.2d 200, 213 (1991). Only "where a knowing consent has been demonstrated, . . . [should] the issue concerning ineffective assistance of counsel be . . . examined pursuant to the normal ineffectiveness standard

set forth in *Strickland v. Washington.*" *Id.* at 387, 407 S.E.2d at 213 (citations omitted).

In the case at bar, counsel for the defense made the following statements to the jury during his closing argument.

> Now, let me tell you what I think—what I contend he's guilty of. I don't think he's guilty of second degree murder. I think he's guilty of involuntary manslaughter.
>
> . . .
>
> Now, again, you listen to His Honor as he instructs the jury. I think the behavior that Mr. Baynes demonstrated that morning shows criminal negligence, but not the malice that the State has tried to allege here.
>
> . . .
>
> So, I say to you it doesn't have to have the malice—I say to you his behavior at that time was criminally negligent, because it was reckless and it was careless, and it showed a thoughtless disregard of the consequences and the behavior, and a heedless indifference to her.

The trial judge instructed the jury on second-degree murder and involuntary manslaughter.

While the State contends in its brief before this Court that the defendant's statements during sentencing "can only be an admission of guilt . . .", we find that these statements alone are insufficient to infer consent to the defense attorney's argument. Whether defendant gave consent for his attorney to concede his guilt during the guilt determination phase is the dispositive question in the determination of the potential Sixth Amendment violation under *Harbison.* This post-verdict statement standing alone cannot foreclose the issue of consent by the defendant to the attorney's oral argument to the jury during the guilt phase of a trial. In the case *sub judice*, the defendant stated, "Well, I would like to say one thing. I would like to say I'm very sorry to the family of Faith Williamson, and to the children and to the Court. And, I would like to thank the jury for going through their patience of going along with the trial." While these statements may indicate remorse on the part of the defendant, standing alone they do not rise to the level of evidence necessary to show knowing consent as mandated by *McDowell* and *Thomas.*

In both *McDowell* and *Thomas*, clear evidence was presented that tended to show the defendant knowingly consented to the actions of his attorney at the time of closing arguments. In *Thomas*, on remand by the North Carolina Supreme Court, an evidentiary hearing was held on the issue of consent. *State v. Thomas*, 327 N.C. 630, 397 S.E.2d 79 (1990). The trial judge found as a fact that the defendant had consented to the attorney's admission to the murder as a matter of trial strategy in order to hold the State to its burden of proof on a sexual offense charge; there was in fact a writing which recorded the defendant's consent. In *McDowell*, the trial judge questioned the defendant just prior to his attorney's closing argument to ensure that he had specifically authorized the concessions in the argument. The court then further advised the defendant that if at any time the defendant felt that his attorney exceeded the authority he had given, he (the defendant) was to raise his hand and the judge would stop the attorney from further argument, "so we can make sure the only arguments to the jury is [sic] within the authority you granted." *McDowell* at 386, 407 S.E.2d at 213. In the instant case, the record fails to disclose any evidence presented at trial which indicates whether an informed and knowing consent was given by the defendant.

Since here, unlike in *Harbison*, the State has questioned the defendant's assertion that he did not in fact consent to the argument of his attorney and the record is silent on that point, in the exercise of our supervisory powers over the trial divisions, we remand this case to the superior court for an evidentiary hearing to determine whether the defendant knowingly consented to counsel's concessions of the defendant's guilt. *State v. Sanders*, 319 N.C. 399, 354 S.E.2d 724 (1987); *see also* N.C. Gen. Stat. § 7A-32(b). If the defendant did not consent, then a new trial would be mandated, although we note our concern that an unscrupulous lawyer has nothing to lose for his client by failing to obtain prior consent to the attorney making an unauthorized admission of guilt to a lesser offense. If the jury accepts the attorney's argument, the defendant potentially escapes conviction of a more serious charge. If the defendant is convicted of the more serious charge, under *Harbison*, the defendant appears to be guaranteed an automatic new trial by virtue of the ineffective assistance argument based on lack of consent.

II.

[2] As to the defendant's second assignment of error, we find no merit to his argument that the Pattern Jury Instructions given to the jury impermissibly shifted the burden of proof to the defendant in violation of *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368 (1970). The disputed instruction given to the jury by the trial judge states:

> [I]f you find from the evidence, beyond a reasonable doubt, that at the time when the victim died, she had sustained multiple injuries at different locations on her body, and that those injuries were at different stages of healing. And, if you find that the physical condition of the victim's body was inconsistent with any explanation as to the cause of the victim's injuries, given at or about the time of her death, you may consider such facts, along with all other facts and circumstances in determining whether the injury which caused the victim's death was intentionally inflicted, and not the product of accident or misadventure.

The above instruction, N.C.P.I., Crim. 206.35, was approved by this Court in *State v. Hitchcock*, 75 N.C. App. 65, 330 S.E.2d 240, *disc. review denied*, 314 N.C. 334, 333 S.E.2d 493 (1985). We therefore overrule this assignment of error.

Remanded.

Judge EAGLES concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT concurring in part and dissenting in part.

I concur with that portion of the majority which finds no error in the trial court's instructions to the jury. I dissent from that portion which remands for an evidentiary hearing on the issue of whether the defendant consented to his counsel's argument to the jury conceding defendant's guilt to manslaughter. In my view, the defendant's argument should be dismissed because defendant has made no factual assertion that he did not consent.

In *State v. Thomas*, 327 N.C. 630, 397 S.E.2d 79 (1990), the Supreme Court case which sets the precedent for remanding for

an evidentiary hearing, the defendant contended on appeal that he did not consent to his attorney's closing argument. *Id.* at 630, 397 S.E.2d at 80. No such contention appears in this case. Rather, defendant contends that he is entitled to a new trial simply because the record is silent regarding his consent. Appellate courts should not remand for an evidentiary hearing without requiring the defendant to make a factual allegation that he did not consent to his counsel's actions. The majority errs in holding to the contrary.

I also take this opportunity to point out that the decision by the Supreme Court in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), abandons the traditional test of prejudice in cases alleging ineffective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984), adopting instead a rule requiring a new trial in every case wherein the defendant's counsel, without defendant's prior consent, concedes defendant's guilt to a lesser offense submitted to the jury. If there is ultimately a factual determination in this case that defendant Baynes did not consent to his counsel's argument to the jury, the *Harbison* rule would be especially harsh to the victims in this case. The evidence of defendant Baynes' torture of these children was overwhelming, corroborated and uncontradicted. This case presents an opportunity for the Supreme Court to reexamine the issue of whether every case involving defendant's lack of consent to counsel's argument conceding some guilt automatically requires a new trial without determining whether defendant was prejudiced by his counsel's concession.

In sum, I vote to dismiss defendant's argument regarding his counsel's argument to the jury, without prejudice to the defendant to raise the issue in a properly filed motion for appropriate relief.

RUBY C. STOREY v. CHARLES A. HAILEY, EXECUTOR OF THE ESTATE OF BERNARD M. HAILEY

No. 926SC1188

(Filed 5 April 1994)

1. **Process and Service § 41 (NCI4th)— service of process—insufficiency—extension of time—waiver**

The trial court erred in a claim against an estate by dismissing the claim for insufficiency of process, insufficiency of service of process, and lack of personal jurisdiction where defendant, who was not a North Carolina resident, was served through his attorney, who was his process agent; the attorney appeared as counsel of record and filed a motion for extension of time to plead; that order was granted; second and third extensions were allowed by stipulation of counsel; and defendant, through new counsel, filed motions to dismiss which were granted. The defendant's conduct in securing extensions of time, through opposing counsel's professional courtesy, to 54 days past the date when plaintiff could have procured endorsement of the original summons or issuance of an alias and pluries summons, acts to estop defendant from asserting these defenses.

Am Jur 2d, Process § 112.

2. **Process and Service § 19 (NCI4th)— summons—caption—erroneous—adequate notice**

Even if defendant in a claim against an estate was not estopped from asserting the defenses of insufficient process and service, and the resulting lack of personal jurisdiction, plaintiff's action should not have been subject to dismissal where the caption referred to the defendant individually rather than as executor of the estate, the summons was directed to the process agent for the individual defendant rather than to defendant as executor in care of the process agent, and the summons did not notify defendant to appear and answer within 30 days. The process was sufficient because the caption in the summons amounted to a misnomer and defendant had adequate notice that the action was against the estate rather than against defendant individually, and the instructions in

the summons were adequate to satisfy the spirit and the letter of N.C.G.S. § 1A-1, Rule 4(b).

Am Jur 2d, Process §§ 94 et seq.

3. **Process and Service § 111 (NCI4th)— service on decedent's estate—process agent—copy of summons left with law partner**

The trial court erred in a claim against an estate by dismissing the case for insufficiency of service of process where the executor of the estate, a nonresident, had appointed an N.C. attorney as process agent and the summons was served by leaving a copy with the process agent's law partner at their law office. The process agent was a member of a law partnership and N.C.G.S. § 1A-1, Rule 4(j)(7)(a) states that a partnership can be served by delivering a copy to any general partner or by leaving copies with the person who is apparently in charge of the office.

Am Jur 2d, Process §§ 170 et seq., 198 et seq.

4. **Limitations, Repose and Laches § 70 (NCI4th); Statutes § 24 (NCI4th)— statute of limitations—"month"—calendar month**

The trial court erred in dismissing plaintiff's action against an estate based on the statute of limitations where the statute allowed "three months" to begin the action and plaintiff filed within three calendar months. It is well-settled that the word "month" shall be construed to be a calendar month, unless otherwise expressed. N.C.G.S. § 12-3, N.C.G.S. § 28A-19-16.

Am Jur 2d, Executors and Administrators §§ 633 et seq.; Statutes §§ 142 et seq.

Appeal by plaintiff from order entered 10 July 1992 and filed 28 July 1992 by Judge Cy A. Grant, Sr., in Northampton County Superior Court. Heard in the Court of Appeals 21 October 1993.

Bailey & Dixon, by Gary S. Parsons and Steven M. Fisher; and Charles M. Slade, Jr., for plaintiff appellant.

Revelle, Burleson, Lee & Revelle, by L. Frank Burleson, Jr., for defendant appellee.

COZORT, Judge.

In this appeal, plaintiff alleges the trial court erred by granting the defendant's motions to dismiss for insufficiency of process, in-

sufficiency of service of process, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. We have reviewed each of the grounds for dismissal and find that the trial court erred in granting defendant's motions. Accordingly, we reverse.

Plaintiff Ruby C. Storey commenced this action on 16 January 1992 to recover compensation from Bernard M. Hailey's estate for services rendered to the decedent. Plaintiff's claim had previously been rejected by defendant Charles A. Hailey, the executor of the decedent's estate, on 17 October 1991. Plaintiff's complaint also contained a claim for $5,000.00, the amount of a check issued by decedent to plaintiff, but which had been returned unpaid because the account upon which it was drawn had been closed.

Because defendant is not a resident of North Carolina, defendant appointed Thomas H. Wellman, an attorney, as his resident process agent to receive service in all actions against the estate. A deputy sheriff of the Halifax County Sheriff's Department made service by leaving a copy of the summons and complaint with William O. White, Jr., Mr. Wellman's law partner, at the offices of Wellman and White in Weldon, North Carolina. The title of the cause as set out in the summons named Charles A. Hailey, 606 Wexwood Court, Richmond, Virginia, as the defendant. The summons was directed to Thomas H. Wellman, "Process Agent for Charles A. Hailey."

On 5 March 1992, Mr. Wellman appeared as counsel of record for defendant. He filed a motion for extension of time to plead, and an order granting the motion was entered by the Northampton County Clerk of Superior Court. The order extended the time for filing an answer up to and including 7 April 1992. By stipulation of counsel, Mr. Wellman obtained a second extension of time for filing an answer on 6 April 1992. The second extension lengthened the time for responding up to and including 7 May 1992. On 4 May 1992, counsel for both parties signed another written stipulation further extending the time for responding to the complaint up to and including 8 June 1992.

On 8 June 1992, defendant, through new counsel, filed and served motions to dismiss the action asserting that plaintiff's claims should be dismissed due to insufficiency of process, insufficiency of service of process, lack of personal jurisdiction, and the expiration of the statute of limitations. The hearing on the motions was conducted in chambers on 10 July 1992; the trial court filed an

order on 28 July 1992 dismissing plaintiff's action based on all grounds asserted by defendant.

[1] Plaintiff first argues on appeal that defendant waived his defenses of insufficiency of process, insufficiency of service of process, and lack of personal jurisdiction by obtaining two extensions of time to file a responsive pleading through written stipulation of counsel. Plaintiff maintains that she was "lured into a false sense of security" in that "[d]efendant's initial trial counsel, regardless of his intent, manifestly lead [*sic*] Plaintiff's trial counsel to believe that there would be no need to continue further process in existence . . . ."

We agree with plaintiff and find that defendant is estopped from asserting the defenses of insufficiency of process, insufficiency of service of process, and lack of personal jurisdiction. Defendant contends that plaintiff has raised the issues of waiver and estoppel for the first time on appeal without a prior objection. As we have no record of any objection or lack thereof since the motions were heard in chambers, we have decided in our discretion pursuant to N.C.R. App. P. 2, to review the issue of whether defendant was estopped from asserting the defenses.

The law in North Carolina provides us with little guidance to resolve the estoppel issue. Cases from other jurisdictions are instructive. For example, in *Tresway Aero, Inc. v. Superior Court of Los Angeles County*, 5 Cal.3d 431, 487 P.2d 1211 (1971), the court refused to grant the defendant's motion to dismiss for insufficiency of service of process where the defendant had received an extension of time in which to make an appearance, but failed to notify the plaintiff of a defect in service. The defendant's action in receiving the extension resulted in plaintiff's failure to serve the summons within the period required by the California statute. In denying the defendant's motion to dismiss, the court explained:

> By requesting that extension, defendant led plaintiff to believe that further service of process on defendant would be duplicatory and redundant.
>
> . . . .
>
> Defendant's conduct in the present case lulled plaintiff into such a "false sense of security," and probably prevented plaintiff from discovering her error and effecting valid service within the statutory period.

> We conclude that since the responsibility for plaintiff's failure to effect valid service within the period of [the statute] rests upon defendant, "the ends of substantial justice" . . . will best be served by estopping defendant from moving to dismiss under that section.

Id. at 441-42, 487 P.2d at 1218-19.

Similarly, in the case below, plaintiff was deprived of any opportunity to cure any defects in the process or in the service of process, because defendant's counsel led plaintiff's counsel to believe it was unnecessary to continue further process. Defendant, absent the additional extension of time stipulated to by plaintiff's counsel, would have been subject to entry of default following the expiration of the second extension on 7 May 1992. The defendant's conduct in securing extensions of time, through opposing counsel's professional courtesy, to 54 days past the date when plaintiff could have procured endorsement of the original summons or issuance of an alias and pluries summons, acts to estop defendant from asserting these defenses. Any other result would serve only to stifle professional courtesy among members of the bar during a time when legal etiquette and professionalism are becoming more rare.

[2] Even had we decided to find that defendant was not estopped from asserting these defenses, plaintiff's action should not have been subject to dismissal for insufficiency of process, insufficiency of service of process, and the resulting lack of personal jurisdiction. The trial court dismissed the case for insufficiency of process because: (1) the caption on the summons was directed to "Charles A. Hailey, 606 Wexwood Court, Richmond, Virginia 28236," rather than "Charles A. Hailey, Executor of the Estate of Bernard M. Hailey,"; (2) the summons was directed to "Thomas H. Wellman, Process Agent for Charles A. Hailey," rather than to "Charles A. Hailey, Executor of the Estate of Bernard M. Hailey, c/o Thomas H. Wellman, Resident Process Agent for Charles A. Hailey, Executor of the Estate of Bernard M. Hailey,"; and (3) the summons did not notify Mr. Hailey to appear and answer within 30 days after service.

Plaintiff argues the process was sufficient because the caption in the summons amounted to a misnomer and defendant had adequate notice that the action was against the estate rather than against Charles Hailey individually. Again, we must agree with plaintiff's position. Our Supreme Court discussed a similar prob-

lem in *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984), where the complaint and summons were directed to a firm as a professional association, when the firm was in actuality a partnership. In reversing the trial court's dismissal of the action for insufficiency of process, the Court explained:

> "[I]f the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit."

Harris, 311 N.C. at 546, 319 S.E.2d at 919 (quoting *Bailey v. McPherson*, 233 N.C. 231, 235, 63 S.E.2d 559, 562 (1951)). We agree with plaintiff that reading the complaint and summons together leaves no doubt as to against whom the action was intended to be brought.

Furthermore, the initial paragraph in the summons is not defective. We recognize that

> a suit of law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

United States v. A. H. Fischer Lumber Co., 162 F.2d 872, 873 (4th Cir. 1947). Here, we find 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," *Wiles v. Welparnel Const. Co.*, 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978), as the documents in tandem indicated the process agent was being served for Charles Hailey, a non-resident, in his capacity as executor of the decedent's estate. The instructions in the summons were also adequate to satisfy the spirit and letter of Rule 4(b) of the North Carolina Rules of Civil Procedure. Accordingly, the trial court erred in dismissing the plaintiff's complaint for insufficiency of process.

[3] Turning now to the issue of insufficiency of service of process, we also conclude the trial court erred in dismissing plaintiff's claim. The trial court dismissed the action because the summons was served by leaving a copy of the summons with the process agent's

law partner at their law office, rather than being served personally on the process agent. Although Thomas H. Wellman was not personally served, we find the service in this case was sufficient. N.C. Gen. Stat. § 28A-4-2 (1984) provides that a personal representative must appoint a non-resident agent to accept service of process in all actions and proceedings concerning the estate. Manner of service is not specified, however, in Chapter 28 of the General Statutes. Therefore, we must review this case to determine whether service complied with the requirements of N.C.R. Civ. P. 4(j).

Although service below was to be made on the decedent's estate, the personal representative, a natural person, was the individual to be served. Rule 4(j)(1) of the North Carolina Rules of Civil Procedure prescribes service on a natural person:

a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(1) (1990). In interpreting Rule 4(j)(6), the provision dictating service on a process agent for a corporation, this Court has stated that with regard to service on an agent, "under North Carolina law we may consider any statute setting forth alternative means of serving such an agent, while under federal law our consideration is limited to statutes providing means of serving corporations." *Great Dane Trailers, Inc. v. North Brook Poultry, Inc.*, 35 N.C. App. 752, 755, 242 S.E.2d 533, 535 (1978). This Court explained:

> The trial court found and the record establishes that at the time this lawsuit was instituted Harvey V. Houser was the registered agent of the defendant corporation . . . . Thus as long as process was served on Houser "in a manner specified by *any statute*" it was effective to confer jurisdiction on the Superior Court. The return of service discloses that process was served on Houser by leaving copies thereof at his house with his wife, "who is a person of suitable age and discretion"

> in compliance with Rule 4(j)(1) which provides the manner of serving process upon a natural person. In our opinion by the interplay of the cited statutes the corporate defendant was properly served with process.

Id. (emphasis in original).

The process agent in the case at bar, Mr. Wellman, was a member of a law partnership at the time the suit was instituted. Rule 4(j)(7)(a) states that a general or limited partnership can be served:

> By delivering a copy of the summons and of the complaint to any general partner . . . or by leaving copies thereof in the office of such general partner, attorney-in-fact or agent with the person who is apparently in charge of the office.

Here, Mr. Wellman was the process agent for the decedent's estate and a member of a law partnership. Pursuant to Rule 4(j)(7), service was made by a member of the Halifax County Sheriff's Department by delivering a copy of the complaint and summons to Mr. White, Mr. Wellman's law partner, at the law office. The service was therefore in compliance with Rule 4, since no individual liability was sought against Mr. White.

Because both the process itself and the service thereof were sufficient to comply with the North Carolina Rules of Civil Procedure, we find the trial court erred in dismissing the plaintiff's case for insufficiency of process and insufficiency of service of process. As a result, the trial court also erred by failing to exercise *in personam* jurisdiction in the case.

[4] Finally, we address the trial court's dismissal of plaintiff's action based on a failure to state a claim because the action was not filed within the statute of limitations. N.C. Gen. Stat. § 28A-19-16 (1984) reads:

> If a claim is presented to and rejected by the personal representative or collector, and not referred as provided in G.S. 28A-19-15, the claimant must, within *three months*, after due notice in writing of such rejection, or after some part of the claim becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon. (Emphasis added.)

The defendant rejected plaintiff's claim on 17 October 1991. Plaintiff filed the current action on 16 January 1992. The trial court determined that the statute of limitations was not met because the complaint "should have been filed on or before January 15, 1992, but it was not filed until 2:24 p.m. on January 16, 1992."

N.C. Gen. Stat. § 12-3 (1986) reads:

> In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say:
>
> * * * *
>
> (3) "Month" and "year".—The word "month" shall be construed to mean a calendar month, unless otherwise expressed . . . . When a statute refers to a period of one or more months and the last month does not have a date corresponding to the initial date, the period shall expire on the last day of the last month.

It is well-settled that "[t]he word 'month' shall be construed to be a calendar month, unless otherwise expressed." *Adcock v. Town of Fuquay Springs*, 194 N.C. 423, 425, 140 S.E. 24, 25 (1927); *Kennedy v. Pilot Life Ins. Co.*, 4 N.C. App. 77, 80, 165 S.E.2d 676, 677 (1969). Consequently, plaintiff had three calendar months, not ninety days, in which to file the present action. Plaintiff did file the action within a three-month period. The trial court thus erred in dismissing plaintiff's cause of action based on the applicable statute of limitations.

We also note that the plaintiff has not argued, and we have not considered, the question of whether defendant's written stipulations constituted a general appearance.

The trial court's order, in its entirety, is therefore

Reversed.

Judges EAGLES and ORR concur.

JACK C. FARNSWORTH, PLAINTIFF/APPELLANT v. HARRILL L. JONES AND GASTON COUNTY BOARD OF ELECTIONS, DEFENDANTS/APPELLEES

No. 9227SC1290

(Filed 5 April 1994)

1. **Domicile and Residence § 5 (NCI4th)— requisites for change of domicile**

To establish a change of domicile, a person must show: (1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of a new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home.

Am Jur 2d, Domicile §§ 16 et seq.

2. **Elections § 60 (NCI4th)— candidate for city council—failure to establish domicile in precinct—not qualified candidate**

Plaintiff was not a qualified candidate for election to the city council in a precinct in Gastonia because he failed to establish a domicile in the precinct for thirty days prior to the election and was thus not legally entitled to vote in the precinct as required by N.C.G.S. § 163-294.2(b), even though plaintiff rented an apartment in the precinct in Gastonia before the election and stated his intent to make the apartment his domicile, where the evidence showed that plaintiff executed a month-to-month lease for a furnished apartment in Gastonia because he wanted to "see what would happen" in the election; prior to becoming a candidate, plaintiff's primary residence was a condominium in Cramerton, N.C.; plaintiff continued to maintain his condominium in Cramerton and spent approximately 50% of his time there; plaintiff did not change his postal address or the address on his driver's license and filed his federal tax return using the Cramerton address; plaintiff stated that he had no intention of selling the Cramerton residence; and the computerized key entry records, utility bills and testimony of neighbors demonstrated that plaintiff was rarely at the Gastonia apartment. N.C.G.S. §§ 163-85(c) and 163-86(d); N.C. Const. art. VI, § 2.

Am Jur 2d, Elections §§ 174 et seq.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period. 65 ALR3d 1048.

Appeal by plaintiff from judgment entered 18 August 1992 by Judge C. Walter Allen in Gaston County Superior Court. Heard in the Court of Appeals 28 October 1993.

Parker, Poe, Adams & Bernstein, by William E. Poe, Frank A. Hirsch, Jr., and Jeffrey I. Ryen, for plaintiff appellant.

Dolley and Morgan, by Steve Dolley, Jr., and Page Dolley Morgan, on brief, for defendant appellee, Harrill L. Jones.

COZORT, Judge.

Plaintiff appeals the trial court's judgment affirming a decision by the Gaston County Board of Elections finding that defendant Harrill L. Jones (defendant) fulfilled the residency requirement to run in the municipal election for the city council seat representing Ward 5 in Gastonia, North Carolina. After conducting a review of the whole record, we conclude the trial court erred in affirming the Board of Election's decision, since there was no substantial evidence to support a finding that defendant had met the residency requirement. We reverse and remand for a new election.

The underlying facts in this case are as follows: On 24 February 1992, defendant Harrill L. Jones filed his notice of candidacy for the Gastonia City Council (Council) seat from Ward 5. The defendant was opposed by incumbent Douglas E. Mincey. At the time of filing, defendant indicated that his address was 201 Flat Rock Pastures Drive, Cramerton, North Carolina. On 25 March 1992, defendant filed an address transfer affidavit with the Gaston County Board of Elections (Board), listing his new address as 1301 Ashley Arms, 800 S. York Street, Gastonia, North Carolina.

On 29 April 1992, plaintiff Jack C. Farnsworth, as a concerned citizen residing within Ward 5, filed a complaint with the Board alleging Jones' lack of domicile within the ward. The Board met to consider the challenge on 1 May 1992, but refused to hear the complaint prior to the election. On 5 May, defendant received a majority of votes from Ward 5, but was not certified to the office because of the pending challenge to his eligibility. On 12 May, the Board met; however, it declined to hold an evidentiary hearing

on the matter. On 13 May, the plaintiff appealed to the State Board of Elections to require a full hearing. The State Board of Elections issued an order requiring the local Board to hold a full evidentiary hearing as to Jones' true domicile and to apply the legal test specified in N.C. Gen. Stat. § 163-57 (1991).

The Board conducted its evidentiary hearing on 2 July 1992 to determine the issue of defendant's domicile qualifications. Plaintiff introduced evidence tending to show that defendant's domicile was in Cramerton rather than Gastonia. Defendant waived his right to put on evidence. The Board of Elections voted not to disqualify Jones as a candidate. A written decision was filed detailing such decision on 6 July 1992. Plaintiff filed a notice of appeal to the Gaston County Superior Court on 8 July 1992 pursuant to N.C. Gen. Stat. § 163-90.2(d) (1991).

On 7 July 1992, the Gastonia City Council permitted Mr. Jones to occupy the seat as Ward 5 council member, although he had not been officially certified as the winner due to the pending proceedings. In response to the Council's action, plaintiff filed in the superior court a motion for writ of mandamus requesting the court to (1) issue a mandatory injunction enjoining the Board from certifying the election for the seat for Ward 5 until after the resolution of the appeal; (2) declare the oath of office of Jones null and void; and (3) prohibit Jones from exercising any authority as a council member. On 21 July 1992, the superior court enjoined Jones "from exercising any authority as a purported member of the Gastonia City Council until the results of the election have been officially determined pursuant to the pending appeal procedures and the County Board of Elections has issued a Certificate of Election." The trial court, on 18 August 1992, issued a judgment sustaining the Board's decision finding that defendant was a qualified candidate. Plaintiff appeals.

Because the Gaston County Board of Elections is a local unit of government and not an administrative agency, *see* N.C. Gen. Stat. § 150B-2(1) (1991), the Administrative Procedure Act (APA), codified in Chapter 150B of the General Statutes, does not apply directly in the present case. Our Supreme Court set forth the standard of review for local board decisions in *Coastal Ready-Mix v. Board of Comm'rs*, 299 N.C. 620, 265 S.E.2d 379, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). "[W]hile the specific review provision of the North Carolina APA is not directly ap-

plicable, the principles that provision embodies are highly pertinent." *Id.* at 625, 265 S.E.2d at 382.

Under the APA, "[t]he scope of review applied by an appellate court when reviewing a decision of a lower court is the same as in other civil cases." *Crowell Constructors, Inc. v. N.C. Dep't of Env't, Health & Natural Resources*, 107 N.C. App. 716, 719, 421 S.E.2d 612, 613 (1992), *cert. denied*, 333 N.C. 343, 426 S.E.2d 704 (1993). Our review is limited to deciding whether the trial court committed any errors of law. *Id.* We therefore necessarily are required to determine whether the trial court erred in determining the following:

> (1) whether the Board committed any errors in law; (2) whether the Board followed the procedures specified by law in both statute and ordinance; (3) whether the appropriate due process rights of petitioner were protected, including the rights to offer evidence, cross-examine witnesses, and inspect documents; (4) whether the Board's decision was supported by competent, material and substantial evidence in the whole record; and (5) whether the Board's decision was arbitrary and capricious.

CG&T Corp. v. Board of Adjustment, 105 N.C. App. 32, 36, 411 S.E.2d 655, 658 (1992), (citing *Coastal Ready-Mix v. Board of Comm'rs*, 299 N.C. at 626, 265 S.E.2d at 383). To verify that the Board's decision was supported by sufficient evidence, we apply the whole record test, which necessitates an examination of all competent evidence before the Board and a determination as to whether the Board's decision was based upon substantial evidence. *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988).

> Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and "is more than a scintilla or a permissible inference." *Lackey v. Dep't of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). "[T]he court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

In Re Application of City of Raleigh, 107 N.C. App. 505, 508, 421 S.E.2d 179, 180-81 (1992).

As a preliminary matter, we note that although plaintiff has challenged only the Board's decision based on the substantiality of the evidence and the possibility of the decision being arbitrary or capricious, we have reviewed the record for any other errors in law, mistakes in procedure, and improprieties related to the petitioner's due process rights as required by law. We can discern no such error. We now address plaintiff's primary contentions.

Plaintiff argues that based on the evidence presented, the Board erred in determining that defendant Harrill L. Jones was a qualified candidate in the election because he was not legally registered to vote in Ward 5 as required by statute. In North Carolina, in order to be qualified as a candidate for election to a municipal office, a person must be registered to vote in the municipality. N.C. Gen. Stat. § 163-294.2(b) (1991). According to N.C. Gen. Stat. § 163-85(c) and § 163-86(d) and Article VI, § 2 of the North Carolina Constitution, an individual must have resided in the precinct for 30 days prior to the general election in order to be registered to vote. The term "residence," as used in our State's election laws, is synonymous with legal domicile. *Hall v. Wake County Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972); *see* N.C. Gen. Stat. § 163-57(3) (1991).

> Precisely speaking, *residence* and *domicile* are not convertible terms. A person may have his residence in one place and his domicile in another. Residence simply indicates a person's actual place of abode, whether permanent or temporary. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. When absent therefrom, it is the place to which he intends to return . . . . [I]t is the place where he intends to remain permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave . . . .

Hall, 280 N.C. at 605, 187 S.E.2d at 55 (emphasis in original). A person who lives in a place for a limited purpose, with the intent of leaving when the purpose has been accomplished is a "mere sojourner." *Groves v. Comm'rs*, 180 N.C. 568, 105 S.E. 172 (1920). Where someone retains his original home with all its incidental privileges and rights, there is no change in domicile. *Hall*, 280 N.C. at 606, 187 S.E.2d at 55.

[1] Once an individual acquires a domicile, it is presumed to continue until a new domicile is established. *Id.* at 608, 187 S.E.2d at 57. "[T]he burden of proof rests upon the person who alleges a change." *Id.* We apply a three-part test to differentiate between a residence and a domicile. To establish a change of domicile, a person must show: (1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home. *Id.* at 608-09, 187 S.E.2d at 57. Although a person's testimony regarding his or her intent regarding the acquisition of a new domicile is competent evidence, it is not conclusive. *Id.* at 609, 187 S.E.2d at 57. We must consider the evidence of all the surrounding circumstances and the conduct of the person in determining whether he or she has effectuated a change in domicile. *Id.*

[2] An examination of the competent evidence before the Board in the case below demonstrates the Board erred in concluding the defendant had established his domicile within Ward 5 thirty days prior to the election. The evidence presented at the hearing indicated that, prior to 25 March 1992, defendant's primary residence was at 201 Flat Rock Pastures Drive in Cramerton, North Carolina. On 25 March, Jones filed an address transfer affidavit with the Board listing his new address as 1301 Ashley Arms, 800 S. York Street, Gastonia, North Carolina. The manager of Ashley Arms Apartments testified that on 16 March, defendant signed a month-to-month lease for a furnished apartment. Defendant explained to the manager that he wanted to wait for the outcome of the election before he signed a long-term lease. Defendant did not move any of his furniture into the apartment until after the election, when he signed a six-month lease. Records of the computerized card key system at the apartment complex indicate minimal entry by defendant during the thirty-day period, and only three entries by his wife. The documentation tended to show that defendant did not enter the apartment community on 9 of the 22 days between the initial occupancy on 16 March and the 6 April qualification deadline. He received one UPS package at the apartment office during the thirty-day period.

Defendant's neighbor at Ashley Arms testified that she had seen him only once in the parking lot and had never seen him in the common areas or laundry area of the apartment. The neighbor stated that defendant's assigned parking space was usually empty.

A utility accounts administrator for the City of Gastonia testified that comparisons between utility usage in defendant's apartment compared randomly to apartments with the same or similar layout at Ashley Arms showed substantially less electricity usage for him.

Defendant's wife, Patty Ann Jones, testified that she stayed at the Ashley Arms location approximately three nights a week. However, she admitted that her automobile registration, driver's license, and address all listed the Cramerton address. Insurance documents covering her automobile, home, and personal effects listed Cramerton as the current address. Telephone bills and bank account statements were mailed to the Cramerton address as well. The Jones' 1991 tax return filed on 14 April 1992 listed Cramerton as the filing address. Mrs. Jones testified that she and her husband dined regularly at the Cramer Mountain Country Club on Wednesday evenings. She stated that the Jones family celebrated special events at both Ashley Arms and in Cramerton. She told the Board that after the election, her son had constructed a cabinet in the bathroom of the apartment where she could store cosmetics.

Defendant gave testimony similar to that of his wife regarding his intent to make his domicile at Ashley Arms. Defendant acknowledged, however, that he had not changed his postal address, filed his federal tax return using the Cramerton address, and had not changed the address on his driver's license. He stated he had no intention of selling his residence at Cramer Mountain. Defendant further admitted that he had a home equity loan covering the property at Cramer Mountain and had failed to notify the lender of any change of address.

After considering all competent evidence in the record of defendant's actions with respect to establishing a domicile for thirty days prior to the municipal election, we conclude there was no substantial evidence to support the Board's conclusion that defendant timely established his domicile in Ward 5 to comply with N.C. Gen. Stat. § 163-57. We reach this conclusion after careful application of the test set out in *Hall*. First, the evidence does not support a determination that defendant had actually abandoned his previous residence with no intent to return. To the contrary, defendant maintained the condominium at Cramer Mountain, ate dinner weekly at the Country Club there, exercised there, and spent approximately 50% of his time there. He additionally did not change his address to Ashley Arms for postal purposes, or for any other purposes.

He executed a month-to-month lease for a furnished apartment because he wanted to "see what would happen" in the election. Although defendant acquired a new residence at the Ashley Arms address and expressed his intention to remain there permanently, there is little evidence in the record to indicate that he was actually residing there. The computerized key entry records, utility bills, and testimony of neighbors demonstrated that defendant was rarely at the apartment. Defendant simply has failed to meet his burden to establish his domicile as the apartment at Ashley Arms.

We have not ignored defendant's declarations concerning his domicile. We must point out, however, that conduct is of greater evidential value than expressions of intent. In this case, the evidence concerning defendant's actions requires a conclusion opposite to that of the Board. Our decision is additionally supported by the underlying rationale for the thirty-day domicile rule for candidate eligibility. The requirement was designed to deter abuses of the election process, such as precinct shopping, and to ensure that elected officials sincerely represent the residents of a particular district.

We therefore declare that the trial court erred in affirming the Board's decision finding defendant Harrill Jones qualified to run in the May 1992 election. The only qualified candidate for the Gastonia City Council position for Ward 5 on the ballot was the incumbent, Doug Mincey. Since Mr. Mincey failed to receive a majority of the votes, he may not be automatically installed in the position. *See Duncan v. Beach*, 294 N.C. 713, 242 S.E.2d 796 (1978). As a result, we must remand this case to the trial court for entry of an order directing the Gaston County Board of Elections to hold a new election pursuant to N.C. Gen. Stat. § 163-22.1 for the Ward 5 seat on the Gastonia City Council. The new election "shall be conducted under applicable constitutional and statutory authority and . . . conducted by the appropriate elections officials." N.C. Gen. Stat. § 163-22.1 (1991).

Reversed and remanded.

Judges EAGLES and ORR concur.

ROBERT A. GRIFFITH, A MINOR BY HIS GUARDIAN AD LITEM, RENEE CROSSWHITE GRIFFITH, PLAINTIFF v. JAMES SHIELDS McCALL, II, DEFENDANT

No. 9322SC447

(Filed 5 April 1994)

1. **Evidence and Witnesses § 2366 (NCI4th)— automobile accident—accident reconstruction analyst—testimony admissible**

The trial court in an automobile accident case properly admitted testimony from an accident reconstruction analyst where the witness holds a B.S. in civil engineering and an M.S. in civil engineering, with a major in traffic engineering; is a registered professional engineer and was previously a consulting engineer in the area of traffic engineering; currently concentrates exclusively in the field of forensic traffic engineering or accident reconstruction; and has performed accident reconstruction analyses previously. His testimony clearly could assist the jury in the determination of the issues in this case; it is the function of cross-examination to expose any weaknesses in expert opinion testimony. N.C.G.S. § 8C-1, Rule 702.

Am Jur 2d, Expert and Opinion Evidence § 345.

Admissibility of opinion evidence as to the cause of an accident or occurrence. 38 ALR2d 13.

2. **Automobiles and Other Vehicles § 571 (NCI4th)— pushing disabled car—struck from rear—last clear chance**

The trial court properly instructed the jury and submitted the issue of last clear chance to the jury where plaintiff was struck from the rear by defendant's car while pushing a disabled vehicle along a road. Plaintiff's accident reconstruction analyst testified that the stopping distance for a vehicle traveling at the speed of defendant's vehicle was 214 to 246 feet and that the disabled vehicle would have been visible from plaintiff's vehicle, with low-beam headlights under the conditions then present, at a distance of 250 feet.

Am Jur 2d, Automobiles and Highway Traffic §§ 438, 439.

Applicability of last clear chance doctrine to collision between moving and stalled, parked, or standing motor vehicle. 34 ALR3d 570.

Appeal by defendant from judgment entered 11 September 1992 by Judge A. Leon Stanback in Iredell County Superior Court. Heard in the Court of Appeals 8 February 1994.

Tim L. Harris & Associates, by T. Scott White, for plaintiff-appellee.

Kluttz, Reamer, Blankenship & Hayes, by Richard R. Reamer and James F. Randolph, for defendant-appellant.

JOHNSON, Judge.

Plaintiff Robert A. Griffith brought a negligence action against defendant James Shields McCall, II for damages arising out of an automobile accident where defendant was driving an automobile which struck plaintiff. Plaintiff was a minor at the time of the accident and brought this action through his guardian ad litem, Renee Crosswhite Griffith.

Testimony presented at trial showed the following: On 6 March 1990, plaintiff was driving a car south on US 321 just south of Blowing Rock, North Carolina. A passenger, Shawn Parks, was in the car with plaintiff. As plaintiff drove, he saw a vehicle parked partially off the northbound lane of US 321 flashing its headlights on and off. Plaintiff and Mr. Parks decided to stop and see if the driver of the car needed any assistance. This section of US 321 is two lanes and the speed limit is 55 miles an hour.

Plaintiff pulled his car off of the southbound lane of travel onto the shoulder of the road with the tires of his car either on the white line marking the outside edge of the lane or on the area of pavement extending beyond the white line and southbound lanes. Plaintiff turned off his car headlights and engine and turned on his car's emergency flashers. There was disputed testimony as to how far south of the disabled vehicle plaintiff's car was parked.

Plaintiff and Mr. Parks walked to the disabled vehicle which was being driven by Mrs. Wilma Winebarger. Mrs. Winebarger's car's emergency flashers were on and the vehicle was parked fifteen feet south of a pull-off area. When plaintiff and Mr. Parks asked Mrs. Winebarger if they could help, she replied that her car had stalled out and asked if they could push her car to the pull-off area. Plaintiff and Mr. Parks went to the rear of Mrs. Winebarger's car to push; plaintiff was pushing on the driver's side rear of the vehicle and Mr. Parks was pushing on the right side rear

of the vehicle. As they pushed, both plaintiff's and Mr. Parks' hands were shoulder width apart and they stood fairly close to each other. The width of the back of Mrs. Winebarger's car was five feet and eight inches. Mr. Parks recalled that the car's emergency flashers were in the area of his chest as they pushed.

Plaintiff and Mr. Parks attempted unsuccessfully to push the vehicle while it was in "neutral" as cars passed by in both directions. Finally, they yelled to Mrs. Winebarger to put the vehicle in "park." As Mrs. Winebarger put the vehicle in "park," Mr. Parks looked down and saw lights on the calves of his legs. He stood erect, turned around, saw car lights approaching and yelled "Bobby" to plaintiff. Mr. Parks heard the squeal of tires, jumped out of the way to avoid being hit, and saw plaintiff being struck by the approaching vehicle. Plaintiff remembers the tires squealing and then laying in the road. Plaintiff's injuries resulted in an amputation of his right leg at the knee and a fractured left ankle.

Defendant testified that he was driving a 1988 Volkswagen Fox and that he had his car headlights on, but could not be sure if they were on low or high beam; that this drive was part of his daily routine; that he knew the section of US 321 in which the accident occurred was curvy; and that at other times he had seen disabled vehicles on US 321. Defendant further testified that as he traveled north, driving upward through a curve and then to the area where the accident occurred, his attention was first on plaintiff's parked vehicle to his left; that he expected a person to come from behind that vehicle to flag him for assistance; that when he returned his gaze to the northbound lane, he noticed an object; that he began backing off the gas, putting his foot on the brake and turning to the left; that he could not identify the object; that he next saw plaintiff turned around and that it was then that he realized it was a person pushing a car; that at that point, he hit his brakes, swerved the wheel fully to the left and skidded into plaintiff. Defendant noted that it was no more than four seconds from the first time he saw the emergency flashers on the plaintiff's parked car to the point of impact. The skid marks left by defendant's vehicle leading to the point of impact measured approximately 72 feet. It was dark at the time of the accident, the sky was clear and the pavement was dry.

An accident reconstructionist, Mr. William T. Jackman, testified at trial for plaintiff. Mr. Jackman opined that Mrs. Winebarger's

vehicle would have been visible and discernible to defendant, driving a 1988 Volkswagen Fox using low beam headlights, at a distance of 250 feet, under the conditions existing at the time of the accident. Mr. Jackman further testified that in preparation for his expert testimony he used the accident report, a photograph of Mrs. Winebarger's vehicle, photographs of the accident scene with measurements, depositions and statements of witnesses, and aerial photographs; that he visited the scene of the accident for the first time the day before testifying; that in his line of work, he takes all of this information and tries to develop the scenario that best fits the data; that information he used about 1988 Volkswagen Fox car headlights was information he obtained from a dealer and he did not know what specific brand of headlights was on defendant's 1988 Volkswagen Fox; that stopping distances do not depend on the type of car that is being driven; that he conservatively assumed for purposes of his reconstruction that the emergency flashers on Mrs. Winebarger's vehicle were blocked by plaintiff and Mr. Parks as they attempted to push the car; that the average perception-reaction time of an individual is one second; and that he was not aware how far Mrs. Winebarger's vehicle was on or off the road.

The judgment noted that the jury answered the following issues, to-wit:

1. Was the plaintiff, Robert A. Griffith, injured and damaged as a result of the negligence of the defendant, James Shields McCall, II?

ANSWER: Yes.

2. Did the plaintiff, Robert A. Griffith, by his own negligence, contribute to his injury or damages?

ANSWER: Yes.

3. Did the defendant, James Shields McCall, II, have the last clear chance to avoid the plaintiff's injury or damages?

ANSWER: Yes.

4. What amount, if any, is the plaintiff, Robert A. Griffith, entitled to recover for personal injuries?

ANSWER: $350,000.00.

Defendant's motions for judgment notwithstanding the verdict and for a new trial were denied by the trial court. Defendant filed timely notice of appeal to our Court.

[1] Defendant brings forth two assignments of error. Defendant first argues that the trial court erred in allowing the testimony of plaintiff's accident reconstructionist, Mr. Jackman.

We turn to North Carolina General Statutes § 8C-1, Rule 702 (1992), which states "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." The expert's opinion must be of assistance to the trier of fact in order to be admissible. *State v. Jackson*, 320 N.C. 452, 358 S.E.2d 679 (1987). "Whether the witness qualifies as an expert is exclusively within the trial judge's discretion . . . 'and is not to be reversed on appeal absent a complete lack of evidence to support his ruling.' " *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). "However, expert opinion is not helpful—and therefore is not admissible—if it is impossible for anyone, expert or nonexpert, to draw a particular inference from the evidence." *State v. Purdie*, 93 N.C. App. 269, 275, 377 S.E.2d 789, 792 (1989).

The facts herein show that Mr. Jackman holds a B.S. in civil engineering and an M.S. in civil engineering, with a major in traffic engineering; that he is a registered professional engineer and was previously a consulting engineer in the area of traffic engineering; that he currently concentrates exclusively in the field of forensic traffic engineering or accident reconstruction; and that he has performed accident reconstruction analyses previously. We believe Mr. Jackman was properly qualified to serve as an expert, and his testimony was properly admitted as expert opinion testimony given his education and experience. The testimony which Mr. Jackman gave clearly could assist the jury in the determination of the issues in this case. We note that "[i]t is the function of cross-examination to expose any weaknesses in [expert opinion testimony.]" *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 244, 311 S.E.2d 559, 571 (1984). An examination of the transcript reveals that defendant's counsel used cross-examination to attack many of the points raised in defendant's brief. This assignment of error is overruled.

[2] Defendant's remaining assignment of error is that the trial court erred in instructing and submitting the issue of last clear chance to the jury. To be entitled to a jury instruction on last clear chance, plaintiff must prove the following four elements:

> (1) the [plaintiff], by his own negligence, placed himself in a position of helpless peril, (2) the defendant was aware of, or by the exercise of reasonable care should have discovered, plaintiff's perilous position and his incapacity to escape, (3) the defendant had the time and means to avoid injury to the plaintiff by the exercise of reasonable care after he discovered or should have discovered the situation, and (4) the defendant negligently failed to use the time and means available to avoid injuring the [plaintiff.]

VanCamp v. Burgner, 99 N.C. App. 102, 103, 392 S.E.2d 453, 454 (1990), *aff'd*, 328 N.C. 495, 402 S.E.2d 375 (1991) (citation omitted), *quoting Watson v. White*, 309 N.C. 498, 308 S.E.2d 268 (1983).

In the case *sub judice*, the jury found that plaintiff, by his own negligence, put himself in a position of helpless peril. Therefore, we address the question of whether defendant, by the exercise of reasonable care, should have discovered plaintiff's perilous position and plaintiff's incapacity to escape in time to avoid injury.

In *Sink v. Sumrell*, 41 N.C. App. 242, 249, 254 S.E.2d 665, 670 (1979), our Court stated "[i]n order for the last clear chance doctrine to apply, there must be evidence that a reasonable person under the conditions existing had the time and means to avoid injury to the imperiled person[.]" We find plaintiff herein presented such evidence in the form of Mr. Jackman's testimony. Mr. Jackman stated that the stopping distance for a vehicle traveling fifty-five miles an hour was in the range of two hundred and fourteen to two hundred and forty-six feet. Mr. Jackman then affirmed that it was his opinion to a reasonable degree of engineering certainty that at a distance of two hundred and fifty feet, Mrs. Winebarger's vehicle would have been visible to defendant driving a 1988 Volkswagen Fox using low-beam headlights under the conditions present and described at the scene of the accident on 6 March 1990 at approximately 7:30 p.m. *See also Hales v. Thompson*, 111 N.C. App. 350, 432 S.E.2d 388 (1993) (where evidence presented by accident reconstructionist supported a reasonable inference that defendant had the time and means to avoid accident). Therefore,

we find the trial court properly instructed and submitted the issue of last clear chance to the jury.

No error.

Judges EAGLES and LEWIS concur.

RACHEL DUNLEAVY AND JOHNNY GLENN COBB, ADMINISTRATORS OF THE ESTATE OF JOHNNY GLENN COBB, II, DECEASED, PLAINTIFFS v. YATES CONSTRUCTION COMPANY, INC.; SPRINGFIELD PROPERTIES, INC.; ROBERT G. YATES; DOUGLAS B. YATES; AND DONALD BAYNES, DEFENDANTS

No. 9318SC370

(Filed 5 April 1994)

1. Master and Servant § 87 (NCI3d)— trench cave-in—death of employee—insufficient evidence for Woodson claim

Plaintiffs' forecast of evidence was insufficient to establish a *Woodson* claim against a corporate employer and its officers for the death of an employee in a trench cave-in while laying sewer pipe, although the walls of the trench were not shored, sloped, braced or otherwise supported when the trench reached a depth of five feet as required by OSHA regulations, where the forecast of evidence tended to show that the employer had only one previous citation relating to trenching safety procedures; the employer's officers were not at the job site when the accident occurred; the employer's foreman believed the soil at the job site was stable and had no reason to believe otherwise; the employer had ordered trench boxes from another construction site on the day of the accident but they had not yet arrived; the employer's foreman had traveled to another part of the job site believing that the crew would not complete enough work to exceed a depth of five feet in the trench before he returned; and the employer's foreman did not consciously, intentionally, and personally order the decedent to work in a portion of the trench that was between five and eight feet in depth.

Am Jur 2d, Master and Servant §§ 164, 167.

2. Labor and Employment § 190 (NCI4th)— trench cave-in—death of independent contractor's employee—nondelegable duty of care—claim against developer—insufficient evidence

In an action to recover for the death of an independent contractor's employee in the cave-in of a trench which had not been shored or sloped when it reached a depth of five feet as required by OSHA regulations, plaintiffs' forecast of evidence was insufficient to establish a claim against the developer for breach of a nondelegable duty of care arising from an inherently dangerous activity where it tended to show that the developer did not know and had no reason to know of the circumstances creating the danger to the decedent; the developer was not versed in the OSHA requirements for trench digging; and although the developer's liaison with the independent contractor had been at the job site earlier the day of the accident, he left before the trench depth began to exceed five feet and was not at the site when the accident occurred.

Am Jur 2d, Independent Contractors §§ 40, 42.

Liability of employer with regard to inherently dangerous work for injuries to employees of independent contractor. 34 ALR4th 914.

Appeal by plaintiffs from order entered 3 February 1993 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 1 February 1994.

Smith, Follin & James, by J. David James, and Ling & Farran, by Stephen D. Ling, for plaintiffs-appellants.

Henson Henson Bayliss & Sue, by Jack B. Bayliss, Jr., of counsel, for defendants-appellees Yates Construction Company, Inc., Robert G. Yates and Douglas B. Yates.

Adams Kleemeier Hagan Hannah & Fouts, by J. Alexander S. Barrett and Edward L. Bleynat, Jr., of counsel, for defendant-appellee Springfield Properties, Inc.

JOHNSON, Judge.

Plaintiffs appeal from a summary judgment order entered in favor of defendants Robert G. Yates, Douglas B. Yates, Yates Construction Company (Company), and Springfield Properties,

Inc. (Springfield). We summarize the facts of this case in part from *Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, 149-51, 416 S.E.2d 193, 195-96, *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992):

> In October, 1985, Company, an independent contractor, contracted with Springfield to construct, among other things, sewer lines within the Raven Ridge Subdivision located in Guilford County, North Carolina. Springfield owned the property on which the subdivision was being built. At this time, Johnny Glenn Cobb, II (Cobb) worked for Company as a member of a "new and inexperienced pipe crew." Cobb had no prior experience on a pipe crew. On 17 October 1985, Cobb and the other members of the crew arrived with their equipment at the Raven Ridge work site to begin installing the sewer lines. Before 17 October 1985, the pipe crew had been digging trenches to lay water lines at a location different than the Raven Ridge work site. They did not begin any trench work that day because Baynes, the crew foreman, did not plan to make much progress with such a new and inexperienced crew.
>
> On the morning of 18 October 1985, the pipe crew began the first leg of the trench work at the Raven Ridge work site. The soil at the work site was "firm and stable." At no time that morning did the depth of the trench exceed five feet. Douglas Yates, vice president of Company, "requested that trench boxes owned by the company be transferred from another construction site for use during the progress of the construction work at the Raven Ridge subdivision . . . ." By the afternoon, the pipe crew had begun the second leg of the trench work. In the early stages of this second leg, the trench was not to exceed five feet in depth. Baynes was called away to another side of the project, and while he was gone, the operator of the backhoe made more progress than Baynes had expected. In fact, the operator of the backhoe was digging well ahead [of] . . . the pipe laying crew. When Baynes left, the trench did not exceed five feet in depth. While Baynes was gone, however, the digging increased at such a rate that before Baynes could return to the trench, the trench exceeded five feet in depth in certain parts. According to Robert Yates, president of Company, "it was the policy of the Company to use trench boxes or slope the sides of a trench when conditions warranted such action, including whenever the depth of a trench

exceeded five feet . . . ." It is undisputed that Occupational Safety and Health Act (OSHA) regulations in effect at the time required trenches of more than five feet in depth to be properly supported. This trench, however, was approximately 150 feet long, the walls of the trench were vertical and had not been shored, sloped, braced, or otherwise supported to prevent a collapse, and the trench boxes which Douglas Yates had requested had not yet arrived. While Cobb was in a portion of the trench where the depth exceeded five feet, a small portion of one side of the trench collapsed and struck Cobb in the head resulting in his death. Cobb, contrary to OSHA regulations, had not been provided a hard helmet and consequently was not wearing such protective equipment at the time of his death.

The plaintiffs, in addition to filing a claim for workers' compensation benefits, filed a complaint against Company, Robert Yates, Douglas Yates, Baynes, and Springfield. As to Company, Robert Yates, Douglas Yates, and Baynes, the plaintiffs alleged that Cobb's death was the result of a deliberate and intentional assault and willful, wanton, and reckless negligence. As against Springfield, the plaintiffs alleged that Springfield was liable to the plaintiffs on the theories of inherently dangerous activity, negligent selection of Company, and negligent retention of Company. On 17 July 1989, Springfield filed a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6). . . . On 27 July 1989, the remaining defendants jointly filed an answer, and on 18 August 1989, they filed a motion to dismiss under Rule 12(b)(6), and in the alternative, for summary judgment under N.C.G.S. § 1A-1, Rule 56. . . . On 26 October 1989, the plaintiffs made a motion to stay all proceedings pending the North Carolina Supreme Court's resolution of *Woodson v. Rowland*, 92 N.C. App. 38, 373 S.E.2d 674 (1988), *disc. review allowed*, 324 N.C. 117, 377 S.E.2d 247 (1989). On 8 November 1989, the trial court denied the plaintiffs' motion to stay and granted summary judgment for Company, Robert Yates, Douglas Yates, and Baynes. The next day, the trial court granted Springfield's motion to dismiss the plaintiff's complaint. The plaintiffs appealed to this Court which, in an unpublished opinion, affirmed the trial court's orders based on *Woodson*, 92 N.C. App. 38, 373 S.E.2d 674. *Dunleavy v. Yates Constr. Co.*, 103 N.C. App. 804, 407 S.E.2d 905 (1991). The plaintiffs then

petitioned the North Carolina Supreme Court for discretionary review of this Court's decision, and on 6 November 1991, the North Carolina Supreme Court allowed the plaintiffs' petition for discretionary review "for the limited purpose of entering the following order: the case is remanded to the Court of Appeals for reconsideration in light of" *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). *Dunleavy v. Yates Constr. Co.*, 330 N.C. 194, 412 S.E.2d 54 (1991).

On remand, our Court in *Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, 416 S.E.2d 193 affirmed the trial court's order granting Springfield's motion to dismiss the plaintiffs' claims for negligent selection and retention; affirmed the trial court's order granting Baynes' motion for summary judgment; reversed and remanded the trial court's order granting Springfield's motion to dismiss the plaintiffs' claim for breach of a nondelegable duty; and remanded the trial court's order granting summary judgment for Company, Robert G. Yates, and Douglas B. Yates for a *de novo* hearing. Back at the superior court level, discovery was completed and after summary judgment orders were entered in favor of defendants Company, Robert G. Yates, Douglas B. Yates, and Springfield, plaintiffs appealed to our Court.

Plaintiffs argue that they proffered sufficient evidence to withstand summary judgment (1) on the claim against Robert G. Yates, Douglas B. Yates, and Company, and (2) on the claim against Springfield. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. North Carolina General Statutes § 1A-1, Rule 56 (1990). "In summary judgment, the burden is on the moving party to (1) prove an essential element of the opposing party's claim is non-existent, or (2) show through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Rose v. Steen Cleaning, Inc.*, 104 N.C. App. 539, 540, 410 S.E.2d 221, 222 (1991). We address plaintiffs' claims separately.

Plaintiffs' Claim Against Robert G. Yates, Douglas B. Yates, and Company

[1] We note that Robert G. Yates and Douglas B. Yates, as officers, were acting in capacities as agents for their principal, Com-

pany, on the date the accident herein occurred. Our Court has stated "[t]he principal is liable for the acts of his agent, whether malicious or negligent, and the employer for similar acts of his employees[.] . . . The test is whether the act was done within the scope of his employment and in the prosecution and furtherance of the business which was given him to do." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 492, 340 S.E.2d 116, 122, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986) (citation omitted). "A corporation can act only through its agents, which include its corporate officers." *Woodson*, 329 N.C. at 344, 407 S.E.2d at 231 (citation omitted). Therefore, the following analysis of the actions of Robert G. Yates and Douglas B. Yates will apply to Company as well.

The standard to be applied to the conduct of Robert G. Yates and Douglas B. Yates is found in *Woodson v. Rowland*, that "when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer." *Id.* at 340-41, 407 S.E.2d at 228. The *Woodson* Court placed great emphasis on the extreme facts in *Woodson*. We have reviewed the evidence in the case *sub judice* and find that the actions of Robert G. Yates and Douglas B. Yates do not rise to this "substantial certainty" level as in *Woodson*.

Some key differences between the facts in *Woodson* and the instant case are the following: In *Woodson*, the employer had been cited four times in the previous six and a half years for violating regulations governing trenching safety procedures; in the instant case, the employer had one previous citation relating to trenching safety procedures. In *Woodson*, the employer was at the job site when the accident occurred; in the instant case, Robert G. Yates was not in town the day of the accident and Douglas B. Yates had stopped by the site briefly the morning of the accident. In *Woodson*, the general contractor's foreman, working the previous day on a separate trench which was not sloped, shored or braced, refused to let his men work until they had a trench box, and yet the employer ordered his crew to work; in the instant case, employers' foreman, Mr. Baynes, a man with many years experience in the field, believed the soil was stable and had no reason to believe otherwise. In *Woodson*, a trench box was available for

use on the day of the accident and the employer chose not to use it; in the instant case, the employers had ordered trench boxes for the site but they had not yet arrived. In *Woodson*, the employer knew the trench had a depth of fourteen feet; in the instant case, employers' foreman, Mr. Baynes, had traveled to another part of the job site believing that the crew would not complete enough work to exceed a depth of five feet in the trench before he returned. Finally, in *Woodson*, the employer consciously, intentionally and personally ordered the decedent to work in the fourteen foot trench; in the instant case, employers' foreman, Baynes, did not consciously, intentionally and personally order decedent to work in a portion of the trench which was somewhere between five and eight feet. Based on the foregoing, we find that the conduct of Robert G. Yates and Douglas B. Yates did not rise to the level of misconduct described in *Woodson*.

Therefore, we find that summary judgment was properly entered by the trial court as to defendants Robert G. Yates, Douglas B. Yates, and Company.

Plaintiffs' Claim Against Springfield

[2] As to plaintiffs' claim against Springfield for breach of the nondelegable duty of care arising from an inherently dangerous activity, in *Dunleavy v. Yates Construction Co.*, 106 N.C. App. at 153, 416 S.E.2d at 197, our Court stated:

> Where a landowner hires an independent contractor to perform an inherently dangerous activity, and the owner knows or should know of the circumstances creating the danger, the owner "has the nondelegable duty to the independent contractor's employees 'to exercise due care to see that . . . [these employees are] provided a safe place in which to work and proper safeguards against any dangers as might be incident to the work [are taken.]' " [(Citation omitted)]. *Woodson*, 329 N.C. at 357, 407 S.E.2d at 238. Read as a whole and viewed liberally, the plaintiffs' complaint alleges sufficient facts to support the substantive elements of their claim against Springfield for breach of this nondelegable duty. The plaintiffs alleged that Springfield hired Company, an independent contractor, to perform an inherently dangerous activity, i.e., digging a trench without required shoring, bracing, or other supportive devices, and that Springfield "had direct knowledge" of the circumstances creating the danger. Furthermore, the plaintiffs alleged that Springfield

breached this duty and that the breach proximately caused their damages.

A review of the evidence presented herein indicates that Springfield did not know and had no reason to know of the circumstances creating the danger in the instant case, nor did Springfield have direct knowledge of the circumstances creating the danger. Springfield's liaison to Company was an independent contractor, Ralph H. Morgan; Springfield was not even versed in the OSHA requirements for trench digging. Further, Springfield did not know that Company had commenced its work at the site. Like the owner of the property where the accident occurred in *Woodson*, Springfield was not on notice of any dangerous condition. *See also Cook v. Morrison*, 105 N.C. App. 509, 413 S.E.2d 922 (1992). Finally, although Mr. Morgan had been at the site earlier the day of the accident, he left before the trench depth began to exceed five feet, and was not at the site when the accident occurred.

As a result, we find that summary judgment was properly entered by the trial court as to defendant Springfield.

The decision of the trial court is affirmed.

Judges EAGLES and LEWIS concur.

ROBERT BRUCE FALLS, PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY & ALLSTATE INSURANCE COMPANY, DEFENDANTS

No. 9327SC312

(Filed 5 April 1994)

1. Insurance § 1155 (NCI4th)— walking along road seeking mechanical assistance—"use" of vehicle—person insured—UIM coverage

Plaintiff was "using" his father's automobile at the time of an accident and was thus a "person insured" under his father's automobile policy for UIM purposes pursuant to N.C.G.S. § 20-279.21(b)(3)(b) when he was struck by an automobile

while walking on the shoulder of the road in search of mechanical assistance after the automobile he was driving broke down.

Am Jur 2d, Automobile Insurance §§ 129-133.

2. Insurance § 530 (NCI4th)— primary UIM insurer—failure to protect subrogation rights—credit for tortfeasor's liability coverage

The primary provider of UIM coverage was entitled to credit for the $25,000 paid by the tortfeasor's liability insurer even though it failed to protect its subrogation rights by matching the amount of the tentative settlement. The maximum amount of coverage available to plaintiff is the same regardless of who receives credit for the liability coverage provided by the tortfeasor's insurer, and the excess UIM provider still gets the benefit of the credit for the liability coverage because its UIM coverage does not apply until the liability coverage and the primary UIM coverage are exhausted.

Am Jur 2d, Automobile Insurance §§ 293 et seq.

Appeal by defendant North Carolina Farm Bureau Mutual Insurance Company and cross-appeal by plaintiff from order entered 20 January 1993 by Judge B. Craig Ellis in Gaston County Superior Court. Heard in the Court of Appeals 13 January 1994.

Carpenter & James, by James R. Carpenter and Larry G. Hoyle, for plaintiff-appellee/appellant.

Willardson and Lipscomb, by William F. Lipscomb, for defendant-appellant/appellee Farm Bureau.

JOHNSON, Judge.

On 30 October 1988, plaintiff, Robert Bruce Falls, was driving a 1977 Ford automobile, owned by his father, Robert G. Falls, when the automobile stalled near the Lowell-McAdenville exit ramp on Interstate 85 in Gaston County. Plaintiff then exited the vehicle and began walking up the exit ramp seeking assistance. After walking approximately one-half mile, plaintiff was struck by a 1984 automobile being operated by Karyn Bolding Arnette (hereafter Arnette). As a result of the collision, plaintiff sustained serious injuries.

Arnette's vehicle was insured by defendant, Allstate Insurance Company (hereafter Allstate), and had the minimum amount of liability insurance mandated by the provisions of North Carolina General Statutes § 20-279.21 (1993) of $25,000.00. The 1977 Ford plaintiff was operating was covered by a policy issued by defendant, North Carolina Farm Bureau Mutual Insurance Company (hereafter Farm Bureau) to plaintiff's father, and provided for underinsured motorists (UIM) coverage with limits of liability of $50,000.00 per person. Additionally, plaintiff had a personal automobile insurance policy with Allstate for two automobiles, which provided (UIM) in the amount of $50,000.00 per person per accident.

In an effort to protect its subrogation rights, Allstate tendered the coverage of $25,000.00 from Arnette's policy to plaintiff, and matched the tender from plaintiff's policies. Plaintiff then informed Farm Bureau of Allstate's tender of coverage; however, Farm Bureau did not match the tender.

Plaintiff filed a complaint against defendants Farm Bureau and Allstate on 6 July 1992 seeking a declaratory judgment that plaintiff was an insured under the UIM coverage of Farm Bureau. Defendant Farm Bureau filed an answer on 17 August 1992. Defendant Allstate's answer was filed on 2 December 1992.

Defendant Farm Bureau filed a motion for summary judgment with supporting affidavits and a motion to amend its complaint on 8 January 1993. The motion for summary judgment and the motion to amend were heard before Judge B. Craig Ellis in Gaston County Superior Court on 19 January 1993, after which the court granted defendant Farm Bureau's motion to amend. On 20 January 1993, the court entered an order and declaratory judgment, which concluded and declared in pertinent part that: "Plaintiff was an insured at the time of the accident in question of the UIM coverage of the Farm Bureau policy in question and; 2. Farm Bureau is entitled to all the credit for the tortfeasor's liability coverage in the amount of $25,000.00 because Farm Bureau's UIM coverage is primary." Defendant Farm Bureau gave notice of appeal to our Court on 12 February 1993. Plaintiff cross-appealed to our Court on 19 February 1993.

The question presented on appeal by defendant Farm Bureau is whether the trial court erred in concluding and declaring that plaintiff was an insured, at the time of the accident in question, of the UIM coverage of the Farm Bureau policy.

[1] Farm Bureau contends that plaintiff is not an "insured" under the UIM portion of the Farm Bureau policy because plaintiff was not "using" the automobile at the time of the accident, as required by the statutory and/or policy definitions of "insured."

Farm Bureau's policy definition of insured is as follows:

Insured as used in this part means:

1. You or any family member;
2. Any other person occupying;
   a. your covered auto; or
   b. any other auto operated by you.

"You" in this case refers to plaintiff's parents, Robert G. and Edith M. Falls. "Family member" is defined in the policy as "a person related to you by blood, marriage, or adoption who is a resident of your household." "Occupying" means in; upon; getting in, or out of. Thus, plaintiff does not qualify as an insured under the policy definition of insured, because he was not a resident of his parents' household at the time of the accident. Additionally, because plaintiff was not "in; upon; getting in, or out of" the vehicle, he was not occupying the vehicle at the time of the accident.

Although plaintiff is not an insured under Farm Bureau's policy definition of insured, plaintiff may nonetheless qualify as an insured under the statutory definition of "persons insured" under North Carolina General Statutes § 20-279.21(b)(3) (1993) for purposes of UIM coverage. This is because our courts have consistently held:

> that when a statute is applicable to the terms of a policy of insurance, the provisions of that statute become part of the 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 will prevail.

Sutton v. Aetna Casualty & Surety Co., 325 N.C. 259, 263, 382 S.E.2d 759, 762, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989) (citations omitted).

North Carolina General Statutes § 20-279.21(b)(3)(b) defines "persons insured" as follows:

> the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while

> in a motor vehicle or otherwise, and *any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies* and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of the motor vehicle. (Emphasis added.)

As we have already determined that plaintiff was not a member of the insured's household at the time of the accident, we must decide whether plaintiff, who was operating the vehicle with his father's (the insured's) consent, was "using" the vehicle at the time of the accident.

In *Whisnant v. Insurance Co.*, 264 N.C. 303, 141 S.E.2d 502 (1965), the North Carolina Supreme Court held that a plaintiff struck by another vehicle as he was trying to push his vehicle onto the shoulder of the road was "using" the vehicle at the time of the accident. The Court opined that a person "uses" a motor vehicle when he[/she] purposefully uses it as a "means of transportation" to a destination. *Id.* at 308, 141 S.E.2d at 506. Additionally, the Court recognized that a person "uses" a motor vehicle when he changes a flat tire during a trip. Quoting *Madden v. Farm Bureau Mutual Automobile Ins. Co.*, 82 Ohio App. 111, 79 N.E.2d 586 (1948), the Court stated:

> The changing of the tires was just as much a part of the use of the automobile for that journey as stopping to replenish the gasoline or oil, or for the change of a traffic light, or to remove ice, snow, sleet, or mist from the windshield. By such acts, the journey would not be abandoned. Such adjustments are a part of the use of the automobile—as much as the manipulation of the mechanism by the operator.

Whisnant, 264 N.C. at 308, 141 S.E.2d at 506.

In *Leonard v. N.C. Farm Bureau Mut. Ins. Co.*, 104 N.C. App. 665, 411 S.E.2d 178 (1991), *rev'd on other grounds*, 332 N.C. 656, 423 S.E.2d 71 (1992), our Court extended the Supreme Court's holding in *Whisnant*, finding that the plaintiff, while not the driver of the vehicle, was nonetheless "using" the automobile at the time of the accident, when he was helping the owner change a flat tire.

In the instant case, plaintiff was walking on the shoulder of the road in search of mechanical assistance after the vehicle he

was driving broke down. After reviewing the case law, and liberally construing the word "using" to ensure that the beneficial purpose of the Financial Responsibility Act will be accomplished, we find that plaintiff was "using" the vehicle at the time of the accident. There was a causal connection between plaintiff's injury and plaintiff's use of the vehicle. Additionally, we believe that immediately seeking help by walking to the nearest point to secure help for a vehicle that has become disabled, is just as much a part of the use of the vehicle for the journey as stopping to replenish the gasoline or changing a flat tire during a trip. But for the vehicle becoming disabled, the journey would not have been abandoned. As such, the trial court correctly found that plaintiff was an insured of Farm Bureau at the time of the accident.

By plaintiff's cross-appeal, plaintiff contends that the trial court erred in determining that Farm Bureau is entitled to all of the credit for the tortfeasor's liability coverage of twenty-five thousand dollars ($25,000.00).

[2] Plaintiff argues that Farm Bureau has no interest in the twenty-five thousand dollars ($25,000.00) paid by Arnette's liability carrier Allstate because Farm Bureau failed to protect its subrogation rights by matching the amount of the tentative settlement. Therefore, plaintiff contends, defendant Allstate is entitled to the credit for the amount paid under Arnette's liability policy.

North Carolina General Statutes § 20-279.21(b)(4) (1993) states in pertinent part:

> [T]he limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.

Therefore, the maximum amount of coverage available to plaintiff remains the same, regardless of who receives credit for the liability coverage provided by Allstate. However, because Farm Bureau is the primary provider of UIM coverage, Farm Bureau is entitled to the credit for the liability coverage. The excess UIM coverage providers still get the benefit of the credit for the coverage because their UIM coverage does not apply until the liability coverage and the primary UIM coverage are exhausted.

Moreover, we note that plaintiff is not the true aggrieved party; the true aggrieved party in this case is Allstate. However, Allstate did not appeal the decision of the trial court. As such, we uphold the decision of the trial court that Farm Bureau is entitled to all the credit for Arnette's liability coverage.

The decision of the trial court is affirmed.

Judges EAGLES and LEWIS concur.

DATAFLOW COMPANIES, INC., PLAINTIFF-APPELLEE v. LISA HUTTO, LISA HUTTO D/B/A PALMETTO ALLERGY, P. A., AND PALMETTO ALLERGY & ASTHMA, P. A., DEFENDANTS-APPELLANTS

No. 9314SC322

(Filed 5 April 1994)

Courts § 16 (NCI4th)— nonresident defendants—shipment of goods to another state—long-arm jurisdiction—minimum contacts

The "long-arm" statute, N.C.G.S. § 1-75.4(5), provided the statutory basis for this state's exercise of personal jurisdiction over the nonresident defendants in plaintiff's action for breach of contract, recovery in *quantum meruit*, and failure to pay on an open account, and defendants had sufficient contacts with this state so that the exercise of personal jurisdiction over them did not violate due process, where defendants entered into an agreement to purchase a computer system from plaintiff; all of the computer components were shipped from plaintiff's office in Durham; plaintiff spent considerable time in its Durham office designing and engineering defendants' computer system; plaintiff sent installation specialists from Durham to service defendants' computer system and to assist defendants in the operation of the system; defendants contacted plaintiff in Durham for technical support; defendants ordered forms and computer supplies from plaintiff which were shipped from plaintiff's Durham office; and defendants sent payments for such items to plaintiff's Durham office.

Am Jur 2d, Courts § 119; Process §§ 184, 190.

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

Appeal by defendants from order entered 19 November 1992 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 13 January 1994.

Faison & Fletcher, by Reginald B. Gillespie, Jr., for plaintiff-appellee.

Nelson, Mullins, Riley & Scarborough, by Robert O. Meriwether, for defendants-appellants.

JOHNSON, Judge.

Plaintiff, Dataflow Companies, Inc., is a North Carolina corporation, licensed to do business in the State of South Carolina, engaged in the sale and service of computer equipment and software for physicians and businesses. Defendant, Lisa Hutto, is a medical doctor in Columbia, South Carolina who conducts business in the name of Palmetto Allergy, P. A., and Palmetto Allergy and Asthma, P. A. Defendant Palmetto Allergy and Asthma, P. A. is a professional organization organized under the laws of South Carolina and with its principal place of business in Columbia, South Carolina.

In the fall of 1990, plaintiff demonstrated the features and capabilities of its computer systems to defendants. Sometime after this demonstration, the parties, namely, Mr. Dickson as plaintiff's representative, and defendant Hutto and defendant's husband, Attorney Keith Hutto, as representatives of defendants, began negotiations for the purchase of a computer system by defendants. The negotiations ended in defendants purchasing a computer system, which consisted of hardware, software, and related items. In conjunction with the purchase of the computer system, defendants subscribed to one year maintenance agreements for the hardware and software components of the computer system. These agreements were renewable at the option of defendants for up to five years.

After the installation of the computer system, in accordance with the hardware and software maintenance agreements, plaintiff's employees assisted defendants by making office visits, pro-

gramming modifications, and providing telephone support via an 800 number. Even after defendants' hardware and software maintenance agreements expired, defendants called upon plaintiff to provide maintenance and support services, without renewing the maintenance agreements.

In addition to purchasing their computer system from plaintiff, defendants also purchased computer forms, supplies and customized forms from plaintiff. Between October 1990 and May 1992, defendants placed up to 28 orders for forms and computer supplies with plaintiff. All of the orders were processed in Durham, North Carolina, and many were shipped to defendants from Durham, North Carolina.

Plaintiff filed a complaint against defendants on 10 June 1992 for breach of contract, *quantum meruit*, and failure to pay on an open account, in Durham County Superior Court. Defendants filed motions to dismiss plaintiff's complaint for improper division and lack of personal jurisdiction on 18 August 1992. On 3 September 1992, plaintiff filed a motion to transfer the case to the district court division in the event that the superior court determined that plaintiff's action was filed in the improper division. The motions were heard on 2 November 1992 in Durham County Superior Court before Judge Robert H. Hobgood. On 19 November 1992, Judge Hobgood issued an order denying defendants' motions to dismiss, and declaring plaintiff's conditional motion to transfer moot.

Defendants gave written notice of appeal to this Court on 2 December 1992, pursuant to North Carolina General Statute § 1-277(b) (1983), which states in pertinent part: "Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant. . . ."

Defendants' sole assignment of error is that the trial court committed reversible error in denying defendants' motion to dismiss plaintiff's complaint for lack of personal jurisdiction. We disagree.

Case law dictates that we apply a two step process in determining whether our state courts have personal jurisdiction over nonresident defendants. "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Tom Togs*,

Inc. v. Ben Elias Industries Corp., 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986).

I

Long-Arm Statute

North Carolina's "long-arm" statute, North Carolina General Statutes § 1-75.4(5) (1983), establishes the jurisdictional authority of the North Carolina courts with respect to plaintiff's causes of action and provides in pertinent part:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:
>
> . . .
>
> (5) Local Services, Goods or Contracts.—In any action which:
>
> . . .
>
> b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or
>
> c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or
>
> d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or
>
> . . . .

The provisions of North Carolina General Statutes § 1-75.4 are to be liberally construed in favor of finding personal jurisdiction, subject only to due process considerations. *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973). Accordingly, if the evidence supports a finding which comports with one of the above provisions, jurisdiction will follow under the long-arm statute.

The evidence in the instant case indicates that this case is governed by the above sections. The evidence indicates that defendants contacted plaintiff in Durham, North Carolina, for technical support, via an 800 number and that plaintiff modified software and computer programs for defendants' computer in Durham, North Carolina. Additionally, plaintiff shipped computers, forms, and computer supplies to defendants from its office in Durham, North Carolina. Since plaintiff's present actions for breach of contract, recovery in *quantum meruit* and failure to pay on an open account relate to the aforementioned goods and services provided by plaintiff, North Carolina General Statutes § 1-75.4(5) plainly provides the statutory basis for this State's exercise of personal jurisdiction over the non-resident defendants.

II

Due Process Requirements

The second part of the two-step inquiry, due process, prohibits our state courts from exercising jurisdiction unless defendants have 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." *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (citations omitted). Although no single factor controls, factors for determining the existence of minimum contacts include, the quality and quantity of contacts, the source and connection of the cause of action with those contacts, convenience to the parties and the interest of the forum state. *Sola Basic Industries v. Electric Membership Corp.*, 70 N.C. App. 737, 321 S.E.2d 28 (1984).

In the instant case, defendants entered into an agreement to purchase a computer system from plaintiff. All the components for the computer system were shipped from plaintiff's office in Durham, North Carolina, and plaintiff spent considerable time and energy in its Durham office engineering and designing defendants' computer system. On several occasions, plaintiff even sent installation specialists from its Durham office to service defendants' computer system and to assist defendants in the operation of the computer system. Additionally, defendants ordered forms and computer supplies from plaintiff, many of which were shipped from the Durham office. In fact, defendants even forwarded the payments for these items to plaintiff's Durham office.

Based on this evidence, we conclude that defendants had sufficient minimum contacts to justify this State's exercise of personal jurisdiction over defendants without violating the due process clause. For this reason, the decision of the trial court denying defendants' motion to dismiss for lack of personal jurisdiction is affirmed.

Affirmed.

Judges EAGLES and LEWIS concur.

RICHARD F. FLORADAY, JR. AND WIFE, CHRISTINE E. FLORADAY, APPELLANT v. DON GALLOWAY HOMES, INC., APPELLEE

No. 9226SC983

(Filed 5 April 1994)

Negligence § 125 (NCI4th)— negligent construction of retaining wall—subsequent purchaser of house—claim against builder

A subsequent purchaser of a house has a claim against the builder for the builder's negligent construction of a retaining wall adjacent to the house when the builder's negligence in constructing the retaining wall has materially affected the use and enjoyment of the house itself.

Am Jur 2d, Negligence §§ 82 et seq., 130 et seq.

Judge JOHN concurring.

Appeal by plaintiffs Richard and Christine Floraday from judgment on the pleadings entered 25 June 1992 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 September 1993.

Hedrick, Eatman, Gardner & Kincheloe, by Gregory C. York, for plaintiffs-appellants.

Parham, Helms, & Kellam, by Raymond L. Lancaster and R. Susanne Knox, for defendant-appellee.

WYNN, Judge.

The question presented in this case is whether a negligent construction action can be maintained by subsequent buyers against

the builder of a backyard retaining wall. We hold that it can and reverse the trial court's grant of summary judgment.

On or about 27 August 1984 Charles and Kathleen Gindhart contracted to buy a home at 11838 Post Ridge Court from Don Galloway Homes, Inc. ("Galloway"), the home's builder. At the time they made the contract, the house was partially constructed. Because the Gindharts were concerned that the gradient of the backyard might cause a mudslide, they conditioned the sale on construction of adequate mudslide protection. Pursuant to this condition, Galloway built a backyard retaining wall using railroad ties. The sale closed on 19 October 1984.

Plaintiffs Richard and Christine Floraday purchased this house from the Gindharts on 24 August 1987. On or about 29 June 1990, as the Floradays prepared to sell the home, a structural inspection of the property uncovered problems with the retaining wall. On 12 September 1990 the Floradays sued Galloway for damages arising from negligent construction of the retaining wall. The Floradays characterized the wall as "infested with termites, improperly treated for ground contact, improperly anchored, and on the verge of collapse," and as "quite dangerous." Galloway moved for judgment on the pleadings. Its motion was granted on 25 June 1992. Plaintiffs appeal.

Since the court considered affidavits and photographs as well as the pleadings, we will treat plaintiff's appeal as an appeal from summary judgment under Rule 56. N.C. Gen. Stat. § 1A-1, Rule 12(c); *Battle v. Clanton*, 27 N.C. App. 616, 220 S.E.2d 97 (1975), *disc. rev. denied*, 289 N.C. 613, 223 S.E.2d 391 (1976). Thus, we must determine whether there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 271 S.E.2d 399 (1980), *cert. denied*, 276 S.E.2d 283 (1981); *Smith v. Smith*, 65 N.C. App. 139, 308 S.E.2d 504 (1983).

The question before us is whether a subsequent purchaser of a residential home has a cause of action against the original builder for the builder's negligent construction of a retaining wall adjacent to the house. The answer depends on whether the duty of reasonable care in construction owed by a home builder to a subsequent home purchaser extends beyond the house itself.

In *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985), our Supreme Court ruled that a subsequent purchaser may sue the builder of a house for negligent construction. *See also Dellinger v. Lamb*, 79 N.C. App. 404, 339 S.E.2d 480, *disc. rev. denied*, 317 N.C. 702, 347 S.E.2d 39 (1986); *Evans v. Mitchell*, 77 N.C. App. 598, 335 S.E.2d 758 (1985), *disc. rev. denied*, 316 N.C. 376, 342 S.E.2d 893 (1986). In other jurisdictions, *see Coburn v. Lenox Homes, Inc.*, 378 A.2d 599 (Conn. 1977); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979); *Brown v. Fowler*, 279 N.W.2d 907 (S.D. 1979). In *Oates*, plaintiffs were the third owners of a house who discovered conditions characterized as "defective, dangerous and unsafe," including a faulty drain pipe, use of non-grade-marked lumber, noncompliance with some North Carolina Uniform Residential Building Code weight bearing requirements, "improper and insufficient nailing on bridging and beams, and faulty and shoddy workmanship." 314 N.C. at 277, 333 S.E.2d at 224. They sued the builder for negligent construction of the house. The *Oates* Court pointed out that a suit in negligence does not require contractual privity between the parties:

> The duty owed by a defendant to a plaintiff may have sprung from a contractual promise made to another; however, the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise. 314 N.C. at 279, 333 S.E.2d at 225.

Thus, the proper inquiry is not whether the parties had a contract, but whether "plaintiff and defendant are in a relationship in which the defendant has a duty imposed by law to avoid harm to the plaintiff." *Id.* The Court concluded that the law does impose a duty of reasonable care between a home builder and a subsequent purchaser. In finding this duty, the Court recognized that a home is unlike any other consumer purchase, such as a car or furniture. It reasoned that a home is a tremendous financial undertaking and is often the largest single investment a consumer ever makes. At the same time, the typical home buyer is ill-equipped to evaluate the quality of workmanship, especially where defects are hidden from sight. The need for special protection of these investments justifies extending the duty of reasonable care to subsequent purchasers.

The Supreme Court's rationale informs our reasoning today. The Floradays allege a loss of the investment they made in their

property that is similar to the loss they would face if the house itself had been damaged. To limit the builder's duty to the four walls of the house itself would be formalistic and would ignore the reality of the financial risks undertaken by property purchasers. We believe there can be other, related structures on a residential property which are so essential to the use and enjoyment of the house that they should be subject to the same protection as the house itself. Therefore, we hold that a subsequent purchaser of a home has a cause of action against the home's builder where the builder's negligence in building a structure on the premises has materially affected the use and enjoyment of the house itself.

In the subject case, there are factual questions as to whether the alleged damage to the retaining wall has materially affected the use and enjoyment of the house and if so, whether it was due to a breach of duty by Galloway. Accordingly, summary judgment is reversed.

Reversed.

Chief Judge Arnold concurs.

Judge John concurs in a separate opinion.

Judge JOHN concurring.

I concur in the result reached by the majority because I also believe reversal of the entry of summary judgment for Galloway is required by *Oates v. JAG, Inc.* However, I respectfully decline to join in the majority's gloss upon *Oates* "that a subsequent purchaser of a home has a cause of action against the home's builder where the builder's negligence in building a structure on the premises *has materially affected the use and enjoyment of the house itself.*" (Emphasis added).

Neither plaintiffs nor Galloway, in their briefs to this Court, advocate the "materially affected" test adopted by the majority in its holding, a question arguably never determinable as a matter of law. Rather, plaintiffs assert that:

> the application of *Oates* should not be limited to the specific dwelling unit . . . . The retaining wall in question was just as much a part of the home purchased by [plaintiffs] as a detached garage, paved driveway, or other fixture which a

builder may construct on a lot in order to complete a property for sale.

Plaintiffs' further assert liability for negligent construction should not be limited to fixtures actually "attached to or physically a part of the actual house structure."

I find plaintiffs' argument persuasive, as well as the majority's comment that "[t]o limit the builder's duty to the four walls of the house itself would be formalistic . . . ." It is uncontroverted that the retaining wall in question, although not physically attached to the house structure, was part and parcel of the original construction of the residential premises purchased by plaintiffs, and indeed part of the purchase contracted for by the original buyers. As such, it fell within a fair interpretation of the purview of *Oates* without the majority's imposition of a new "materially affected" test, and summary judgment should not have been entered against the plaintiffs herein.

Accordingly, I concur only in the result reached by the majority.

STATE OF NORTH CAROLINA v. TONEY GEAN McEACHERN

No. 9316SC374

(Filed 5 April 1994)

Constitutional Law § 251 (NCI4th)— narcotics—confidential informant—refusal to furnish identity—dismissal

The trial court did not abuse its discretion in dismissing charges of felonious possession with intent to sell or deliver marijuana, possession with intent to sell or deliver crack cocaine, possession with intent to manufacture crack cocaine, and maintaining a drug dwelling where the charges resulted from a search of defendant's home pursuant to a warrant based upon information provided by a confidential informant and the State refused to disclose the informant's identity after the court granted defendant's motion to require disclosure. The only evidence linking defendant to possession of the drugs and maintaining his premises for the use or sale of drugs to others was an officer's testimony of what the informant

told him. The informant could testify that defendant was not in fact the person selling drugs, that the drugs belonged to a third party, and could corroborate defendant's alibi by testifying that he did not observe defendant on the premises at the time of the drug buy. The testimony was sufficient to support the trial court's finding that the defendant's testimony established the informant as a material and necessary witness to the defense to corroborate defendant's alibi, point toward third party guilt, and show nonexclusivity of the defendant's premises.

Am Jur 2d, Criminal Law § 1002.

Accused's right to, and prosecution's privilege against, disclosure of identity of informer. 76 ALR2D 262.

Appeal by the State from dismissal entered 3 February 1993 by Judge Henry Barnette, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 30 November 1993.

Attorney General Michael F. Easley, by Assistant Attorney General Jeffrey P. Gray, for the State-appellant.

Public Defender Angus B. Thompson, Jr., by Assistant Public Defender Gayla Graham Biggs, for defendant-appellee.

WYNN, Judge.

Defendant, Toney Gean McEachern, was charged with felonious possession with intent to sell or deliver marijuana, possession with intent to sell or deliver crack cocaine, possession with intent to manufacture crack cocaine, and maintaining a drug dwelling on 8 March 1991. These charges resulted from a search of defendant's trailer home pursuant to a warrant that was based upon information provided by a confidential informant.

At a pretrial hearing, police officer Barnett testified that, on 7 March 1991, a confidential informant told him he had observed a large quantity of cocaine in defendant's trailer home. Officer Barnett testified that the informant said that the person selling the cocaine was a black man named Toney, who was approximately 5'8" or 5'9" and had formerly worked for the Department of Transportation or road crews. Officer Barnett testified that he gave the informant some money, searched him and then drove him to defendant's trailer during the day on 8 March 1991. Officer Barnett sat

outside in the car while the informant went into the trailer. Officer Barnett testified that the informant returned to the car, showed him some crack cocaine and told him that he bought it from "Toney" and that there was cocaine inside the trailer. The officer then prepared a "John Doe" search warrant (a warrant that does not name a person to be searched) and had it issued by a magistrate. On 8 March 1991, at approximately 6:00 p.m., Officer Barnett and other officers took the warrant to defendant's trailer. As they approached the premises, they observed defendant backing his truck out of the front yard. The officers followed defendant's truck and pulled him over. Defendant and his companion, Charles McLaughton, were searched. One of the officers told defendant to drive back to his home. He did so, followed by the police. The officers entered the trailer, where they confiscated marijuana and crack cocaine.

Defendant testified to the following: On 7 March 1991 at 2:30 p.m. he gave his nephew, Charles Devince Jackson, permission to use his trailer home for a party. Defendant then left the trailer and went to his uncle's house in the town of Lumber Bridge, North Carolina. He remained at his uncle's house until approximately 5:30 p.m. on 8 March 1991, when he received a telephone call from Charles McLaughton, his next-door neighbor. McLaughton asked defendant for a ride to the town of Red Springs. Defendant then went to McLaughton's home and picked him up. Defendant was not in his residence from 2:30 p.m. on 7 March until 6:00 p.m. on 8 March, when he entered in the company of the police officers. There were no controlled substances in his residence when he departed at 2:30 p.m. on 7 March 1991 and he had no knowledge of who was inside his residence during his absence. He had not seen Jackson since he gave him permission to use his home and he had fruitlessly attempted to find Jackson.

Following this hearing, the court found that "the defendant's testimony . . . established the informant as a material and necessary witness to the defense to corroborate the defendant's alibi, point toward third party guilt, and show nonexclusivity of the defendant's premises." The court granted defendant's motion to require the prosecution to disclose the police informant's identity. The prosecution refused to disclose the informant's identity. Upon defendant's motion, the court dismissed all of the charges with prejudice "on the basis that the prosecutor's refusal to provide counsel for the defense with the identity of the informant in these cases violated the defendant's due process rights as guaranteed by the North

Carolina Constitution and the Constitution of the United States." The State appeals the court's order pursuant to N.C. Gen. Stat. § 15A-1445(a)(1) (1988), which provides that "the State may appeal from the superior court to the appellate division . . . [w]hen there has been a decision or judgment dismissing criminal charges as to one or more counts." The State argues that the trial court erred both in ordering the prosecution to provide the informant's identity and in ordering dismissal of the charges. For the following reasons, we disagree.

The State contends that in granting defendant's motion to order the prosecution to provide the informant's identity, the trial court failed to make sufficient findings of fact; its findings were not supported by the evidence; its conclusion of law was incorrect; and it abused its discretion.

In *State v. Gilchrist*, 71 N.C. App. 180, 182, 321 S.E.2d 445, 447-48 (1984), *disc. rev. denied*, 313 N.C. 332, 327 S.E.2d 894 (1985), our Supreme Court held:

> The prosecution is privileged to withhold the identity of an informant unless the informant was a participant in the crime or unless the informant's identity is essential to a fair trial or material to defendant's defense (citations omitted). A defendant must make a sufficient showing that the particular circumstances of his case mandate disclosure before the identity of a confidential informant must be revealed.

An informant should be disclosed "[i]f the informant can testify as to the details surrounding the *actual* crime . . . ." *State v. Parks*, 28 N.C. App. 20, 25, 220 S.E.2d 382, 386 (1975), *disc. rev. denied*, 289 N.C. 301, 222 S.E.2d 701 (1976). Here, three of the charges were possession offenses under N.C. Gen. Stat. § 90-95(a)(1), and one was for knowingly maintaining or keeping a dwelling place resorted to by others for the unlawful use or buying of a controlled substance, N.C. Gen. Stat. § 90-108(a)(7). The only evidence linking defendant to possession of the drugs and maintaining his premises for the use or sale of drugs to others was Officer Barnett's testimony that the informant told him that, when he observed the cocaine at defendant's residence on 7 March, there was a man selling it identified as Toney, and that when they returned for the controlled drug buy, the same man sold him drugs. Defendant argued that if called as a witness, the informant could testify that defendant was not in fact the person who was selling drugs and who sold

him drugs. The informant could also testify that the drugs belonged instead to a third party. Both of these statements would help to show that defendant did not possess the drugs.

Furthermore, defendant's defense consisted of an alibi which placed him away from the trailer during the drug buy and placed a third party, Jackson, inside the trailer at that time. Defendant argued that the informant could corroborate his alibi by testifying that he did not observe defendant on the premises at the time of the drug buy. This would help to show both that defendant did not possess the drugs and that he did not knowingly maintain his residence as a place for others to use and buy drugs.

We hold that this testimony was sufficient to support the trial court's finding that "the defendant's testimony . . . established the informant as a material and necessary witness to the defense to corroborate the defendant's alibi, point toward third party guilt, and show nonexclusivity of the defendant's premises."

Having made this finding, the court ordered the prosecutor to reveal the informant's identity to defendant's attorney. An accused has a constitutional right to disclosure of evidence that would tend to exculpate him. *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). Suppression of evidence "favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218 (1963). When a trial court determines that such disclosure is relevant or helpful to the accused's defense, it may properly require disclosure of an informant's identity. In *Roviaro v. United States*, 353 U.S. 53, 1 L. Ed. 2d 639 (1957), the United States Supreme Court held:

> Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the [government's privilege to withhold an informant's identity] must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.

Roviaro, 353 U.S. at 60-61, 1 L. Ed. 2d at 645. *See also State v. Ketchie*, 286 N.C. 387, 211 S.E.2d 207 (1975). Under *Roviaro*,

the court's decision to order disclosure was proper and not an abuse of discretion.

Having so found, the remaining question is whether, upon the prosecution's refusal to comply with the disclosure order, the court erred by dismissing with prejudice the charges against defendant.

Roviaro provides that an action may be dismissed when the government withholds information it is required to disclose. Furthermore, our discovery rules provide that dismissal with prejudice is a proper judicial remedy where a party fails to comply with a discovery order. N.C. Gen. Stat. § 15A-910(3b) (1988); *State v. Adams*, 67 N.C. App. 116, 312 S.E.2d 498 (1984). A dismissal pursuant to this power is not reviewable on appeal unless the court abused its discretion. *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983). We find that the trial court did not abuse its discretion in dismissing the charges.

Affirmed.

Judges COZORT and GREENE concur.

JAMES ROBERT HUSSEY AND EVA LEE BROWN HUSSEY, PLAINTIFFS v. MONTGOMERY MEMORIAL HOSPITAL, INC., DEFENDANT

No. 9319SC363

(FIled 5 April 1994)

Limitations, Repose, and Laches § 22 (NCI4th)— medical malpractice—brain damage from fall—accrual

The trial court properly granted defendant's motion for summary judgment based on the statute of limitations where plaintiff husband was taken to defendant hospital on 14 June 1986; he was seated on a gurney without side rails in the emergency room; he fell from the gurney shortly thereafter and was rendered unconscious; the side of his head looked as if it had been severely beaten, his right eye and the right side of his face and head were swollen, he was comatose and totally unresponsive, and he was having continuous seizures; plaintiff's wife was advised in the emergency room that her

husband's condition was caused by a lot of swelling in the brain that resulted from striking his head on the floor; plaintiffs allege that they questioned the attending doctor as to whether plaintiff husband had suffered permanent brain damage or injury during the ten-day period after the fall and again in July and were told that there was not and had not been any brain damage or injury; plaintiff continued to see medical providers for the next three and one-half years, but no doctor ever disclosed a brain injury; tests in a psychiatric ward in April of 1990 disclosed permanent and residual brain impairment; plaintiffs first instituted this action on 12 June 1990, voluntarily dismissed it, and refiled on 7 October 1992; and the court granted defendant's judgment based on the statute of limitations. The head injury was not latent; upon falling from the gurney, plaintiff suffered a severe head injury, was rendered unconscious and a treating physician in the emergency room advised plaintiff that her husband's condition was caused by swelling in the brain from striking his head on the floor. It was apparent that there had been wrongdoing most likely attributable to defendant hospital on the date of the fall.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 319, 321.

When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner. 80 ALR2d 368.

Appeal by plaintiffs from order entered 22 January 1993 by Judge Judson D. DeRamus in Montgomery County Superior Court. Heard in the Court of Appeals 1 February 1994.

Wishart, Norris, Henninger & Pittman, P. A., by William H. Elam and Daniel C. Marks, for plaintiffs-appellants.

Elrod & Lawing, P. A., by Sally A. Lawing, of counsel, for defendant-appellee.

JOHNSON, Judge.

This appeal involves an action brought by plaintiffs, husband James Robert Hussey and wife Eva Lee Brown Hussey, against defendant Montgomery Memorial Hospital, Inc., alleging that de-

fendant's negligence resulted in permanent brain damage to plaintiff husband when he fell from a gurney (a stretcher with wheels) at defendant hospital.

Plaintiff husband's fall occurred on 14 June 1986. On that date, plaintiff husband had been ill and was taken to defendant hospital by plaintiff wife; upon his arrival, he was seated on a gurney in the emergency room. The gurney had no side rails. Shortly thereafter, plaintiff husband fell from the gurney, was rendered unconscious, and suffered "severe head injury." The right side of plaintiff husband's head looked like it had been severely beaten, and his right eye and the side of his face and head were swollen. Plaintiff husband was comatose, totally unresponsive, and was having "continuous seizures."

Plaintiff husband was treated by a physician in the emergency room who advised plaintiff wife that her husband's condition was caused by "a lot of swelling in the brain" that resulted from striking his head on the floor. Plaintiff husband was moved by ambulance to another hospital, where he was diagnosed with a dislocated clavicle and laceration of the skin and two fractures of the lateral wall of the right orbit. Plaintiff husband underwent surgery for the dislocated clavicle and when he was discharged from the hospital on 23 June 1986 had "significant memory loss" and was nervous, depressed, moody and easily upset.

Plaintiffs allege that during the ten day period after the fall and again on 10 July 1986, they questioned the attending doctor, Dr. Ellen Andrews, as to whether plaintiff husband had suffered permanent brain damage or injury, and that on each occasion, Dr. Andrews answered that there was not and would not be any brain damage or injury. Two months after the fall, plaintiffs consulted with an attorney concerning a possible claim against defendant hospital, but plaintiffs decided not to pursue a lawsuit at that time because they feared doing so might impair plaintiff husband's ability to receive medical treatment.

For the next three and one-half years, plaintiff husband continued to see his medical providers. Plaintiff husband was kept on medication for his nerves, and no doctor ever disclosed to plaintiffs that plaintiff husband had suffered a brain injury or that he may suffer permanent brain impairment.

In April of 1990, plaintiff husband's behavior became severely erratic and unpredictable to the point that plaintiff wife took her husband to Sandhills Center for Mental Health, Mental Retardation and Substance Abuse, a division of the North Carolina Mental Health Department. Plaintiff husband was examined there and transferred to the Dartmouth Clinic, the psychiatric ward at Moore Regional Hospital at Pinehurst. After a series of psychological tests, Dr. Fred Lee, Ph.D. informed plaintiffs that the test results indicated "permanent and residual brain impairment."

On 12 June 1990, plaintiffs first instituted this action by filing their complaint alleging negligence against defendant hospital; defendant filed a motion to dismiss on the grounds that the action was barred by the three-year statute of limitations. Defendant's motion to dismiss was denied "without prejudice to the defendants' right to renew their motion to dismiss on the basis of the statute of limitations at the close of discovery." Plaintiffs voluntarily dismissed the action on 7 October 1991, and refiled the lawsuit on 7 October 1992. Defendant filed answer on 2 November 1992, again arguing that the action was barred by the applicable statute of limitations. On 22 December 1992, defendant filed a motion for summary judgment seeking dismissal of the complaint on the grounds of the expiration of the statute of limitations. The trial judge granted defendant's motion for summary judgment, and plaintiffs filed timely notice of appeal to this Court.

Plaintiffs argue that the trial judge created reversible error in finding that plaintiffs' action was barred by the applicable statute of limitations provision of North Carolina General Statutes § 1-15(c) (1983) on the ground that plaintiffs' claims were timely filed within the provisions of said statute.

North Carolina General Statutes § 1-15(c) states in pertinent part:

> 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 . . . which originates under circumstances making the injury . . . not readily apparent to the claimant at the time of its origin, and the injury . . . 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[.] . . .

Plaintiffs argue that plaintiff husband suffered a bodily injury that was not "readily apparent" at the time of its origin, i.e., the permanent brain injury; that plaintiffs had no knowledge of this specific injury until May of 1990, a date more than two years after plaintiff husband's fall at defendant hospital; that plaintiffs then statutorily commenced the suit within one year from the time this discovery was made; and that plaintiffs complied with the statutory four-year limitation on commencement of a suit by filing the suit within four years from the last act of defendant.

Defendant argues that plaintiffs' cause of action accrued on 14 June 1986, the date of plaintiff husband's fall, because on that date injury to plaintiff husband was "immediately and graphically apparent." Defendant asserts that the "discovery provision" in North Carolina General Statutes § 1-15(c), deferring accrual of professional malpractice claims in circumstances where no injury is "readily apparent" at the time of a defendant's negligent conduct, does not apply in the case *sub judice* because injury was immediately apparent on the day of the fall.

In *Black v. Littlejohn*, 312 N.C. 626, 325 S.E.2d 469 (1985), our Supreme Court interpreted North Carolina General Statutes § 1-15(c), specifically determining what the word "injury" in the statute meant. The Court opined, "[w]e view this Court's interpretation of the term injury within the discovery provision of our statute to be consistent with the intent of the legislature and also consistent with the general statement of the judicially created discovery rule, that is, the statute does not begin to run until plaintiff discovers, or in the exercise of reasonable care, should have discovered, that he was injured as a result of defendant's wrongdoing." *Id.* at 642, 325 S.E.2d at 480. The Court quoted at length from *Dawson v. Eli Lilly and Co.*, 543 F. Supp. 1330, 1338 (D.D.C. 1982):

> Where the injury is latent, the claim is held not to accrue until the plaintiff discovers the injury. Where causation of

> an injury is unknown, the action accrues when both the injury and its cause have been (or should have been) discovered. *Where the injury and causation are known, but not that there has been any wrongdoing, the action is held to accrue when the plaintiff discovered, or by due diligence should have discovered, the wrongdoing.*

Black, 312 N.C. at 645, 325 S.E.2d at 481-82 (emphasis retained).

With *Black* as our guide, we have examined the applicable facts in the instant case, and find that the statute of limitations accrued on 14 June 1986, the date of plaintiff husband's fall. The head injury in the instant case was not latent. We acknowledge that plaintiffs questioned hospital personnel on occasions immediately after the fall to attempt to ascertain the *extent* of plaintiff husband's injuries, and that on those occasions, plaintiffs were told by hospital personnel that there was not and would not be any brain damage or injury. Nonetheless, plaintiff husband had a cause of action on the date he fell from the gurney. Upon falling from the gurney, plaintiff husband suffered severe head injury and was rendered unconscious. A treating physician in the emergency room advised plaintiff wife that her husband's condition was caused by "a lot of swelling in the brain" that resulted from striking his head on the floor. The probable cause of the accident was defendant hospital's negligence and on the date of the fall, it was apparent that there had been wrongdoing, most likely attributable to defendant hospital.

The ultimate injuries sustained by plaintiff husband were a direct result of the 14 June 1986 fall caused by defendant hospital's wrongdoing which occurred on that date. Therefore, we find the trial court properly granted defendant's motion for summary judgment.

The decision of the trial court is affirmed.

Judges EAGLES and LEWIS concur.

PAMELA A. BROWNING, GLENN BROWNING AND SHELBA BROWNING, PLAINTIFFS/APPELLANTS v. CAROLINA POWER & LIGHT COMPANY AND TONY LYNN GREGG, DEFENDANTS/APPELLEES

No. 9230SC1161

(Filed 5 April 1994)

1. **Automobiles and Other Vehicles § 416 (NCI4th)— automobile collision—failure to instruct on joint and concurring negligence—error**

The trial court erred in an action arising from an automobile accident by failing to instruct on joint and concurring negligence where plaintiff was injured while a passenger in an automobile driven by Miss Fisher which collided with a truck owned by defendant CP&L and driven by defendant Gregg; plaintiff did not sue Miss Fisher; the substance of the defendants' case was that the automobile driven by Miss Fisher was the sole cause of plaintiff's injuries and that defendant Gregg reacted non-negligently to the emergency created by the driver of the car; plaintiff's evidence attempted to establish that the accident took place in the plaintiff's lane and that defendant Gregg responded in an unreasonable manner under the circumstances; and both the pleadings and the evidence put the other driver's negligence in issue.

Am Jur 2d, Automobiles and Highway Traffic § 432.

2. **Evidence and Witnesses § 90 (NCI4th)— automobile accident—mini-bottles of alcohol—erroneously admitted—prejudicial**

The trial court erred in an automobile accident case by denying plaintiffs' motion *in limine* and in allowing defendants to introduce evidence of mini bottles of white lightning found at the scene where the officer who found the bottles in one driver's purse testified that he had no reason to believe that alcohol consumption contributed to the accident and the driver testified that she did not remember the accident or putting the bottles in her purse. Although defendants assert that the evidence was offered to impeach the driver in that her memory was "somewhat selective," the testimony concerning the bottles was elicited on at least ten occasions. The possible prejudicial effect of the evidence exceeded any probative value that the evidence may have had. N.C.G.S. § 8C-1, Rule 402; N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence § 260.

Judge COZORT dissenting.

Appeal by plaintiffs from judgment entered 5 May 1992 by Judge Marvin K. Gray in Haywood County Superior Court. Heard in the Court of Appeals 19 October 1993.

The plaintiffs initiated this action on 28 January 1991 alleging the negligence of Tony L. Gregg and Carolina Power & Light Company (CP&L), his employer, in an automobile accident involving Plaintiff Pamela A. Browning, the minor child of the plaintiffs Glenn and Shelba Browning. Defendant Gregg was operating a CP&L vehicle at the time of the accident, and the minor plaintiff was a passenger in an automobile driven by Lorenda Kae Fisher. Miss Browning suffered severe injuries as a result of the collision.

The defendants in their answer denied the allegation of negligence. They responded that the negligence of the driver, Miss Fisher, was the proximate cause of the collision. The defendants alternatively pled the affirmative defense of sudden emergency in bar to the plaintiffs' claim. The defendants contended that Miss Fisher, rather than Defendant Gregg, crossed the center line into the defendant's lane of traffic. Miss Fisher was not joined in the action by either party.

After trial during the 27 April 1992 civil term, the jury concluded that the defendants were not negligent in causing the plaintiff's injuries. From this verdict, the plaintiffs appeal.

Hyler & Lopez, PA, by George B. Hyler, Jr. and Robert J. Lopez, for plaintiff-appellants.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Larry McDevitt and Michelle Rippon, for defendant-appellee.

ORR, Judge.

I.

[1] The plaintiffs first argue in their appeal to this Court that the trial court committed prejudicial error in failing to instruct the jury on joint and concurring negligence. They also argue that the court erred in giving the jury instructions on the doctrine of sudden emergency and no duty to anticipate the negligence of others. The record reveals that there was no objection to the

request for instruction on sudden emergency and no duty to anticipate the negligence of others, nor is there any authority supporting these assignments of error in the appellants' brief; they are therefore deemed abandoned and we decline to address them. However, we agree that the jury should have been charged on the legal principle of joint and concurring negligence and therefore reverse and remand for a new trial.

The record indicates that the substance of the defendant's case was that the automobile driven by Miss Fisher was the sole cause of plaintiff's injuries; therefore, that CP&L and its employee had no liability. The evidence offered at trial by the defendant attempted to show that the collision occurred in the defendant's lane of traffic; he swerved to avoid more extensive injuries to the passengers in the automobile, and he reacted non-negligently to the emergency created by the driver of the car. The plaintiff's evidence on the other hand attempted to establish that the accident took place in the plaintiff's lane and that the defendant responded in an unreasonable manner under the circumstances.

The defendants argue in their brief that the case was tried only on the issue of the defendant's negligence and that therefore the negligence, if any, of the driver of the vehicle in which the plaintiff was a passenger was not an issue for the jury in this trial. However, the record reveals that in the defendants' answer, they alleged that

> [i]t is admitted that on the 6th day of July, 1988 the Volkswagon [sic] car which, it is believed to have been driven by Laurie Fisher, crossed the centerline of Highway 110 and struck and collided with a truck which was being lawfully driven and operated by Tony Lynn Gregg. It is further admitted that CP&L owned the truck which was operated by Gregg.

This allegation, as defendants' first defense, clearly put the other driver's negligence in issue.

Testimony at trial from various witnesses, including Defendant Gregg as well as the investigating highway patrol officer, repeatedly raised the issue of the position of the Volkswagen in relation to the position of the CP&L truck at the time of the collision. Both the pleadings and the evidence offered attempted to establish that the driver of the Volkswagen was negligent and in fact created a sudden emergency which was defendants' second defense.

In *Tillman v. Bellamy*, 242 N.C. 201, 205, 87 S.E.2d 253, 255 (1955), the North Carolina Supreme Court held:

> [T]he negligence of . . . plaintiff's driver, was put in issue in defendant's pleading and the evidence which was offered pursuant thereto. True this was done in the effort to show that [the driver of the plaintiff's automobile] . . . was the sole proximate cause of plaintiff's injury, but the evidence was equally available in support of the applicable principle of the concurring negligence of both drivers. As this constitutes a substantial and material phase of the case arising on the evidence, it was incumbent on the trial judge to submit it to the jury with appropriate instructions. Plaintiff did not see fit to sue [the driver], . . . nor did the defendant ask that he be made party defendant for the purpose of determining his contingent liability for contribution as joint tort-feasor, but the question of his negligence is raised by both pleading and evidence.

We find that the failure of the trial court to give the above charge to the jury was error and accordingly remand for a new trial consistent with the above opinion.

II.

[2] We next address one evidentiary assignment of error which may recur in the new trial. The plaintiffs contend that the trial court erred in denying plaintiffs' motion *in limine* and in allowing defendants to introduce evidence of small bottles of "white lightning." We agree with plaintiffs on this issue.

Plaintiffs argue that the testimony regarding mini-bottles found by the investigating officer at the scene was irrelevant to the issues in the case and should have been excluded by Rule 401 of the North Carolina Rules of Evidence. Alternatively, they argue that the evidence was more prejudicial than probative, and should have been excluded by Rule 403. We agree that the possible prejudicial effect of the evidence exceeded any probative value that the evidence may have had.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). "All relevant evidence is admissible, ... Evidence which is not

relevant is not admissible." N.C.G.S. § 8C-1, Rule 402 (1992). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992). In applying this well-settled litany to the facts at bar, we find not only that the evidence has very little probative value but also that any probative value that the evidence may have is clearly exceeded by the proscriptions of Rule 403.

Officer Sorrells testified that at the time of the accident, he looked through Miss Fisher's pocketbook searching for identification. In searching, he discovered two small bottles of liquor in her purse. He further testified on cross-examination that he had no reason to believe that alcohol consumption contributed to the accident. Miss Fisher testified that she did not remember anything about the accident. She also testified that she did not remember putting the bottles in her purse. The defendants assert that the evidence was offered for impeachment purposes—to show that Miss Fisher's memory was "somewhat selective." We find this argument to be without merit.

Our review of the record finds at least ten occasions where testimony was elicited concerning the bottles in her purse. While it is true that some evidence may be relevant for impeachment purposes, it is also true that it may be incompetent for other purposes and "[w]hen there is a highly prejudicial likelihood that the jury will give the evidence controlling, or at least significant, weight on the issue as to which it is incompetent, a limiting instruction would be ineffectual and the evidence should be excluded." K. Broun, *Brandis & Broun on North Carolina Evidence* § 83 (1993).

We find it unnecessary to review the plaintiffs' remaining assignments of error brought forward in their brief. For the above stated reasons, they are entitled to a new trial consistent with the above opinion.

Reversed and remanded for a new trial.

Judge EAGLES concurs.

Judge COZORT dissents in a separate opinion.

Judge COZORT dissenting.

I dissent because I find no error in the trial court's rulings on both issues addressed in the majority opinion.

First, I find the trial court did not err in failing to instruct on joint and concurring negligence. This case is distinguishable from *Tillman v. Bellamy*, 242 N.C. 201, 87 S.E.2d 253 (1955), relied on by the majority. In *Tillman*, the negligence of the plaintiff's driver was "put in issue in defendant's pleading and in the evidence which was offered pursuant thereto." *Id.* at 205, 87 S.E.2d at 255. The pleadings of defendant below raise no such issue, and it would have been error to instruct on an issue not raised by the pleading and the evidence.

Second, I do not find the evidence concerning the liquor bottles, even if error, was so prejudicial that a new trial is required.

I vote no error.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PLAINTIFF-APPELLEE v. MAJOR KENNETH BRANCH; DON WHITEHURST PONTIAC, BUICK AND GMC, INC. D/B/A AMERICAN TRUCK AND AUTO LEASING; AND UNIVERSAL UNDERWRITERS INSURANCE COMPANY, DEFENDANTS-APPELLANTS

No. 933SC202

(Filed 5 April 1994)

Insurance § 571 (NCI4th)— automobile liability insurance— noncovered vehicle furnished for regular use—exclusion from coverage

A Mercedes automobile was furnished to defendant driver for his regular use at the time of an accident and was excluded from coverage under the driver's personal automobile liability policy by the "furnished for your regular use" exclusion for noncovered vehicles where the driver leased the Mercedes from defendant dealer and continued to possess the vehicle after the lease expired; he returned the vehicle to the dealer for repairs and discussed purchasing it from the dealer; upon completion of the repairs, the Mercedes was returned to the driver so that he could test drive it; and the driver continued to possess and use the vehicle for twenty-nine days until the

accident occurred. Therefore, the dealer's garage liability policy provided coverage for the accident.

Am Jur 2d, Automobile Insurance §§ 217 et seq.

Liability insurance of garages, motor vehicle repair shops and sales agencies, and the like. 93 ALR2d 1047.

When is automobile furnished or available for regular use within "drive other car" coverage of automobile liability policy. 8 ALR4th 387.

Appeal by defendants from order entered 16 December 1992 by Judge George K. Butterfield, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 5 January 1994.

Speight, Watson, Brewer & Stanley, by William C. Brewer, Jr. and Sara Beth Fulford Rhodes, for plaintiff-appellee.

Wallace, Morris, Barwick & Rochelle, P. A., by Edwin M. Braswell, Jr., for defendants-appellants Don Whitehurst Pontiac, Buick and GMC, Inc. d/b/a American Truck and Auto Leasing.

Gaylord, Singleton, McNally, Strickland & Snyder, by Danny D. McNally, for defendant-appellant Major Kenneth Branch.

JOHNSON, Judge.

On 11 August 1988, defendant Major Kenneth Branch (Branch) entered into a Lease Agreement with defendant Whitehurst Pontiac, Buick and GMC, Inc. d/b/a American Truck and Auto Leasing (American) for the lease of a 1986 Mercedes Benz owned by American. The lease agreement was for a period of eleven months and required the payment of $562.72 per month.

Upon the expiration of the lease in July 1989, Branch continued to possess and operate the Mercedes and make the monthly lease payments. In January 1990, Branch ceased making the monthly lease payments, but retained possession of the automobile.

On 2 July 1990, Branch returned the Mercedes to American for repairs and initiated discussions concerning purchasing another vehicle from the dealership. Mr. Don Whitehurst suggested that Branch purchase the Mercedes he was driving. Concerned about the mechanical stability of the automobile, Branch verbally agreed

to purchase the Mercedes upon completion of the repairs and after test driving the vehicle. On the same day, American returned the Mercedes to Branch's possession with a ninety-six hour Demonstration Permit for Use of Dealer Plate so that Branch could test drive the Mercedes. On or about 3 July 1990, Branch drove the Mercedes to South Carolina, where he continued to use and possess the vehicle during the entire month of July 1990.

On 31 July 1990, in or near the Town of Manning, South Carolina, Branch was involved in a collision with a 1987 Ford truck driven by Betty T. Baughman. At the time of the accident, Branch had a personal liability automobile policy in effect which had been issued by plaintiff State Farm Mutual Automobile Insurance Company. However, the policy did not list the Mercedes as a covered vehicle. The Mercedes was however covered under American's garage liability policy issued by defendant Universal Underwriters Insurance Company (Universal).

On 15 May 1991, plaintiff filed a declaratory judgment action against defendants Branch, American and Universal. Plaintiff alleged that at the time of the accident, the Mercedes was furnished for Branch's regular use and that plaintiff's automobile policy issued to Branch did not provide coverage for vehicles furnished for Branch's regular use. Therefore, plaintiff did not have an obligation to provide coverage for the collision Branch had with the Mercedes, nor did it have an obligation to defend Branch in the lawsuits which evolved from the accident.

On 18 April 1991 defendants American and Universal filed an answer to the complaint and counterclaimed for declaratory judgment. Defendants alleged that the Mercedes was not furnished for Branch's regular use, and that Branch was test driving the Mercedes on the day of the accident. Therefore, the Mercedes is covered by the plaintiff's liability policy. On 16 May 1991, plaintiff filed a reply to defendants' counterclaim.

On 3 December 1992, plaintiff filed a motion for summary judgment. Defendants, American and Universal filed a motion for summary judgment on 14 December 1992. Both motions were heard at the 14 December 1992 term of Pitt County Superior Court. On 16 December 1992, plaintiff's motion for summary judgment was granted. All defendants appealed to our Court.

Defendants first argue that the trial court erred in denying defendants' motion for summary judgment, because as a matter of law, the garage liability policy of American only provides excess coverage to a customer's liability policy when the customer is test driving the garage owner's vehicle.

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) (citations omitted). The issue before us then is whether American's policy only provides excess coverage. We hold that it does not.

In *United Services Auto. Ass'n v. Universal Underwriters Ins. Co.*, 332 N.C. 333, 420 S.E.2d 155 (1992), the North Carolina Supreme Court examined the same garage policy at issue in this case and concluded that the garage policy only provides excess coverage for the permissive user of the vehicle owned by the garage policy owner. The Court held that the garage policy does not provide coverage if the permissive user's personal automobile liability policy provides the minimum amount of coverage required by the Motor Vehicle Financial Responsibility Act.

In the case *sub judice*, however, the policy issued by plaintiff to Branch contained a provision which excluded coverage for the frequent or regular use of a non-covered vehicle. The policy issued by plaintiff to Branch contained the following language:

EXCLUSIONS

B. We do not provide Liability coverage for the ownership, maintenance or use of:

1. Any vehicle, other than your covered auto which is:

a. owned by you; or

b. furnished for your regular use.

The rationale behind this exclusion as noted by the North Carolina Supreme Court is to "give coverage to the insured while engaged in the only infrequent or merely casual use of an automobile other than the one described in the policy, but not cover him against personal liability with respect to his use of another automobile which he frequently uses or has the opportunity to do so." *Whaley v. Insurance Co.*, 259 N.C. 545, 552, 131 S.E.2d 491, 496 (1963). Therefore, plaintiff is not obligated to provide coverage for the vehicle Branch was operating at the time of the accident in question, if the vehicle was provided for Branch's regular use.

The North Carolina Supreme Court has addressed the issue of regular use and concluded that "[n]o absolute definition can be established for the term 'furnished for regular use.' Each case must be decided on its own facts and circumstances." *Whaley*, 259 N.C. at 552, 131 S.E.2d at 496-97 (1963) (citations omitted). The Court also opined that determining whether a vehicle has been provided for a driver's regular use, requires examining the availability and frequency of use of the vehicle.

We find there is sufficient evidence to establish that the Mercedes was furnished for Branch's regular use and possession until the accident in question on 31 July 1990. This is true even though Branch allegedly began test driving the vehicle on 2 July 1990. The forecast of evidence shows that the Mercedes was placed under and remained under Branch's authority and control until the date of the accident. Additionally, the vehicle was available for Branch's exclusive use for the entire period in question. The fact that Branch returned the vehicle to American on 2 July 1990 is not dispositive because Branch continued to possess and use the vehicle. Accordingly, we overrule defendants' first assignment of error.

Defendants next argue that even if the trial court did not err in denying their motion for summary judgment, the trial court erred in granting plaintiff's motion for summary judgment because a genuine issue of material fact exists as to whether the Mercedes was provided for Branch's regular use. More specifically, defendants allege that a material question exists as to whether the Mercedes was placed with Branch for his regular use or placed with Branch for the sole purpose of allowing him to test drive the vehicle. We disagree.

Under the facts of this case, it is our opinion that American's reason or motive for entrusting Branch with the Mercedes has little bearing on the issue of regular use. It is undisputed that the Mercedes was placed in the exclusive possession of Branch and was available for his use. The frequency of Branch's use of the Mercedes is also undisputed; Branch used the Mercedes daily for transportation and for personal use. That this use was with the permission of American and for the principal purpose of a test drive, affects neither the availability nor frequency of the use of the Mercedes. *See Insurance Co. v. Bullock*, 21 N.C. App. 208, 203 S.E.2d 650 (1974). As such, we overrule defendants' second assignment of error.

The decision of the trial court is affirmed.

Judges MARTIN and McCRODDEN concur.

NADINE LANYON SMITH ROGEL, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF WILLIAM SMITH LANYON LAMPARTER, PLAINTIFFS v. WILLIAM BRUCE JOHNSON; DUKE UNIVERSITY; ARTHUR JOSEPH VAN SUETENDAEL IV; KATHRYN ANN WHITNEY (KAY A. WHITNEY); JERRY S. WHITNEY; RUTGERS PREPARATORY SCHOOL; MICHAEL SHAWN KOCH; REBECCA W. HENDERSON AND HUSBAND, TERRY ALAN HENDERSON; FRANCES TUCKER DAVENPORT; RICHARD F. LANYON; DAVID WILLIAM DUNSTER JONES, A MINOR; MARY CAROLINA VAN SUETENDAEL; STUART LANYON ROGEL (FORMERLY STUART STRUNK); HICKORY MUSEUM OF ART, INC.; BOBBY JOE BARGER; RICHARD DAVID BERRY, JR.; THOMAS CECIL LAUGHON, JR.; JOHN WILTON LANNING, JR.; JEFFREY DAVID ELSTON; JEFFREY DAVID NORRIS; STEVEN DAVENPORT; HARRY THEODORE SHERWOOD SMITH II; JOHN GEORGE LAMPARTER; JOAN LAMPARTER DOWNS; AND FREDERIC OSCAR LAMPARTER, DEFENDANTS

No. 9325SC513

(Filed 5 April 1994)

Wills § 13.1 (NCI3d)— will—caveat—declaratory judgment action

The superior court did not have jurisdiction, and its judgment was vacated, where the executrix of an estate filed this declaratory judgment action seeking a determination of whether decedent died testate and, if so, the terms of his will, attaching to the complaint a document entitled "Will" which had been

offered for probate, a handwritten document entitled "Codicil to my Will," and another handwritten document which purported to be a will. No caveats had been filed. The only way to attack a will is by caveat; collateral attacks are not permitted. While it is clear that questions as to the construction of a will may be brought in a declaratory judgment action, and although use of a declaratory judgment action would expedite the determination of which documents constitute the valid will, plaintiff here sought more than the construction of a will in that the third document, if given effect, would revoke the validly probated will.

Am Jur 2d, Wills § 850.

Right of executor or administrator to contest will or codicil of his decedent. 31 ALR2d 756.

Appeal by defendants from judgment and order entered 15 and 16 February 1993 respectively by Judge Lacy H. Thornburg in Catawba County Superior Court. Heard in the Court of Appeals 1 March 1994.

Hunter, Wharton, Stroupe & Lynch, by John V. Hunter III, for defendants Bobby Joe Barger, Richard David Berry, Jr., Frances Tucker Davenport, Steven Davenport, Terry Alan Henderson, Michael Shawn Koch, John Wilton Lanning, Jr., Thomas Cecil Laughon, Jr., and Stuart Lanyon Rogel (formerly Stuart Strunk).

Maxwell, Freeman & Beason, P.A., by James B. Maxwell, for defendants Duke University and Rutgers Preparatory School.

Gaither, Gorham & Crone, by J. Samuel Gorham, III, for defendant David William Dunster Jones.

LEWIS, Judge.

On 15 September 1992, plaintiff, the executrix of the estate of William Smith Lanyon Lamparter, filed this declaratory judgment action seeking a determination of whether the decedent died testate, and, if so, what the terms of his will were. Plaintiff attached three documents to the complaint: (1) Exhibit A, a typewritten, signed and witnessed document entitled "Will"; (2) Exhibit B, a handwritten document entitled "Codicil to My Will"; and (3) Exhibit

C, a handwritten document beginning, "In the Name of God! Amen!" Plaintiff had offered the first document, Exhibit A, for probate in common form, which was completed in April 1992. No caveats to that will have been filed.

In its 15 February 1993 declaratory judgment, the trial court determined that the first two documents were valid and effective as the last will of the decedent as amended by the codicil, and that the last document had no testamentary effect. On the same day the court entered its judgment, defendants Barger, Berry, Davenport, Davenport, Henderson, Koch, Lanning, Laughon, and Rogel (hereinafter "Barger *et al*") filed a motion to dismiss the complaint for lack of subject matter jurisdiction. The court denied the motion. The various defendants now appeal from the court's judgment and from its order denying the motion to dismiss.

The only issue to be addressed in this appeal is whether the superior court had subject matter jurisdiction to determine whether certain unprobated documents, Exhibits B and C, had testamentary effect. Defendants Barger *et al* contend the superior court did not have jurisdiction to hear plaintiff's declaratory judgment action, because a civil action may not be used to determine whether a paper writing is a will. According to Barger *et al*, such questions may only be addressed in a caveat proceeding, and a declaratory judgment action may not be used to circumvent the caveat requirements. We agree.

The question of whether a paper writing is a will must be addressed to the clerk of superior court, who has the exclusive and original jurisdiction over proceedings for the probate of wills. *Brissie v. Craig*, 232 N.C. 701, 62 S.E.2d 330 (1950); *Anderson v. Atkinson*, 234 N.C. 271, 66 S.E.2d 886 (1951). After a will has been offered for probate, interested persons have three years to enter a caveat to the probate of the will. N.C.G.S. § 31-32 (1984). The only way to attack a will is by caveat; collateral attacks to the validity of a will are not permitted. *Brickhouse v. Brickhouse*, 104 N.C. App. 69, 407 S.E.2d 607 (1991). Offering another will for probate in another proceeding is considered a collateral, and therefore impermissible, attack. *In re Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965); *In re Hester*, 320 N.C. 738, 360 S.E.2d 801 (1987).

Once a caveat is entered, the superior court acquires jurisdiction of the matter and holds a caveat proceeding. *Charles*, 263 N.C. at 416, 139 S.E.2d at 591. Caveat proceedings are unique;

they are in rem and are heard before a jury. *Id.* at 415, 139 S.E.2d at 591. The clerk must give notice to all interested parties, who then have the opportunity to participate. *Id.*; N.C.G.S. § 31-33 (1984). At such proceedings any interested person may present to the court any script which is material to the determination of whether there is a will and what its terms may be. *Charles*, 263 N.C. at 415-16, 139 S.E.2d at 591. "Any other script purporting to be the decedent's will should be offered and its validity determined in the caveat proceeding." *Id.* at 416, 139 S.E.2d at 592.

Defendants Duke University (hereinafter "Duke") and Rutgers Preparatory School (hereinafter "Rutgers") contend, however, that a declaratory judgment action is an appropriate forum for the resolution of the issues involved in this case. According to the Declaratory Judgment Act,

> Any person interested under a deed, will, written contract or other writings constituting a contract . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder.

N.C.G.S. § 1-254 (1983). Duke and Rutgers argue that, in the case at hand, plaintiff was merely seeking guidance as to the construction of a will, Exhibit A, which already had been probated. *See Taylor v. Taylor*, 301 N.C. 357, 271 S.E.2d 506 (1980). Duke and Rutgers point out that plaintiff was in a position to distribute the estate, because the six-month period for the filing of claims against the estate had expired and no caveat had been filed. However, she hesitated to do so in light of the questions surrounding the disputed documents. Thus, instead of distributing the estate at a time when caveats might still be filed, plaintiff attempted to expedite the process by filing the present declaratory judgment action.

Although plaintiff's use of a declaratory judgment action would certainly expedite the determination of which documents constitute the valid will, we cannot legislate that procedure. It is clear, as Duke and Rutgers contend, that questions as to the construction of a will may be brought in a declaratory judgment action. *Brickhouse*, 104 N.C. App. at 72, 407 S.E.2d at 609. However, it is also clear that there are limitations to the use of a declaratory judgment action. According to *Farthing v. Farthing*, 235 N.C. 634, 70 S.E.2d 664 (1952),

> The Declaratory Judgment Act . . . is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments. Nor is it a substitute or alternate method of contesting the validity of wills.

Id. at 635, 70 S.E.2d at 665.

In the case at hand, plaintiff sought more from the court than the construction of a will validly probated. In her complaint, plaintiff requested the court to determine whether there was a will and to ascertain the validity of two documents with potential testamentary effect. The third document, Exhibit C, purported to be a will which, if given effect, would revoke the validly-probated will, Exhibit A. As mandated by *Charles* and *Farthing*, other documents purporting to be the valid will should be offered and their validity determined in a caveat proceeding.

We conclude that the superior court did not have subject matter jurisdiction over the issues involved in this case, and therefore vacate its judgment.

Vacated.

Chief Judge ARNOLD and Judge COZORT concur.

GUILFORD COUNTY, PLAINTIFF-APPELLANT v. GARY PAUL KANE; NCNB MORTGAGE CORPORATION, NOTEHOLDER; TIM, INC., TRUSTEE; FIRST UNION NATIONAL BANK OF NORTH CAROLINA, NOTEHOLDER; AND CHARLOTTE F. MANESS, TRUSTEE, DEFENDANTS-APPELLEES

No. 9318SC492

(FIled 5 April 1994)

1. Eminent Domain § 101 (NCI4th)— condemnation—sewer easement—land partially taken—value—directed verdict denied

The trial court did not err by denying plaintiff's motion for a directed verdict in a condemnation action where plaintiff condemned a sewer line easement across a 32.6-acre tract in Guilford County; the sewer line separated the northernmost

7.7 acres from the rest of the tract; and defendant's evidence consisted of the before and after values of the 7.7-acre tract. It may be assumed that the value of the remaining land remained relatively constant because there was no evidence of diminution in the value of that land, and the diminution of value of the 7.7-acre area therefore equals the diminution in value of the whole tract. N.C.G.S. § 40A-64(b).

Am Jur 2d, Eminent Domain § 269.

2. **Eminent Domain § 244 (NCI4th)— sewer easement—taking of partial tract—damages—instructions**

The trial court did not err in a condemnation action in its instructions on the value of the property where the instructions allowed the jury to view the contentions of the parties in light of the evidence. The jury apparently found the truth and the amount of damages between the opposing contentions and was well within its rights.

Am Jur 2d, Eminent Domain § 266.

Appeal by plaintiff from judgment entered 5 November 1992 and order entered 3 December 1992 by Judge R.G. Walker in Guilford County Superior Court. Heard in the Court of Appeals 10 February 1994.

Guilford County Attorney's Office, by Deputy County Attorney J. Edwin Pons, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Michael D. Meeker, for defendant-appellee Gary Paul Kane.

LEWIS, Judge.

On 8 February 1991, plaintiff filed this condemnation action to acquire a sewer line easement and a temporary construction easement across part of a tract of land belonging to Gary Paul Kane (hereinafter "defendant"). The matter was tried before a jury, which returned a verdict awarding defendant $77,000 in compensation. Judgment on the verdict was entered and plaintiff's motions for judgment notwithstanding the verdict and for a new trial were denied. From the judgment and the denial of the post-trial motions plaintiff appeals.

[1] The procedure for determining compensation in a condemnation action is set out in Chapter 40A of the North Carolina General Statutes. Specifically, when there is a taking of less than the entire tract, "the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken." N.C.G.S. § 40A-64(b) (1984). Plaintiff's first contention on appeal is that inasmuch as defendant presented no evidence of either measure of damages as prescribed by the statute, plaintiff was entitled to a directed verdict on the issue of compensation.

In reviewing the trial court's denial of plaintiff's motion for a directed verdict, the question is whether the evidence was sufficient to go to the jury on defendant's claim. The evidence is sufficient to go to the jury when there is more than a scintilla of evidence to support each element of the claim. Furthermore, the evidence must be viewed in the light most favorable to defendant, affording defendant all reasonable inferences which may be drawn from the evidence. *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580-81 (1983).

The evidence at trial, taken in the light most favorable to defendant, tended to show the following: The property which is the subject of this appeal is a 32.6 acre tract located in Guilford County. Defendant has owned the property, known as the Kellenberger Estate, since March of 1988. A house, a lake, botanical gardens, and hardwood trees are on the property. In 1991, plaintiff condemned the sewer line easement at issue. The easement was twenty feet wide and stretched 1471 feet across the property. A temporary construction easement twenty feet wide was also taken. The sewer line separated the northernmost 7.7 acres of the 32.6 total from the rest.

The highest and best use for the 7.7 acres was for subdivision into large, single-family lots. Defendant, an experienced developer with knowledge of the value of raw land in Guilford County, testified that immediately before the taking, the fair market value of the 7.7 acres was $192,500, or $25,000 per acre. Defendant further testified that the sewer line rendered the 7.7 acres unfit for their highest and best use. Therefore, the fair market value of the 7.7 acre area after the taking was, in effect, zero. In addition, Kaye

Hancock, a real estate broker in Guilford County, testified that it was her opinion that the 7.7 acres had a pre-taking value of $25,000 to $27,000 per acre. She stated that after the taking, the value was $1,000 per acre. Both witnesses testified that the value of the remainder of the 32.6 acre tract was decreased by the construction of the sewer line, but neither witness stated by what amount the value of that area was decreased. The witnesses based their conclusions on the fact that the resulting forty foot cleared easement through the hardwoods was obvious and made the remainder more accessible to trespassers.

Plaintiff contends that defendant presented no evidence of (i) the amount by which the fair market of the entire tract before the taking exceeded the fair market value of the remainder after the taking or (ii) the fair market value of the property taken. Further, plaintiff presented evidence that the fair market value of the entire 32.6 acre tract before the taking was $247,000 and that the value of the remainder after the taking was $241,100, leaving a difference of $5,900. Plaintiff argues that defendant's failure to present evidence as to the amount due defendant under the statutory valuation method set forth by section 40A-64(b) required the trial court to direct a verdict for plaintiff, awarding defendant at the most $5,900. We disagree.

Defendant's evidence was that the most dramatic decrease in value caused by the sewer line was to the 7.7 acre area. As to this area, he and Ms. Hancock testified to before-taking and after-taking values. As to the remainder of the 32.6 acre tract, defendant and Ms. Hancock testified that its value was decreased by the sewer line, but they did not specify an amount. Because there was no evidence of any diminution in value, we may assume that the value of such land remained relatively constant. The logical consequence of assuming that only the 7.7 acre area was affected is that the diminution in its value will necessarily equal the diminution in value of the "entire tract." On this point, the analysis of this Court in *Duke Power Co. v. Mom 'N' Pops Ham House, Inc.*, 43 N.C. App. 308, 258 S.E.2d 815 (1979), is illustrative.

In that case, Duke Power condemned part of the defendant's property under N.C.G.S. § 136-112, which provides for the same measure of compensation as section 40A-64(b)(i). Because part of the tract was not affected by the taking, an expert witness sought to testify as to the before and after values of only that part of

the tract that decreased in value. This Court reasoned that where part of the property will remain constant in value despite the taking, expert appraisers will not have to include that value in their computations in order for their testimony to be competent. *Id.* at 313, 258 S.E.2d at 819. In the present case, defendant's evidence consisted of the before and after values of the 7.7 acre area. We conclude that this was sufficient evidence to go to the jury. Accordingly, the trial court properly denied plaintiff's motion for a directed verdict.

[2] Plaintiff's second contention on appeal is that the trial court erred in instructing the jury on the measure of damages. Plaintiff argues that the following portion of the jury charge did not allow the jury to view the contentions of the parties in light of the evidence:

> On the issue before you, the defendant and the plaintiff take different positions. Mr. Kane has presented evidence which tends to show that the difference in the value of the property immediately prior to the taking and the value of the property subject to the sewer easement immediately after the taking was $192,500.00. The plaintiff disagrees and has presented evidence which tends to show that the difference in the value of the property immediately prior to the taking and immediately after the taking was $5,900.00. What the evidence does show is for you to say and determine.

We believe that the charge did allow the jury to view the contentions of the parties in light of the evidence, and, thus, plaintiff's contention is without merit. The jury was free to consider the value of the entire tract even if based on specific values for the 7.7 acre tract from defendant's evidence. There was, however, evidence as to the value of the "entire tract" from plaintiffs. The jury apparently found the truth and the amount of damages between the opposing contentions. We believe the jury was well within their rights.

No error.

Judges JOHNSON and EAGLES concur.

CHARLES B. HOFFMAN, EXECUTOR OF THE ESTATES OF RUTH B. HOFFMAN AND HENRY HOFFMAN, PLAINTIFF-APPELLANT v. MOORE REGIONAL HOSPITAL, INC., DEFENDANT-APPELLEE

No. 9316SC450

(Filed 5 April 1994)

1. **Hospitals and Medical Facilities or Institutions § 63 (NCI4th)—radiologist not hospital employee—no vicarious liability by hospital for negligence**

Defendant hospital was not vicariously liable for a radiologist's alleged negligence in the performance of an angioplasty procedure under the doctrine of *respondeat superior* because the radiologist was not an employee of the hospital where the patient was referred to the hospital and was assigned to one of the radiologists practicing at the hospital without any expression of preference by the patient; the radiologist was a member of a private group whose members rotated as attending physicians at the hospital; the radiologist's schedule was worked out by members of the group and not by the hospital; and the patient was billed for the radiologist's services by the group rather than by the hospital. An employer-employee relationship was not shown by evidence that the radiologist did not have the authority to admit patients or to write orders for patients, that hospital policy precluded the radiologist from seeing any person who did not have orders from a physician with staff privileges at the hospital, and that hospital policy dictated what lab work would be performed on a patient in preparation for the procedures performed by the radiologist.

Am Jur 2d, Hospitals and Asylums § 28.

Liability of hospital or sanitarium for negligence of physician or surgeon. 51 ALR4th 235.

2. **Hospitals and Medical Facilities or Institutions § 63 (NCI4th)—negligence by radiologist—hospital not liable on basis of apparent authority**

Defendant hospital was not vicariously liable for a radiologist's alleged negligence based on the doctrine of apparent authority even if the hospital represented in some manner to the patient that the radiologist was its employee where

there was no evidence of reliance in that there was no evidence that the patient would have sought treatment elsewhere or done anything differently had she known for a fact that the radiologist was not an employee of the hospital.

Am Jur 2d, Hospitals and Asylums § 28.

Liability of hospital or sanitarium for negligence of physician or surgeon. 51 ALR4th 235.

Appeal by plaintiff from order entered 1 March 1993 by Judge Henry W. Hight, Jr. in Scotland County Superior Court. Heard in the Court of Appeals 8 February 1994.

The McLeod Law Firm, P.A., by Joe McLeod, for plaintiff-appellant.

Elrod & Lawing, P.A., by Rachel B. Hall, for defendant-appellee.

LEWIS, Judge.

Plaintiff brought this action to recover damages for alleged medical negligence. Plaintiff sought to hold defendant Moore Regional Hospital (hereinafter "Hospital") liable under the theory of *respondeat superior* for the negligence of the treating physician. The Hospital moved for summary judgment on the ground that the physician was not an employee of the Hospital, but was instead an independent contractor. The trial court granted partial summary judgment for the Hospital, dismissing plaintiff's claim concerning any agency relationship between the Hospital and the treating physician. The order, however, did not affect plaintiff's remaining claims of negligence against the Hospital. From the order of partial summary judgment, plaintiff appeals.

On 13 September 1988 plaintiff's decedent, Ruth Hoffman, was admitted to the Hospital with an order from her physician, Dr. John Neal, for a renal arteriogram. Dr. Neal was informed that Hospital policy required that such orders come from a doctor with staff privileges at the Hospital, which he did not have. Dr. Neal made arrangements for a doctor with staff privileges, Dr. Clay Daughtridge, to order the procedure. After receiving Dr. Daughtridge's orders, Nurse Cornelia Blue presented a consent form to Mrs. Hoffman for her signature. The consent form did not specify which radiologist would perform the procedure. Instead, it listed five radiologists, any of whom might perform the arteriogram.

The list of radiologists was comprised of members of Pinehurst Radiology Group. The group performed much, if not all, of the radiology work at the Hospital. Which doctor was to work at the Hospital at a given time was determined internally by the members of the group. Neither the Hospital nor Mrs. Hoffman had a role in that decision. On the date in question, Dr. John Lina was assigned to perform the arteriogram on Mrs. Hoffman.

Dr. Lina met with Mrs. Hoffman and explained the risks and alternatives to the arteriogram procedure. Mrs. Hoffman signed the consent form, and the arteriogram was performed. After Dr. Lina completed the procedure, he determined that angioplasty on Mrs. Hoffman's renal arteries was necessary. Dr. Lina then undertook to perform the angioplasty. During this procedure, Mrs. Hoffman experienced complications which necessitated her transfer by helicopter to Duke University Medical Center. Her condition deteriorated over the next year, and on 9 January 1990, Mrs. Hoffman died.

[1] Plaintiff's first contention on appeal is that the trial court erred in granting partial summary judgment for the Hospital, because Dr. Lina was an employee of the Hospital and as such, the Hospital was vicariously liable for his negligence. Whether an employer-employee relationship exists is a question of fact for the jury when there is evidence which tends to prove it. However, it is a question of law for the court if only one inference can be drawn from the facts. *Smock v. Brantley*, 76 N.C. App. 73, 75, 331 S.E.2d 714, 716 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 30 (1986). The key factor is whether the alleged employer has the right to supervise and control the details of the work performed by the alleged employee. *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 277, 357 S.E.2d 394, 397, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 87 (1987).

We conclude that no genuine issue of material fact exists as to whether Dr. Lina was an employee of the Hospital. As a matter of law, he was not. In *Smock v. Brantley, supra*, this Court, on similar facts, concluded that no employer-employee relationship existed. There, as here, the patient was referred to the defendant hospital and was assigned to one of the private physicians practicing at the hospital, without any expression of preference by the patient; the treating physician was a member of a private group whose members rotated as attending physicians at the hospital;

the physicians' schedule was worked out by the members of the group, not the hospital; and the patient was billed for the physician's services by the group, not the hospital. *Smock*, 76 N.C. App. at 75-76, 331 S.E.2d at 716.

In the instant case, plaintiff argues that the Hospital's right to control the work of Dr. Lina was evidenced by the fact that Dr. Lina did not have the authority to admit patients or to write orders for patients; that hospital policy precluded Dr. Lina from seeing any person who did not have orders from a physician with staff privileges at the Hospital; and that hospital policy dictated what lab work would be performed on a patient in preparation for the procedures performed by Dr. Lina. These facts, however, are merely examples of the Hospital's general policy rules. They are not indicative of that kind of control and supervision over the details of a physician's work that a plaintiff must show in order to prove that there was an employer-employee relationship.

Plaintiff also contends that the evidence showed that a contract existed between the Hospital and Pinehurst Radiology Group, and that, therefore, the case of *Willoughby v. Wilkins*, 65 N.C. App. 626, 310 S.E.2d 90 (1983), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 697-98 (1984), is controlling. We note that the only evidence of a contract that plaintiff points to is the affirmative response by an x-ray technologist at deposition to the question: "Do they [Pinehurst Radiology Group] have some type of agreement to provide the radiological services in the Radiology Department at the Hospital?" Thus, if there was an agreement, there is no evidence in the record of its contents. Moreover, the mere existence of an agreement does not compel the result reached in *Willoughby*.

In *Willoughby*, this Court concluded that there was sufficient evidence of an employer-employee relationship between a hospital and a physician to submit the case to the jury. The Court found significant the physician's and hospital's contract of employment. There, the contract provided that, *inter alia*: the physician was to conduct his work so as to further the best interest of the hospital and to meet the approval of the hospital; a specified number of days for educational leave and vacation were available to the physician; the physician's work schedule was subject to hospital approval; and the physician would not maintain a private practice. *Willoughby*, 65 N.C. App. at 634-35, 310 S.E.2d at 96. In contrast, the only evidence relating to a contract in the instant case is the

x-ray technologist's testimony that there was some type of agreement. Accordingly, plaintiff's reliance on *Willoughby* is misplaced. Because Dr. Lina was not subject to the supervision and control of the Hospital, we conclude that Dr. Lina was not an employee of the Hospital.

[2] Plaintiff's second argument is that even if there was no employer-employee relationship, the Hospital may still be held vicariously liable based on the doctrine of apparent agency. That doctrine holds that a principal who represents to a third party that another is his agent is liable for harm caused the third party by the apparent agent if the third party justifiably relied on the principal's representation. *Hayman*, 86 N.C. App. at 278, 357 S.E.2d at 397.

In the case at hand, assuming, *arguendo*, that the Hospital represented in some manner to plaintiff that Dr. Lina was its agent, plaintiff's claim still must fail, as plaintiff has put forth no evidence that Mrs. Hoffman relied on any such representation. There is no evidence in the record that Mrs. Hoffman would have sought treatment elsewhere or done anything differently had she known for a fact that Dr. Lina was not an employee of the hospital. *See Hayman*, 86 N.C. App. at 279, 357 S.E.2d at 398. There being no evidence of reliance, plaintiff's claim of apparent agency must fail.

Because there was no basis on which to hold the Hospital vicariously liable for the alleged negligence of Dr. Lina, the trial court properly granted partial summary judgment dismissing plaintiff's agency claim.

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

Affirmed.

Judges JOHNSON and EAGLES concur.

IN THE MATTER OF: SAMUEL ARMANIA DAVIS

No. 9318DC639

(Filed 5 April 1994)

Infants or Minors § 80 (NCI4th) — amendment of juvenile petition — charge of different crime — violation of due process and statute

Where a juvenile petition alleged that respondent unlawfully set fire to a public building in violation of N.C.G.S. § 14-59, the trial court erred by permitting the State to proceed on the theory that respondent unlawfully set fire to personal property in the building in violation of N.C.G.S. § 14-66 and by adjudicating respondent a juvenile delinquent on that ground since the trial court in effect amended the petition; the burning of personal property in violation of § 14-66 is not a lesser included offense of burning a public building in violation of § 14-59; and the amended petition charged defendant with a different offense in violation of due process and N.C.G.S. § 7A-627.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 41, 42.

Comment Note. — Power of court to make or permit amendment of indictment. 17 ALR3d 1181.

Appeal by respondent from order entered 8 October 1992 in Guilford County District Court by Judge Joseph E. Turner. Heard in the Court of Appeals 2 March 1994.

Michael F. Easley, Attorney General, by T. Lane Mallonee, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine M. Crawley, Assistant Appellate Defender, for respondent-appellant.

GREENE, Judge.

Samuel Armania Davis (respondent) appeals from an 8 October 1992 adjudication of him as a delinquent juvenile under N.C. Gen. Stat. § 7A-517(12) in that he "unlawfully, willfully and feloniously set fire to personal property located in a building owned by Harris Teeter."

Rodney Stuart Blackwell (Blackwell) testified for the State that on 26 March 1992, he was employed as a cashier at Harris Teeter (the store), Summit Avenue location, in Greensboro, North Carolina. Around 10:00 p.m., after he observed respondent enter the store, Blackwell left his register and went into the bathroom. While he was washing his hands, respondent entered the bathroom and proceeded to the stall nearest the wall. Blackwell left the bathroom, but poked his head back in and observed respondent "just walking around standing there" with his head "hung down." Blackwell then proceeded to his register. He "noticed that [respondent] had already left the bathroom and proceeded to exit the store." Blackwell did not see anyone enter the bathroom after that point. When he looked again, he noticed that after respondent "had exited the store nearest to the bathroom, he had then again reentered the store from the far end." When he "looked back around, the bag boy was yelling 'fire,' and smoke and flames were already coming out from the bathroom door." Blackwell heard someone yelling "fire" only a moment after respondent reappeared back into the building.

Dennis Franklin Pennix (Captain Pennix), an employee with the City of Greensboro Fire Department, Fire Prevention Bureau, testified for the State that he investigated the fire at the store. In the bathroom, "there was, of course, smoke damage. The garbage can itself, the trash can that was in the corner, was melted down completely." He observed in the back stall a "big round toilet paper holder that's plastic" and "two places on that toilet paper holder where it looked like someone had taken a lighter and tried to ignite it." He could not, however, find the ignition source to the fire, but the origin was the trash can in the men's bathroom. At the end of the State's evidence, respondent moved to dismiss.

After the trial judge expressed his opinion that he did not "believe that there's been any evidence of any burning of a building," he allowed both parties to argue whether "the burning of personal property is alleged by burning a building." The State argued that "personal property would be a lesser included offense of the building" while defense counsel stated "[i]f your honor rules that it is not a lesser included offense, they can rebring another petition and have another trial. There's no point in doing that. We'd agree to proceed on both charges regardless of the court's technical ruling." The court responded:

> Well, I would allow the motion to dismiss at the close of the State's evidence as it relates to the charge of willfully and wantonly setting fire to a building, and I'm going to allow the State to proceed on the theory of willfully and wantonly setting fire to personal property.

After hearing from defense counsel, the trial court found that respondent "did unlawfully, willfully and feloniously set fire to personal property located in a building owned by Harris Teeter."

The issue presented by this appeal is whether a juvenile can be adjudicated delinquent on the grounds he set fire to personal property in violation of N.C. Gen. Stat. § 14-66 when the juvenile petition only alleged the unlawful setting of fire to a public building in violation of N.C. Gen. Stat. § 14-59.

N.C. Gen. Stat. § 7A-523(a) provides that "[t]he court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent, undisciplined, abused, neglected, or dependent." N.C.G.S. § 7A-523(a) (1989). The petition alleging delinquency may be amended "when the amendment does not change the nature of the offense alleged or the conditions upon which the petition is based." N.C.G.S. § 7A-627 (1989).

Although our Courts have not extensively addressed Section 7A-627, our Courts have interpreted Section 15A-922(f), which allows for amendment of a criminal warrant "when the amendment does not change the nature of the offense charged," to permit amendments "as long as the amended warrant does not charge the defendant with a different offense." N.C.G.S. § 15A-922(f) (1988); *State v. Clements*, 51 N.C. App. 113, 117, 275 S.E.2d 222, 225 (1981). Because juveniles are afforded certain due process protections guaranteed by both the federal and state constitutions, including the right to "be notified, in writing, of the specific charge or factual allegations to be considered at the hearing," *In re Gault*, 387 U.S. 1, 33, 18 L. Ed. 2d 527, 549 (1967), we construe Section 7A-627 to permit a juvenile petition to be amended only if the amended petition does not charge the juvenile with a different offense.

In this case, the burning of personal property in violation of Section 14-66 is not a lesser included offense of burning a public building in violation of Section 14-59. *State v. Pierce*, 208 N.C. 47, 49, 179 S.E. 8, 9 (1935). The trial court essentially amended

the juvenile petition by allowing the State to proceed on a theory of burning of personal property. Therefore, because amending the juvenile petition in this case would charge respondent with a different offense, the trial court erred by allowing the State to proceed on a theory of burning of personal property and by adjudicating respondent delinquent on the grounds he had set fire to personal property in violation of Section 14-66.

The State argues that respondent waived the benefit of this due process protection by "consenting to be tried for a slightly different offense arising out of the same operative facts"; however, we reject this argument because jurisdiction over the subject matter of a proceeding cannot be conferred by consent, waiver, or estoppel. *In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979).

Vacated.

Judges JOHNSON and JOHN concur.

WILLIAM M. ADAMS AND WIFE, ANN C. ADAMS, PLAINTIFFS v. JIM JONES AND AUTO MART, INC. A/K/A SMITHFIELD FORD LINCOLN MERCURY, INC., DEFENDANTS

No. 9311SC652

(Filed 5 April 1994)

1. **Appeal and Error § 119 (NCI4th)— action on note—summary judgment—punitive damages and attorney fees reserved—interlocutory—appeal heard to promote judicial economy**

An appeal was treated as a petition for certiorari in order to promote judicial economy where plaintiff filed an action seeking to enjoin foreclosure under a note, to have the contract, note, and deed of trust cancelled, and to recover damages under N.C.G.S. § 75-1.1; and the trial court granted partial summary judgment for plaintiff but expressly reserved the issues of punitive damages and attorney's fees for future determination. The judgment was interlocutory because it failed to dispose of the entire case.

Am Jur 2d, Appeal and Error § 104.

2. Contracts § 43 (NCI4th)— foreclosure on note—given in forbearance of criminal prosecution—void

A contract, note, and deed of trust given in exchange for a promise not to pursue a criminal embezzlement action were void as against public policy.

Am Jur 2d, Contracts §§ 272-274, 278.

3. Unfair Competition § 1 (NCI3d)— note—given in forbearance of criminal prosecution—Chapter 75 violation

The trial court properly granted partial summary judgment for plaintiffs on a claim for unfair or deceptive acts under N.C.G.S. § 75-1.1 where plaintiffs entered into a contract and executed a note and deed of trust in consideration of defendant abstaining from criminal or civil remedies for embezzlement. A practice is unfair if it offends established public policy, as this does, and defendants' acts were in or affecting commerce since their purpose in executing the note was to recover embezzled money and to protect the financial interest of their business.

Am Jur 2d, Contracts § 292.

Appeal by defendants from order signed 23 March 1993 in Johnston County Superior Court by Judge William C. Gore, Jr. Heard in the Court of Appeals 9 March 1994.

On 13 June 1988, Alfred Coats and plaintiffs, Ann C. Adams, his mother, and William M. Adams, his step-father, entered into a contract with Smithfield Ford, Lincoln, Mercury, Incorporated (hereinafter Smithfield). The terms of the contract obligate plaintiffs to pay, over a period of time, a total of $25,000 to Smithfield. Plaintiffs executed a promissory note in the amount of $25,000 in favor of Smithfield. Smithfield is also the beneficiary of a deed of trust executed by plaintiffs to secure their debt. Defendant Jim Jones is the president and sole shareholder of defendant Auto Mart, Incorporated, formerly called Smithfield.

Plaintiffs filed this action on 29 December 1992 seeking to: (1) enjoin defendants from foreclosing under the terms of the note and deed of trust; (2) have the contract, note, and deed of trust cancelled; and (3) recover damages for defendants' violation of G.S. § 75-1.1. Plaintiffs moved for summary judgment. On 23 March 1993, the trial court granted partial summary judgment cancelling

the contract, note, and deed of trust and awarding plaintiffs compensatory damages which it then trebled under G.S. § 75-16. The trial court expressly reserved the issues of punitive damages and attorney's fees for future determination. Defendants appeal.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for plaintiffs-appellees.

Hewett and Hewett, by Alan B. Hewett, for defendants-appellants.

WELLS, Judge.

[1] Initially, we note that the judgment appealed from is interlocutory because, by reserving judgment on the issues of punitive damages and attorney's fees, the trial court's judgment fails to dispose of the entire case. *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 277, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Since the judgment appealed from does not affect a substantial right, defendants' appeal is subject to dismissal. N.C. Gen. Stat. §§ 1-277 and 7A-27. However, to expedite a decision in this case in order to promote judicial economy, pursuant to Rule 2 of the Rules of Appellate Procedure, we suspend the appellate rules and treat defendants' appeal as a petition for certiorari under Rule 21(a)(1) and grant it. *Kimzay Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 404 S.E.2d 176, *rev. denied*, 329 N.C. 497, 407 S.E.2d 534 (1991).

[2] The forecast of evidence reveals that Alfred Coats embezzled $54,000 from Smithfield while he was employed as the credit manager. Paragraph ten of the contract provides:

> That in consideration of Coats and Adams paying said monies as noted hereinabove, Smithfield Ford agrees to abstain from pursuing any legal remedies available to it including both civil and criminal prosecution. However, it is clearly understood and agreed by the parties that in the event that either Coats or Adams fail to make timely payments as set forth hereinabove, Smithfield Ford is free to pursue all remedies available to it including both civil and criminal.

On 10 August 1988, plaintiffs began repaying their debt as set forth in the contract and promissory note. Plaintiffs made 31 payments, 25 to defendant Jim Jones and 6 to defendant Smithfield, totaling $10,043.37. Plaintiffs made their last payment on 10 October 1991. On 6 November 1992, the attorney for defendant Jones

notified plaintiffs that unless they made all past due payments foreclosure proceedings would be commenced.

The well-settled law in this State is that "executory agreements . . . made in consideration of preventing, refraining, or suppressing prosecution of a crime are void as against public policy." *See Gillikin v. Whitley*, 66 N.C. App. 694, 311 S.E.2d 677 (1984) and cases cited and relied upon therein. As the foregoing language from the contract discloses, plaintiffs signed the contract, note, and deed of trust in exchange for Smithfield's promise not to pursue criminal action against Alfred Coats. We therefore hold that the contract, note, and deed of trust are void as against public policy.

[3] G.S. § 75-1.1 declares unlawful "unfair or deceptive acts or practices in or affecting commerce." For plaintiffs to be entitled to recover damages under § 75-16, they must show that defendants' conduct was "in or affecting commerce" and "unfair." A practice is unfair if it offends established public policy. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981). Based on our holding that the contract, note, and deed of trust executed by plaintiffs are void as against public policy, the only remaining question is whether defendants' conduct was "in or affecting commerce." For purposes of G.S. § 75-1.1, commerce "includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." Since defendants' purpose in executing the contract, note, and deed of trust was to recover the money embezzled by Alfred Coats and thereby to protect the financial interests of Smithfield, defendants' acts were "in or affecting commerce."

The trial court properly granted partial summary judgment in favor of plaintiffs because, on the basis of the materials presented to the trial court, there existed no genuine issues of material fact, and plaintiffs were entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 of the Rules of Civil Procedure. We note that should plaintiffs succeed in their claim to recover punitive damages they will be required to elect between that recovery and the recovery allowed by the partial summary judgment we have affirmed. *See Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 344 S.E.2d 297, *rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986).

Accordingly, the order appealed from is

Affirmed.

Judges ORR and WYNN concur.

RONNIE LYNN BETTS v. GREAT AMERICAN INSURANCE COMPANIES

No. 9311DC675

(Filed 5 April 1994)

Insurance § 571 (NCI4th)— automobile insurance—other vehicle exclusion—applicable

The trial court properly granted summary judgment for defendant insurance company where plaintiff was injured while driving a dump truck used in his family's farming operation and titled in the name of one of his parents and defendant denied payment and moved for summary judgment based on a policy provision which excluded coverage for injury sustained while occupying or when struck by any vehicle other than the covered auto which was owned by the insured or furnished for the insured's regular use. Although plaintiff contended that the dump truck was furnished for use by the farm and not for his regular use, and that the truck was not furnished for his use because it was available to and used by other farm personnel, this case falls squarely under *North Carolina Farm Bureau Mut. Ins. Co. v. Warren*, 326 N.C. 444.

Am Jur 2d, Automobile Insurance § 244.

When is automobile furnished or available for regular use within "drive other car" coverage of automobile liability policy. 8 ALR4th 387.

Exclusion from "drive other cars" provision of automobile liability insurance policy of other automobile owned, hired, or regularly used by insured or member of his household. 86 ALR2d 937.

Appeal by plaintiff from summary judgment entered 27 April 1993 by Judge Albert A. Corbett, Jr. in Harnett County District Court. Heard in the Court of Appeals 22 March 1994.

Kelly & West, by Johnny C. Chriscoe, Jr. and W. Ty Sawyer, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, by Robert H. Griffin, for defendant-appellee.

WYNN, Judge.

On 31 October 1991 plaintiff, Ronnie Lynn Betts, was driving a dump truck used in his family's farming operation and titled in the name of one of his parents. He was involved in an accident and incurred $2,630.52 in medical expenses. He sought payment from defendant, Great American Insurance Company, under his personal automobile insurance policy. When defendant refused coverage, plaintiff sued for breach of contract. Summary judgment was granted for defendant on 27 April 1993. Plaintiff appeals.

Defendant excluded plaintiff from coverage pursuant to a provision in the policy which states:

> We do not provide Medical Payments Coverage for any person for bodily injury:
>
> . . . .
>
> 4. Sustained while occupying, or when struck by, any vehicle (other than your covered auto) which is:
>
> a. owned by you; or
>
> b. furnished for your regular use.

Plaintiff argues that this provision does not apply because the vehicle in question was not furnished for his regular use.

The facts of this case fall squarely under *North Carolina Farm Bureau Mut. Ins. Co. v. Warren*, 326 N.C. 444, 390 S.E.2d 138 (1990). In that case, defendant, Dr. Warren, was a medical resident at the East Carolina University School of Medicine in Greenville, North Carolina. While serving an eight-week rotation at Wayne County Memorial Hospital in Goldsboro, North Carolina, Dr. Warren regularly drove between Greenville and Goldsboro in a van owned by the East Area Health Education Agency. She was allowed to use the van only for transportation to and from Goldsboro during this rotation, and she was specifically prohibited from using the van for personal business or pleasure. Occasionally, a medical student would drive the van to Goldsboro and Dr. Warren would

ride with another. One day while driving the van, Dr. Warren was involved in an accident in which one of her passengers was injured. The plaintiff insurance company, who had issued Dr. Warren's personal automobile liability insurance policy, brought a declaratory judgment action to determine whether the van was "furnished for [her] regular use," within the meaning of that policy, thus excluding it from liability coverage. The Supreme Court held that it was.

The exclusion clause in *Warren* applied to liability coverage, while the clause in Betts's policy applies to medical payments coverage. Nevertheless, the clauses contain identical language, and we use the *Warren* analysis in determining whether the farm truck was furnished for Betts's regular use.

Plaintiff Betts argues that the regular use exclusion does not apply because the dump truck was not furnished for *his* regular use, as his policy specifies, but rather, for use by the farm. However, in *Warren*, Dr. Warren used the vehicle solely as an employee, in furtherance of the medical school's purposes. In fact, she was expressly prohibited from using the van for personal business or pleasure. Nevertheless, the Supreme Court found this use to be "[her] regular use." Following *Warren*, we decline to construe the phrase "your use" to mean your *personal* use, as plaintiff urges.

Plaintiff further contends that the fact that the vehicle was available to and used by other farm personnel meant that it was not "furnished for [his] use." However, in *Warren*, the van provided for Dr. Warren was occasionally driven by medical students during the rotation. The Court held that the regular use exclusion applied. "Under the facts and circumstances of this case, for Dr. Warren's use of the van to have been 'regular,' it was not necessary that the van's availability be exclusive or permanent." *Warren*, 326 N.C. at 447-48, 390 S.E.2d at 140. So long as the insured driver regularly used the vehicle, it is irrelevant that others also used it.

We find no basis upon which to distinguish this case from *Warren*. Accordingly, the trial court's entry of summary judgment for defendant is affirmed.

Affirmed.

Judges Wells and Orr concur.

LILLIE LUCILLE HARWARD v. CHERYL SMITH

No. 9310SC633

(Filed 5 April 1994)

Judgments § 115 (NCI4th)— lump sum offer of judgment—inclusion of attorney's fees and costs

Defendant's offer of judgment "in the lump sum of $7,001.00 for all damages, attorneys' fees taxable as costs, and the remaining costs accrued at the time this offer is filed" evinces an unmistakable intent that the $7,001.00 lump sum be payment not only for plaintiff's damages but also for her attorney's fees and the costs accrued at the time the offer was filed, and the trial court erred by ordering defendant to pay plaintiff's attorney's fees and the costs of the action in addition to the sum of $7,001.00.

Am Jur 2d, Costs § 22; Judgments § 1137.

Appeal by defendant from judgment entered 20 May 1993 in Wake County Superior Court by Judge Narley L. Cashwell. Heard in the Court of Appeals 9 March 1994.

E. Gregory Stott for plaintiff-appellee.

Bailey & Dixon, by David S. Coats, for defendant-appellant.

GREENE, Judge.

Cheryl Smith (defendant) appeals from judgment entered 20 May 1993 ordering her to pay to Lillie Lucille Harward (plaintiff) $7,001.00, taxing as costs to defendant plaintiff's attorney's fees of $4,808.00, and taxing the costs of the action against defendant.

This action arose out of an automobile accident between plaintiff and defendant which occurred on 11 February 1991. On 4 December 1991, plaintiff filed suit against defendant seeking in excess of $10,000.00 in compensatory damages based upon the alleged negligence of defendant. On 6 May 1993, defendant served upon plaintiff, and filed with the superior court, an Offer of Judgment which reads as follows:

> Defendant, pursuant to G.S. § 1A-1, Rule 68, more than ten days before trial, offers to allow judgment to be taken

against her in this action in the lump sum amount of $7,001.00 for all damages, attorneys' fees taxable as costs, and the remaining costs accrued at the time this offer is filed. This offer is made for the purposes set out in G.S. § 1A-1, Rule 68(a), and for no other purpose.

On 7 May 1993, plaintiff's attorney notified defendant's attorney in writing that plaintiff accepted the Offer of Judgment. Plaintiff's Notice of Acceptance, filed with the superior court on 7 May 1993, read as follows:

> The plaintiff hereby accepts Offer of Judgment in the sum of $7,001.00 tendered by defendant together with cost accrued at the time said offer was filed.

On 17 May 1993, plaintiff requested that the court assess court costs and interest against defendant in addition to the amount set forth in defendant's Offer of Judgment. After hearing arguments of counsel, the court found and concluded that plaintiff was entitled to recover costs in addition to the lump sum Offer of Judgment. Judgment was entered against defendant and defendant was ordered to pay plaintiff the $7,001.00 and $4,808.00 for attorney's fees taxable as costs and prejudgment interest from the date the complaint was filed.

The issue presented is whether the defendant can be required to pay costs and plaintiff's attorney's fees in addition to the $7,001.00 figure in the Offer of Judgment.

This Court has recently addressed this issue in *Aikens v. Ludlum*, 113 N.C. App. 823, 440 S.E.2d 319 (1994). In *Aikens*, we held that lump sum offers of judgment are permissible, but that the defendant making the offer bears the responsibility of making "sure that he has used language which conveys that he is making a lump sum offer." *Aikens*, 113 N.C. App. at 826, 440 S.E.2d at 321. *See also* 2 G. Gray Wilson, *North Carolina Civil Procedure* § 68-2 (Supp. 1993) (hereinafter *Wilson*) ("An offer for a specified sum that includes costs or costs and attorney's fees is valid, such that acceptance precludes any further recovery or award beyond the amount stated in the offer.").

In *Aikens*, the defendant's Offer of Judgment read:

> 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.*

Aikens, 113 N.C. App. at 824, 440 S.E.2d at 320 (emphasis in original). We held that the phrase "together with the remaining costs accrued at the time this offer is filed" created an ambiguity as to whether the offer of judgment was intended to include costs. We construed this ambiguity against the drafter of the offer of judgment and held that the offer of $10,001.00 included the plaintiff's damages and attorney's fees, but did not include the remaining costs accrued. In this case however, the Offer of Judgment created no ambiguity; it specifically offered to allow judgment to be taken against defendant "in the lump sum amount of $7,001.00 for all damages, attorney's fees taxable as costs, and the remaining costs accrued at the time this offer is filed." This language evinces an unmistakable intent that the $7,001.00 lump sum be payment not only for plaintiff's damages, but for her attorney's fees and the costs accrued at the time the Offer of Judgment was filed on 6 May 1993.

Because the acceptance contained language somewhat different from the language of the offer, there may be some question as to whether plaintiff accepted the offer as tendered or made a counteroffer. *See Wilson* § 68-2 ("Acceptance of an offer of judgment must be unconditional."). It is unnecessary, however, that we address this issue because it has not been assigned as error by the plaintiff nor has it been argued in this Court. Furthermore, it does not appear that the issue was raised before the trial court.

The superior court's order requiring defendant to pay plaintiff's attorney's fees and the costs of the action in addition to the sum of $7,001.00 is reversed. Remand is unnecessary because the record does not reveal that any attorney's fees or costs accrued after 6 May 1993, the date the offer of judgment was filed.

Reversed.

Judges JOHNSON and JOHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 MARCH 1994

BERGIN v. PENNCORP FINANCIAL No. 9310SC292	Wake (92CVS06559)	Affirmed
BURCHFIELD v. N.C. MEMORIAL HOSPITAL No. 9310IC246	Ind. Comm. (TA-11822)	Dismissed
DUNN v. PACIFIC EMPLOYERS INS. CO. No. 9310SC395	Wake (89CVS5982)	Dismissed
HANSLEY v. SOUTHEASTERN FREIGHT LINE No. 939SC38	Granville (91CVS494)	Affirmed
HOLLOWAY v. DUKE UNIVERSITY No. 9314SC550	Durham (92CVS00012)	Dismissed
IN RE ESTATE OF BUCKNER v. BUCKNER No. 9315SC542	Alamance (91E617)	Dismissed
JUSTICE v. PORTER No. 9321DC231	Forsyth (89CVD1764)	Reversed & Remanded
MARSH v. MARSH No. 9229DC874	Rutherford (90CVD165)	Reversed & Remanded
MARUSAK v. PPG INDUSTRIES, INC. No. 9310IC724	Ind. Comm. (639999)	Vacated & Remanded
MASON v. MASON No. 9322SC446	Iredell (91CVS1470)	No Error
MILLER v. POOLE No. 9310SC519	Wake (92CVS01451)	Affirmed
POTTER v. BRETAN No. 9324SC264	Yancey (87CVS131)	No Error
RENFROW v. DEANS No. 927SC1258	Wilson (89CVS747)	New Trial
SHELTON v. FIRST CHRISTIAN CHURCH OF WALNUT COVE No. 9317SC44	Stokes (92CVS184)	Affirmed
SMART v. HUGHES No. 935DC424	Pender (92CVD00344)	Dismissed

STATE v. BARNES No. 938SC592	Lenoir (92CRS9571)	No Error
STATE v. CONYERS No. 9318SC213	Guilford (91CRS52997) (91CRS52999) (91CRS20578)	No Error
STATE v. ERWIN No. 9318SC672	Guilford (92CRS44916)	No error in trial; remanded for resentencing
STATE v. GOODWIN No. 9315SC543	Alamance (92CRS9802)	No Error
STATE v. McDONALD No. 9316SC179	Mecklenburg (91CRS30979)	No Error
STATE v. MORGAN No. 9326SC489	Mecklenburg (91CRS67596)	Reversed
STATE v. SCHOFIELD No. 9310SC427	Wake (92CRS00014)	No Error
STATE v. THOMPSON STATE v. CATHEY No. 9126SC1219	Mecklenburg (91CRS759) (90CRS69273) (90CRS69276)	Defendant Cathey—reversed as to trafficking conviction. Defendant Thompson—no error.
THOMPSON v. MULTITEK, INC. No. 922SC1190	Beaufort (91CVS606)	Affirmed in part, reversed & remanded in part
WHISNANT v. WHISNANT No. 9325SC356	Catawba (91CVS589)	Vacated & Remanded

FILED 5 APRIL 1994

ALLSBROOK v. ALLSBROOK No. 936DC594 No. 936DC189	Halifax (90CVD1126)	Affirmed
ASKEW v. WINN-DIXIE RALEIGH No. 938SC403	Lenoir (92CVS68)	Reversed & Remanded
CHRISTMONT CHRISTIAN ASSEMBLY v. JOYCE No. 9328SC417	Buncombe (92CVS199)	Affirmed

EDGECOMBE COUNTY ex rel. TAYLOR v. GRAHAM No. 937DC880	Edgecombe (90CVD907)	Appeal Dismissed
FRENCH BROAD ELECTRIC MEMBERSHIP CORP. v. HARTFORD FIRE INS. CO. No. 9224SC1238	Madison (91CVS126)	Affirmed
GALLAGHER v. ROBINHOOD MANOR ASSN. No. 9318SC484	Guilford (92CVS223)	Affirmed
GODLEY v. GODLEY No. 9326DC910	Mecklenburg (87CVD1393)	Dismissed
GURGANUS v. GURGANUS No. 934SC577	Onslow (88SP616)	Reversed
IN RE LEVIN v. LEVIN No. 9324DC159	Watauga (92CVD347)	Affirmed
IN RE SALE OF LAND OF MARTIN No. 9323SC458	Wilkes (92SP156)	Affirmed
JONES v. BROUGHAM No. 9314DC443	Durham (92CVD05189)	Reversed
LOVE v. LOVE No. 9319DC927	Rowan (92CVD798)	Affirmed
LOY v. LOY No. 9315DC177	Alamance (91CVD2516)	Affirmed
MATIER v. CONE MILLS CORP. No. 9310IC242	Ind. Comm. (72691) (725368)	Affirmed
McNEILL v. McNEILL No. 9311DC871	Harnett (93CVD171)	Affirmed in part & vacated in part
MILLER v. MILLER No. 925DC1193	New Hanover (91CVD3832)	Affirmed in part, reversed in part & remanded
MOORING v. KAWASAKI MOTORS CORP. USA No. 938SC536	Greene (92CVS98)	Affirmed

OLIVE v. OLIVE No. 9310SC84	Wake (90CVS5991)	Affirmed
PORTERS NECK QUALITY OF LIFE ASSN. v. PORTERS NECK HOMEOWNER ASSN. No. 935SC42	New Hanover (92CVS2567)	Dismissed
SMITH v. WEST HILL LIMITED PARTNERSHIP No. 9221SC959	Forsyth (90CVS5791)	No Error
STATE v. ADAMS No. 9318SC423	Guilford (91CRS18524)	Affirmed
STATE v. ANDERSON No. 9320SC546	Union (92CRS4402) (92CRS4779)	No Error
STATE v. ARRINGTON No. 9321SC1023	Forsyth (93CRS11755) (93CRS11756) (93CRS11757) (93CRS11758) (93CRS11759)	No Error
STATE v. BELL No. 9334SC765	Sampson (92CRS7237)	No Error
STATE v. BURR No. 9321SC498	Forsyth (91CRS51986) (91CRS51987)	No Error
STATE v. CATES No. 9321SC1005	Forsyth (92CRS37612) (92CRS37613) (92CRS37614) (92CRS37344)	No Error
STATE v. CONNELLY No. 9325SC931	Catawba (92CRS4170)	Affirmed
STATE v. DALTON No. 9317SC950	Stokes (92CRS5887) (92CRS5886) (92CRS5885) (92CRS5920)	No Error
STATE v. EDDIE No. 937SC452	Wilson (92CRS2289) (92CRS7706)	No Error

STATE v. GREENE No. 935SC340	New Hanover (92CRS16979) (92CRS16980) (92CRS16981)	Affirmed
STATE v. HALL No. 9229SC562	Polk (90CRS712)	No Error
STATE v. HANDY No. 9215SC1326	Alamance (91CRS26217) (91CRS26218) (91CRS30994)	No Error
STATE v. HERNANDEZ No. 924SC1268	Sampson (91CRS5411) (91CRS5438) (91CRS5439) (91CRS5442) (91CRS5443)	Reversed & Remanded
STATE v. JONES No. 936SC1055	Halifax (92CRS2473) (92CRS2474)	No Error
STATE v. LAWSON No. 938SC388	Lenoir (92CRS7335) (92CRS8985)	Remanded for resentencing
STATE v. McLAURIN No. 9312SC287	Cumberland (91CRS20125) (91CRS20127)	No Error
STATE v. McLEAN No. 9310SC901	Wake (92CRS74300)	No Error
STATE v. McNEILL No. 9320SC854	Moore (92CRS10653) (93CRS115)	Appeal Dismissed
STATE v. MYERS No. 9311SC487	Johnston (92CRS6992) (92CRS6993) (92CRS6998)	No Error
STATE v. NORRIS No. 934SC768	Sampson (92CRS4836) (92CRS4837) (92CRS4838)	No Error
STATE v. PATTON No. 9325SC823	Burke (90CRS7293)	No Error
STATE v. SNYDER No. 9329SC904	Rutherford (90CRS1181)	No Error

STATE v. STINES No. 9329SC887	McDowell (91CRS3821) (92CRS920)	As to defendant's conviction for being an habitual felon, judgment arrested. As to defendant's conviction for felonious larceny, remanded for resentencing.
STATE v. SUTTON No. 9221SC986	Forsyth (91CRS30148)	No Error
STATE v. THORPE No. 9310SC771	Wake (91CRS87828) (91CRS87829)	No Error
STATE v. VICK No. 9310SC308	Wake (91CRS33524)	No Error
STATE v. WHITE No. 9328SC570	Buncombe (92CRS66767) (92CRS66768) (92CRS9842)	No Error
STATE v. WHITFIELD No. 933SC441	Pitt (92CRS10577)	Appeal Dismissed
STYRON v. PIZZA INN OF MOREHEAD CITY No. 923SC227	Carteret (89CVS354)	Affirmed in part, reversed in part & remanded
VILEISIS v. JAEGER No. 9314DC418	Durham (91CVD1358)	Affirmed
WELLS v. EVANS FORD, INC. No. 938DC882	Lenoir (92CVD18)	Vacated & Remanded

IN THE MATTER OF DELORA DENNIS, ROUTE 2, BOX 478, BREVARD, NORTH CAROLINA 28712, AND OTHER CUSTOMERS OF HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, COMPLAINANTS v. DUKE POWER COMPANY AND HAYWOOD ELECTRIC MEMBERSHIP COPORATION, RESPONDENTS AND MR. THOMAS W. MCGOHEY AND OTHER CUSTOMERS OF HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, 505 CONNESTEE TRAIL, BREVARD, NORTH CAROLINA 28712, COMPLAINANTS v. DUKE POWER COMPANY AND HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, RESPONDENTS AND MRS. CARMELETTA MOSES, ROUTE 68, BOX 326, TUCKASEGEE, NORTH CAROLINA 28783, COMPLAINANT v. DUKE POWER COMPANY AND HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, RESPONDENTS AND MR. FORREST COLE, ROUTE 63, BULL PEN ROAD, CASHIERS, NORTH CAROLINA 28717, AND OTHER CUSTOMERS OF HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, COMPLAINANTS AND NANTAHALA POWER & LIGHT COMPANY AND HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, RESPONDENTS

No. 9310UC278

(Filed 19 April 1994)

1. **Utilities Commission § 51 (NCI3d) — appellate review — standard of review**

Appellate review of a Utilities Commission order is governed by N.C.G.S. § 62-94(b) and the order will not be upheld if error is found based on one of the grounds enumerated in that statute. Grounds for relief not specifically set forth in the notice of appeal filed with the Commission may not be relied upon in the appellate courts and, even when specific grounds are set forth, the scope of review may be determined only from an examination of the issues brought forward by the appealing party and the nature of the supporting contentions.

Am Jur 2d, Public Utilities §§ 276 et seq.

2. **Utilities Commission § 55 (NCI3d) — appellate review — findings of fact — sufficient**

The findings of the Utilities Commission were sufficient where the facts presented throughout the order provide the basis for concluding whether an action or decision was reasonable or prudent. N.C.G.S. § 62-79(a) mandates that the Commission find all facts which are essential to a determination of the issues before it and the failure to include all the necessary findings is an error of law and a basis for remand. However, the Commission is not required to set forth comments regarding every single fact or item of evidence presented

by the parties. While the Commission's summary of evidence, findings of fact, and conclusions of law in this case are mixed together, the mislabeling in itself does not require that the Commission's order be overturned.

Am Jur 2d, Public Utilities §§ 286, 289.

3. Utilities Commission § 5 (NCI3d)— electrical utility—order requiring reassignment of customer—punitive—no authority

The Utilities Commission exceeded its authority under N.C.G.S. § 62-110.2(d)(2) where a number of customers of Haywood Electric Membership Corporation requested reassignment to Duke Power Company, an investor owned public utility; the Commission held hearings and entered an order which summarized the testimony of 47 witnesses who testified against Haywood regarding poor service and their attempts to obtain relief; after a further hearing to consider a proposal from Duke Power, the Commission ordered the transfer of responsibility for furnishing electric utility service to M-B Industries, Haywood's largest commercial ratepayer, to Duke Power; the Commission ruled that Haywood's service to all complainants was inadequate and undependable and that its conditions of service and service regulations were arbitrary and unreasonably discriminatory; and it was apparent from the order that the punitive effect on Haywood of the transfer was a major factor in the decision and served as a ground for the decision. A legislative directive cannot be found in N.C.G.S. § 62-110.2(d)(2) or elsewhere authorizing the Commission to order a reassignment of customers based on the Commission's intent to punish an electric supplier by the selective transfer of a commercially significant and highly valuable customer.

Am Jur 2d, Public Utilities §§ 9 et seq.

4. Utilities Commission § 15 (NCI3d)— electric service—inadequate service—Commission's failure to transfer service—no error

The Utilities Commission did not err by failing to order the immediate transfer of electric service suppliers for appellant residential customers of Haywood Electric Membership Corporation upon the Commission's determination that the service provided by Haywood is inadequate or undependable and that Haywood's conditions of service and service regulations are arbitrary and unreasonably discriminatory. Under N.C.G.S.

§ 62-110.2(d)(2), the power to order a transfer is discretionary once the Commission has made appropriate findings which would justify a transfer. There was sufficient competent, material, and substantial evidence here to sustain the order of the Commission as to the nontransfer of the residential complainants; it was particularly noted that the Commission took appropriate steps to resolve the assorted problems at issue by ordering improvements monitored by periodic progress reports and further public hearings.

Am Jur 2d, Public Utilities §§ 9 et seq.

5. **Evidence and Witnesses § 2148 (NCI4th)— transfer of customer—expert testimony on impact—excluded—error**

The Utilities Commission erred in a hearing on whether to transfer customers from Haywood Electric Membership Corporation to Duke Power by excluding expert testimony on the impact of the transfer on Haywood. The evidence was relevant to a nonprofit electric supplier's ability to provide adequate future services to its consumer-members and may be significant in the Commission's formulation of an appropriate remedy. N.C.G.S. § 62-65.

Am Jur 2d, Expert and Opinion Evidence §§ 5 et seq., 32-38.

Appeal by Respondent Haywood Electric Membership Corporation, Intervenor North Carolina Electric Membership Corporation, and Intervenor Public Staff from order entered 5 October 1992 by the North Carolina Utilities Commission. Heard in the Court of Appeals 11 January 1994.

This appeal presents a case of first impression. In the words of the North Carolina Utilities Commission, this appeal arises from a proceeding in which "the Commission [was] faced with an unprecedented number of [customer] complainants requesting reassignment" from an electric membership corporation to an investor-owned public utility pursuant to G.S. 62-110.2(d)(2) of the Public Utilities Act. Respondent Haywood Electric Membership Corporation (hereinafter "Haywood EMC") is a rural electric nonprofit corporation established pursuant to the Electric Membership Corporation Act. *See* G.S. 117-7 *through* 117-27. This appeal involves proceedings arising from four separate complaints filed with the North Carolina Utilities Commission (hereinafter "Commission"). *See* G.S. 62-110.2(d)(2).

On 30 July 1990, Delora Dennis and approximately 640 residents of Transylvania County, North Carolina, filed a complaint against Haywood EMC and Duke Power Company (hereinafter "Duke," which is a public utility as defined by G.S. 62-3(23)(a)(1)), alleging *inter alia* that Haywood EMC provided inadequate and undependable electrical service and requesting that they be reassigned to Duke. On 27 August 1990, Haywood EMC filed an answer and subsequently filed a supplemental answer and motion to dismiss the complaint. On 6 September 1990, Duke filed an answer, alleging that it had no authority to provide service to the customers of an electric membership corporation without action by the electric membership corporation or by the Commission and alleged that G.S. 62-110.2(d)(2) "provides for the Commission to consider the concerns of these customers."

On 12 September 1990, Thomas W. McGohey and approximately 229 of Haywood EMC's customers filed a similar complaint against Haywood EMC and Duke. On 28 September 1990, the Commission denied Haywood EMC's motion to dismiss. By order dated 29 November 1990, the Commission scheduled a public hearing on the complaints in Brevard, North Carolina, for 19-20 March 1991. This public hearing was later rescheduled for 21-22 May 1991.

During January 1991, Carmeletta Moses, a resident of Jackson County, North Carolina, filed a complaint against Haywood EMC and Duke, requesting reassignment from Haywood EMC to Duke. On 20 February 1991, a complaint was filed by Forrest Cole and various residents of Jackson County, North Carolina, against Haywood EMC and Nantahala Power & Light Company (hereinafter "Nantahala," which is a public utility as defined by G.S. 62-3(23)(a)(1)), requesting reassignment to Nantahala. On 20 March 1991, the Utilities Commission's Public Staff filed with the Commission a petition signed by these customers, who alleged in the petition that "we would receive more efficient service at more reasonable rates from Nantahala Power Company."

On 18 April 1991, the Public Staff filed additional letters of complaint from Haywood EMC's customers, including a letter from M-B Industries, which is a manufacturing company in Rosman, North Carolina. The letter from M-B Industries stated that "[o]ur service from Haywood Electric has been poor . . . . If, in fact, changing providers is a possible option we would appreciate guidance regard-

ing the proper administrative procedures we must follow to transfer the Haywood Electric portion of our power provision to Duke Power."

Other parties have intervened during the course of this litigation. The Public Staff, acting pursuant to G.S. 62-15, intervened in this action on behalf of the complainants. North Carolina Electric Membership Corporation (hereinafter "NCEMC") is a generation and transmission cooperative organized in accordance with Chapter 117 of the General Statutes and is a wholesale bulk power supplier for its 27 member cooperatives, one of which is Haywood EMC. On 7 January 1991, the Commission granted NCEMC's petition to intervene. Carolina Power & Light, a public utility as defined by G.S. 62-3(23)(a)(1), intervened in this action as an interested party by order dated 4 February 1991. On 10 May 1991, the National Rural Utilities Cooperative Finance Corporation (hereinafter "CFC"), a District of Columbia private, not-for-profit, national cooperative association, filed a petition to intervene. In its petition, CFC stated that it "is owed over $6.8 million by Haywood [EMC], with such funds having been loaned in conjunction with loans from [the] REA [Rural Electrification Administration], which loans are secured by one or more supplemental mortgage and security agreements which require repayment of loans over a 35-year period of time." The Commission denied CFC's petition to intervene by order dated 17 May 1991.

On 14 May 1991, the Commission held a pre-hearing conference "to consider matters of procedures, evidence, the order of examination and cross-examination of witnesses, motions to strike testimony, and other such matters." On 17 May 1991, the Commission filed a pre-hearing order which *inter alia* ordered the exclusion of the testimony of Gregory L. Booth, a witness for NCEMC, regarding the adverse economic impact on Haywood EMC of a shift of customers from Haywood EMC to other electric suppliers.

A public hearing was held on 21-22 May 1991, in Brevard, North Carolina, and a subsequent hearing was held on 7-8 August 1991, in Raleigh, North Carolina. On 5 October 1992, the Commission entered a thirty-two page "ORDER REASSIGNING ELECTRIC SERVICE FOR M-B INDUSTRIES PLANTS, PROVIDING TIME TO RESOLVE CUSTOMER COMPLAINTS PURSUANT TO REVISED WORK PLAN, AND REQUIRING PROGRESS REPORTS." The Commission, in its recitation of "Discussion of Evidence and Conclusions," summarized *inter alia* the testimony of "the 47 witnesses who testified

against Haywood regarding the problems and their numerous attempts to obtain relief from these problems without satisfactory response by Haywood." The order examined *inter alia* the subjects of "customer service," "voltage levels," "outage levels," "source of supply," and "construction work plan." The 5 October 1992 order provided *inter alia* as follows:

FINDINGS OF FACT

1. Haywood EMC is a duly constituted electric membership corporation in the State of North Carolina established pursuant to Chapter 117 of the General Statutes of North Carolina. It provides electric service to portions of Buncombe, Haywood, Jackson, Macon, and Transylvania Counties, with the bulk of its service being provided in Haywood and Transylvania Counties.

2. Haywood is subject to the jurisdiction of the North Carolina Utilities Commission under G.S. 62-110.2(d)(2), which gives the Commission the authority to reassign electric service territory from one supplier to another upon a finding that service to a consumer by the electric supplier which is providing the service to that consumer's premises is or will be inadequate or undependable, or that the rates, conditions of service or service regulations, applied to that consumer, are unreasonably discriminatory.

3. Duke, Nantahala, and CP&L are engaged in the generation, transmission, and distribution of electric power to the general public for compensation in North Carolina. They are public utilities as defined by G.S. 62-3(23)(a)(1) and are electric suppliers as defined by G.S. 62-110.2(a)(3). The Commission has jurisdiction over the extension of electric power service by these utilities to meet the reasonable needs of the electric consumers on the facts of this case and has jurisdiction over the subject matter of the complaints.

4. This proceeding is before the Commission on petition of certain customers of Haywood for reassignment to other electric suppliers on the grounds that the electric service they receive from Haywood is inadequate and undependable and that the conditions of service and service regulations as applied to them are unreasonably discriminatory.

5. Haywood's customer service is not provided uniformly to its customers. The district office has discretionary power, which can be, and is, exercised arbitrarily in responding to customer complaints, deposit procedures, credit checks, disconnect procedures, equal payment plans, and late payments.

6. The complainants have received voltage from Haywood which is outside the voltage standards set by Haywood itself, REA, and this Commission. This includes periods of low voltage, high voltage, and voltage swings.

7. The improper voltage and electric service provided by Haywood has caused, and continues to cause, damage to the complainants, including, but not limited to, damage to heating equipment, water pumps, major electric appliances, and electronic equipment such as TVs, VCRs, computers, [sic] telephone answering devices.

8. The complainants have experienced and continue to experience frequent electric service outages. Among the major causes of these outages are:

(a) Haywood's inability to control or mitigate the impact of lightning, storms, planned outages, and similar problems;

(b) Haywood's inadequate and nonuniform line clearing procedures;

(c) Haywood's indifference, or inadequate response, to consumer problem reports;

(d) Haywood's lack of knowledge of customer growth and usage patterns; and

(e) Lack of communication and coordination between Haywood and its consultant engineer.

9. The complaints of Haywood EMC against its power suppliers Duke and Nantahala are without merit. There has been no conclusive showing that the power supply to Haywood from Duke or Nantahala has been inadequate. The problems Haywood has experienced in attempting to obtain sources of supply at multiple distribution level delivery points in difficult terrain, instead of obtaining a reliable transmission level sup-

ply, do not absolve Haywood of its responsibility for reliability of service.

10. The revised 1991-93 Construction Work Plan of Haywood substitutes a new tie line between the Quebec substation and the cashiers metering point for the new transmission line and substation contained in the original work plan, although the details of such a tie line have not been discussed with Duke or Nantahala. Both Duke and Nantahala objected to approval of the tie line without first settling the various issues between Haywood and the suppliers which are raised by the new tie line.

11. Haywood has instituted a new management. Haywood has also prepared and adopted a revised 1991-93 Construction Work Plan which contains improvements that, according to Haywood, will "improve its reliability of service to members through the use of sound engineering and economics judgments."

12. Responsibility for the electric utility service to the M-B Industries plants served by Haywood EMC should be transferred from Haywood to Duke Power Company. One plant is only fifty feet away from Duke's lines, another plant is some 200 yards from Duke's lines, and a sister plant in the same area is already served by Duke with a satisfactory level of service. The load on the troubled Quebec substation of Haywood can be relieved by transferring the M-B Industries plant load from Haywood to Duke, and transfer of the plants to an alternate supplier would make clear to Haywood the Commission's determination to effect a resolution of the complainants' service problems.

CONCLUSIONS

I. The Commission concludes that the electric service provided by Haywood EMC to the Complainants and to the public witnesses in this proceeding is inadequate and undependable and that Haywood's conditions of service and service regulations, as applied to the Complainants and to the public witnesses, are arbitrary and unreasonably discriminatory.

II. The Commission further concludes that, except for the M-B Industries plants served by Haywood, there should be no reassignment of customers or service territory at this time in order to allow Haywood the opportunity to undertake the

improvements to its facilities outlined in its revised construction work plan.

III. With respect to the M-B Industries plants served by Haywood, the Commission concludes that electric service to these plants should be hereinafter furnished by Duke Power Company and that pursuant to the procedures set forth below, Haywood EMC shall cease and desist from supplying electric service to the M-B Industries plants.

The Commission ordered Duke to submit a proposal outlining its plan to serve the facilities of M-B Industries and ordered that "implementation of the transfer of responsibility for furnishing electric utility service to the M-B Industries plants from Haywood to Duke shall commence upon approval by the Commission of the proposal for transfer prepared by Duke." Additionally, the Commission's 5 October 1992 order requires quarterly progress reports from Haywood EMC "describing the status of improvements to facilities and customer services of the Haywood system, the status of customer response to the improvements, and the status of necessary approvals from REA and other agencies." Additionally, the Commission ordered further hearing and that the docket remain open for at least two years "in order to monitor and address the effectiveness of Haywood's two-year improvement program for addressing customer complaints. During this two-year period, the Commission may issue further and final Order [sic] regarding the complaints."

On 4 November 1992, respondent Haywood EMC filed a "request for rehearing, motion for stay, and request for oral argument." Pursuant to the Commission's 5 October 1992 order, Duke filed its service proposal for reassignment of M-B Industries on 3 November 1992. Haywood EMC filed a response to Duke's proposal on 9 November 1992. On 19 November 1992, the Public Staff filed a "request for reconsideration and response" recommending that "[t]he Commission should not rescind its decision to transfer the electric service of M-B Industries to Duke" and that "[t]he Commission should reconsider its decision to leave residential complainants in the Haywood EMC service area." Oral argument was held before the Commission on 30 November 1992. Duke's service proposal was accepted and authorized by the Commission by an order dated 1 December 1992. The order denied Haywood EMC's 4 November 1992 motions and denied the Public Staff's 19 November

1992 request for reconsideration regarding the Commission's refusal to reassign the residential complainants.

During December 1992, Haywood EMC, NCEMC, and the Public Staff all filed timely notices of appeal and exceptions to the 5 October 1992 order. On 9 December 1992, Haywood EMC filed a petition for writ of supersedeas, which was later denied by this Court. Additionally, Haywood EMC filed a petition for temporary stay, which subsequently was granted by this Court. The temporary stay has since expired.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Jerry W. Amos, for respondent-appellant Haywood Electric Membership Corporation.

Victoria O. Hauser, Staff Attorney, and A. W. Turner, Jr., Staff Attorney, for intervenor-appellant Public Staff.

Thomas K. Austin, Associate General Counsel, for intervenor-appellant North Carolina Electric Membership Corporation.

Steve C. Griffith, Jr., Executive Vice President and General Counsel, William Larry Porter, Associate General Counsel, Karol P. Mack, Senior Attorney, and Kennedy, Covington, Lobdell & Hickman, by Myles E. Standish, for respondent-appellee Duke Power Company.

Hunton & Williams, by Edward S. Finley, Jr., and James L. Hunt, for respondent-appellee Nantahala Power & Light Company.

EAGLES, Judge.

On the appeals of respondent Haywood EMC and intervenors NCEMC and the Public Staff, the questions presented are whether the Commission erred in: (1) failing to render its decision pursuant to the standards set forth in G.S. 62-79(a), thereby frustrating appellate review; (2) reassigning complainant M-B Industries, the manufacturing company, from Haywood EMC to Duke; (3) failing to reassign the residential complainants to an electric supplier other than Haywood EMC, and; (4) excluding an expert's testimony regarding the adverse economic impact on Haywood EMC of shifting customers to other electric suppliers. After careful review of the record, transcript, and briefs, we hold that the Commission erred in reassigning M-B Industries from Haywood EMC to Duke and

remand for entry of an order vacating that portion of the Commission's 5 October 1992 order. We further hold that the Commission erred in excluding the expert testimony. As to the other issues brought forward in these appeals, the Commission's 5 October 1992 order is affirmed.

I. *Standard of Review*

[1] G.S. 62-94(b) governs our review of the Commission's order. G.S. 62-94(b) provides that an appellate court

> (b) . . . may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

The Commission's order will not be upheld if error is found based on one of the enumerated grounds of G.S. 62-94(b). *State ex rel. Utilities Comm. v. Southern Bell*, 88 N.C. App. 153, 177, 363 S.E.2d 73, 87 (1987); *Utilities Comm. v. Bird Oil Co.*, 302 N.C. 14, 20, 273 S.E.2d 232, 235 (1981) ("judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria which circumscribe judicial review"). Grounds for relief not specifically set forth in the notice of appeal filed with the Commission may not be relied upon in the appellate courts. G.S. 62-94(c). However, even when specific grounds are set forth, the applicable scope of review may be determined only from an examination of the issues brought forward by the appealing party and the nature of the supporting contentions. *Utilities Comm. v. Bird Oil Co.*, 302 N.C. 14, 273 S.E.2d 232.

II. *Appealability of the Commission's Order*

[2] Respondent Haywood EMC argues that "[t]he Commission's order lacks proper findings and conclusions and a statement of

the reasons or bases therefore concerning all the material issues as required by G.S. 62-79(a)." We disagree. G.S. 62-79 provides, in pertinent part, that:

> (a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:
>
> (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and
>
> (2) The appropriate rule, order, sanction, relief or statement of denial thereof.

G.S. 62-79(a) mandates that the Commission has "to find all facts which are essential to a determination of the issues before it, in order that the reviewing court may have sufficient information to determine whether an adequate basis exists, in law and in fact, to support the Commission's resolution of the controverted issues." *State ex rel. Utilities Comm. v. Mackie*, 79 N.C. App. 19, 29, 338 S.E.2d 888, 895 (1986), *modified on other grounds and aff'd*, 318 N.C. 686, 351 S.E.2d 289 (1987) (citations omitted). "The failure to include all the necessary findings of fact is an error of law and a basis for remand upon N.C.G.S. § 62-94(b)(4) because it frustrates appellate review." *State ex rel. Utilities Comm. v. The Public Staff*, 317 N.C. 26, 34, 343 S.E.2d 898, 904 (1986) (citations omitted). *See State ex rel. Utilities Comm. v. Carolina Water Service*, 335 N.C. 493, 502, 439 S.E.2d 127, 132 (1994); *State ex rel. Utilities Comm. v. AT&T Communications*, 321 N.C. 586, 588, 364 S.E.2d 386, 387 (1988). However, the Commission is not required to set forth comments regarding "every single fact or item of evidence presented by the parties." *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 313 N.C. 614, 745, 332 S.E.2d 397, 474 (1985), *rev'd on other grounds sub nom., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 90 L.Ed.2d 943 (1986). Our Supreme Court has stated that:

> The purpose of the findings required by G.S. § 62-79(a) is to provide the reviewing court with sufficient information to allow it to determine the controverted questions presented in the proceedings. . . .

> The Commission's summary of the appellant's argument and its rejection of the same is sufficient to enable the reviewing court to ascertain the controverted questions presented in the proceeding. That is all that G.S. § 62-79 requires.

State ex rel. Utilities Comm. v. Conservation Council, 312 N.C. 59, 62, 320 S.E.2d 679, 682 (1984).

Respondent Haywood EMC contends that various findings of fact actually are "mere conclusions." Regarding findings of fact, our Supreme Court has stated:

> Findings of fact are statements of what happened in space and time. . . .
>
> The Commission's mislabeling of its findings and conclusions will not, however, be fatal to its order if certain procedural requirements are met. The judgments and orders of courts and administrative bodies must reflect a basic understanding of how the decision-making process is supposed to work. "Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken . . . in logical sequence; each link in the chain of reasoning must appear in the order itself." *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). As long as "each link in the chain of reasoning" appears in the Commission's order, mislabeling is merely an inconvenience to the courts.

State Ex Rel. Utilities Comm. v. Eddleman, 320 N.C. 344, 351-52, 358 S.E.2d 339, 346 (1987). *See Mackie*, 79 N.C. App. at 30, 338 S.E.2d at 896 (a conclusion of law "applies principles of law, rather than a determination of facts from the [parties'] evidence, to resolve the issue"). Here, the Commission's summary of evidence, findings of fact, and conclusions of law are mixed together in portions of the order entitled *inter alia* "Findings of Fact," "Discussion of Evidence and Conclusions," "Conclusions," and "Conclusions on Decision." Proper labeling would have made this Court's task more efficient, but we nevertheless have been able to separate facts from conclusions in examining appellants' various assignments of error. After careful scrutiny of the briefs, transcript, and record, we are persuaded that the Commission's summary of evidence, findings of fact, and conclusions of law satisfy "the limited purpose of N.C.G.S. § 62-79(a)." *Eddleman*, 320 N.C. at 353, 358 S.E.2d

at 346. Considered together, the facts presented throughout the order provide the basis for concluding, as the Commission did here, whether an action or decision was reasonable or prudent. *Id.* The mislabeling of certain portions of the record does not in itself require us to overturn the Commission's order. Having set forth the standard of review and determined that the order is appealable, we turn to the merits of the appeals.

III. *Propriety of Reassignment of M-B Industries*

[3] Respondent Haywood EMC argues that "[t]he Commission's order exceeds its authority under G.S. 62-110.2(d)(2)" in that the portion of the order requiring the reassignment of M-B Industries to Duke Power Company is based upon improper grounds. We agree.

G.S. 62-110.2(d) provides:

> (2) The Commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and after hearing, if a hearing is requested by any affected electric supplier or any other interested party, to order any electric supplier which may reasonably do so to furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, and to order such other electric supplier to cease and desist from furnishing electric service to such premises, upon finding that service to such consumer by the electric supplier which is then furnishing service, or which has the right to furnish service, to such premises, is or will be inadequate or undependable, or that the rates, conditions of service or service regulations, applied to such consumer, are unreasonably discriminatory.

G.S. 62-110.2(d)(2). In that the Commission may "order such other electric supplier to cease and desist from furnishing electric service," it is clear that the Commission, after due deliberation in an appropriate proceeding, may order the reassignment of customers from one electric supplier to another under G.S. 62-110.2(d)(2). Here, our task pursuant to G.S. 62-94 is to discern whether the Commission, after considering the relevant facts and applying the pertinent statute (G.S. 62-110.2(d)(2)), made an allowable judgment, based upon permissible grounds as prescribed by our General Assembly, in its choice of remedy.

Regarding the extent of the Commission's authority under this statute, respondent Haywood EMC argues:

> G.S. 62-110.2(d)(2) authorizes the Commission to transfer a customer from one electric supplier to another only "upon finding that service *to such consumer* by the electric supplier which is then furnishing service, or which has the right to furnish service, to such premises, is or will be inadequate or undependable, or that the rates, conditions of service or service regulations, *applied to such consumer*, are unreasonably discriminatory." (Emphasis added.) As shown by the italicized portion of the quote, the Commission may only transfer a consumer upon a finding that service "to such consumer" is inadequate or that the rates, *etc.*, when "applied to such consumer" are unreasonably discriminatory. There is nothing in the statute that permits the Commission to require the transfer of one customer for the purpose of letting an electric supplier know that the Commission is serious about the need to solve alleged problems of other customers. Therefore, the Commission has exceeded its authority under the statute.

In our examination of the 5 October 1992 order, we find particularly troubling a specific passage from the section of the order entitled "Conclusions on Decision" which states:

> The Commission has concluded that the service complaints in the Quebec substation area indicate a level of service that has been unacceptable and needs to be improved. The most severe remedy would be a transferral of the entire service area to another supplier. Other remedies include an upgrade of the service facilities, or transferral of a portion of the service area to another supplier in order to relieve the load on the Haywood facilities, or some combination thereof.
>
> The Commission further concludes that the best candidate for a transferral of a portion of the Haywood service area to another supplier is the M-B Industries plants. One plant is fifty feet away from an alternative supplier (Duke), its sister plant in the same area is already served by that alternative supplier with a satisfactory level of service, and the third plant (Flame Spray) is some 200 yards from Duke's lines. *No other single customer in the area affects as many employees, and people, as these plants.* Transferral of the M-B Industries plants from Haywood to Duke would relieve the load on the

> troubled Quebec substation. *Transferral of the plants would also make it clear to Haywood, and particularly to the Board of Directors of Haywood, the seriousness with which the Commission views the service problems that have been occurring, and the Commission's determination to press for a resolution of the service problems throughout the Haywood service areas. The plants are apparently the only industrial plants in Transylvania County served by Haywood. It pays Haywood approximately $4,000 per month for the electric service.*

(Emphasis added.) While Haywood EMC disputes the Commission's findings regarding the Quebec substation, it argues that assuming *arguendo* these findings were true, the Commission's conclusion that the "[t]ransferral of the M-B Industries plants from Haywood to Duke would relieve the load on the troubled Quebec substation," is irrelevant to "the requirements of G.S. 62-110.2(d)(2) that the Commission make a finding that Haywood's service *to M-B Industries* is or will be inadequate or undependable or that the rates, conditions of service or service regulations are unreasonably discriminatory *as applied to M-B Industries*." (Emphasis in original.)

In its conclusions, the Commission ruled that Haywood EMC's service to *all* complainants was "inadequate and undependable and that Haywood's conditions of service and service regulations, as applied to the complainants and to the public witnesses, are arbitrary and unreasonably discriminatory." While it is obvious from the order that the Commission declined to impose "[t]he most severe remedy . . . [that is,] a transferral of the entire service area to another supplier," it is also apparent from the record that the poor quality of electric service arising from the "troubled Quebec substation" affected the area's individual residential consumers as well as the facilities at M-B Industries. Yet the Commission elected to transfer only M-B Industries. Accordingly, it is apparent from the italicized portion of the Commission's order, *supra*, that the punitive effect on Haywood EMC of the transfer of its (Haywood EMC's) largest commercial ratepayer was a major determinative factor in the Commission's decision to reassign M-B Industries and served as a ground for the Commission's decision to reassign M-B Industries while leaving the similarly affected residential consumers assigned to Haywood EMC. The last sentence of G.S. 62-110.2(d)(2) expressly delineates the five grounds upon which a transfer may be based: (1) inadequate service; (2) undependable service; (3) unreasonably discriminatory conditions of service; (4) unreasonably

discriminatory service regulations, or; (5) unreasonably discriminatory rates. We do not find a legislative directive in G.S. 62-110.2(d)(2) or elsewhere authorizing the Commission to order a reassignment of customers based on the Commission's intent to punish an electric supplier by the selective transfer of a commercially significant and highly valuable customer. Nor do we find in the General Statutes authority for the Commission to transfer customers for purposes of "mak[ing] it clear" to the management of an electric membership corporation that the Commission viewed their situation seriously.

We conclude that authority for a punitive basis for the transfer of customers by the Commission would have to be expressly enacted by our General Assembly. *See Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 166 S.E.2d 663 (1969) (Utilities Commission is a creation of the Legislature and has no authority except insofar as that authority has been conferred upon it by statute). *See also Utilities Comm. v. Electric Membership Corp.*, 276 N.C. 108, 171 S.E.2d 406 (1970); *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E.2d 184 (1977). At this time, the Public Utilities Act does not contain such authority. Accordingly, we reverse the Commission's decision to transfer the M-B Industries plants from Haywood to Duke, G.S. 62-94(b)(2), and we remand for entry of an order reinstating service of these plants by Haywood EMC.

IV. *Propriety of Failure to Reassign Residential Complainants*

[4] The Public Staff argues that the Commission erred "by failing to order an investor-owned utility to serve the appellants[-residents] and by failing to order Haywood Electric Membership Corporation to cease and desist from providing electrical service to the appellants[-residents]." We disagree.

The Public Staff contends that G.S. 62-110.2(d)(2), *supra*, mandates the immediate transfer of electric service suppliers upon the entry of the Commission's determination "that the service provided to the petitioning consumers by the current service supplier [Haywood EMC] is inadequate or undependable, or that the conditions of service and service regulations, as applied to those consumers, is unreasonably discriminatory." The Public Staff argues that the General Assembly has not authorized a waiting period for transfer proceedings and that the Commission has acted in excess of its statutory authority by unilaterally instituting a delay period through its failure to immediately reassign the residential complainants.

We discern no directive in G.S. 62-110.2(d)(2) which *mandates* an automatic transfer of a customer upon the Commission's finding of the existence of "inadequate or undependable . . . [or] unreasonably discriminatory" service. *Id.* Rather, the precise language utilized by our General Assembly, stating that "[t]he Commission shall have the authority and jurisdiction" to order a reassignment, grants to the Commission the *power* to order a transfer but does not require an automatic, immediate transfer. We conclude that under G.S. 62-110.2(d)(2) once the Commission has made appropriate findings which would justify a transfer, the power of the Commission to order a transfer is discretionary. *Cf. State ex rel. Utilities Comm. v. Mackie*, 79 N.C. App. 19, 338 S.E.2d 888 (1986), *modified on other grounds and aff'd*, 318 N.C. 686, 351 S.E.2d 289 (1987) (interpreting as discretionary the language in G.S. 62-118(a) "[u]pon finding . . . that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power . . . to authorize by order any public utility to abandon or reduce such service"); *Utilities Comm. v. R.R.*, 254 N.C. 73, 118 S.E.2d 21 (1961). *Compare e.g.*, G.S. 62-18 (mandating that "[t]he Commission *shall* keep a record showing in detail all receipts and disbursements" and that "all license fees and seal taxes, all money received from fines and penalties, and all other fees paid into the office of the Utilities Commission *shall* be turned in to the State treasury") *with* G.S. 62-110.2(d)(2). Upon careful consideration of the whole record, we conclude that there is sufficient competent, material, and substantial evidence to sustain the order of the Commission as to the nontransfer of the residential complainants. G.S. 62-65(a). In so concluding, we particularly note that the Commission took the appropriate steps to resolve the assorted problems at issue by ordering improvements to Haywood EMC's facilities and customer services, monitored by periodic progress reports from Haywood EMC and by further public hearings. The Public Staff further contends that the petitioning consumers "were entitled to the same treatment by the Commission as that accorded to M-B Industries . . . . [in] that the same findings of fact regarding inadequate, undependable, and discriminatory service that supported a change in the electric service provider of M-B Industries were not found to support a change in service provider for all the rest of the complainants, resulting in unequal treatment before the law." Given that we have held that the Commission reassigned M-B Industries based upon improper grounds and remanded for entry of an order reinstating Haywood EMC

as the electric supplier for M-B Industries, this argument and the remainder of the Public Staff's arguments are rendered moot by our disposition of the other issues in this appeal.

V. *Propriety of Exclusion of Expert Testimony Regarding Economic Impact of Transfer on Nonprofit Electric Supplier*

[5] Haywood EMC and NCEMC argue that the Commission erred by excluding the testimony of Gregory L. Booth, an executive vice president of an engineering consulting firm, who would have testified *inter alia* that "there will be significant and irreparable harm imposed on Haywood EMC and its member/consumers and on NCEMC and its other members if any or all of the service area is transferred to another power supplier." We agree.

G.S. 62-65 provides:

> (a) When acting as a court of record, the Commission shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable, but no decision or order of the Commission shall be made or entered in any such proceeding unless the same is supported by competent material and substantial evidence upon consideration of the whole record. Oral evidence shall be taken on oath or affirmation. The rules of privilege shall be effective to the same extent that they are now or hereafter recognized in civil actions in the superior court. The Commission may exclude incompetent, irrelevant, immaterial and unduly repetitious or cumulative evidence. All evidence, including records and documents in the possession of the Commission of which it desires to avail itself, shall be made a part of the record in the case by definite reference thereto at the hearing. Any party introducing any document or record in evidence by reference shall bear the expense of all copies required for the record in the event of an appeal from the Commission's order. Every party to a proceeding shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues, to impeach any witness regardless of which party first called such witness to testify and to rebut the evidence against him. If a party does not testify in his own behalf, he may be called and examined as if under cross-examination.
>
> (b) The Commission may take judicial notice of its decisions, the annual reports of public utilities on file with the

Commission, published reports of federal regulatory agencies, the decisions of State and federal courts, State and federal statutes, public information and data published by official State and federal agencies and reputable financial reporting services, generally recognized technical and scientific facts within the Commission's specialized knowledge, and such other facts and evidence as may be judicially noticed by justices and judges of the General Court of Justice. When any Commission decision relies upon such judicial notice of material facts not appearing in evidence, it shall be so stated with particularity in such decision and any party shall, upon petition filed within 10 days after service of the decision, be afforded an opportunity to contest the purported facts noticed or show to the contrary in a rehearing set with proper notice to all parties; but the Commission may notify the parties before or during the hearing of facts judicially noticed, and afford at the hearing a reasonable opportunity to contest the purported facts noticed, or show to the contrary.

G.S. 62-65.

G.S. 62-60 provides:

For the purpose of conducting hearings, making decisions and issuing orders, and in formal investigations where a record is made of testimony under oath, the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law. The commissioners and members of the Commission's staff designated and assigned as examiners shall have full power to administer oaths and to hear and take evidence. The Commission shall render its decisions upon questions of law and of fact in the same manner as a court of record. A majority of the commissioners shall constitute a quorum, and any order or decision of a majority of the commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this Chapter.

G.S. 62-60.

It is well established that within its discretion the Commission may agree with a single witness, provided that the evidence supports his or her position, regardless of the number of opposing

witnesses that might come forward. *State Ex Rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987). This Court is then required to determine whether the Commission's decision is supported by "competent, material and substantial evidence in view of the entire record as submitted." G.S. 62-94(b)(5). However, here we are confronted with the issue of the propriety of the Commission's *exclusion* of testimony from an expert witness.

Mr. Booth's testimony was pre-filed by NCEMC and was offered to "evaluate the financial impact which will be imposed on Haywood EMC and its remaining consumers if any or all of the service area is transferred to another utility." *See* G.S. 62-66. The testimony was excluded by an order of the Commission entered prior to the first public hearing. G.S. 62-69. Mr. Booth's testimony stated that "there will be significant and irreparable harm imposed on Haywood EMC and its member consumers and on NCEMC and its other members if any or all of the service area is transferred to another power supplier." NCEMC argues that the Commission should have considered the financial impact on both Haywood EMC and NCEMC of transferring customers in making its determination of whether to order the transfer of any of Haywood EMC's customers. NCEMC also argues that such consideration is constitutionally mandated by due process under both the federal and state constitutions. NCEMC further argues that the customer reassignments "will reduce the payment base and force higher rates on the residential members, thereby frustrating the original intent of the REA [Rural Electrification Act of 1936, 7 U.S.C.A. 901 *et seq.*], i.e., to provide affordable electric service to the rural areas of this country." Noting its own substantial loans acquired through the Rural Electrification Administration and "made on the basis of existing load and anticipated future load of Haywood and NCEMC's other members," NCEMC cites the following passage from a recent federal case, *City of Morgan City v. South Louisiana Electric*, 837 F. Supp. 194, 199 (W.D.La. 1993), which involved the municipal condemnation of the property of a distribution cooperative, as support for the relevancy of Mr. Booth's evidence to the Commission's proceedings:

> This Court notes that the federal government, through the REA, has loaned directly or guaranteed loans to Cajun [Electric Power Cooperative, a generation and transmission cooperative] of approximately $3.2 billion. The federal government's security for these loans is limited to the assets of Cajun and the revenue stream resulting from the sale of electric

> power generated by the facilities constructed by Cajun to its members/owner distribution cooperatives, including SLECA [a federally financed, nonprofit cooperative], under the All Requirements Wholesale contracts. Loans for the construction of multi-million dollar generating plants were made on the basis of existing load and anticipated future load of SLECA and Cajun's other member distribution cooperatives with the expectation that those loads would continue and grow in order to generate the revenue stream necessary to repay the loans. The report by the REA details the backgrounds of both Cajun and SLECA including the financial stability of the cooperatives, which is of particular concern to the United States considering the $3.2 billion debt involved. The REA made a detailed analysis of the ability of Cajun and the SLECA to repay these loans and the impact of the proposed expropriation on this repayment. Further, *the expropriation would result in a loss of operating margins*, as the customers sought to be expropriated by the City of Morgan City are located in SLECA's highest density service area. *Therefore, expropriation of these customers would reduce the payment base and thereby force higher rates on those being served in less dense areas, thereby frustrating the original intent of the REA, i.e., to provide affordable electrical service to the rural areas of this country.* Further, the expropriation by stripping SLECA's densest service area could place repayment itself in jeopardy.

City of Morgan City v. South Louisiana Electric, 837 F. Supp. 194, 199 (W.D.La. 1993) (emphasis added). *See* G.S. 62-2(3) (declaring our State's public policy to be "[t]o promote adequate, reliable and economical utility service to *all* of the citizens and residents of the State"); G.S. Chapter 117 (North Carolina's version of the federal Rural Electrification Act); G.S. 117-2 (declaring that the "purpose of [the] North Carolina Rural Electrification Authority is to secure electrical service for the rural districts of the State . . . and it is hereby empowered to do" several enumerated activities, including "(12) . . . all other acts and things which may be necessary to aid the rural communities in North Carolina to secure electric energy"). *See also Membership Corp. v. Light Co.*, 253 N.C. 610, 616-17, 117 S.E.2d 764, 769 (1961) ("The 'Rural Electrification Act of 1936,' USCA, Title 7, § 901 *et seq.*, the Act creating the North Carolina Rural Electrification Authority, G.S. Chapter 117, Art. 1, and the Act providing for the formation of

nonprofit membership corporations, G.S. Ch. 117, Art. 2, established a Federal-State policy to provide the benefits of electric service in rural areas not served or inadequately served with electricity").

Supporting the admissibility of Mr. Booth's testimony, Haywood EMC argues that

> It is important for the Court to recognize the important role that electric membership corporations, in general, and Haywood, in particular, have played in the health and welfare of this State and how the Commission's order, if not reversed, will affect that role.
>
> . . . .
>
> It is the declared policy of this State to "promote adequate, reliable and economical utility service to all of the citizens and residents of the State." G.S. 62-2. This policy cannot be accomplished unless all electric suppliers, including Haywood, are financially able to construct and maintain their facilities.
>
> . . . . Obviously, the loss of this revenue will affect Haywood's ability to serve its remaining customers and to make the costly improvements required by the Commission. Therefore, this loss of revenues is relevant to the Commission's decision. Nevertheless, the Commission refused to permit witness Booth to offer evidence showing how the loss of this revenue would affect Haywood's ability to serve its remaining customers.
>
> . . . .
>
> The Commission's decision to exclude this evidence not only violates rules of evidence, it is in direct contravention of the Commission's obligations under G.S. 62-2 to "promote adequate, reliable and economical utility service to all of the citizens and residents of the State." The Commission's decision not to consider any evidence on any harm that its decision may have on Haywood and its remaining customers was *a fortiori* a decision that the Commission can order a transfer of customers under G.S. 62-110.2(d)(2) without regard to the financial effect of that decision on Haywood. Haywood respectfully suggests that the Commission's decision to ignore the financial effect of its order on Haywood is in direct conflict with G.S. 62-2.

G.S. 62-65(a) provides that "the Commission shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable." *See* G.S. 8C-1, Rule 401 (" '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"). It is well established that "evidence is relevant if it has any logical tendency, *however slight*, to prove a fact in issue in the case." *State v. Prevette*, 317 N.C. 148, 162, 345 S.E.2d 159, 168 (1986) (citations omitted) (emphasis added). *See also State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (4 March 1994); *Penley v. Penley*, 314 N.C. 1, 25, 332 S.E.2d 51, 65 (1985). *See generally* K. Broun, 1 *Brandis & Broun on Evidence*, § 81 (4th Ed. 1993). Furthermore, " '[p]rocedure before the Commission in the trial of utilities matters, *and particularly in the admission of evidence*, is not so formal as litigation conducted in the superior court. *Utilities Comm. v. Telegraph Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).' " *Utilities Comm. v. Springdale Estates Assoc.*, 46 N.C. App. 488, 491, 265 S.E.2d 647, 649-50 (1980) (emphasis added). *See generally* K. Broun, 1 *Brandis & Broun on Evidence*, § 4, at 13 (4th Ed. 1993) (in administrative hearings, "[w]hatever may be the situation with regard to evidence admitted in violation of the regular rules, exclusion of significant evidence admissible under those rules may certainly be reversible error"). We note that in its 5 October 1992 order, the Commission noted that "[t]he plants are apparently the only industrial plants in Transylvania County served by Haywood. It pays Haywood approximately $4,000 per month for the electric service." We note further that Mr. Booth's testimony was excluded from the proceedings even though it is apparent from the record that the Commission considered evidence of the amount of monthly payments that M-B Industries made to Haywood EMC (notwithstanding that rates were not at issue).

It is clear that the economic effect on an electric supplier of a transfer of its customers to another electric supplier is not one of the expressly delineated grounds for transfer under G.S. 62-110.2(d)(2). It is also clear that Haywood is a *nonprofit* corporation, established pursuant to statute: it is owned by and dependent upon its consumer-members. G.S. 117-16 (providing that "[t]he corporate purpose of each corporation formed hereunder shall be to render service to its members only, and no person shall become or remain a member unless such person shall use energy supplied

by such corporation and shall have complied with the terms and conditions in respect to membership contained in the bylaws of such corporation"); *see Utilities Comm. v. Municipal Corporations*, 243 N.C. 193, 202, 90 S.E.2d 519, 527 (1955) (distinguishing suppliers of electric energy for profit from cooperatives "which are created and operated on a nonprofit basis pursuant to the established public policy of the State and Federal Government"). G.S. 110.2(d)(2) directs the Commission to examine how the electric supplier's service "is or will be . . . ," connoting a forecast by the Commission as to the quality of *future* services provided by the electric supplier. This type of evidence, given both the strong public policy enunciated in both G.S. 62-2 and G.S. 117-2 and the liberal standards for the admission of evidence in proceedings before the Commission, is relevant to a nonprofit electric supplier's ability to provide adequate future services to its consumer-members. This evidence *may* be significant in the Commission's formulation of an appropriate remedy, within its limited discretion as prescribed by G.S. 110.2(d)(2), which best serves the public policies and competing interests involved.

While we hold that this evidence is admissible pursuant to G.S. 62-65, we note that the weight to be accorded to the testimony lies within the Commission's sound discretion. *See State Ex Rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 358 S.E.2d 339 (1987); *Utilities Comm. v. Town of Pineville*, 13 N.C. App. 663, 672, 187 S.E.2d 473, 478 (1972). We conclude that Mr. Booth's testimony does not constitute "incompetent, irrelevant, immaterial and unduly repetitious or cumulative evidence." G.S. 62-65(a). Accordingly, we hold that the Commission erred by excluding this testimony. G.S. 62-94(b)(4).

VI. *Conclusion*

Summarizing, we hold that the Commission erred in transferring the facilities of M-B Industries from Haywood EMC to Duke. Accordingly, we remand for entry of an order vacating that portion of the Commission's 5 October 1992 order transferring M-B Industries from Haywood EMC to Duke and for further proceedings not inconsistent with this opinion. We further hold that the Commission erred in excluding the testimony of expert witness Booth as to the financial impact on Haywood EMC of the transfer of customers. As to the other issues brought forward in these appeals, the Commission's decision is affirmed.

For the reasons stated, the Commission's 5 October 1992 order is

Affirmed in part, reversed in part and remanded.

Judges JOHNSON and WYNN concur.

BEVERLY DYANNA CLARK, ADMINISTRATRIX OF THE ESTATE OF EARNEST CLARK, JR., APPELLANT v. IRVIN S. PERRY, M.D., AND FORSYTH COUNTY HOSPITAL, INC., FORMERLY FORSYTH COUNTY HOSPITAL AUTHORITY, INC., D/B/A FORSYTH MEMORIAL HOSPITAL, APPELLEES

No. 9221SC314

(Filed 19 April 1994)

1. Physicians, Surgeons, and Other Health Care Professionals § 127 (NCI4th)— Jehovah's Witness—blood transfusion—malpractice—failure to show standard of care

The trial court properly entered a directed verdict for defendant attending physician in plaintiff's medical malpractice action based on defendant's alleged negligence in ordering a blood transfusion for plaintiff's husband, a Jehovah's Witness AIDS patient, when his hemoglobin became dangerously low while he was asleep or unconscious after surgery where plaintiff failed to present any expert testimony of the applicable standard of care, and plaintiff's evidence failed to show that defendant knew that plaintff's husband was a Jehovah's Witness and had requested that he not receive blood products. What constitutes reasonable care and diligence in the treatment of plaintiff's husband by defendant was not readily apparent to a layperson, and a lay jury should not have to determine how thorough a consulting or attending physician's review of a patient's records must be before ordering a blood transfusion in a life-threatening, emergency situation.

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

***Liability of physician or surgeon for extending operations or treatment beyond that expressly authorized.* 56 ALR2d 695.**

2. Physicians, Surgeons, and Other Health Care Professionals § 142 (NCI4th)— Jehovah's Witness—blood transfusion—absence of consent—failure to show standard of care

The trial court properly directed a verdict for defendant attending physician in plaintiff's medical malpractice action based on defendant's failure to obtain informed consent before ordering a blood transfusion for plaintiff's husband, a Jehovah's Witness AIDS patient, when his hemoglobin became dangerously low while he was asleep or unconscious after surgery where plaintiff produced no appropriate evidence of the applicable standard of care. Deposition testimony by defendant physician setting forth his practice when informed that a patient is a Jehovah's Witness who desires to receive no blood products was insufficient to show the standard of care for obtaining informed consent in the circumstances of this case. There was no evidence of what information about blood transfusions and their usual and most frequent risks and hazards would be, under the circumstances confronted by defendant, customarily provided by other members of the same health profession with similar training and experience and situated in the same or similar communities.

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

Liability of physician or surgeon for extending operations or treatment beyond that expressly authorized. 56 ALR2d 695.

3. Discovery and Depositions § 65 (NCI4th); Physicians, Surgeons, and Other Health Care Professionals § 104— medical malpractice—failure to identify expert witness—exclusion of testimony

The trial court did not abuse its discretion by excluding a physician's testimony that it was the "consensus of the medical community" that a competent patient can refuse treatment, including blood transfusions, because of plaintiff's failure in discovery to designate the physician as an expert witness regarding the standard of care. Furthermore, such testimony did not establish the applicable standard of care in obtaining a patient's informed consent for a blood transfusion. N.C.G.S. § 1A-1, Rule 26(f1)(2).

Am Jur 2d, Depositions and Discovery §§ 373 et seq.

4. Hospitals and Medical Facilities or Institutions § 62 (NCI4th)—Jehovah's Witness—blood transfusion—liability of hospital—failure to show standard of care

The trial court properly directed a verdict for defendant hospital in plaintiff's action based on the alleged negligence of hospital employees in administering a blood transfusion to plaintiff's husband, a Jehovah's Witness AIDS patient, pursuant to a physician's order, where there was evidence that the husband's hospital records indicated that he was a Jehovah's Witness and was to receive no blood products, the admitting physician and other hospital personnel knew that plaintiff's husband should receive no blood products, the husband's medical chart taken from the admitting office to his room bore a red label marked "Jehovah's Witness" and "No Blood," and the red label was not on the chart when plaintiff's husband was placed in the ICU, but plaintiff offered no expert testimony as to the standard of care to be followed by employees of defendant hospital in maintaining patient records and in administering blood transfusions pursuant to a physician's order in an emergency situation.

Am Jur 2d, Hospitals and Asylums §§ 14 et seq.

Necessity of expert evidence to support action against hospital for injury to or death of patient. 40 ALR3d 515.

5. Hospitals and Medical Facilities or Institutions § 64 (NCI4th)—Jehovah's Witness—blood transfusion—absence of informed consent—corporate liability of hospital—failure to show standard of care

The trial court properly entered a directed verdict for defendant hospital in plaintiff's action based on corporate negligence in failing to obtain informed consent before administering a blood transfusion to plaintiff's husband, a Jehovah's Witness AIDS patient who had requested that he receive no blood products, where plaintiff offered no expert testimony as to the standard of care utilized by health care facilities like defendant in Winston-Salem or similar communities when obtaining a patient's informed consent to a blood transfusion under any circumstances, much less the circumstances of this case when a blood transfusion was given pursuant to a physician's order to a terminally ill patient whose hemoglobin dropped

to a dangerous level while he was unconscious or asleep following surgery.

Am Jur 2d, Hospitals and Asylums §§ 14 et seq.

Necessity of expert evidence to support action against hospital for injury to or death of patient. 40 ALR3d 515.

6. Negligence § 6 (NCI4th)— Jehovah's Witness—blood transfusion—negligent infliction of emotional distress—insufficient evidence

Plaintiff failed to show that her husband, a Jehovah's Witness AIDS patient, suffered severe emotional distress upon learning that he had received a blood transfusion while he was unconscious or asleep following surgery, and the trial court properly directed verdicts for defendant attending physician and defendant hospital in plaintiff's action for the negligent infliction of emotional distress, where plaintiff's evidence tended to show that, upon learning of the transfusion, her husband became "excited" and "upset," some monitors in his room went off, and he cried; her husband was "very upset or depressed," "dejected, more depressed," "preoccupied," "upset and emotional," and "showed anger which continued until he died" nine days later; and her husband neither exhibited signs of nor reported emotional disturbance to his treating physician. The evidence tended to show only that plaintiff's husband was temporarily upset and was insufficient to show that he suffered from a "severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 45, 53.

Appeal by plaintiff from directed verdict entered 21 August 1991 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 4 March 1993.

Herman L. Stephens and Howard C. Jones, III, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by Joseph T. Carruthers, for defendant-appellee Perry.

Wilson & Iseman, by G. Gray Wilson, Urs R. Gsteiger, and Elizabeth Horton, for defendant-appellee Forsyth County Hospital, Inc.

JOHN, Judge.

Plaintiff, administratrix of her late husband's estate, appeals an order directing verdict in favor of defendants Dr. Irvin Perry and Forsyth Memorial Hospital and dismissing her claims of medical negligence (malpractice) and negligent infliction of emotional distress. She also assigns error to numerous evidentiary rulings made by the trial court. We find plaintiff's contentions unpersuasive.

Plaintiff offered evidence tending to show that her late husband, Earnest Clark, Jr. (Clark), was under the medical care of Dr. Romulo Jacinto (Dr. Jacinto) for the ten years preceding Clark's death on 27 September 1986. In November 1985, Clark was baptized into the Jehovah's Witness religious faith, allegedly adhering thereafter to its tenets forbidding the use of blood and blood components. Clark informed Dr. Jacinto of his baptism, giving him a pamphlet entitled "Jehovah's Witnesses and the Question of Blood."

Clark was admitted to Forsyth Memorial Hospital (Forsyth Hospital) several times in 1985 and 1986: 9 August 1985, 30 September 1985, 1 October 1985, and 2 February 1986. Patient evaluation records and admission forms were filled out incident to these admissions, and certain of these documents (kept in Forsyth Hospital's permanent files) indicate Clark's religion as Jehovah's Witness; additionally, during the 9 August 1985 hospital stay, an anesthesiologist's notation in Clark's record specified he was not to receive blood products.

On 14 September 1986, Dr. Jacinto admitted Clark to Forsyth Hospital as the result of complications associated with acquired immune deficiency syndrome (AIDS). These included right upper lobe pneumonia, congestive heart failure, blood clots, skin problems, shortness of breath, and fever. Before this admission, Dr. Jacinto was personally reminded by Clark of his conversion to the Jehovah's Witness faith. On the day of admission, plaintiff similarly informed the admitting office of Forsyth Hospital and the nurse checking Clark into his room. Clark's patient evaluation record from 14 September 1986 and his identification bracelet carried the notation "Jehovah's Witness," and Dr. Jacinto testified the outside of the

medical chart taken to Clark's hospital room from admissions bore a red label marked with "Jehovah's Witness" and "No Blood."

Dr. Jacinto related that Forsyth Hospital's unit secretaries bore the responsibility of transferring a patient's chart from one area of the hospital to another, although he was unable to detail a particular manner in which this task was always to be accomplished.

Upon Clark's 14 September admission, Dr. Jacinto called in Dr. Irvin Perry (Dr. Perry), a specialist in internal medicine and pulmonary diseases, for consultation. Dr. Perry "reviewed current and old records" and, after examining Clark, decided to perform first a Swan-Ganz catheterization and then a fibrotic bronchoscopy to relieve some of Clark's respiratory problems. On cross-examination, Dr. Jacinto revealed he spoke with Clark about what each procedure entailed, and testified Clark thereafter stated "whatever it takes to help him (Clark), to make him more comfortable for him to breathe better . . . should be done," and "if blood was needed, it was okay." Plaintiff signed consent forms authorizing the procedures to be performed by Dr. Perry. Plaintiff testified she also requested and signed a document releasing the hospital from liability in the event of her husband's death, stating that she did not want him to receive a blood transfusion and that there was "reference on the form to blood transfusion."

Following the bronchoscopy, Clark was transferred from the operating room to the Intensive Care Unit (ICU). Upon being notified by telephone that Clark's hemoglobin level had dropped precariously low, Dr. Perry ordered that Clark receive a blood transfusion. Clark was either asleep or unconscious, and unaware the transfusion had taken place. Shortly thereafter, plaintiff entered the ICU to visit her husband. She woke him, and as the two were talking, a nurse brought an additional pint of blood into the room and prepared to administer a second transfusion to Clark. When plaintiff determined what was taking place, she insisted her husband did not want to receive any blood products because he was a practicing Jehovah's Witness. No further blood was administered. Within moments, the ICU head nurse called plaintiff from Clark's room, whereupon she apologized for the oversight and also showed plaintiff where she had subsequently marked Clark's chart with his Jehovah's Witness status to prevent any recurrence. In the interim, plaintiff related to her husband what had transpired. She testified that upon learning of the transfusion, Clark became excited and

upset, some "machines and things started going off" (including the "beeping of the heart machine"), and he cried in front of plaintiff for the first time in their eighteen years of marriage. However, the head nurse related plaintiff said "he was not upset and she was not upset and he was not that devout anyway."

Clark died from complications associated with the AIDS virus on 27 September 1986. Plaintiff and others testified that during his last nine days of life, Clark was upset and distraught about having been given a blood transfusion. Joseph Mitchell, a minister of the faith, explained that Jehovah's Witnesses refuse blood transfusions based upon biblical commands. Reginald Stocks, a minister in Clark's congregation, professed the depth and sincerity of Clark's religious convictions. Stocks saw Clark seven times between the date of the transfusion and the time of death, and observed on each occasion that Clark appeared preoccupied with the effects of having been given blood. Despite Stocks' temporarily successful efforts to reassure Clark, the latter remained concerned, seeming "very, very upset," "dejected," and "depressed" on each subsequent visit. Plaintiff offered testimony to the effect that her husband was "upset," "really upset," "emotional," demonstrated an "angriness," and, in fact, was desirous of suing Dr. Perry and Forsyth Hospital for violating his rights by defiling his blood. Yet Dr. Jacinto, who remained Clark's primary physician for the last nine days of his life, testified neither Clark nor plaintiff mentioned the blood transfusion to him. Moreover, Dr. Jacinto's daily notes about his patient lacked any indication Clark was experiencing unusual emotional difficulty at that time and reflected Clark was contemplating taking the drug AZT to prolong his life.

On behalf of her late husband's estate, plaintiff filed suit on 5 October 1989 against Dr. Jacinto, Dr. Perry, and Forsyth Hospital. Plaintiff voluntarily dismissed her action against Dr. Jacinto on 4 September 1990.

At trial on 21 August 1991, both defendants moved at the close of plaintiff's evidence for directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. The trial court allowed the motions of both defendants. Announcing his decision, the judge stated:

> I cannot find severe emotional distress from the evidence that we've got.

Furthermore, I can't find proximate cause from the evidence that you bought [sic] out from Jehovah's Witnesses. All the Jehovah's Witnesses have said that the decedent was not in any blame-worthy position from his religious standpoint in any way at all . . . . So, that removes proximate cause.

Finally, as to the negligence of the doctor, there is no evidence that Dr. Perry knew anything about Mr. Clark being a Jehovah's Witness.

As to the negligence of the hospital, there certainly is evidence that there was a sticker on the front of his chart before he went to the intensive care unit showing no blood. But that's the only evidence. And there is no evidence that that sticker ever got to the intensive care unit. There is some evidence that the—on occasion, the contents of the charts were removed from that metal clipboard and carried upstairs with a rubber band wrapped around them.

And you don't have anything showing . . . the people in the intensive care unit were ever placed on—nurses in intensive care units were ever placed on notice that this man was a Jehovah's Witness until after the blood—one unit of blood had been given and at that point was stopped immediately.

I. MEDICAL NEGLIGENCE (MALPRACTICE)

Plaintiff's complaint asserted two allegations of negligence against the "defendants" as follows: 1) breach of the "duty to exercise resonable [sic] care and diligence in the application of their knowledge and skill to [Clark's] care"; and 2) breach of a "duty not to perform any transfusions into his body without his consent" or that of an authorized person. Both defendants contended at the directed verdict hearing, *inter alia*, that plaintiff had put forth no evidence of the standard of care each owed to Clark.

In considering a motion for directed verdict, the task of the trial court is to determine whether the evidence, viewed in the light most favorable to the non-movant, is sufficient to submit the case to the jury. *Southern Bell Telephone and Telegraph Co. v. West*, 100 N.C. App. 668, 670, 397 S.E.2d 765, 766 (1990) (citations omitted), *aff'd per curiam*, 328 N.C. 566, 402 S.E.2d 409 (1991). Evidence of medical negligence or malpractice adequate to withstand a motion for directed verdict must establish each of the

following elements: "(1) the standard of care [duty owed]; (2) breach of the standard of care; (3) proximate causation; and (4) damages." *Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570 *disc. review denied*, 303 N.C. 711, *and reconsider'n of denial of disc. review denied*, 304 N.C. 195, 291 S.E.2d 148 (1981). Failure to make a *prima facie* evidentiary showing in support of even one element is fatal. *Id.; see also Hong v. George Goodyear Co.*, 63 N.C. App. 741, 742-43, 306 S.E.2d 157, 159 (1983).

This Court has described the standard of care applicable to health care providers in medical malpractice actions as follows:

> [T]he physician is required to (1) possess the degree of professional learning, skill, and ability possessed by others with similar training and experience situated in the same or similar communities at the time of the alleged negligent act; (2) exercise reasonable care and diligence, in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged negligent act, in the application of his knowledge and skill to the patient's case; and (3) use his best judgment in the treatment and care of his patient.

Bailey v. Jones, 112 N.C. App. 380, 386, 435 S.E.2d 787, 791 (1993); *see also* N.C. Gen. Stat. § 90-21.12 (1993). Failure of a physician to comply with any one of these duties is negligence. *Bailey*, 112 N.C App. at 386, 435 S.E.2d at 791-92 (citation omitted).

Additionally, a health care provider is ordinarily required to obtain the informed consent of a patient to procedures and treatment rendered. *McPherson v. Ellis*, 305 N.C. 266, 270, 287 S.E.2d 892, 895 (1982). "[T]he standard required of health care providers in obtaining the consent of [a] patient," *Nelson v. Patrick*, 58 N.C. App. 546, 549, 293 S.E.2d 829, 831 (1982), *appeal upon remand*, 73 N.C. App. 1, 326 S.E.2d 45 (1985), is established by statute as being "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities . . . ." N.C. Gen. Stat. § 90-21.13(a)(1) (1993); *see also Foard v. Jarman*, 326 N.C. 24, 26-27, 387 S.E.2d 162, 164 (1990).

The standard of care required of a health care provider in a particular case generally concerns specialized knowledge and is

thus unfamiliar to most laypersons. *See, e.g., Mazza v. Huffaker*, 61 N.C. App. 170, 175, 300 S.E.2d 833, 837 (citation omitted), *disc. review denied*, 309 N.C. 192, 305 S.E.2d 734 (1983), *reconsider'n denied*, 313 S.E.2d 160 (1984). Consequently, our courts have consistently held that in the usual medical malpractice or medical negligence case, testimony of a qualified expert is required to establish the standard of care. *Tice v. Hall*, 63 N.C. App. 27, 28, 303 S.E.2d 832, 833 (1983), *aff'd*, 310 N.C. 589, 313 S.E.2d 565 (1984); *Beaver v. Hancock*, 72 N.C. App. 306, 311, 324 S.E.2d 294, 298 (1985) (citation omitted).

Likewise, regarding actions based upon a health care provider's failure to obtain informed consent, this Court has concluded G.S. § 90-21.13(a)(1) requires the use of expert medical testimony by the party seeking to establish the standard of care. *Nelson*, 58 N.C. App. at 549-50, 293 S.E.2d at 831-32. Thus, an expert must testify as to what information concerning the particular treatments or procedures, their inherent hazards and risks, is customarily provided by other members of the same health care profession, with similar training and experience, situated in the same or similar communities. *Nelson*, 73 N.C. App. at 11, 326 S.E.2d at 51-52.

A. Dr. Perry

1. Failure to Exercise Reasonable Care and Diligence

[1] Plaintiff correctly states that "[i]t has never been the rule in this State . . . that expert testimony is needed in *all* medical malpractice cases to establish . . . the standard of care." *Smithers v. Collins*, 52 N.C. App. 255, 260, 278 S.E.2d 286, 289, *disc. review denied*, 303 N.C. 546, 281 S.E.2d 394 (1981). However, we disagree with the subsequent assertion in plaintiff's brief that the current case is one wherein "the result is so inconsistent with normal care" that " 'the judgment of the reasonableness of what the doctor has done is clearly within the competence of the layman . . . .' " *Hyder v. Weilbaecher*, 54 N.C. App. 287, 292, 283 S.E.2d 426, 429 (1981) (quoting Robert G. Byrd, *Proof of Negligence in North Carolina*, 48 N.C.L. Rev. 452, 465 (1970)), *disc. review denied*, 304 N.C. 727, 288 S.E.2d 804 (1982).

In the circumstances before us, the cases to which plaintiff directs our attention are not applicable; the factual scenarios therein "manifest . . . obvious lack of skill and care" on the part of the defendant physicians, *Hyder*, 54 N.C. App. at 289, 283 S.E.2d at

428, to the extent of allowing the affected plaintiffs to proceed under the doctrine of *res ipsa loquitur*. *See, e.g., Tice*, 63 N.C. App. at 29-30, 37, 303 S.E.2d at 833-34, 838 (surgeon left sponge in patient's body after operating); *Hyder*, 54 N.C. App. at 288-89, 283 S.E.2d at 427-28 (physician left stainless steel wire in patient following surgery).

Despite plaintiff's assertions to the contrary, what constituted or would have constituted "reasonable care and diligence" in the treatment of Clark by Dr. Perry in this case is not readily apparent to a layperson. *See, e.g., Bailey*, 112 N.C. App. at 388, 435 S.E.2d at 792. How meticulously a consulting physician must pore through the medical records of a patient prior to performing a Swan-Ganz catheterization or a bronchoscopy is not a matter of common knowledge; nor is the course a surgeon should take when a dying AIDS patient, who happens to be a Jehovah's Witness, is asleep or unconscious following surgery, and his hemoglobin level drops substantially. Accordingly, we hold it was incumbent upon plaintiff to establish by expert testimony the applicable standards of care in order successfully to proceed under the theory that Dr. Perry failed to exercise reasonable care and diligence, *in accordance with those standards of practice*, when applying his knowledge and skill to Clark's case. *See id.* at 386, 435 S.E.2d at 791-92.

Plaintiff alternatively maintains the requirement of expert testimony, if applicable to this case, was satisfied by Dr. Perry's own deposition testimony. In this context, she highlights the doctor's opinion that a patient's admitting physician (in this instance, Dr. Jacinto) bears the responsibility of writing up orders for the nurses on duty and of indicating if the patient is a Jehovah's Witness who wants no blood products; thereafter, the chart should be labelled appropriately by whatever nurse is on duty. When asked, "Are you saying that in your opinion, the standards of care as the physician in this medical community should follow?", Dr. Perry responded, "Yes." However, that statement refers only to the procedure an *admitting* physician should follow upon a patient's admission to the hospital, not an *attending* physician several days into a patient's hospital stay. Furthermore, we find the question posed (at least as recorded in the transcript) is meaningless both as written and in context, and it is impossible to assign any significance to Dr. Perry's response. Moreover, although at one point he was specifically asked, "with regard to an *attending physician* having prior knowledge of patients' religious preference, do you have an

opinion as to what that physician's responsibility would be with regard to seeing that the chart's appropriately marked?", Dr. Perry answered simply, "It should have been marked with the admission orders."

Plaintiff also points to Dr. Perry's testimony detailing his standard practice when seeing a patient at the hospital. This customarily included first reviewing a patient's hospital chart and, among other things, observing any notations regarding a patient's religious status. Although he could not remember specifically at what moment or in what location he examined Clark's chart, Dr. Perry was certain he had done so and that at that time there was no red label on its front cover. He denied ever having been made aware Clark was a Jehovah's Witness. Had he learned this, Dr. Perry acknowledged he would not have ordered the transfusion given "until [he] had discussed it with [the] patient and/or family." If Clark had refused treatment after such discussion, Dr. Perry said he would not have ordered a blood transfusion, because a patient "has the right, if he's competent, to refuse any care."

Plaintiff insists this testimony, coupled with Dr. Perry's failure to ascertain Clark's Jehovah's Witness status, established the requisite standard of care, and further demonstrated Dr. Perry's violation of it. However, Dr. Perry's deposition testimony referred only to *his* routine practice with respect to a patient's religious beliefs. It is undisputed that the record does not reflect Dr. Perry ever being told about Clark's religious status by anyone, and plaintiff provided no evidence Dr. Perry actually saw a "Jehovah's Witness" or "No Blood" label on the chart or any notation to that effect in Clark's records. Thus, as the trial court remarked, plaintiff's evidence failed to show Dr. Perry *knew* of Clark's wish not to undergo a blood transfusion.

In addition to alleging Dr. Perry actually "knew" of Clark's Jehovah's Witness faith, plaintiff also stated in her complaint that Dr. Perry breached his duty to Clark because the doctor "to [sic] the very least *in the exercise of reasonable care should have known*, that he was a Jehovah's Witness . . . ." (Emphasis added). Yet neither Dr. Perry's deposition testimony, nor any of plaintiff's evidence, provided the necessary insight into how, "in the exercise of reasonable care," Dr. Perry should have acquired this information. A lay jury should not be confronted with the task of determining how thorough a consulting or attending physician's review of

a patient's records and documents must be before ordering the administration of a blood transfusion in a "life-threatening," emergency situation.

We hold expert testimony was necessary to establish whether or not Dr. Perry "exercise[d] reasonable care and diligence, in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged negligent act, in the application of his knowledge and skill to [Clark's] case." *Bailey*, 112 N.C. App. at 386, 435 S.E.2d at 791. In the absence of such testimony, plaintiff's claim against Dr. Perry based upon his alleged failure to exercise reasonable care and diligence lacked *prima facie* evidence of an essential element. *See Hong*, 63 N.C. App. at 742-43, 306 S.E.2d at 159. Therefore, the trial court properly directed verdict against her on that claim.

2. Failure to Obtain Informed Consent

[2] Plaintiff's second allegation of negligence against Dr. Perry asserted he breached the "duty not to perform any transfusions into [Clark's] body without his consent or that of another authorized to give his consent for him." However, plaintiff again produced no appropriate evidence of the applicable standard of care.

In his deposition, Dr. Perry indicated that had he known Clark was a Jehovah's Witness, he "would first have explained to him the consequences, the possible consequences of not taking [a transfusion]. And I would not have [ordered it] because he has the right, if he's competent, to refuse any care." When asked, "Do you have an opinion as to whether or not that practice is consistent with the standards of practice among members of your health care profession with similar training and experience as yours in this community, Forsyth County?", Dr. Perry simply replied, "It's my opinion—is it—."

Assuming *arguendo* the foregoing vague response may accurately be considered affirmative, it in no way set forth the standard of care for obtaining informed consent in the circumstances of this case. Significantly, the testimony presupposed knowledge of a patient's religious status, and recited Dr. Perry's practice when informed a patient is a Jehovah's Witness, desirous of receiving no blood products. His comments concerned only his method of interacting with patients. *See Estrada v. Jaques*, 70 N.C. App.

627, 648, 321 S.E.2d 240, 253 (1984) (Deposition testimony of surgeons "described generally their usual procedure [in obtaining informed consent], but did not attempt to relate it to any standard professional practice.").

Moreover, even if Dr. Perry had a duty to obtain Clark's informed consent before ordering a blood transfusion administered to him, plaintiff's evidentiary showing with respect to that alleged duty was insufficient. She offered *no* evidence, from any source, regarding what such a duty would have involved. In particular, plaintiff presented no expert testimony tending to show whether Dr. Perry's actions were "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities." G.S. § 90-21.13(a)(1). There was no showing of what information about blood transfusions and their "usual and most frequent risks and hazards," G.S. § 90-21.13(a)(2), would be, under the circumstances confronted by Dr. Perry, "customarily provided by other members of the same health care profession with similar training and experience situated in the same or similar communities . . . ." *Nelson*, 73 N.C. App. at 11, 326 S.E.2d at 51-52. A lay jury should not be left to speculate on the nature of a physician's duty to obtain "informed consent" when the hemoglobin level of a dying AIDS patient drops substantially while he is unconscious or asleep and recuperating from surgery. Thus, as plaintiff did not meet her evidentiary burden with respect to the standard of care element of her negligence allegation against Dr. Perry based upon failure to obtain informed consent, we hold the trial court properly allowed the motion for directed verdict thereon.

[3] In this context, plaintiff also assigns as error the trial court's exclusion of Dr. Jacinto's opinion that it was the "consensus" of the "medical community" that a patient who is competent can refuse treatment (including blood transfusions) and that he was unaware of anyone in the same or similar communities having a different opinion. The court's ruling was based upon plaintiff's failure in discovery to designate Dr. Jacinto as an expert witness regarding the standard of care, *see* N.C.R. Civ. P. 26(f1)(2) (1990), and we find no abuse of discretion in the court's choice of sanction. We also observe that testimony about "consensus of the medical community" would not constitute the equivalent of evidence as to the "standards of practice among members of the same health care profession with similar training and experience situated in the same

or similar communities at the time of the alleged act giving rise to the cause of action." G.S. § 90-21.12; *Estrada*, 70 N.C. App. at 648, 311 S.E.2d at 253 (Surgeons' depositions did not establish the standard of care in obtaining a patient's informed consent, in part because they failed to address the standards of practice among members of the same health care profession.). Our determination of the propriety of a directed verdict against plaintiff would therefore be unaffected even had the excluded testimony been permitted.

In her appellate brief, plaintiff also argues it was error to direct verdict in favor of Dr. Perry on the additional ground he failed to use his best judgment in Clark's treatment. However, as we find nothing in the record which would indicate that this theory of liability was asserted in plaintiff's complaint or before the trial court, this matter is not properly preserved for our consideration, and we decline to address it. *Henderson v. LeBauer*, 101 N.C. App. 255, 263-64, 399 S.E.2d 142, 147, *disc. review denied*, 328 N.C. 731, 404 S.E.2d 868 (1991). Nonetheless, we observe that although Dr. Perry's deposition testimony adequately presented his concept of the exercise of his best judgment in dealing with a Jehovah's Witness patient, no evidence shows he knew of Clark's faith or that his conduct in this instance in some way violated the personal standards he enunciated.

B. Forsyth Memorial Hospital

As with Dr. Perry, plaintiff contends Forsyth Hospital breached its duty to Clark by: 1) "failing to exercise reasonable care and diligence to comply with Earnest Clark, Jr's. [sic] instructions . . . ," and 2) "causing a blood tranfusion [sic] to be given to Earnest Clark, Jr. without having obtained any consent thereto." However, because plaintiff failed to establish the applicable standard of care owed to Clark by Forsyth Hospital under either theory, we hold the trial court properly granted the hospital's directed verdict motion.

A plaintiff in a medical malpractice action may proceed against a hospital (defined by statute as a "health care provider," *see* N.C. Gen. Stat. § 90-21.11 (1993)), under two separate and distinct theories, *Bost v. Riley*, 44 N.C. App. 638, 645-47, 262 S.E.2d 391, 395-96, *disc. review denied*, 300 N.C. 194, 269 S.E.2d 621 (1980)—*respondeat superior* (charging it with vicarious liability for the negligence of its employees, servants or agents), or *corporate negligence* (charging the hospital with liability for its employees' violations of duties

owed directly from the hospital to the patient). *Id.* at 645, 262 S.E.2d at 395. Regrettably, plaintiff's argument with respect to the liability of Forsyth Hospital is not a model of clarity; she appears to borrow and confuse notions derived from both theories. However, we understand her first allegation of negligence to refer primarily to the hospital's accountability for the negligent acts of its employees (*respondeat superior*), while her second appears to be grounded in the doctrine of corporate negligence.

We also note plaintiff's allegations against the hospital were directed at nursing and clerical personnel, and that at no time has she contended the actions of either Dr. Perry or Dr. Jacinto were attributable to the hospital.

1. Failure to Exercise Reasonable Care and Diligence

[4] Plaintiff argues Forsyth Hospital failed to exercise reasonable care and diligence by (1) administering a transfusion to Clark despite its knowledge he was a Jehovah's Witness, and (2) by not properly maintaining his medical chart.

However, plaintiff offered no expert testimony tending to show the actions undertaken by the hospital's employees in administering a blood transfusion were contrary to a standard of care followed among health care facilities of this type situated in Winston-Salem, North Carolina or similar communities. *See Tripp v. Pate*, 49 N.C. App. 329, 333, 271 S.E.2d 407, 409-10 (1980) ("In order to withstand a motion for directed verdict . . . , plaintiff [is] required by N.C. Gen. Stat. § 90-21.12 . . . to offer some evidence that the care of the defendant hospital was not in accordance with the standards of practice among *other hospitals* in the same or similar communities.").

Plaintiff nonetheless impliedly asserts again this is a case wherein expert testimony was not required because a jury, by reference to common knowledge and experience, would have been able to understand and to judge the actions of the hospital's employees. *See, e.g., Powell v. Shull*, 58 N.C. App. 68, 71, 293 S.E.2d 259, 261 (citations omitted), *disc. review denied*, 306 N.C. 743, 295 S.E.2d 479 (1982). We disagree.

Plaintiff's argument rests upon the assumption that the duty of Forsyth Hospital (the standard of care) regarding administration of a blood transfusion under the circumstances of the case *sub judice* is governed exclusively by reference to a patient's religious

beliefs, or by the label on his medical chart reflecting those beliefs. However, nothing of record supports this assumption, and a lay jury should not be placed in the position of attempting to intuit the proper procedure for hospital employees to follow when confronted with the emergency occurrence presented by the instant case, or of deciding without evidentiary basis whether, in obeying physician orders, Forsyth Hospital's nursing staff adhered to that procedure. Indeed, based upon Dr. Jacinto's testimony that had Clark not received a transfusion, his life could have been endangered, it arguably may have constituted malpractice for the hospital's nurses *not* to have followed Dr. Perry's order to administer the transfusion to Clark. *See, e.g., Burns v. Forsyth Co. Hospital Authority*, 81 N.C. App. 556, 563, 344 S.E.2d 839, 845 (1986) (under doctrine of corporate negligence, hospital has a duty to obey instructions of a patient's physician, so long as the instructions are not obviously negligent or dangerous); *Byrd v. Hospital*, 202 N.C. 337, 341, 162 S.E. 738, 740 (1932).

As the course which Forsyth Hospital's employees should have followed in this case is not self-evident, it was plaintiff's burden to establish, by expert testimony, whether Forsyth Hospital's employees exercised reasonable care and diligence with respect to each allegation of negligence, *in accordance with the standards of practice customarily followed by hospitals in Winston-Salem, North Carolina or similar communities*, in the application of their knowledge and skill to the circumstances of Clark's case. *Bailey*, 112 N.C. App. at 386, 435 S.E.2d at 791 (emphasis added).

If such evidence was required, plaintiff responds, then the deposition testimony of Nurse Luann Andrews (head nurse of Forsyth Hospital's ICU) adequately showed the hospital's standard of care in administering a blood transfusion. Nurse Andrews testified (*not* as an expert witness) that upon learning a patient is a Jehovah's Witness, her instructions were to "[n]otify the physician and flag the chart and the cardex." While the routine practice of Forsyth Hospital was thus presented, Nurse Andrews shed no light whatsoever on whether that practice was in accordance with the standard of care applicable to other hospitals in the same or similar communities. *See Tripp*, 49 N.C. App. at 333, 271 S.E.2d at 409-10.

Regarding plaintiff's contention Clark's medical chart was not properly maintained, her evidence included certain forms and records from Forsyth Hospital's permanent files which undeniably reflected

Clark's faith as Jehovah's Witness. These tended to show that at various points in Clark's extensive treatment history, some employees of the hospital knew of his wish not to receive blood products. Plaintiff also offered the deposition and trial testimony of several individuals (Dr. Jacinto, Dr. Perry, Nurse Andrews) indicating their understanding about how and by whom a patient's chart should be labelled with his religious persuasion, and how the chart is transported to various sections of the hospital as the patient is moved. However, plaintiff presented no expert testimony to the effect that a patient's religious status or expressed wishes play any role in determining a *hospital's* standard of care in circumstances such as these (again, Dr. Perry testified only as to *his* manner of dealing with individuals having treatment preferences). Thus, plaintiff failed to draw a necessary nexus between Forsyth Hospital's alleged knowledge (as previously reflected in his medical records) that Clark was a Jehovah's Witness, and any failure on the part of its employees to exercise reasonable care and diligence in the maintenance of his hospital chart. *See Bailey*, 112 N.C. App. at 386, 435 S.E.2d at 791.

Moreover, plaintiff's appellate brief is equally deficient in this regard; she cites not a single authority directly supporting her arguments concerning the alleged duty of Forsyth Hospital to maintain the medical charts of its patients. *See* N.C.R. App. P. 28(b)(5); *see also, e.g., Brown v. Boney*, 41 N.C. App. 636, 647, 255 S.E.2d 784, 791, *disc. review denied*, 298 N.C. 294, 259 S.E.2d 910 (1979). Therefore, we need not address further this portion of plaintiff's assignment of error relating to Forsyth Hospital's motion for directed verdict. *See, e.g., Byrne v. Bordeaux*, 85 N.C. App. 262, 265, 354 S.E.2d 277, 279 (1987) (citation omitted).

Accordingly, we hold plaintiff did not meet her evidentiary burden with respect to the standard of care element of this particular allegation, and the trial court properly allowed the hospital's directed verdict motion addressed thereto.

2. Failure to Obtain Informed Consent

[5] Plaintiff also alleged in her complaint that Forsyth Hospital breached its duty of care by "causing a blood tranfusion [sic] to be given to Earnest Clark, Jr. without having obtained any consent thereto." In her appellate brief, she characterizes her position somewhat differently, arguing Forsyth Hospital breached its duty to Clark by "ignor[ing] the restrictions on the consent for Dr. Perry's

procedures given by plaintiff when she insisted on signing the release form . . . ." Assuming such contention is preserved for our review, *see, e.g., Gilbert v. Thomas*, 64 N.C. App. 582, 584, 586, 307 S.E.2d 853, 855, 856 (1983), and regardless of the language used by plaintiff to identify Forsyth Hospital's alleged breach of the standard of care, the duty with which she charges the hospital is one owed directly from the hospital to the patient (*i.e.*, she is proceeding under a theory of corporate negligence).

We first note plaintiff has failed to offer any authority in support of this contention, *see* N.C.R. App. P. 28(b)(5), entitling us to disregard this assignment of error. *Byrne*, 85 N.C. App. at 265, 354 S.E.2d at 279. Nevertheless, pursuant to the powers reserved to us in N.C.R. App. P. 2, we elect to examine plaintiff's argument briefly.

While it is the rule that a hospital is generally required to make a "reasonable effort to monitor and oversee the treatment" a physician provides, *Bost*, 44 N.C. App. at 647, 262 S.E.2d at 396, this Court has not as yet carved from that broad general obligation the specific duty plaintiff herein asserts. *Cox v. Haworth*, 54 N.C. App. 328, 332-33, 283 S.E.2d 392, 395-96 (1981). Moreover, we have expressly declined to extend the doctrine of corporate negligence in order to impose upon a hospital the duty to obtain a patient's informed consent before treatment when, as here, the patient is admitted by a private physician for surgery. *Id.* (the role of the hospital is to provide facilities and support personnel for the physician); *see also Johnson v. Sears, Roebuck & Co.*, 832 P.2d 797, 799 (N.M. App. 1992) (majority rule is that "hospitals have no duty to obtain informed consent for a procedure ordered by a non-employee physician and performed by hospital employees"), *cert. denied*, 832 P.2d 1223 (N.M. 1992); *contra Campbell v. Pitt County Memorial Hosp.*, 84 N.C. App. 314, 352 S.E.2d 902, *aff'd*, 321 N.C. 260, 265-66, 362 S.E.2d 273, 276 (1987) (Court of Appeals opinion wherein one judge concurred only in result on issue of informed consent and one judge dissented; affirmed by evenly divided Supreme Court expressly stating decision is *without precedential authority*) (emphasis added), *overruled in part on other grounds, Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).

In any event, in actions for medical malpractice or negligence based on a health care provider's failure to obtain informed consent,

this Court has held G.S. § 90-21.13(a)(1) requires the use of expert medical testimony by the party seeking to establish the standard of care. *Nelson*, 58 N.C. App. at 549-50, 293 S.E.2d at 831-32. Plaintiff produced *no* evidence about the standard of care utilized by health care facilities like Forsyth Hospital, located in Winston-Salem, North Carolina or similar communities, when obtaining a patient's informed consent to a blood transfusion under *any* circumstances, much less the circumstances of this case—where a terminally ill patient is unconscious (or asleep) following surgery, and his hemoglobin drops to a life-threatening level.

We therefore hold plaintiff's failure to present *prima facie* evidence of the standard of care applicable to Forsyth Hospital in obtaining Clark's informed consent to undergo a blood transfusion was fatal to this claim against defendant Forsyth Hospital. *See, e.g., Hong*, 63 N.C. App. at 742-43, 306 S.E.2d at 159. Therefore, the trial court's allowance of a directed verdict thereon was proper.

We note also that in her appellate brief and in addition to the allegations set forth in her pleadings, plaintiff asserts that Forsyth Hospital's staff "failed to exercise its best judgment in administering the blood transfusion to Clark without bringing his religion and no blood instructions to the attention of Dr. Perry." However, as plaintiff failed to include this theory in her complaint or to argue it at trial, it is not properly presented to us for consideration. "In passing upon a trial judge's ruling as to a directed verdict, we cannot review the case as the parties might have tried it; rather, we must review the case as tried below, as reflected in the record on appeal." *Tallent v. Blake*, 57 N.C. App. 249, 252, 291 S.E.2d 336, 339 (1982) (citation omitted).

II.

[6] The trial court directed a verdict in favor of both defendants on plaintiff's claim for negligent infliction of emotional distress. The court observed plaintiff established neither "severe emotional distress" nor proximate cause between defendants' actions or inactions and whatever distress Clark may actually have suffered.

While "emotional distress, standing alone, is an actual and compensable injury," *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 299, 395 S.E.2d 85, 94, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990), plaintiff cannot recover without proving *severe* emotional distress, as opposed to "mere fright or temporary anxiety." *Id.*

at 303-04, 395 S.E.2d at 97. Our Supreme Court has defined "severe emotional distress" as follows:

> any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, *or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.*

Id. at 304, 395 S.E.2d at 97 (emphasis added).

In the recent case of *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22 (1992), the Court, after acknowledging that *Johnson v. Ruark Obstetrics* enunciated "a high standard of proof on the severe emotional distress element," adopted the same for cases involving intentional infliction of emotional distress. *Id.* at 83, 414 S.E.2d at 27. The Court cited with approval the following discussion of emotional distress:

> Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. *It is only where it is extreme that the liability arises. . . . The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.* The intensity and the duration of the distress are factors to be considered in determining its severity. . . . It is for the court to determine whether on the evidence severe emotional distress can be found . . . .

Id. at 84, 414 S.E.2d at 27-28 (quoting Restatement (Second) of Torts § 46, Comment j., at 77-78 (1965)).

In the case *sub judice*, plaintiff's evidence, taken in the light most favorable to her, failed to show Clark suffered the requisite degree of emotional distress necessary to maintain plaintiff's cause of action. Clark lived but nine days following the blood transfusion. Upon learning, interestingly from *plaintiff*, that he had been given blood, Clark became "excited" and "upset," some monitors in his room "started going off," and he cried. During the next nine days, he was from time to time "very, very upset or depressed," "dejected, more depressed," "preoccupied," "upset and emotional," and "showed anger which continued until he died." However, he neither exhibited signs of nor reported emotional disturbance to his own

treating physician, Dr. Jacinto, when the latter examined him over the course of those days.

Plaintiff maintains a jury reasonably could have concluded Clark suffered severe emotional distress before he died, based upon evidence reflecting his demeanor, emotional state, and concerns. We disagree and affirm the court's grant of directed verdict. The evidence tended at best to show only that Clark was temporarily upset and that he did not suffer anxiety "so severe that no reasonable man could be expected to endure it." *Waddle*, 331 N.C. at 84, 414 S.E.2d at 27-28 (quoting Restatement (Second) of Torts § 46, Comment j., at 77). The adjectives used in describing Clark's state of mind do not, without more, constitute the type of "severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. In addition, plaintiff's account was not supported by medical commentary, despite Clark's being situated in a large hospital with a psychiatric staff.

In this context, plaintiff also assigns error to the trial court's exclusion of Reginald Stocks' observation that Clark "was very devastated" about having received a transfusion. Assuming *arguendo* the comment was erroneously excluded, plaintiff has failed to show how she was prejudiced thereby, and we hold any such error to have been harmless. *See* N.C.R. Civ. P. 61 (1990); *see also, e.g., Segrest v. Gillette*, 331 N.C. 97, 103-04, 414 S.E.2d 334, 338, *reh'g denied*, 331 N.C. 386, 417 S.E.2d 791 (1992). First, as related above, identical or extremely similar testimony was otherwise admitted. *United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 489, 403 S.E.2d 104, 108 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993); *Williams v. State Farm Mut. Auto. Ins. Co.*, 67 N.C. App. 271, 277-78, 312 S.E.2d 905, 909 (1984). Moreover, Stocks' characterization, even if permitted, would not affect our determination regarding defendants' entitlement to a directed verdict.

As plaintiff did not offer evidence of severe emotional distress, she failed to make out a *prima facie* case of negligent infliction of emotional distress. *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97; *see also Hong*, 63 N.C. App. at 742-43, 306 S.E.2d at 159. Accordingly, we hold the trial court properly granted a directed verdict as to this claim with respect to both defendants, and we decline to address the issue of proximate causation.

III.

Finally, plaintiff assigns error to several of the court's evidentiary rulings on grounds the court thereby excluded relevant and admissible evidence. The party asserting error "must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986) (citations omitted). Plaintiff has not made such a showing here, and after carefully reviewing each assignment of error, we determine she suffered no prejudice. Even had the excluded testimony been allowed in its entirety by the trial court, its grant of directed verdict would remain proper, and our decision on appeal affirming its action would be unaffected thereby.

Affirmed.

Judges JOHNSON and LEWIS concur.

DORA POWELL, AS ADMINISTRATRIX OF THE ESTATE OF TIMOTHY GWAN POWELL (DECEASED) v. S & G PRESTRESS COMPANY, THE ARUNDEL COMPANY, MICHAEL MEANS AND RICHARD SCHOUTEN

No. 935SC572

(Filed 19 April 1994)

Workers' Compensation § 62 (NCI4th)— employee crushed by crane—employer not engaged in intentional misconduct

In an action to recover for the wrongful death of plaintiff's intestate who was crushed by a straddle crane while he worked for defendant, plaintiff's forecast of evidence was insufficient to show that defendant employer intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death where the evidence tended to show that defendant's policy was that the straddle crane was not to be operated without a signal man and at the time of death this policy was being enforced; no employees of defendant had been struck by a crane in the past; defendant's past safety violations did not concern the hazards of operating a crane in close proximity to workers; and there were no safety regula-

tions which required Prestress to use tire guards or keep its employees a certain distance from moving cranes.

Am Jur 2d, Workers' Compensation §§ 75-87.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Judge WYNN dissenting.

Appeal by plaintiff from orders signed 15 February 1993 and 18 February 1993 in New Hanover County Superior Court by Judge Frank R. Brown and judgment signed 11 March 1993 in New Hanover County Superior Court by Judge Judson D. DeRamus, Jr. Heard in the Court of Appeals 21 March 1994.

Plaintiff, the administratrix of the estate of Timothy Powell, brought this wrongful death action to recover damages in her representative capacity for the death of her son, Timothy Powell. The decedent, Timothy Powell, was employed at the time of his death by S & G Prestress Company (Prestress). Prestress manufactures reinforced concrete elements used in the construction of bridges and foundations. The Arundel Company is the parent company of Prestress. At the time of Timothy Powell's death, Michael Means was the Vice President of Prestress. He was in charge of day-to-day operations and administered the safety program. Richard Schouten was the President of Prestress.

Plaintiff filed the complaint in this action on 3 January 1991, and by amended complaint filed 26 November 1991, plaintiff added defendants Prestress, The Arundel Company, and Michael Means. On 5 February 1993, all defendants moved for summary judgment. By order dated 15 February 1993, Judge Brown granted summary judgment in favor of Michael Means and Richard Schouten, and by order dated 18 February 1993, Judge Brown granted summary judgment in favor of The Arundel Company. By judgment dated 11 March 1993, Judge DeRamus granted Prestress' motion for summary judgment. From these orders and judgments plaintiff appeals to this Court.

William H. Dowdy for plaintiff-appellant.

Johnson & Lambeth, by Beth M. Bryant and Robert White Johnson, for defendants-appellees.

WELLS, Judge.

Plaintiff contends that the trial court erred by granting defendants' motion for summary judgment because there exist genuine issues of material fact regarding the liability of defendants for their alleged intentional misconduct based on *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). We disagree.

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

The forecast of evidence reveals the following. Timothy Powell, the decedent, age 22, was a temporary employee of Prestress which hired him from a temporary employment agency. Prestress regularly employed approximately 15 temporary employees. Temporary employees were provided with hardhats and safety glasses but were not given any safety training. Prestress did not provide temporary employees with its safety manual.

Powell began work at Prestress on 22 November 1989 and worked 9.24 hours on that day. He next returned to Prestress on 29 November 1989, the day of the accident. On the day he was killed, Powell was one member of an eight-person crew working on one of two forming beds used to construct concrete elements. His job was to attach reinforcing bars to the forming beds before the concrete was poured. The two forming beds run parallel to one another, and an overhead crane straddles the forming beds. The crane has four rubber wheels approximately 16 inches wide and 45 inches high. Two wheels move on the outside of each forming bed. The crane travels only forward and backward along the length of the forming beds. The wheels are approximately 3 to 5 feet from the forming beds, and it is necessary for employees working on the forming beds to work, often with their backs to the wheels, between the wheels and the forming bed as the crane moves past them. The crane has a maximum speed of 4 miles per hour. On each side of the crane were motion alarms which sounded loudly any time the crane was in gear, whether or not the crane was moving. The wheels of the crane were not equipped with tire guards although guards were available, and Prestress had recently purchased a straddle crane which was equipped with tire guards. No law required such tire guards. Prestress' policy was that the crane

was not to be moved without a signal man directing the forward and backward movement of the crane. Prestress did not train any of its employees in signaling nor were there any uniform signals. None of its employees were designated specifically as signal men. Rather, any employee could serve as the signal man on any particular occasion.

On the date of Powell's death, there was, in addition to the crew with which he was working, another crew working on the other forming bed. This crew was further ahead in preparing its forming bed than was Powell's crew and required the use of the crane to move tarps on top of its forming bed. Anthony Brewer, who had worked at Prestress for over 5 years, operated the crane which carried the tarps. Brewer had a driver's license but is legally blind in his right eye. The tarps measured 42 feet by 15 feet. The crane moved backward, past Powell, to pick up a tarp and began moving forward at full speed toward him. The crane carried the tarp while the unsecured end was held by another worker. Brewer could not see Powell because the tarp obstructed his vision. Powell's left foot was caught under the wheel, and before the crane could be stopped, it traveled the length of his body, crushing and killing him.

The accident report of the North Carolina Department of Labor reveals the following about the factors which contributed to the accident. The motion alarm was sounding at the time of Powell's death but "[t]he size of the crane and the location of the alarm devices [were] such that the alarm sound [did] not produce a warning of imminency of danger. The sound seem[ed] remote from the point of danger." Prestress did not instruct employees to move away from the crane when it was moving past them. Instead, employees were expected to remain working between the wheels and the forming beds. Although there were no specific requirements for tire guards on straddle cranes, "[t]he guards would prevent standing employees being caught in the nip point created by the tires and the ground by pushing or knocking the employee out of the way. . . . A prudent employer would have installed guards on existing equipment after becoming aware of their availability and feasibility." As to the operation of the crane, no mechanical defects were detected, and there was no indication that the crane was operated recklessly. Brewer's vision impairment was not a factor in the death of Powell because the tarp obstructed his view of him. Concerning the employer's knowledge, the report provides

that Prestress knew that crews frequently worked in close proximity to the crane and in overlapping areas such that the crane aided one crew while passing another which was performing tasks unrelated to the crane operation. According to the report, Prestress could have provided adequate protection to employees working in close proximity to the crane by adding tire guards and requiring nonessential employees to move away from the operation of the crane.

Mr. Brewer's statements contained in the report and in his deposition reveal that when he was operating the crane he checked the location of the crew members before moving. He believed that all employees were clear of the crane's path. Mr. Brewer also stated that, although he could not remember who was signaling him, he was being signaled to move forward at the time of Powell's death. The accident report identifies a temporary employee named Orlando Chisolm as the person giving signals at the time of Powell's death. Mr. Chisolm was never located. Herbert Tyson, crew chief of Powell's crew, and Leroy Pridgen, Jr., the crew chief of the other crew, both testified that the policy was that a signal man should always be directing the movement of the crane and that they thought there was a signal man at the time of Timothy Powell's death. However, neither man could identify who was signaling at the time of Powell's death.

The North Carolina Department of Labor cited Prestress for 4 violations—3 of which were serious—of the Occupational Safety and Health Act. Prestress was cited twice for violating G.S. § 95-129(1) (requiring employer to furnish to employees conditions of employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious injury) for failing to protect employees working in close proximity to straddle cranes and for permitting Mr. Brewer to operate a crane without meeting the minimum physical requirements. The citation provided that Prestress could rectify the hazard by providing tire guards, training signal persons, and prohibiting workers within 5 feet of a moving crane. The fines from these violations totaled $1,540.

Prestress had twice previously been cited for violations of the Occupational Safety and Health Act for incidents involving unsafe crane operations. In 1979, the North Carolina Department of Labor cited Prestress for violation of 29 C.F.R. § 1910.179(d)(2) and (3) and 29 C.F.R. § 1910.23(c)(1) for failing to provide a railing and footwalk on a crane. In 1983, the North Carolina Department

of Labor cited Prestress for violation of 29 C.F.R. § 1910.180(j)(1)(i) for its failure to allow a minimum clearance of 10 feet between the top of a crane boom and an electrical power line which resulted in the death of one employee.

Plaintiff offered the affidavit of William Dickinson, the Vice President and Associate Director of the Crane Institute of America, in which he stated:

> Based upon my review of the conditions attendant at the time of the crane death of Timothy Powell, as nearly as such can be determined based upon the statements of the persons who were present, and who were deposed and who spoke with the OSH[A] investigator and to the police, as well as my own review of reports and the scene, my conclusion is that the procedures and practices that were being followed by Prestress violated industry-wide standards regarding operation of cranes in proximity to workers, that new and inexperienced workers were placed into a work environment that was unsafe even for experienced personnel, that Prestress did not observe such common industry rules as maintaining clear passage and aisle ways in obstructed fashion, and that Prestress did not maintain barriers between dangerous machinery, i.e. cranes and its workers working within 36-40 inches of same, and thereby created an extremely and exceedingly high likelihood that the crane would come into contact with the workers and based upon the facts that existed, such was substantially certain to occur. . . .

The question for our determination is whether the forecast of evidence is sufficient to show that Prestress intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). If plaintiff's forecast of the evidence is sufficient to show that there is a genuine issue of material fact as to whether Prestress' conduct meets the substantial certainty standard, then plaintiff is entitled to have her claim against Prestress tried by a jury. We conclude that plaintiff's forecast of evidence is not sufficient to raise such a material issue of fact against Prestress.

In *Woodson*, our Supreme Court explained the continuum of tortious conduct as follows:

> The most aggravated conduct is where the actor actually intends the probable consequences of his conduct. One who intentionally engages in conduct knowing that particular results are substantially certain to follow also intends the results for purposes of tort liability. Restatement (Second) of Torts § 8A and comment b (1965) (hereinafter "Rest. 2d of Torts"). "[I]ntent is broader than a desire to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does." W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 8, at 35 (5th ed. 1984) (hereinafter "Prosser"). This is the doctrine of "constructive intent." "As the probability that a [certain] consequence will follow decreases, and becomes less than substantially certain, the actor's conduct loses the character of intent, and becomes mere recklessness. . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence." Rest. 2d of Torts § 8A, comment b.

Woodson, supra.

The misconduct which satisfies the substantial certainty standard is best demonstrated by the following illustration provided by the Restatement (Second) of Torts:

> A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that this act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort.

Restatement (Second) of Torts § 8A illus. 1 (1965). Substantial certainty requires more than a mere possibility or substantial probability of serious injury or death. *Hooper v. Pizzagalli,* 112 N.C. App. 400, 436 S.E.2d 145 (1993); *Dunleavy v. Yates Construction Co.,* 114 N.C. App. 196, --- S.E.2d --- 1994). *See also Zocco v. Department of Army,* 791 F. Supp. 595 (E.D.N.C. 1992).

The forecast of evidence in this case persuades us that Prestress did not engage in misconduct *knowing* it was substantially certain to cause serious death or injury. All the evidence showed that Prestress' policy was that the straddle crane was not to be operated without a signal man and that, at the time of Powell's death, this

policy was being enforced. Plaintiff presented no evidence that Prestress had a policy to allow cranes to be moved without a signal man. Unlike the employer in *Woodson*, Prestress did not permit work to go on without an arrangement to carry out a policy designed to protect the safety of its employees. Assuming *arguendo* that a reasonable juror could determine that by permitting employees to work in close proximity to a moving straddle crane, the risk of serious injury or death as a result of contact with a crane was present, then the forecast of evidence is not sufficient to show that these circumstances were substantially certain to cause Powell's injury and death. No employees of Prestress had been struck by a crane in the past. Prestress' past violations involving crane operation do not concern the hazards of operating a crane in close proximity to workers. There were no safety regulations which required Prestress to use tire guards or keep its employees a certain distance from moving cranes. The circumstances of Powell's death demonstrate that Prestress could have taken further steps to ensure the safety of its employees who worked in close proximity to straddle cranes, but the forecast of evidence is not sufficient to show that there exists a genuine issue of material fact regarding whether Prestress engaged in misconduct knowing it was substantially certain to cause serious injury or death. Summary judgment in favor of Prestress must therefore be affirmed.

Plaintiff's remaining assignments of error concern the entry of summary judgment in favor of Prestress' corporate officers, Michael Means and Richard Schouten, and Prestress' parent company, The Arundel Company. Since the forecast of evidence fails to disclose that Means and Schouten were actual participants at the time of the alleged wrongful activity, they cannot be held liable. *Woodson, supra.* Having found the subsidiary company not liable, we do not reach the question of the liability of the parent company, The Arundel Company. Accordingly, plaintiff's remaining assignments of error are overruled.

The orders and judgments appealed from are

Affirmed.

Judge ORR concurs.

Judge WYNN dissents in a separate opinion.

Judge WYNN dissenting.

The majority correctly identifies the question for our determination as "whether the forecast of evidence is sufficient to show that Prestress intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death." The majority also correctly states our standard of review, that summary judgment should be reversed "[i]f plaintiff's forecast of the evidence is sufficient to show that there is a genuine issue of material fact as to whether Prestress' conduct meets the substantial certainty standard." However, I reach a different result than the majority.

This case presents an opportunity to revisit the standard of employer culpability set forth in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). Prior to *Woodson*, an employee sustaining a workplace injury could not recover against the employer outside the Workers' Compensation Act unless the injury was the result of an intentional tort committed by the employer. *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 340 S.E.2d 295 (1986), *overruled, Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). This was a very difficult standard to meet, as a plaintiff would have to show that the employer intended its acts to result in actual injury or death to the employee. *Id.* at 507-8, 340 S.E.2d at 300. The *Barrino* majority quoted with approval the leading workers' compensation treatise:

> *[T]he common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury.*
>
> . . . .
>
> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.

Id., *quoting* 2A Larson, The Law of Workmen's Compensation § 68.13 (1984) (omission in original).

The *Woodson* Court recognized that there could be situations in which, although the employer did not actually intend to injure an employee, the employer's conduct was so egregious that it was "tantamount to an intentional tort." *Woodson*, 329 N.C. 341, 407 S.E.2d at 228. In trying to find a standard that would address such situations, the Court considered the "willful and wanton" standard, under which an employee may hold a *co-employee* civilly liable for injuries. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). The Court declined to apply the willful and wanton standard to employers' conduct because of the countervailing policies of the workers' compensation scheme. The Court reasoned, "[I]t is also in keeping with the statutory workers' compensation trade-offs to require that civil actions against employers be grounded on more aggravated conduct than actions against co-employees. Co-employees do not finance or otherwise directly participate in workers' compensation programs; employers, on the other hand, do." *Woodson*, 329 N.C. at 342, 407 S.E.2d at 229.

Instead, the Court established a standard in between the intentional tort and willful and wanton standards, known as the "substantial certainty" standard. The Court held that a civil action may be pursued against an employer when "an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct." *Id.* at 340-41, 407 S.E.2d at 228.

After establishing the "substantial certainty" standard, the *Woodson* Court did not further define it, except as it found the *Woodson* facts met it. The majority's bomb-throwing example, taken from the Restatement of Torts, sets a higher standard than that actually applied by the Court in *Woodson*. Although *Woodson* cited the Restatement, it did not expressly adopt it. Thus, the *Woodson* facts provide the authoritative understanding of "substantial certainty" as intended by our Supreme Court.

In *Woodson*, the Court found that reasonable jurors could conclude that defendant knew of the substantial certainty that the conditions would cause serious injury or death where: defendant was experienced; he had been cited for safety violations similar to the one causing the death; he was aware of safety regulations

designed for such conditions; and an experienced foreman testified that the conditions were unsafe.

With this standard in mind, I evaluate plaintiff's forecast of evidence as follows. "[I]n a summary judgment proceeding, the forecast of evidence and all reasonable inferences must be taken in the light most favorable to the non-moving party." *Id.* at 344, 407 S.E.2d at 231. Taken in the light most favorable to plaintiff, the evidence tends to show the following: Decedent was a temporary worker, on his second day on the job, who had received no safety training. He was placed in a workspace in which a crane lacking tire guards regularly passed within as little as 36 inches of him, often behind his back. The crane had an inadequate alarm and the policy requiring a signal man may not have been followed. After the incident, the worksite was cited by the North Carolina Department of Labor pursuant to N.C. Gen. Stat. § 95-129(1) for failing to protect employees working in close proximity to straddle cranes and for permitting crane operators to work without meeting minimum physical requirements. There was additional evidence that the site violated industry standards by allowing new and inexperienced workers to be placed into an unsafe work environment; by failing to maintain clear passage and aisle ways; and by failing to maintain barriers between the workers and the dangerous cranes. I conclude that a reasonable juror could determine from this evidence that serious injury or death was a "substantial certainty rather than an unforeseeable event, mere possibility, or even substantial probability." *Id.* at 345, 407 S.E.2d at 231.

Again, in the light most favorable to the plaintiff, there is evidence that defendant Prestress knew of this substantial certainty. Prestress regularly employed temporary workers such as decedent. Prestress did not provide these workers with any safety training nor with a copy of its safety manual. The company knew that crews frequently worked in close proximity to the moving crane. Instead of instructing workers to move away from the crane when it moved past them, Prestress expected workers to remain working between the wheels and the forming beds as the crane moved behind their backs. Prestress knew that, although it had a policy requiring a signal man to direct the crane, it did not train any of its employees in signaling, there were no uniform signals, and none of the employees was designated as a signal man.

As in *Woodson*, the plaintiff here has forecast evidence that Prestress had a practice of hiring untrained workers; it had twice been cited for safety violations in its crane operations; there were safety violations at the time of the incident; and, according to expert testimony, under the conditions existing at the time, it was substantially certain that the crane would come into contact with the workers. I would hold that plaintiff has presented a genuine issue of material fact as to whether defendants engaged in intentional conduct which they knew was substantially certain to result in serious injury or death.

I reject the majority's suggestion that the existence of a safety policy is enough to relieve an employer of knowledge, where there is evidence that the policy was not effective. Employers should not be able to use policies and regulations which they do not effectively enforce on the worksite as a paper shield from liability. I further reject the implication that a worksite must have had a previous fatality or "near miss" before its supervisors can be held to know of the likelihood of serious injury or death. Employees should not have to lose a co-worker before their own safety can be ensured.

For the foregoing reasons, I respectfully dissent.

BEAUFORT COUNTY SCHOOLS, APPELLEE v. JANET ROACH, APPELLANT

No. 922SC1117

(Filed 19 April 1994)

1. Schools § 113 (NCI4th)— child with special needs—free appropriate public education—duty of system to develop individualized educational plan

The trial court erred in determining that respondent was under no legal obligation to fully develop an Individualized Educational Program for petitioner's daughter, to present an IEP to petitioner upon request, and to present respondent's proposals in writing to petitioner, regardless of petitioner's request, since it was undisputed that respondent was a local educational agency, petitioner was a resident of respondent's

district, and petitioner's child was determined to be a child with special needs. N.C.G.S. § 115C-113; 20 U.S.C. § 1400.

Am Jur 2d, Schools §§ 298 et seq.

Requisite conditions and appropriate factors affecting educational placement of handicapped children. 23 ALR4th 740.

2. **Schools § 227 (NCI4th)— child with special needs—free appropriate public education—no failure by school system to provide**

There was no evidence to support a finding or conclusion that respondent failed in its statutory duty to provide a free appropriate education for petitioner's child who had been determined to be a child with special needs, since the precipitating factor which led to a breakdown in respondent's following the procedure outlined by N.C.G.S. Article 9, Chapter 115C and the federal regulations for the "Education for All Handicapped Children Act of 1975" for providing the child with a free appropriate public education was petitioner's own act of placing the child in another school system.

Am Jur 2d, Schools §§ 298 et seq.

Requisite conditions and appropriate factors affecting educational placement of handicapped children. 23 ALR4th 740.

Appeal by Petitioner Janet Roach from order entered 8 May 1992 by Judge W. Russell Duke, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 6 October 1993.

On 26 September 1989, Petitioner Janet Roach filed a petition for a contested case hearing in the Office of Administrative Hearings against Respondent Beaufort County Schools ("BCS") alleging that Beaufort County Schools had "failed to provide a free appropriate public education for [her] daughter, Ginger Goforth" pursuant to Article 9 of Chapter 115C of the North Carolina General Statutes. Following a hearing, the Administrative Law Judge on 25 July 1990 filed his recommended decision finding that BCS had "not properly offered or provided an appropriate education for Ginger" and ordered BCS to provide Ginger Goforth with an appropriate education and reimburse petitioner for reasonable private placement costs from 22 February 1989 until the time BCS provides such education. On 26 September 1990, the State Board of Educa-

tion, which was the agency given the authority to make the final decision in an action brought pursuant to N.C. Gen. Stat. § 115C-116 and Article 3 of Chapter 150B prior to 1 October 1990, filed its final decision in this action adopting the findings of fact and conclusions of law made by the administrative law judge in his recommended decision.

BCS filed a petition for judicial review of this decision in Beaufort County Superior Court pursuant to Article 4 of Chapter 150B. After making additional findings of fact, on 8 May 1992, Judge W. Russell Duke, Jr. entered an order reversing the decision of the State Board of Education. From this order, petitioner appeals.

Lee E. Knott, Jr. for appellee Beaufort County Schools.

Governor's Advocacy Council for Persons with Disabilities, by Judy J. Burke, Augustus B. Elkins, II and Barbara A. Jackson, for appellant.

ORR, Judge.

The issue presented by this appeal is whether the trial court erred in reversing the decision of the State Board of Education concluding that BCS failed to provide a free appropriate education for petitioner's daughter, Ginger Goforth, who is a behaviorally-emotionally handicapped ("BEH") child.

This case was first heard by an Administrative Law Judge ("ALJ") who made the following findings of fact: In August of 1987, Ginger Goforth was enrolled in the BCS system at Bath High School and placed in a self-contained BEH class. In October of 1987, following a violent episode, petitioner committed Ginger to Brynn Marr Hospital with the help of the Tideland Mental Health Center. On 9 December 1987, Ginger was moved directly from Brynn Marr to The Whitaker School, a school in Granville County for children who exhibit behavior that could be considered dangerous to themselves or others. In late 1988, The Whitaker School determined that Ginger's discharge was necessary and convened a community planning conference for 5 January 1989.

The principal of Bath High School and the Program Administrator for Exceptional Children Programs of BCS, Rosa Beamon, both attended this meeting. At this meeting, the principal expressed his opinion that because of Ginger's previous violent behavior at Bath High School in 1987, it would not be a good idea to return

her to this school. Beamon stated that BCS could provide homebound services for Ginger. A teacher and a unit supervisor of The Whitaker School expressed their opinions, however, that a self-contained BEH class or day treatment, with group placement as a back-up, would be a less restrictive way to meet Ginger's needs.

On 22 February 1989, The Whitaker School discharged Ginger, and she returned to Beaufort County. On 1 March 1989, Rosa Beamon mailed out notices of a meeting of the School Based Committee to be held 6 March 1989 for the purpose of planning Ginger's placement. Although informed of this meeting, petitioner did not attend.

At this meeting, "[i]t was decided by those present that when and if the Petitioner contacted the school to enroll Ginger that it be suggested that she have Homebound Services or limited time at school with a teacher assistant and much support from the Tideland Mental Health Center. No [Individualized Educational Program ("IEP")] for Ginger was developed at this meeting." On 27 March 1989, the School Based Committee held another meeting.

The petitioner appeared at this meeting along with a representative from The Governor's Advocacy Council, and petitioner "was advised that a teacher assistant had been employed by [BCS] to work with Ginger on her return to Bath High School in a BEH self-contained classroom setting." Petitioner stated that she did not want Ginger at home. Also at this meeting, BCS began preparing an IEP for Ginger.

During this process, on 10 April 1989, without giving prior notice to BCS, petitioner placed Ginger in NOVA, a private residential treatment center in Lenoir County. At NOVA, Ginger's teacher was provided by the Lenoir County Schools. BCS did not thereafter complete the IEP.

Subsequently, funding by Tideland Mental Health Center for Ginger to attend NOVA was to run through September, 1989, and on 15 August 1989, the Tideland Mental Health Center called a meeting to discuss the fact that funding for Ginger's placement at NOVA was ending. Rosa Beamon and Dan Winslow, School Psychologist for BCS, attended this meeting. At the meeting, Beamon reported that BCS could provide education but not treatment for Ginger. She stated that BCS' program would consist of a resource or full-time BEH placement depending on Ginger's need and a full-

time teacher assistant at Northside High School. As found by the ALJ, "[s]hortly after this meeting the petition for a contested case hearing was filed[,] and Ginger has remained at NOVA."

Based on these facts, the ALJ concluded that BCS failed to provide a free appropriate education for Ginger Goforth "by not fully developing an IEP and presenting it in writing to Petitioner along with her procedural rights and safeguards as required" and recommended that BCS provide an appropriate education for Ginger and "reimburse Petitioner for reasonable private placement costs from February 22, 1989, until it does so." Subsequently, the State Board of Education adopted the findings and conclusions of the ALJ.

On petition for judicial review, the trial court found, however, that BCS "had no legal obligation to fully develope [sic] an IEP for Ginger Goforth and present it to the [petitioner] along with her procedural rights and safeguards," that there was "no substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted within the meaning of G.S. 150B-51(b)(5) to support a finding of fact that [BCS had] not properly offered or provided an appropriate education for Ginger Goforth," and reversed the Board's decision. On appeal, petitioner contends that the trial court erred in its finding that BCS was under no legal obligation to fully develop an IEP for Ginger and present it to petitioner and that the trial court exceeded its scope of review by making additional findings of fact not contained in the final decision of the Board and reversing the Board's decision.

Our standard of review over an agency's decision is governed by N.C. Gen. Stat. § 150B-51(b), "the same scope of review utilized by superior courts." *Clay v. Employment Security Commission of N.C.*, 111 N.C. App. 599, 602, 432 S.E.2d 873, 875 (1993), *disc. review allowed*, 335 N.C. 553, --- S.E.2d --- (1994); *Jarrett v. N.C. Dep't of Cultural Resources*, 101 N.C. App. 475, 478, 400 S.E.2d 66, 68 (1991).

Under N.C. Gen. Stat. § 150B-51(b) (1991), a court may "reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced . . . ." Petitioner's rights may have been prejudiced under the statute if the agency's findings, inferences, conclusions, or decisions are:

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1991).

"Agency findings of fact are conclusive if, upon review of the whole record, they are supported by competent, material, and substantial evidence." *In re Humana Hosp. Corp. v. North Carolina Dep't of Human Resources*, 81 N.C. App. 628, 633, 345 S.E.2d 235, 238 (1986). "[T]he Superior Court is without authority to make findings at variance with the findings of the [agency] when the findings of the [agency] are supported by competent, material and substantial evidence." *In re Appeal of Amp, Inc.*, 287 N.C. 547, 561, 215 S.E.2d 752, 761 (1975). However, "[w]here the reviewing court determines that the findings of the agency are not supported by substantial evidence, the [C]ourt may make findings at variance with those of the agency." *Scroggs v. North Carolina Criminal Justice Educ. and Training Standards Comm'n*, 101 N.C. App. 699, 702-03, 400 S.E.2d 742, 745 (1991).

[1] First we must determine whether the trial court erred in finding that BCS was under no legal obligation to fully develop an IEP for Ginger. The federal "Education for All Handicapped Children Act of 1975" (the "EHCA"), 20 U.S.C. § 1400, et seq., which Act is now entitled "Individuals with Disabilities Education Act," was enacted to promote the education of children with special needs. Specifically, the EHCA creates a state grant program to aid states in educating handicapped children. The EHCA requires all states receiving funds under this Act to provide a "free appropriate public education" for all children with disabilities in the state. 20 U.S.C. § 1412.

North Carolina receives funds under the EHCA and is, therefore, required to provide a free appropriate public education to children with disabilities living in the State. Article 9 of Chapter 115C of the North Carolina General Statutes ("Article 9") establishes policies in accordance with the EHCA to provide this education. Article 9 states, "[e]ach local educational agency shall provide free appropriate special education and related services in accordance

with the provisions of this Article for all children with special needs who are residents of, or whose parents or guardians are residents of, the agency's district, beginning with children aged five." N.C. Gen. Stat. § 115C-110(i).

In the present case, the issue before us is whether the trial court erred in reversing the Board's decision that BCS failed to provide Ginger with a free appropriate education since her release from The Whitaker School on 22 February 1989.

On 22 February 1989, N.C. Gen. Stat. § 115C-113(c) (1987) stated that once a child is referred for diagnosis and evaluation,

> [w]ithin 30 days of such referral, the local educational agency shall send a written notice to the parents or guardian describing the evaluation procedure to be followed and requesting consent for the evaluation. If the parents or guardian consent, the diagnosis and evaluation may be undertaken; if they do not, the local educational agency may obtain a due process hearing on the failure of the parent to consent under G.S. 115C-116.
>
> The local educational agency shall provide or cause to be provided a diagnosis and evaluation appropriate to the needs of the child within 30 calendar days after sending the notice unless the parents or guardian have objected to such evaluation. At the end of such diagnosis and evaluation, the local educational agency shall offer a proposal for an educational program appropriate to the child's needs. If this proposal calls for a special educational program, it shall set forth the specific benefits expected from such a program, a method for monitoring the benefits, and a statement regarding conditions which will be considered indicative of the child's readiness for participation in regular classes.

Further, at the time of Ginger's release from The Whitaker School, N.C. Gen. Stat. § 115C-113(f) (1987) stated:

> Each local educational agency shall prepare individualized educational programs for all children found to be children with special needs . . . . The individualized educational program shall be developed in conformity with Public Law 94-142 and the implementing regulations issued by the United States Department of Education and shall be implemented in conformity with timeliness set by that Department.

Public-Law 94-142 was codified into the EHCA. At the time of Ginger's release from The Whitaker School, the federal regulations for the EHCA pertaining to the preparation and implementation of an IEP stated:

> (b) An individualized education program must:
>
> (1) Be in effect before special education and related services are provided to a child; and
>
> (2) Be implemented as soon as possible following the meetings under § 300.343.

34 C.F.R. § 300.342(b). Under 34 C.F.R. § 300.343, "[e]ach public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's [IEP]." 34 C.F.R. § 300.343(a). "[A] meeting must be held within thirty calendar days of a determination that the child needs special education and related services." 34 C.F.R. § 300.343(c).

"Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:" notifying parents of the meeting and scheduling meetings at a mutually agreed upon time and place. 34 C.F.R. § 300.345(a). "A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend." 34 C.F.R. § 300.345(d). Further, "[t]he public agency shall give the parent, on request, a copy of the [IEP]." 34 C.F.R. § 300.345(f); *See also* N.C. Gen. Stat. § 115C-113(d) (1987) ("local educational agency shall furnish the results, findings, and proposals based on the diagnosis and evaluation to the parents or guardian in writing . . . .").

Our review of the applicable provisions of Article 9 and the EHCA and its regulations in effect at the time of Ginger's release from The Whitaker School shows no provision whereby a local educational agency is relieved of its duty to create an IEP for a child whose parents reside in the agency's district once that child has been determined to be a child with special needs. In the present case, it is undisputed that BCS is a "local educational agency" and that petitioner, the parent of Ginger, is a resident of BCS' district. It is also undisputed that at the time of Ginger's release from The Whitaker School on 22 February 1989, Ginger had been determined to be a child with special needs. Thus, based

on our reading of the statute and federal regulations, BCS had a legal obligation to fully develop an IEP for Ginger following her release from The Whitaker School, to present the IEP to petitioner upon petitioner's request, and to present BCS's proposals in writing to petitioner, regardless of petitioner's request; the trial court erred, therefore, in its finding that BCS was under no legal obligation to do so.

[2] The determination that BCS had a duty to fully develop an IEP for Ginger and that BCS failed to do so is not, however, dispositive of this case. The failure to fully develop an IEP does not necessarily constitute a failure to provide a free appropriate education under the statute or the EHCA.

The facts of this case as found by the ALJ and adopted by the Board show that Ginger was released from The Whitaker School on 22 February 1989. The Board found that before the expiration of thirty days, on 1 March 1989, BCS informed petitioner that it was going to hold a meeting on 6 March 1989 to determine Ginger's educational needs; petitioner chose, however, not to attend. Then on 27 March 1989, BCS held another meeting which petitioner did attend. At this meeting, BCS began to create an IEP for Ginger with petitioner. Before BCS completed the IEP, however, on 10 April 1989, petitioner chose to enroll Ginger in NOVA, a private residential treatment center in Kinston, N.C., where, according to the evidence, Lenoir County School System developed an IEP for Ginger, and BCS, therefore, stopped preparing an IEP for her. Petitioner's act of placing Ginger in NOVA effectively prevented BCS from implementing an IEP for Ginger "as soon as possible."

Subsequently, on 15 August 1989, Tideland Mental Health Center called a meeting to discuss the fact that Ginger's funding at NOVA was running out. At this time, N.C. Gen. Stat. § 115C-113(c) had been amended effective 21 June 1989, which provision is still in effect and states that once a child is referred for diagnosis and evaluation,

> [t]he local educational agency shall provide or cause to be provided, as soon as possible after receiving consent for evaluation, a diagnosis and evaluation appropriate to the needs of the child unless the parents or guardian have objected to such evaluation. If at the conclusion of the evaluation, the child is determined to be a child with special needs, the local

> educational agency shall within 30 calendar days convene an [IEP] committee. The purpose of the meeting shall be to propose the special education and related services for the child. . . . The proposal shall set forth the specific benefits expected from such a program, a method for monitoring the benefits, and a statement regarding conditions which will be considered indicative of the child's readiness for participation in regular classes.
>
> After an initial referral is made, the provision of special education and related services shall be implemented within 90 calendar days to eligible students, unless the parents or guardian refuse to consent to evaluation or placement or the parent or local educational agency requests a due process hearing.

Further, N.C. Gen. Stat. § 115C-113(d) was amended effective 21 June 1989, which provision is still in effect, and states,

> [t]he local educational agency shall furnish the results, findings, and proposals, as described in the [IEP] or group educational program based on the diagnosis and evaluation to the parents or guardian in writing . . . prior to the parent or guardian giving consent for initial placement in special education and related services.

In the present case, as found by the Board, Rosa Beamon and a School Psychologist for BCS were invited to and attended the meeting of 15 August 1989 called by Tideland Mental Health Center. When asked what type of education BCS could provide for Ginger, Beamon stated that "the Beaufort County Schools program would consist of a resource or full-time BEH placement *depending on Ginger's need* and a full-time teacher assistant at Northside High School." (Emphasis added.) "Shortly after this meeting the petition for a contested case hearing [in which petitioner alleged that BCS had failed to provide a free appropriate public education for Ginger] was filed and Ginger has remained at NOVA."

Our review of the amendments to Article 9 again shows no provision whereby a local educational agency is relieved of its duty to create an IEP for a child whose parents reside in the agency's district once that child has been determined to be a child with special needs. Thus, BCS was still under the obligation to fully develop an IEP for Ginger but with additional time constraints.

Under Article 9 as amended, once a child has been referred for a diagnosis and evaluation, the local educational agency shall, "as soon as possible after receiving consent for evaluation," provide or cause to be provided a diagnosis and evaluation of the child. N.C. Gen. Stat. § 115C-113(c) (1991). If the child is determined to be a child with special needs, the local educational agency is to convene an IEP committee within thirty calendar days after such determination. N.C. Gen. Stat. § 115C-113(c) (1991). The local educational agency is to develop an IEP, furnish the results as described in the IEP to the child's parent or guardian in writing, and implement the special education and related services within ninety calendar days from the initial referral. N.C. Gen. Stat. § 115C-113(c), (d) and (f) (1991).

Our review of the evidence shows that BCS followed the correct procedure to provide Ginger with a free appropriate education upon her release from The Whitaker School. The process for providing Ginger with a free appropriate education was, however, interrupted by petitioner's act of placing Ginger into another school. Further, at the time Tideland Mental Health Center called the meeting to discuss the fact that Ginger's funding to attend NOVA was ending, Ginger was still enrolled at NOVA as a student, and the Board made no findings as to whether petitioner contacted BCS again after this meeting before filing this action.

Based on these facts, we conclude that there is no evidence to support a finding or conclusion that BCS failed to provide a free appropriate education. Although the record reveals subsequent discussion among the parties as funding for NOVA ran out, it is not clear from the record or issues presented that any subsequent acts of BCS constituted a failure to provide a free appropriate education.

Thus, the precipitating factor that led to a breakdown of BCS following the procedure outlined by Article 9 and the federal regulations for the EHCA for providing Ginger with a free appropriate education was petitioner's own act of placing Ginger into another school system. Based on our review of the facts as found by the Board and as supported by sufficient and competent evidence, we conclude that insufficient evidence exists to support the Board's conclusion that BCS failed to provide a free appropriate education for Ginger.

Accordingly, insofar as the trial court reversed the Board's conclusion that BCS failed to provide a free appropriate education for Ginger, we affirm the order of the trial court. Insofar as the trial court concluded that BCS was under no legal obligation to prepare an IEP for Ginger and present it to petitioner, however, we reverse the order of the trial court and remand this case for entry of an order requiring BCS to prepare an IEP for Ginger, to present the results of the IEP to petitioner pursuant to the provisions of Article 9, and to implement that IEP within 90 calendar days absent one of the factors listed in G.S. 115C-113(c) taking place.

Affirmed in part, reversed and remanded in part.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. GARY DEAN NELSON

No. 9318SC515

(Filed 19 April 1994)

1. **Rape and Allied Offenses § 200 (NCI4th)— first-degree rape— defendant's denial of penetration—instruction on attempted rape required**

In a prosecution of defendant for second-degree rape, defendant's testimony was an unequivocal denial of penetration which entitled him to an instruction on the lesser included offense of attempted rape.

Am Jur 2d, Rape § 110.

2. **Criminal Law § 496 (NCI4th)— jury request to view exhibits— failure to return jury to courtroom to hear request and response—error**

The trial court committed prejudicial error in responding to the jury's written request to review evidence where the trial judge brought only the foreman and not the entire jury back into the courtroom to clarify which exhibits the jury wished to see and to instruct the foreman that the exhibits should not be altered in any way.

Am Jur 2d, Trial §§ 1573-1579.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—post-Parker cases. 35 ALR4th 890.

Judge LEWIS dissenting.

Appeal by defendant from judgment entered 2 October 1992 by Judge Narley Cashwell in Guilford County Superior Court. Heard in the Court of Appeals 11 January 1994.

On 20 April 1992, defendant was indicted on charges of second degree rape in violation of G.S. 14-27.3, and first degree kidnapping in violation of G.S. 14-39. At trial, the State's evidence tended to show the following: On 9 January 1992, Ms. Carla Shavers worked as a topless dancer at a nightclub in Greensboro. As part of her job, Ms. Shavers danced topless on stage every one to two hours during her shift and received tips from patrons who placed them in a garter belt on her thigh. If a patron requested, Ms. Shavers would perform a topless dance at the patron's table. When she was not dancing, Ms. Shavers mingled with the crowd.

On the evening of 9 January 1992, Ms. Shavers worked from approximately 7:30 p.m. until the club closed at 2:00 a.m. the next morning. Ms. Shavers testified that sometime in the middle of the evening, defendant tipped Ms. Shavers in her garter while she danced on stage. Ms. Shavers testified that defendant tipped her approximately $20-30 during the whole night. Sometime between 11:30 p.m. and 12:00 a.m., Ms. Shavers had a brief conversation with defendant. Ms. Shavers testified that defendant told her that he knew some of the other dancers at the club and that he used to be a bouncer for another local club. Defendant told Ms. Shavers that he was currently an escort for ladies who worked for a "Strip-O-Gram" service. Defendant gave Ms. Shavers a card and told her that he wanted her to work with him. Ms. Shavers did not express any interest in defendant's offer. Ms. Shavers also testified that she performed a table dance for defendant at around the same time that she had this conversation. Ms. Shavers testified that nothing else was said between her and defendant during that conversation and that she had no further conversations with defendant at the club.

When the club closed at 2:00 a.m., Ms. Shavers and another dancer left the building together. Once outside, they went their separate ways to their respective cars. Ms. Shavers went around

the building in the back to where her car was parked. Ms. Shavers testified that while she was walking to her car, defendant jumped out from behind a truck and told her that he needed a ride. Ms. Shavers told defendant that she did not give people rides and hurried to get to her car. Defendant followed. Ms. Shavers testified that when she unlocked the driver's door and got inside, defendant wedged himself in the car door opening and prevented her from closing the door. Defendant told Ms. Shavers that they were going to get in her car and leave together. When she refused, defendant yanked her from the car. Ms. Shavers screamed for help and struggled with defendant but defendant pinned her face down in the dirt behind the car and threatened to break her neck. Ms. Shavers testified that defendant then told her that they were going to get up from the ground, get into her car and leave together. Defendant pulled Ms. Shavers off the ground and took her to the car. When she got in the car, Ms. Shavers told defendant that she did not have her car keys and that she had no way to start the car. Defendant again pulled Ms. Shavers out of the car and told her to find the keys. Ms. Shavers saw the keys in the dirt where they had struggled and stepped on them to cover them. She then pretended that she could not find the keys. When Ms. Shavers told defendant that she could not find the keys, defendant picked her up, put her over his shoulder and carried her behind some U-Haul trucks.

Ms. Shavers testified that defendant then ripped open her shorts and underwear and started rubbing his penis on her vagina. Defendant did not have an erection at that time. Ms. Shavers further testified that defendant performed oral sex on her and then "put his penis inside [her] and began to have sex with [her]." While defendant was having sex with her, Ms. Shavers saw two people coming towards her car and told defendant that if the people looked in their direction, they would see defendant. Defendant then got up and pulled Ms. Shavers up by her arm. Ms. Shavers broke away from defendant and ran to the two people in the parking lot yelling that she had been raped.

Defendant presented evidence. Defendant testified that on 9 January 1992, he went to the nightclub with two friends. Defendant drank several glasses of double vodka and bourbon throughout the night. Defendant watched Ms. Shavers dance on stage and tipped her several times throughout her dance. Defendant testified that Ms. Shavers kissed him on the cheek one of the times that he

tipped her. Defendant testified that Ms. Shavers appeared to like him, so he offered to buy Ms. Shavers a drink when she was mingling in the crowd. Ms. Shavers accepted and defendant bought Ms. Shavers approximately six double vodkas while they talked.

Defendant testified that Ms. Shavers asked defendant what he would be doing later in the evening. Defendant told her that he worked for a power company and that he had to get up at 5:00 a.m. to go to work. Defendant testified that Ms. Shavers asked defendant if he would like to have breakfast with her. Defendant said that he was not driving and was riding with a friend. Ms. Shavers said that was okay and that she would have defendant home in time for him to get to work.

While defendant and Ms. Shavers were talking, Rick Loye, one of the friends with whom defendant came to the club that night, approached defendant and asked defendant if he was ready to leave. Defendant answered, "No." Defendant told Loye that Ms. Shavers was going to carry him home. Defendant and Loye both testified that Loye looked at Ms. Shavers and asked her if that was true. Ms. Shavers nodded her head and said, "Yes." Defendant testified that Ms. Shavers later told him that her last dance would be between 1:30 and 1:45 a.m. and that he should meet her at her car around back. Ms. Shavers told him that her car was a blue car sitting under a night light in the back of the club.

Defendant testified that when Ms. Shavers had almost finished her last dance, he left the club and went out back to Ms. Shavers' car. Defendant testified that he was very drunk by that time because he had been drinking heavily throughout the night. Defendant testified that he waited approximately 10 to 15 minutes for Ms. Shavers and then went around to the front of the building and used the pay phone. Defendant testified that he dialed "0" for the operator and told the operator that he was very intoxicated and asked if she would call him a taxi cab. A short while later, defendant saw Ms. Shavers come out of the club and head for her car. Defendant testified that he hollered to Ms. Shavers and that when she saw him, she motioned for him to join her. Defendant, however, felt hot and nauseous and went behind a U-Haul truck and sat down on a bumper so he would not be sick in front of her. Defendant testified that while he was sitting on the bumper with his hands on his knees, Ms. Shavers came up to him to see if he was okay and began to rub the back of defendant's neck

and shoulders. Defendant testified that he then felt her hand on the inside of his thigh rubbing his private parts. Defendant testified that Ms. Shavers unzipped his pants and performed oral sex on him. After defendant got a slight erection, Ms. Shavers knelt in front of defendant and pulled defendant to her but defendant had lost his erection by this time. Defendant testified that Ms. Shavers began rubbing his penis against her vagina and tried to insert it into her vagina. However, defendant testified that "she never got it inside her vagina."

Ms. Shavers then told defendant that someone was coming out the back door and pushed him off of her. Defendant testified that Ms. Shavers went to the two people and that he heard her tell one of them that he had raped her. Defendant got scared and left the area and was subsequently apprehended by the police.

The jury found defendant guilty on both charges. Defendant was sentenced to a term of 25 years imprisonment for second degree rape and a concurrent term of 25 years imprisonment for first degree kidnapping. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Melissa L. Trippe, for the State.

Geoffrey C. Mangum for defendant-appellant.

EAGLES, Judge.

Defendant contends that the trial court erred in 1) refusing to submit to the jury the charge of attempted second degree rape as a lesser included offense of second degree rape, 2) responding to a jury request to review evidence without all of the jurors present in the courtroom, and 3) entering judgment on first degree kidnapping. After careful review of the record and briefs, we remand to the trial court for a new trial on both charges.

I.

[1] Defendant first contends that the trial court erred in refusing to instruct the jury on the lesser included offense of attempted rape. We agree.

The trial court must instruct the jury upon a lesser included offense when there is evidence to support it. *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). However, "when the State's evidence is clear and positive with respect to each

element of the offense charged, and there is no evidence showing the commission of a lesser included offense," the trial court may refuse to instruct the jury on the lesser included offense. *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980). Instructions on the lesser included offenses of rape are required only when there is some conflict or doubt concerning the crucial element of penetration. *See State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981).

Here, the victim testified that defendant "put his penis inside me, and he began to have sex with me." Defendant, however, testified as follows:

> Q. Did you ever insert your penis, or did your penis ever get into any part of her body, her vagina or anything else?
>
> A. No, sir. I—she had my penis in her hand, and no, she never—she never got it inside her vagina.
>
> Q. Did you ever have intercourse with her?
>
> A. No, sir.

Defendant contends that his testimony was an unequivocal denial of penetration entitling him to an instruction on attempted rape under *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985). We agree.

In *Williams, supra*, the prosecuting witness testified unequivocally that the defendant inserted "his penis . . . into my vagina." *Id.* at 352, 333 S.E.2d at 718. The defendant's written statement, however, stated that:

> I [defendant] embarrassingly removed my pants to my knees, and without touching her elsewhere, *struggled to penetrate without an erection.* At this the girl began a muffled laugh, so I got up and dressed as Shannone was going through her purse.

Id. at 351, 333 S.E.2d at 718 (emphasis in original). The defendant in *Williams* contended that this portion of his written statement was essentially a denial of penetration. The Supreme Court held that the defendant's statement was not an unequivocal denial of penetration and that "[h]ad the defendant unequivocally denied the essential element of penetration, it would have been incumbent

upon the trial judge to have placed that issue before the jury." *Id.* at 353, 333 S.E.2d at 719.

Since defendant here unequivocally denied the essential element of penetration, we conclude that defendant was entitled to an instruction on attempted rape. Accordingly, we hold that defendant must be given a new trial on the charge of second degree rape.

II.

[2] Defendant further contends that the trial court erred in responding to the jury's written request to review evidence when the trial judge orally addressed the jury foreman without all of the jurors being present in the courtroom. We agree and conclude that defendant must also be awarded a new trial on both charges.

During deliberations, the jury sent a note to the court through the bailiff requesting to review certain pieces of evidence introduced at trial. The note read as follows: "One, photos. Two, underwear. Three, medical reports. Four, rose." In order to determine which exhibits to send back to the jury, the trial court brought only the jury foreman back into the courtroom to clarify which exhibits the jury was referring to in the note. The other jurors remained in the jury room. The relevant parts of the conversation are as follows:

> THE COURT:—I want to just clarify one thing. Mr. Farley, [foreman] I have a note given me by the bailiff which lists four items that the jury wishes to see. One is photographs.
>
> JUROR NO. 9:—[Foreman] Yes, sir.
>
> THE COURT:—Two says underwear, three says medical reports, and four says rose.
>
> JUROR NO. 9:—Yes.
>
> THE COURT:—Do you—does the jury wish to see all of the photographs?
>
> JUROR NO. 9:—I think they more meant the photographs that were laying out right in front of us just before we went in.
>
> THE COURT:—Okay.
>
> Mr. Cahoon and Mr. Panosh, I'm going to send back all of the photographs.
>
> I don't know which ones were laying out there, but I'll let you have all of the photographs.

When you say "underwear," are you referring to a particular item?

JUROR NO. 9:—Ms. Shavers' underwear

. . . .

THE COURT: You will be allowed to get that.

Medical reports, you're referring to all of the medical reports, that is, both the defendant's exhibits—and I don't know if the State had any marked or not.

MR. PANOSH: Yes, sir.

THE COURT:—All of the reports referring to medical reports, is that correct?

JUROR NO. 9:—Yes. I polled the room asking individuals—

THE COURT:—Don't tell me that. Just tell me yes or no what you want. Just all the medical reports, too?

JUROR NO. 9:—Yes, sir.

. . . .

THE COURT:—Mr. Farley, I would ask you, of course, when these items are in the jury's possession back in the jury room, do not alter or change them in anyway. Don't make any marks on them. Don't do anything in that regard. You may examine them, but don't alter or change them in anyway, please.

Defendant contends that the trial court erred in not bringing all the jurors back into the courtroom to hear the jury foreman's request and the trial court's response to it. We agree.

G.S. 15A-1233(a) provides that "If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom." In *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985), the jury foreman returned alone to the courtroom and asked if the jury could review certain portions of the testimony. The trial court responded that there was no transcript available and that the jurors would have to rely upon their own recollections during deliberations. Our Supreme Court held that the trial court committed prejudicial error in violation of G.S. 15A-1233 in not bringing all the jurors into the courtroom to hear both the jury foreman's request and the trial court's response

to the request. The Court stated that the danger in allowing an individual juror or jury foreman to communicate privately with the trial court was that:

> [T]he person, even the jury foreman, having alone made the request of the court and heard the court's response firsthand, may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the court's response, or both, to the defendant's detriment. Then each juror, rather than determining for himself or herself the import of the request and the court's response, must instead rely solely upon their spokesperson's secondhand rendition, however inaccurate it may be.

Id. at 36, 331 S.E.2d at 657.

The State, however, contends that *Ashe* is distinguishable from the case at hand because the trial court in *Ashe* essentially gave the jury foreman additional jury instructions in telling him that the jurors would have to recollect the evidence as best they could. The State argues that here, the trial court only asked the jury foreman to clarify which exhibits the jury wanted. However, we think that the trial court's actions here presented one of the dangers explicitly referred to in *Ashe*. The jury foreman here may have inaccurately relayed the jury request or the judge's response. In addition, the trial court's instruction to the jury foreman not to mark on the exhibits is an instruction required to be given under G.S. 15A-1233(b) when the jury is allowed to take exhibits back into the jury room. Accordingly, we hold that the trial court erred in not bringing all the jurors back into the courtroom to hear the jury foreman's explanation of the jury's note and the trial court's response.

The State also contends that if the trial court committed error it was harmless error under G.S. 15A-1443. We disagree. In concluding that the trial court in *Ashe* committed prejudicial error in not requiring that all jurors be present to hear the jury foreman's request and the trial court's response to it, the *Ashe* Court stated:

> First, as we have already said, all jurors should be present to hear the request itself, for it is only in light of the request, the manner and precision with which it is put, that the court's response can be accurately assessed and properly understood. Second, the trial court's response was not a simple "no" as

> the state contends. Rather, the court explained that it could not grant the foreman's request because no transcript existed, and that the jurors would have to rely upon their recollection of the evidence as best they could. Although the foreman might have relayed this exact message, he might as easily have conveyed some altered message or phrased the judge's response in his own words in such a way as to alter its connotation and its import. The manner in which he reported his request and the response might have led the other jurors to believe the trial court thought the evidence which the jury wanted reviewed unimportant or not worthy of further consideration.

State v. Ashe, 314 N.C. 28, 38, 331 S.E.2d 652, 658-59 (1985).

Here, the trial court did not simply grant the jury's request to review the exhibits, but called only the jury foreman out to explain which exhibits the jury was referring to in the note. Not only did the jury not hear the jury foreman's request or explanation, they did not hear the trial court's response or its instruction not to mark on or tamper with the exhibits. We conclude that the trial court's error here was prejudicial and that defendant is entitled to a new trial on both charges on this ground.

III.

We need not address defendant's third contention as it is not likely to arise in the new trial. For the reasons stated, we remand to the trial court for a new trial on the charges of second degree rape and first degree kidnapping.

New trial.

Judge JOHNSON concurs.

Judge LEWIS concurs in part and dissents in part.

Judge LEWIS dissenting.

I respectfully dissent as to the majority's conclusion that the defendant is entitled to a new trial on first degree kidnapping because the trial judge spoke only to the foreman of the jury in the courtroom without bringing the entire jury in. I believe *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985), is distinguishable from this case. Absolutely nothing in substantive law or recitation

of facts was exchanged. The judge simply ascertained what the jurors wanted and then allowed them to see all of the evidence requested. The dangers outlined in *Ashe* should be avoided, but a fair trial and verdict should not be overturned because of what might have happened. I interpret N.C.G.S. § 15A-1233(a) (1988) to mean that if the judge grants the jury's request to review certain testimony, then the entire jury should be brought back into the courtroom to have the testimony read to them from the transcript. They should not have to all come in the courtroom to see evidence. Frequently, the practice now is for notes requesting evidence to be sent out of the jury room by the bailiff and pieces of evidence to be sent back in without any juror coming into the—courtroom. If testimony is to be read, all the jurors must be brought back into the courtroom and the reading must take place on the record. As to the sending in of pieces of evidence, according to the majority's interpretation, if the jury requested to view a piece of evidence, for example, a shoe, the entire jury would have to be brought back in to see it. This is neither required nor should be, as evidence can be sent to the jury room without disrupting the jurors by having them all come back out. It is no longer necessary to have consent of the parties for the judge to send evidence to the jury room.

Assuming for the sake of argument that it was error for the judge to speak to the foreman, it was certainly, under the facts of this situation, harmless. This conviction for kidnapping should stand.

I concur with the majority that the trial court should have instructed on attempted second degree rape as there was testimony by the defendant that penetration had never occurred but that it had been attempted. We are bound by *State v. Wright*, 304 N.C. 349, 283 S.E.2d 502 (1981).

LINDA LOU WYATT (HOLLIFIELD) v. JIMMY H. HOLLIFIELD, SR.

No. 9325DC593

(Filed 19 April 1994)

1. **Divorce and Separation § 284 (NCI4th)— alimony pendente lite—recoupment properly ordered**

When a jury or trial judge finds that none of the grounds on which a spouse alleges entitlement to permanent alimony pursuant to N.C.G.S. § 50-16.2 exists, the trial court, in its discretion, may order recoupment of any alimony pendente lite paid by the supporting spouse, and the trial court in this case did not abuse its discretion in requiring such recoupment.

Am Jur 2d, Divorce and Separation § 710.

2. **Divorce and Separation § 538 (NCI4th)— alimony pendente lite—recoupment ordered—award not reversed or vacated—award still basis for award of attorney fees**

There was no merit to defendant's contention that, because the trial court ordered recoupment of alimony pendente lite pursuant to N.C.G.S. § 50-16.11, it followed that plaintiff was not entitled to counsel fees incurred in the prosecution of the alimony pendente lite claim pursuant to N.C.G.S. § 50-16.4, since the alimony pendente lite award was not appealed and reversed, nor vacated, remained a valid order, and could support an award of counsel fees.

Am Jur 2d, Divorce and Separation § 616.

Right to attorneys' fees in proceeding, after absolute divorce, for modification of child custody or support order. 57 ALR4th 710.

Judge JOHN concurring.

Appeal by plaintiff from judgment filed 5 January 1993 in Caldwell County District Court by Judge Jonathan L. Jones. Heard in the Court of Appeals 4 March 1994.

Todd, Vanderbloemen, Respess and Brady, P.A., by William W. Respess, Jr., for plaintiff-appellant.

Rudisill & Brackett, P.A., by J. Richardson Rudisill, Jr., and H. Kent Crowe, for defendant-appellee.

GREENE, Judge.

Linda Lou Hollifield Wyatt (plaintiff) appeals from a judgment filed 5 January 1993 in Caldwell County District Court, ordering her to repay the alimony pendente lite she had received from Jimmy H. Hollifield, Sr. (defendant) and denying her attorney's fees for services rendered prior to the jury trial for permanent alimony.

On 15 January 1991, defendant filed a verified complaint seeking a divorce from bed and board from plaintiff. On 28 January 1991, plaintiff filed a verified complaint seeking divorce from bed and board, alimony pendente lite, permanent alimony, and attorney's fees. In her complaint, plaintiff alleged that she is unemployed, has no employment other than assisting defendant as bookkeeper for Hollifield Lumber Company, and is without the means to subsist during the prosecution of this action. Defendant moved to dismiss plaintiff's complaint on the grounds that there was a prior pending action between the parties.

After a hearing on 28 May 1991, Judge Nancy Einstein, by order dated 8 June 1991, denied defendant's motion to dismiss, treated defendant's complaint as a counterclaim and joined the two files for trial. At the hearing, the trial court received evidence on plaintiff's claim for alimony pendente lite and made the following pertinent findings of fact:

> 9. The defendant has committed such indignities to the person of the plaintiff so as to make her life burdensome and condition unbearable as follows:
>
> a. . . . the defendant assaulted the plaintiff by throwing her on a bed choking her with one hand while holding a pistol to her forehead with the other and stating that he intended to kill her. . . .
>
> b. The defendant is an excessive user of alcohol and has been an excessive user consistently for several years.
>
> c. The defendant told the plaintiff on January 7, 1991, just prior to the separation of the parties, that he intended to kill himself and her to "end it all".
>
> d. The defendant has for several years gone into rages for no apparent or predictable reasons including several in-

stances of throwing food in restaurants to the embarrassment and humiliation of the plaintiff.

e. The defendant threw food, lamps, ashtrays and other objects at the plaintiff from time to time while in the marital home.

10. The defendant constructively abandoned the plaintiff. The defendant has on at least two occasions, threatened the plaintiff with death including the day immediately prior to her leaving the martial [sic] home.

. . . .

14. The plaintiff was never paid a salary for her efforts [as a bookkeeper in the offices of Hollifield Lumber Company].

. . . .

22. . . . The plaintiff earns approximately $300.00 per month working on a part time basis.

23. The plaintiff has submitted an affidavit which was admitted into evidence indicating needs exceeding $2,400.00. to meet monthly living expenses.

. . . .

26. . . . The plaintiff's attorney has a normal hourly rate of $125.00. The plaintiff's attorney has devoted 12.9 hours for the preparation of the pleadings and for this hearing, as well as, various conferences with the defendant's attorney. The plaintiff paid her attorney a $2,500.00 retainer fee from the monies which she took into her possession at the time of separation.

Based upon these findings, Judge Einstein concluded as a matter of law that plaintiff is a dependent spouse, "likely to prevail on her action for alimony," "without the means whereon to subsist pending the prosecution of this action," and "without the ability to meet the defendant on an equal footing." Judge Einstein ordered defendant to pay plaintiff alimony pendente lite of $2,000.00 a month, but deferred plaintiff's motion for attorney's fees "until hearing upon the trial of this matter for permanent alimony." Defendant appealed the denial of his motion to dismiss to this Court which affirmed Judge Einstein's denial of defendant's motion. *Hollifield v. Hollifield*, 104 N.C. App. 803, 411 S.E.2d 662 (1991) (unpublished opinion).

On 12 May 1992, defendant filed an amended answer and counterclaim to plaintiff's claim for permanent alimony, divorce from bed and board, and attorney's fees. He requested a jury trial on the issue of permanent alimony and a refund of all alimony pendente lite paid to plaintiff. An absolute divorce judgment was entered on 29 May 1992. A jury trial on plaintiff's claim for permanent alimony was conducted, beginning on 2 December 1992, and the jury answered the questions submitted to them as follows:

> Issue # One (1):
>
> Did the defendant, Jimmy H. Hollifield, Sr., by cruel and barbarous conduct endanger the life of the plaintiff, Linda Hollifield (Wyatt), without provocation?
>
> Answer No
>
> Issue # Two (2):
>
> Did the defendant, Jimmy H. Hollifield, Sr., without provocation, offer such indignities to the person of the plaintiff, Linda Hollifield (Wyatt), as to render her condition intolerable an [sic] life burdensome?
>
> Answer No
>
> [IF YOU ANSWERED BOTH ISSUES 1 & 2 "NO", YOU WILL HAVE CONCLUDED YOUR DELIBERATIONS. . . .]

After the jury answered these questions, Judge Jonathan L. Jones made the following additional findings of fact:

> 7. That from the date of separation of the parties hereto, January 8, 1991, through April, 1992, the Plaintiff Mrs. Hollifield had worked at various cleaning jobs and had borrowed two thousand dollars ($2,000.00) from First Union Bank and six hundred dollars ($600.00) from one of her sons. That, in addition, Mrs. Hollifield also had over ten thousand dollars ($10,000.00) during this period of monies removed from the marital home.
>
> 8. That from January 8, 1991, through April, 1992, Mrs. Hollifield had purchased a Cutlass automobile, had engaged in some recreational activity, had housed herself, clothed herself, and provided for herself in a reasonable manner.

9. That after April, 1992, the Plaintiff Mrs. Hollifield traded her Oldsmobile Cutlass automobile for a new red Chrysler LeBaron convertible and has continued to engage in some recreational activity and house, clothe, and accommodate herself in a reasonable manner. That Mrs. Hollifield between April and November, 1992, expended in excess of thirty thousand dollars ($30,000.00) of the thirty-two thousand five hundred dollars ($32,500.00) of temporary alimony paid by Mr. Hollifield to her.

Based on these findings of fact and the jury's answers, Judge Jones denied plaintiff's application for permanent alimony, dismissed her claim with prejudice, ordered her to repay defendant $32,500.00, the entire sum of alimony pendente lite she received pursuant to N.C. Gen. Stat. § 50-16.11, and denied plaintiff's request for attorney's fees.

The issues presented are whether (I) a spouse who receives alimony pendente lite can be required to return that alimony to the paying spouse in the event the recipient spouse's permanent alimony claim is denied; and (II) a spouse awarded alimony pendente lite loses her right to attorney's fees for services rendered in the pendente lite proceeding in the event the recipient's permanent alimony claim is denied.

I

[1] Alimony pendente lite is defined as "payment [ordered to be paid] for the support and maintenance of a spouse" pending "the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce." N.C.G.S. §§ 50-16.1(1), (2) (1987). With some exceptions, the supporting spouse must have five days notice of the alimony pendente lite hearing. N.C.G.S. § 50-16.8(e) (1987) (listing exceptions). At the pendente lite hearing, both parties must be given an opportunity to offer evidence "orally, upon affidavit, verified pleading, or other proof," and the trial judge is to "find the facts from the evidence so presented." N.C.G.S. § 50-16.8(f) (1987);[1] *Austin v. Austin*, 12 N.C.

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1. Although N.C. Gen. Stat. § 50-16.8(f), as printed in the 1987 edition of the North Carolina General Statutes (the current edition), uses the word "party," because the original amendment adding Section 50-16.8(f) in 1967 uses the word "parties,"

App. 286, 295, 183 S.E.2d 420, 427 (1971). The spouse seeking alimony pendente lite, if he or she also claims an entitlement to "absolute divorce, divorce from bed and board, annulment, or alimony without divorce," has the burden of showing that (1) he or she is a "dependent spouse" as defined in N.C. Gen. Stat. § 50-16.1(3); (2) that there is a "likelihood of success on the merits" with regard to his or her action for "absolute divorce, divorce from bed and board, annulment, or alimony without divorce," N.C.G.S. § 50-16.3(a)(1); *see Gardner v. Gardner*, 40 N.C. App. 334, 338, 252 S.E.2d 867, 870, *disc. rev. denied*, 297 N.C. 299, 254 S.E.2d 917 (1979); *Cameron v. Cameron*, 231 N.C. 123, 129, 56 S.E.2d 384, 388 (1949) (prima facie evidence deemed inadequate where both parties given opportunity to present evidence); *cf. A.E.P Indus. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983) (discussing requisites of preliminary injunction); and (3) she has, pursuant to N.C. Gen. Stat. § 50-16.3(a)(2), "[i]nsufficient means whereon to subsist during the prosecution . . . of the suit and to defray the necessary expenses thereof." If the spouse seeking alimony pendente lite seeks no affirmative relief in an action filed against her for "absolute divorce, divorce from bed and board, annulment, or alimony without divorce," she has the burden of showing that (1) she is a dependent spouse, and (2) she does not have sufficient means to subsist during the defense of the suit and to defray the necessary expenses thereof. *See Johnson v. Johnson*, 237 N.C. 383, 385, 75 S.E.2d 109, 111 (1953).

Defendant, pursuant to N.C. Gen. Stat. § 50-16.11, sought reimbursement of the alimony pendente lite he had paid pursuant to Judge Einstein's order.

N.C. Gen. Stat. § 50-16.11 provides in pertinent part:

> upon motion by the supporting spouse, if a final judgment is entered in any action denying alimony because none of the grounds specified in G.S. 50-16.2 exists, the court may enter a judgment against the spouse to whom the payments were made for the amount of alimony pendente lite paid by the supporting spouse to that spouse pending a final disposition of the case.

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and because there has been no amendment since 1967 changing "parties" to "party," the word "party" contained in the current version of Section 50-16.8(f) is a misprint and must be read as "parties."

N.C.G.S. § 50-16.11 (1987). Because the language of this provision is unambiguous, it must be given its plain and definite meaning. *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 451, 232 S.E.2d 184 (1977). The plain and definite meaning is that when a jury or trial judge finds that none of the grounds on which a spouse alleges entitlement to permanent alimony pursuant to Section 50-16.2 exists, the trial court, in its discretion, *see In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978) (when statute employs word "may," its provisions are ordinarily construed as permissive), may order recoupment of any alimony pendente lite paid by the supporting spouse.

In this case, plaintiff proceeded in her action for permanent alimony on two of the ten grounds contained in Section 50-16.2: (1) defendant, by cruel and barbarous conduct endangered her life; and (2) defendant, without provocation, offered indignities to plaintiff so as to render her condition intolerable and life burdensome. Because the jury found that these two grounds did not exist, it was in the trial court's discretion upon defendant's motion pursuant to Section 50-16.11 whether or not to order recoupment of the $32,500.00 in alimony pendente lite defendant had paid to plaintiff. Because we are unable to say, on this record, that the decision to order recoupment is "so arbitrary that it could not have been the result of a reasoned decision," there was no abuse of discretion. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (defining abuse of discretion).

II

[2] Contemporaneous with the order requiring plaintiff to return to defendant the alimony pendente lite paid, the trial court denied plaintiff's motion for attorney's fees rendered in the prosecution of the alimony pendente lite hearing. This motion had been made by plaintiff at the termination of the pendente lite hearing and deferred by Judge Einstein until the permanent alimony trial.

The defendant argues that because the trial court ordered recoupment of alimony pendente lite pursuant to Section 50-16.11, it follows that plaintiff is not entitled to counsel fees pursuant to N.C. Gen. Stat. § 50-16.4. We disagree. Section 50-16.11 cannot be read to mean that the jury's rejection of the plaintiff's grounds for permanent alimony is tantamount to a reversal or vacating of the alimony pendente lite award. Section 50-16.11 merely authorizes the trial judge to order recoupment of alimony pendente lite which

may be for the entire amount or a portion of the amount paid by the supporting spouse to the dependent spouse. The statute does not mandate an order or recoupment in the event permanent alimony is denied. Thus, because the alimony pendente lite award has not been appealed and reversed, see *Stephenson v. Stephenson*, 55 N.C. App. 250, 252, 285 S.E.2d 281, 282 (1981) (permitting appeal of alimony pendente lite awards only after final judgment), nor vacated pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 or 60, it remains a valid order and can support an award of counsel fees. Accordingly, this matter must be remanded to the trial court for consideration, on this record and pursuant to N.C. Gen. Stat. § 50-16.4, of the plaintiff's request for counsel fees.

Affirmed in part, reversed in part, and remanded.

Judge JOHNSON concurs.

Judge JOHN concurs with separate opinion.

Judge JOHN concurring.

I concur in the majority opinion affirming the trial court's order of recoupment of alimony paid by defendant. As to the question of counsel fees *pendente lite*, I concur in the result reached by the majority remanding this matter for "consideration" because I am persuaded the trial court's rulings under the recoupment statute and concerning the award of counsel fees must be independent of each other. Unfortunately, a critical page from the transcript of the proceedings below has been, apparently inadvertently, omitted from the appellate record. Consequently, it is not possible to determine whether the court properly exercised its discretion in denying counsel fees independent of its order of recoupment.

I write separately to emphasize that, because neither new evidence nor additional argument are required to clarify the point in question, *see Smith v. Smith*, 111 N.C. App. 460, 517, 433 S.E.2d 196, 230, *disc. review denied*, 335 N.C. 177, 438 S.E.2d 202 (1993), the court's "consideration . . . on this record" need consist only of reliance upon the existing record for entry of an order containing appropriate findings and conclusions consistent with N.C.G.S. § 50-16.4 (1987) and other applicable law. Further, the majority opinion should not be read necessarily to mandate an award of counsel fees in any amount, nominal or otherwise.

G.S. § 50-16.4 provides: "[a]t any time that a dependent spouse would be entitled to alimony *pendente lite* . . . , the court *may* . . . enter an order for reasonable counsel fees . . . ." (Emphasis added.) Simply stated, upon a *pendente lite* award, the statute *authorizes*, but does not *require*, the court to award *pendente lite* counsel fees, *see Perkins v. Perkins*, 85 N.C. App. 660, 667-68, 355 S.E.2d 848, 853, *disc. review denied*, 320 N.C. 633, 360 S.E.2d 92 (1987), and the court's decision is reversible only upon a showing of an abuse of discretion. *Id.* at 668, 355 S.E.2d at 853.

KENNETH R. POTTS, PLAINTIFF v. SUSAN TUTTEROW (POTTS), DEFENDANT

No. 9322DC196

(Filed 19 April 1994)

1. **Judgments § 25 (NCI4th)— written order entered 30 days after judgment announced—appeal within 30 days of entry of written judgment—appeal timely**

Where the trial court announced its decision to dismiss defendant's contempt motion on 13 October 1992 and filed a written order to that effect on 13 November 1992, defendant's notice of appeal filed on 11 December 1992 was timely, since there was no indication in the record that the trial court directed the clerk to make a notation of the judgment in the minutes, and entry of judgment therefore occurred when the written order was filed on 13 November.

Am Jur 2d, Judgments §§ 52-57.

Comment Note.—Formal requirements of judgment or order as regards appealability. 73 ALR2d 250.

2. **Divorce and Separation § 303 (NCI4th)— lump sum alimony to be paid in periodic payments—no vesting of lump sum—lump sum award terminated by defendant's remarriage**

Where the trial court ordered a lump sum alimony award in the amount of $54,420, and ordered plaintiff to make semi-monthly payments of $452 until the entire lump sum was paid, the entire $54,420 did not vest at the time of the court's

order, and plaintiff's obligation to pay alimony was terminated by defendant's remarriage. N.C.G.S. § 50-16.9(b).

Am Jur 2d, Divorce and Separation §§ 635-637, 680-683.

Alimony as affected by wife's remarriage, in absence of controlling specific statute. 48 ALR2d 270.

Judge GREENE dissenting.

Appeal by defendant from order entered 13 November 1992 by Chief Judge Robert W. Johnson in Davie County District Court. Heard in the Court of Appeals 7 December 1993.

Morrow, Alexander, Tash & Long, by C. R. Long, Jr.; and Victor M. Lefkowitz, for defendant-appellant.

James C. Eubanks and David F. Tamer for plaintiff-appellee.

WYNN, Judge.

Plaintiff, Kenneth R. Potts, and defendant, Susan Tutterow (Potts), were married on 30 December 1979 and had two children. On 18 November 1988 plaintiff filed an action seeking divorce from bed and board, possession of the marital residence, and custody of the children. Defendant filed an answer and counterclaim seeking custody of the children, possession of the marital residence, and temporary and permanent alimony. The parties entered into a consent order on 5 April 1989 which provided that defendant would have possession of the marital residence, custody of the children, and child support. On 17 September 1991, upon a motion to set child support and alimony, the trial court made, *inter alia*, the following conclusion of law:

> 1. Plaintiff shall execute and deliver a deed to the house and eleven acre lot of land in Indian Hills Minifarms subdivision, Davie County, North Carolina, to Defendant, as alimony. Furthermore, Plaintiff shall pay into the office of the Clerk of Superior Court of Davie County, lump-sum alimony of $54,240, payable in semi-monthly installments of $452, beginning August 15, 1991, and continuing until the sum of $54,240 is paid. This sum, together with the equity in the house and lot shall be the only and entire alimony obligation of Plaintiff.

Defendant remarried on 8 August 1992. On 28 August 1992 defendant filed a motion asking that plaintiff be found in contempt

for his failure to comply with the 17 September order. After a hearing the trial court made the following findings of fact:

> THIS COURT FINDS from the record in this cause and specifically the Order dated September 17, 1991, that this Court found that Defendant was entitled to alimony in gross by transfer of the marital residence and relabilitative (sic) alimony in the amount of $54,240. Plaintiff's interest in the marital residence was ordered to be deeded to Defendant as alimony, and that this was done; The rehabilitative alimony was ordered to be paid in periodic payments.
>
> THIS COURT FINDS from the record that its Order dated September 17, 1991, was not a consent order; did not constitute a property settlement; is not ambiguous, and the Order clearly provides for periodic payments of alimony as defined by G.S. 50.16.1(1), 50-16.7(a); and
>
> That Plaintiff is not in violation of the Order dated September, 1991.

The trial court then concluded that plaintiff's obligation to pay the periodic payments of alimony was terminated by defendant's remarriage and dismissed defendant's motion for contempt. From this order, defendant appeals.

I.

[1] Initially we must address plaintiff's motion filed before this Court to dismiss defendant's appeal for failure to give timely notice of appeal. The trial court announced its decision to dismiss defendant's contempt motion on 13 October 1992 and filed a written order to that effect on 13 November 1992. Defendant filed a notice of appeal on 11 December 1992. Since there is no indication in the record that the trial court directed the clerk to make a notation of the judgment in the minutes, entry of judgment occurred when the written order was filed on 13 November. *Cobb v. Rocky Mount Bd. of Educ.*, 102 N.C. App. 681, 684, 403 S.E.2d 538, 540 (1991), *aff'd*, 331 N.C. 280, 415 S.E.2d 554 (1992); *Reed v. Abrahamson*, 331 N.C. 249, 415 S.E.2d 549 (1992). Therefore, defendant's appeal was filed within the thirty-day time period as provided by N.C.R. App. P. 3(c) and plaintiff's motion to dismiss is denied.

II.

[2] Defendant contends that the trial court erred by concluding that plaintiff's alimony obligation was terminated by defendant's remarriage. Defendant argues that she received a lump sum alimony award which had accrued and vested and could not be modified or terminated. We disagree.

"Alimony" is defined as "payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce." N.C. Gen. Stat. § 50-16.1(1) (1987). The purpose of alimony is to provide support and maintenance for the dependent spouse. *Gilbert v. Gilbert*, 71 N.C. App. 160, 162, 321 S.E.2d 455, 456 (1984). Only the dependent spouse is entitled to alimony. *Williams v. Williams*, 299 N.C. 174, 179, 261 S.E.2d 849, 853 (1980); N. C. Gen. Stat. § 50-16.2 (1987). A dependent spouse is defined as one "who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1(3) (1987).

In the instant case, the trial court awarded defendant "lump-sum alimony of $54,240, payable in semi-monthly installments of $452, beginning August 15, 1991, and continuing until the sum of $54,240 is paid." Defendant argues that the lump sum of $54,240 vested when it was awarded and cites *McCall v. Harris*, 55 N.C. App. 390, 285 S.E.2d 335, *disc. rev. denied*, 305 N.C. 301, 290 S.E.2d 703 (1982) which held that a lump sum award of alimony accrues when it is granted. *McCall*, 55 N.C. App. at 392, 285 S.E.2d at 336.

In *McCall*, however, the wife first obtained a lump sum alimony award of $20,000 and $3,000 in attorney's fees. *Id.* at 390, 285 S.E.2d at 336. The husband then initiated a special proceeding to recover the excess funds remaining after the foreclosure of property he owned with the wife as tenants by the entirety. *Id.* at 390, 285 S.E.2d at 335. The husband argued that the wife had forfeited her right to the alimony award when she obtained a divorce since at that time an absolute divorce terminated all rights of a dependent spouse to receive alimony. *Id.* at 391, 285 S.E.2d at 336. The Court in *McCall* rejected the husband's argument and held that the lump sum alimony award had accrued upon judgment and was unaffected by the subsequent divorce decree. *Id.* at 392, 285 S.E.2d at 337.

The question presented by the case *sub judice* is whether a lump sum alimony award payable in semi-monthly installments survives defendant's remarriage. *McCall* did not address whether the dependent spouse's remarriage terminates her alimony award. N.C. Gen. Stat. § 50-16.9(b) provides: "If a dependent spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate." N.C. Gen. Stat. § 50-16.9(b) (1987). The supporting spouse is relieved of the obligation to pay any alimony which accrued subsequent to the dependent spouse's remarriage. *Allison v. Allison*, 51 N.C. App. 622, 626, 277 S.E.2d 551, 554, *disc. rev. denied*, 303 N.C. 543, 281 S.E.2d 660 (1981). *See also Garner v. Garner*, 88 N.C. App. 472, 363 S.E.2d 370 (1988) (Defendant's obligation to pay alimony of $400 per month for ninety-six months ceased upon plaintiff's remarriage); *Minor v. Minor*, 70 N.C. App. 76, 318 S.E.2d 865, *disc. rev. denied*, 312 N.C. 495, 322 S.E.2d 558 (1984) (Possession of marital home was an alimony award that would terminate upon dependent spouse's remarriage). Any alimony payments which have accrued and are unpaid at the time of the remarriage can still be recovered from the former supporting spouse. *See generally* 2 Robert E. Lee, *North Carolina Family Law* § 154 (4th ed. 1980). Therefore, a lump sum alimony award that has vested prior to the dependent spouse's remarriage survives the remarriage. *See McCall*, 55 N.C. App. at 392, 285 S.E.2d at 337.

Did the lump sum award in the subject case vest prior to the defendant's remarriage? For the following reasons, we find that it did not. In *Faught v. Faught*, 50 N.C. App. 635, 274 S.E.2d 883 (1981) this Court held that execution is only available for past due installments of alimony and "with respect to the payment of alimony *in futuro*, no indebtedness would arise upon which execution could issue until each installment became due." *Faught*, 50 N.C. App. at 639, 274 S.E.2d at 886-7. In the case *sub judice*, therefore, defendant was only entitled to semi-monthly payments of $452. If plaintiff failed to make one of the payments, defendant could only execute on that amount—she was not entitled to the entire balance owed. We thus conclude that the entire amount of $54,420 did not vest when it was awarded. Therefore, defendant's remarriage terminated plaintiff's obligation to pay alimony.

We disagree with the dissent's statement that "[t]he only issue in this case is whether the award the trial judge made is in the nature of a 'lump sum payment' or 'periodic payments.' " Whether

the alimony award is in the form of a "lump sum" or "periodic payments" is irrelevant since N.C. Gen. Stat. § 50-16.9(b) clearly provides that the supporting spouse's obligation to pay *any* alimony is terminated by the dependent spouse's remarriage and the statute does not distinguish between the method of payment. *See Martin v. Martin*, 26 N.C. App. 506, 216 S.E.2d 456 (1975) (Alimony award of $100 a month for five years terminated by dependent spouse's remarriage); *Garner*, 88 N.C. App. at 475, 363 S.E.2d at 672.

Instead, the issue in the instant case is whether the dependent spouse's right to the $54,240 *vested* at the time of the judgment or whether she was just entitled to semi-monthly payments of $452 until the sum of $54,240 was paid. The authority cited by the dissent recognizes that if a lump sum award has vested, then the award is not alimony but rather a property settlement. *See* 2 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 17.5, at 270 (2d ed. 1987) ("An award of alimony in gross is . . . impossible to distinguish from a property division on divorce where the latter is to be accomplished by cash payments.") Our courts have held that support payments which constitute reciprocal consideration for a property settlement are not alimony in the true sense of the word and are not subject to modification. *Hayes v. Hayes*, 100 N.C. App. 138, 146, 394 S.E.2d 675, 679 (1990); *see Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986); *Rogers v. Rogers*, 111 N.C. App. 606, 432 S.E.2d 907 (1993). There is, however, no indication of any such reciprocal consideration in the instant case. Therefore, the alimony award, unless it has vested, terminates upon the dependent spouse's remarriage. Because we conclude the alimony award had not vested, plaintiff's obligation to pay alimony ceased upon defendant's remarriage. *See Martin*, 26 N.C. App. at 509, 216 S.E.2d at 458.

We note further that the dissent equates the alimony award in this case with a vested pension. In the pension context "vesting" is defined as " 'when an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future." *Milam v. Milam*, 92 N.C. App. 105, 106-7, 373 S.E.2d 459, 460 (1988), *disc. rev. denied*, 324 N.C. 247, 377 S.E.2d 755 (1989) (quoting *In re Marriage of Grubb*, 745 P.2d 661 (Colo. 1987)). In the instant case, however, there is no indication that defendant was entitled to receive anything more than semi-monthly payments of $452. Plaintiff's obligation to make

these payments therefore terminated upon defendant's remarriage. *Allison*, 51 N.C. App. at 626, 277 S.E.2d at 554.

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

Affirmed.

Judge COZORT concurs.

Judge GREENE dissents in separate opinion.

Judge GREENE dissenting.

I agree with the majority that any part of the alimony award which accrued prior to the defendant's remarriage remains payable and is not subject to divestment. I disagree, however, with the conclusion that only those portions of the award which were payable before the defendant's remarriage were accrued.

"[A] lump sum award of alimony accrues when it is granted," *McCall v. Harris*, 55 N.C. App. 390, 392, 285 S.E.2d 335, 336, *disc. rev. denied*, 305 N.C. 301, 290 S.E.2d 703 (1982), and at that point the award becomes final and is not subject to modification. 2 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 17.5, at 270 (2d ed. 1987) (hereinafter *Clark*).

The only issue in this case is whether the award the trial judge made is in the nature of a "lump sum payment" or "periodic payments." N.C.G.S. § 50-16.7(a) (1987). The order itself explicitly labels the alimony as "lump sum" and the fact that the award is payable in "installments" over a period of time does not alter its character. 2 *Clark* § 17.5, at 269-70 (lump sum alimony is alimony payable "at once or in installments"). In fact, "an award of alimony for a specified period of time" has been classified by our Supreme Court as "indubitably alimony in gross or 'lump sum alimony.' " *Whitesell v. Whitesell*, 59 N.C. App. 552, 552, 297 S.E.2d 172, 173 (1982), *disc. rev. denied*, 307 N.C. 583, 299 S.E.2d 653 (1983) (citing *Mitchell v. Mitchell*, 270 N.C. 253, 257, 154 S.E.2d 71, 74 (1967)). *See Taylor v. Taylor*, 46 N.C. App. 438, 443-44, 265 S.E.2d 626, 629-30 (1980) (classifying $50,000 alimony award as "lump sum" even though it was "payable $30,000.00 within ten days of entry of judgment and the balance of $20,000.00 within four months thereafter").

In this case, the trial court ordered plaintiff to pay "lump-sum alimony of $54,240, payable in semi-monthly installments of $452, . . . until the sum of $54,240 is paid." Such an award is an award of a definite sum payable over a specified period of time and, as such, is an award of lump sum alimony. *See Mitchell*, 270 N.C. at 257, 154 S.E.2d at 74; *Whitesell*, 59 N.C. App. at 552, 297 S.E.2d at 173.

In this case, the award of lump sum alimony accrued, and defendant's right to receive $54,240 therefore vested, upon entry of the order. *McCall*, 55 N.C. App. at 392, 285 S.E.2d at 336. Defendant at that time possessed a vested, non-modifiable right to receive $54,240, although actual receipt of the total amount was delayed until an ascertainable point in the future. *Cf. Milam v. Milam*, 92 N.C. App. 105, 106-07, 373 S.E.2d 459, 460 (1988) (in equitable distribution action, pension was vested although not receivable until some point in the future), *disc. rev. denied*, 324 N.C. 247, 377 S.E.2d 755 (1989); 2 Robert E. Lee, *North Carolina Family Law* § 169.8, at 235 (Supp. 1993) (inequitable distribution, pension rights, although vested, may not be payable until future date). This case is thus distinguishable from *Faught*, relied upon by the majority, because in that case, the payments of alimony were periodic in nature and did not vest until each payment was due. *Faught v. Faught*, 50 N.C. App. 635, 636, 274 S.E.2d 883, 885 (1981). Furthermore, it is immaterial that immediate execution is not an available remedy with regard to the payments due in the future because vesting is an issue separate from execution.

Because defendant possessed a vested, non-modifiable right to receive the lump sum alimony award on the date the order was entered, her subsequent remarriage therefore did not operate to terminate her right to receive $54,240 from plaintiff. I would therefore reverse the trial court and remand for a hearing on the defendant's motion for contempt.

GWENDOLYN A. SURRETTE, PLAINTIFF v. DONALD R. SURRETTE, DEFENDANT

No. 9329DC373

(Filed 19 April 1994)

1. **Divorce and Separation § 142 (NCI4th)— equitable distribution —value of pension—proper retirement date**

In calculating the value of defendant's pension plan, the trial court in an equitable distribution action did not err in using the date of separation as defendant's retirement date instead of the date at which defendant became eligible for retirement.

Am Jur 2d, Divorce and Separation §§ 948, 949.

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

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

2. **Divorce and Separation § 142 (NCI4th)— equitable distribution —value of pension—no double discounting**

There was no merit to plaintiff's contention in an equitable distribution action that the trial court erred in double discounting the present value of defendant's pension, since the trial court did discount the value of the pension at defendant's age 65 to arrive at its present value as of the date of separation, but the trial court's order did not require plaintiff to wait to receive her discounted benefits until defendant retired.

Am Jur 2d, Divorce and Separation §§ 948, 949.

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

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

3. **Divorce and Separation § 142 (NCI4th)— equitable distribution —value of pension—averaging harmless error**

In an equitable distribution proceeding where the trial court was required to determine the value of defendant's pen-

sion, and the court calculated the present value on the date of separation if defendant began drawing benefits at defendant's earliest retirement age, age 50, and at age 65, the trial court erred in averaging the age 50 and age 65 figures to arrive at the date of separation value, since the court should have chosen the valuation of defendant's pension which assumed defendant would begin drawing benefits at his earliest retirement age; however, plaintiff was not prejudiced by this error because the court's valuation of defendant's pension was greater than the valuation the court should have used.

Am Jur 2d, Divorce and Separation §§ 948, 949.

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

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

4. **Divorce and Separation § 144 (NCI4th)— unequal division of marital assets—distributional factors considered—no abuse of discretion**

The trial court did not abuse its discretion in determining that an unequal division of the marital assets was equitable when the court's findings sufficiently addressed the statutory distributional factors and adequately supported its unequal division.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Appeal by plaintiff from order entered 19 November 1992 by Judge Robert S. Cilley in Transylvania County District Court. Heard in the Court of Appeals 1 February 1994.

Plaintiff appeals from an order of equitable distribution. The parties were married on or about 20 March 1976. The parties separated on 26 January 1991 and were divorced on 5 March 1992. Defendant was employed at E.I. DuPont during the marriage and had worked there since 26 October 1970. On the date of separation, defendant had a vested interest in a defined benefit retirement plan at DuPont. The trial court made the following finding of fact

regarding the present value of the marital portion of defendant's pension plan.

> Assuming that Defendant ceased working for DuPont without prejudice on DOS [date of separation], his retirement plan would begin paying him a monthly lifetime benefit, beginning on one of two dates. Four years from DOS, when he reached 50, Defendant could begin drawing $206 per month. His remaining lifetime is assumed to be 25.5 years from age 50. Or, at age 65, he could begin drawing $823 per month. Using the legal rate (8%) both to capitalize the benefits, and to give the DOS value of the right to receive a benefit in the future, it is the case that the first option yields a DOS value for the pension of $19,520. The second option yields a DOS value of $19,612. Considering the near equivalence of these two projections, the Court finds that Defendant's pension was worth $19,566. Applying the fraction (178/243) mentioned above [Defendant's months in the marriage up to DOS divided by his total months with DuPont] the Court finds that the marital portion of Defendant's pension on DOS had a value of $14,332.

Plaintiff appeals.

Averette & Barton, by Donald H. Barton, for plaintiff-appellant.

Ramsey, Hill, Smart, Ramsey & Pratt, P.A., by Michael K. Pratt, for defendant-appellee.

EAGLES, Judge.

Plaintiff brings forward several assignments of error. After careful review of the record and briefs, we affirm.

I.

Plaintiff first contends that the trial court abused its discretion in calculating the value of defendant's DuPont pension plan and in valuing the marital portion of the plan. We disagree.

The trial court found that if defendant retired without prejudice on the date of separation, defendant could choose between two alternatives to begin receiving the monthly benefits under his pension. Under the first alternative, defendant would receive $206 per month for the remainder of his lifetime beginning at age 50. Under the second alternative, defendant would receive $806 per month for the remainder of his lifetime beginning at age 65.

The trial court found that defendant's remaining lifetime from age 50 was 25.5 years. Using the legal rate of interest of 8% per annum, the trial court found that the present value of defendant's DuPont pension on the date of separation was $19,520 under the first alternative and $19,612 under the second alternative. Noting that the present value of defendant's pension under the two alternatives was nearly identical, the trial court apparently averaged the values of defendant's pension under both alternatives and found that the present value of defendant's pension on the date of separation was $19,566.

[1] Plaintiff contends that the trial court erred in using the date of separation as defendant's retirement date instead of the date at which defendant became eligible for retirement. Plaintiff argues that defendant's pension should be valued according to the amount defendant would receive upon retirement and that the trial court should have assumed defendant's continuous employment with DuPont until defendant reached the earliest retirement age. We disagree. G.S. 50-20(b)(3) states that a distributive award of a vested pension plan "shall be based on the vested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and shall not include contributions, years of service or compensation which may accrue after the date of separation." Under G.S. 50-20(b)(3) the value of defendant's pension must be calculated as of the date of separation and years of service after the date of separation are not to be included in the valuation. Here, plaintiff urges us to assume defendant's continued employment with DuPont until defendant reaches retirement age and then to value defendant's pension as of that date. This method of valuation clearly violates the mandate of G.S. 50-20(b)(3). *Bishop v. Bishop*, 113 N.C. App. 725, 732, 440 S.E.2d 591, 596 (1994) (it would have been error for the trial court to have valued defendant's pension assuming defendant's continuous employment beyond the date of separation); *Seifert v. Seifert*, 82 N.C. App. 329, 338, 346 S.E.2d 504, 509 (1986) (trial court correctly used defendant's basic pay at date of separation instead of defendant's basic pay at date of trial in determining the present value of defendant's military pension), *aff'd*, 319 N.C. 367, 354 S.E.2d 502 (1987). Accordingly, plaintiff's contention in this regard is without merit.

[2] Plaintiff also contends that even if the trial court did not err in using the date of separation as defendant's retirement date, the trial court erred in double discounting the present value of

defendant's pension. This contention is equally without merit. Plaintiff relies on language in *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987), where our Supreme Court held that the trial court erred in discounting defendant's pension to its present value and then delaying plaintiff's receipt of discounted benefits until defendant retired and began receiving his benefits under the plan. Quoting from this court's opinion in the case, the Supreme Court stated, "This in effect, operated as a double reduction: plaintiff received a discounted value for immediate distribution but nevertheless was required to wait to receive payment until, if and when, the defendant reached retirement and began receiving benefits." *Id.* at 371, 354 S.E.2d at 509 (quoting *Seifert v. Seifert*, 82 N.C. App. 329, 338, 346 S.E.2d 502, 509 (1986)).

Plaintiff argues that defendant's evidence, particularly Exhibit I, showed that the present value of defendant's pension on the date of separation was $84,533.41. The pertinent part of Exhibit I reads as follows:

> Alternative 2: At age 65 to provide $823.00 per month for 15.0 years (life expectancy). At an assumed 8.0% interest rate, the Present Value of an Annuity to provide $823.00 per month for 15 years at [defendant's] age 65, would be $84,533.41. Since he will not be 65 for 213 months from 1/26/91 (separation date), the Present Value of the $84,533.41 on 1/26/91 would be $19,611.75.

Plaintiff argues that $19,611.75 represents the amount necessary to place on deposit on the date of separation to yield $84,533.41 at the time defendant reaches retirement age. Plaintiff contends that this is a double discounting of her benefits under *Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987), because the court further discounted the present value of defendant's pension to arrive at a figure that would yield the present value amount at defendant's retirement age. We disagree.

In *Seifert, supra*, the plaintiff was forced to wait to receive at a time in the future benefits that had already been discounted to their present value. In *Seifert*, the defendant's pension had been discounted to its present value as of the date of separation. It was effectively discounted again when the plaintiff was forced to wait until a time in the future to receive those discounted benefits. Here, the $84,533.41 represents the present value of defendant's pension when he reaches age 65. This was not the present value

of the pension as of the date of separation. The trial court then further discounted the $84,533.41 to arrive at its present value as of the date of separation. G.S. 50-20(b)(3) requires that the pension be valued as of the date of separation. Unlike the situation in *Seifert*, the order here does not require plaintiff to wait to receive her discounted benefits until defendant retires.

[3] We note that since this case was heard, this court in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), laid down specific guidelines for valuing defined benefit plans such as the DuPont pension plan at issue here. We stated that:

> 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). . . . 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.** . . .

Id. at ---, 440 S.E.2d. at 595-96 (emphasis added). Here, the trial court calculated the present value of defendant's pension on the date of separation if he began drawing benefits at his earliest retirement age, age 50 (Alternative 1) and at age 65 (Alternative 2). The trial court found the present value of defendant's pension to be $19,520 on the date of separation assuming defendant began drawing benefits at age 50. The trial court found the present value of defendant's pension to be $19,612 on the date of separation if defendant delayed drawing benefits until age 65. The trial court then averaged these two figures and found the present value of defendant's pension to be $19,566 on the date of separation. We

note that the trial court erred in averaging the age 50 and age 65 figures to arrive at the date of separation value of defendant's pension. Instead, the trial court should have chosen the valuation of defendant's pension under Alternative 1 ($19,520) because it assumed that defendant would begin drawing benefits at his earliest retirement age as our holding in *Bishop, supra*, requires. However, plaintiff was not prejudiced by this error because the trial court's valuation of defendant's pension ($19,566) was greater than the valuation that the trial court should have used ($19,520). Accordingly, we conclude that under these facts, the trial court's error in calculating the value of defendant's pension plan was harmless error.

II.

In a related assignment of error, plaintiff contends that the trial court erred in valuing the marital portion of defendant's pension because of it its underlying error in calculating the present value of defendant's pension plan. *See* I, *supra*. Since we have already concluded that the trial court did not commit prejudicial error in calculating the present value of defendant's pension plan to be $19,566, this assignment of error is also overruled.

III.

[4] Plaintiff further contends that the trial court abused its discretion in determining that an unequal division of the marital assets was equitable. We disagree. Under G.S. 50-20(c), an equal division of marital property is mandatory unless the trial court determines that an equal division is not equitable. *White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985). G.S. 50-20(c) lists twelve distributional factors the court must consider in determining whether an equal division of marital property is equitable. The party seeking an unequal division must introduce evidence concerning one or more of these factors and prove by a preponderance of the evidence that an equal division would be inequitable. *Id.* If evidence of one or more of the factors listed in G.S. 50-20(c) is presented, the trial court's findings of fact must show that the trial court considered those factors. *McIver v. McIver*, 92 N.C. App. 116, 127, 374 S.E.2d 144, 151 (1988). The trial court must then exercise its discretion to "make an equitable division of the marital property by balancing the evidence presented by the parties in light of the legislative policy which favors equal division." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). The trial court is vested with wide discretion in making an equitable division of marital property under

G.S. 50-20 and its order of distribution will not be disturbed on appeal absent a showing that the distribution was manifestly unsupported by reason. *Smith v. Smith*, 111 N.C. App. 460, 500, 433 S.E.2d 196, 220 (1993).

Here, the trial court found the following:

> 30. The Court is persuaded that an effectively equal division of the parties' marital property is equitable, but because of the various matters noted above, to achieve that effect it is necessary that the division percentage be unequal. Upon due consideration, the Court had calculated, and accordingly finds that an equitable distribution will be achieved by a division in the following proportions: Plaintiff, 48.7%; Defendant, 51.3%.

Plaintiff contends that the trial court's order does not specify which of the twelve distributional factors in G.S. 50-20(c) the court relied upon in determining that an equal division was inequitable. We disagree. The trial court here made the following findings of fact:

> 19. As of 6/26/92, Defendant had paid $3300 to Plaintiff under a rent agreement between the parties, such that Defendant is stipulated to receive credit for one-half that amount in the division made herein.
>
> 20. The Court notes, and considers as a distributional factor, the fact that Defendant has, since DOS [date of separation], paid $5,582.83 on the Chrysler's debt (see finding 4 above), $138 on Plaintiff's life insurance policy, $70.81 on Plaintiff's Sears charge account, and $461.30 on Plaintiff's car insurance (see finding 4).
>
> 21. Defendant made certain money payments after separation, to wit:

Real estate appraisal	$250.00
Visa credit card	259.83
Belk credit card	60.24
County property taxes	472.57
Homeowner's insurance	456.00

> The real estate appraisal was obtained for this litigation. The Visa debt accrued during the marriage, and Defendant has paid it off. The Belk debt was Plaintiff's post-separation debt. It is noted in connection with the taxes and insurance that

> Defendant had the use of the marital home since DOS. The Court has considered the Visa payment, the taxes, and the insurance in arriving at the distributional percentage used herein. Defendant is entitled to a direct credit for the Belk payment.

The trial court clearly relied upon these findings in determining that an unequal division was equitable. In these findings, the trial court noted which of defendant's payments it considered as distributional factors and referred indirectly to these findings in its finding that an unequal division was equitable. Although the trial court did not explicitly recite these distributional factors in its finding that an unequal division was necessary, the order in paragraph 30 generally referred to "the various matters noted above." We note that while "the trial court [is] not required to recite in detail the evidence considered in determining what division of the property would be equitable, it [is] required to make findings sufficient to address the statutory factors and support the division ordered." *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988).

The trial court's findings here sufficiently address the statutory factors and adequately support its unequal division. Plaintiff here did not except to any of the findings concerning the distributional factors (Findings 19-21). From our examination of the record, we conclude that there is sufficient evidence to support them. A finding that a single distributional factor supports an unequal division will be upheld on appeal if that finding is supported by the evidence. *Andrews v. Andrews*, 79 N.C. App. 228, 234, 338 S.E.2d 809, 814 (1986) (disapproved on other grounds in *Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988)). Accordingly, we hold that the trial court did not abuse its discretion in ordering an unequal division of the marital property.

IV.

In plaintiff's remaining assignments of error, plaintiff failed to cite in her brief any case authority or statutory support for her contentions. Accordingly, these assignments of error are deemed abandoned. N.C.R. App. P. 28(b)(5); *Joyner v. Adams*, 97 N.C. App. 65, 71, 387 S.E.2d 235, 239 (1990).

For the reasons stated, we affirm the judgment of the trial court.

Affirmed.

Judges JOHNSON and LEWIS concur.

CITY OF ASHEVILLE v. WOODBERRY ASSOCIATES, LTD.

No. 9328SC499

(Filed 19 April 1994)

1. **Environmental Protection, Regulation, and Conservation § 124 (NCI4th); Municipal Corporations § 147 (NCI4th)— land disturbing activities—project not funded by state or federal funds—jurisdiction of city to regulate**

An apartment development project was not funded in whole or in part by the State or the United States so as to deprive plaintiff city of the authority under N.C.G.S. § 113A-56 to regulate land disturbing activities on the project site where (1) HUD insured the loan on the project and later purchased the note and deed of trust, since any money provided by HUD was not used for construction of the project, and any "land disturbing activity" occurred before HUD purchased the note and deed of trust; or where (2) a grant was received from the Appalachian Regional Commission, since the grant monies were not used to fund any "land disturbing activities" on the project site but instead were used to install water and sewer lines to the project site. Therefore, the city had jurisdiction to impose a civil penalty on the apartment owner and developer for violations of the city's soil erosion and sedimentation control ordinance.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 98 et seq.; Pollution Control §§ 185, 248 et seq., 277 et seq.

2. **Judgments § 38 (NCI4th)— judgment signed out of session—apparent consent by fair implication—judgment not null and void**

It appeared by fair implication that the parties consented to the entry of judgment outside the session where the record showed that at the end of the trial which occurred on Wednes-

day, 9 December 1992, the judge indicated that it might be "a week or so" before he decided the case, there was no objection, and the judge signed the judgment on 9 January 1993.

Am Jur 2d, Judgments § 60.

Judge ORR concurring.

Appeal by defendant from order entered 24 August 1992 by Judge John Mull Gardner and judgment entered 9 January 1993 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 10 February 1994.

Nesbitt & Slawter, by William F. Slawter, City Attorney, and Martha Walker-McGlohon, Associate City Attorney, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed, Jr., for defendant-appellant.

GREENE, Judge.

Woodberry Associates, Ltd. (defendant) appeals from an order denying its motion to dismiss and from a judgment requiring it to pay $90,910 as a penalty for failing to comply with the City of Asheville's (the City) "Soil Erosion and Sedimentation Control" ordinance (the ordinance).

Defendant is a Virginia limited partnership doing business in North Carolina. The general partners of the partnership are Poff Construction Company, Inc., and N. Thomas Poff. Defendant is the owner and developer of the Woodberry Apartments (the project), a multi-unit apartment complex built within the City.

Prior to beginning construction of the project, defendant obtained permits from the City allowing it to perform grading operations on lot 56 (the project site) in accordance with the City's ordinance. Prior to any construction activity on the project site, it was described as "very rocky and very steep" with trees. During the construction of the project most of the trees were removed and the slopes were "cut" and "filled" to accommodate the construction of the apartments, the swimming pool, and the parking lots. In 1987, construction of the project was completed and the City determined that the defendant had complied with the ordinance.

The total cost of the project was $5,593,404, of which $4,865,600 was financed by issuance of bonds by the City Housing Authority. The bonds were secured by a deed of trust on the project site which was insured by the United States Department of Housing and Urban Development (HUD) pursuant to 12 U.S.C. § 1701 *et seq.*, commonly known as the National Housing Act. A $15,000 grant from the Appalachian Regional Commission (ARC), distributed through the North Carolina Housing Finance Agency (NCHFA), was received by the defendant to be used for "sewer and water line extensions to the [project] site." Although there was some dispute in the evidence as to whether the $15,000 was actually used to pay for the water and sewer lines, the trial court found as fact that these monies were "used . . . in sewer and water line extensions," and there is no assignment of error relating to this finding. The ARC is a federally established commission whose purpose is generally to foster economic growth and prosperity in the Appalachian region. 40 U.S.C. App. § 101 (1988). The NCHFA is a state agency established in part to "provide financing for residential housing construction . . . for sale or rental to persons and families of lower income." N.C.G.S. § 122A-2 (1986). On 14 April 1989, both general partners of the partnership filed a Chapter 11 proceeding with the federal bankruptcy court in Virginia. In August 1990, the deed of trust was purchased by HUD and at the time of trial continued to be owned by HUD. Since 1989, the project has been managed by PCI Management, Inc. under a management agreement approved by HUD.

In the spring of 1989, heavy rains resulted in several slope failures at the project site which in turn caused both on-site and off-site sedimentation problems. In late May of 1989, the erosion control officer for the City inspected the project site and found several violations of the City's erosion and sedimentation control ordinance. Among the problems at the project site were slippage of the cut slopes on the southeast side of the project, erosion and slippage of the fill slopes on the northwest side of the project, and sedimentation caused by the on-site erosion. Despite expenditures of over $160,000 made to bring some portions of the project site into compliance, at the time of trial, it remained in violation of the ordinance.

The City filed a complaint in the Superior Court of Buncombe County on 9 April 1991 seeking to collect penalties for failure of the defendant to take protective action to control the erosion

and sedimentation which was occurring and seeking an injunction restraining defendant from violating the provisions of the ordinance. Defendant moved to dismiss the complaint on the grounds that the City had "no jurisdiction over this matter" under N.C. Gen. Stat. § 113A-56(a)(5) because the deed of trust was owned by HUD. This motion was denied by Superior Court Judge John Mull Gardner on 24 August 1992. In denying the motion, Judge Gardner noted that "N. C. Gen. Stat. sec. 113A-56 . . . does not prevent . . . [the City] from enforcing its soil and sedimentation ordinance against a project whose mortgage has been federally insured."

The case was called for trial at the 9 December 1992 session of Superior Court in Buncombe County before Judge C. Walter Allen. Before evidence was taken on the issues raised in the complaint, the defendant orally moved to dismiss the complaint on the grounds that the court was without jurisdiction because the project was constructed in part with funds from the $15,000 ARC grant (ARC grant). The trial court reserved its ruling on the motion to dismiss and allowed the parties to present evidence on the issues raised in the complaint. At the end of the evidence the trial court stated:

> THE COURT: All right. So I'll have to let you hear from me, Ladies and Gentlemen. And I'll have to go through these exhibits. Some I've already looked at. Some I don't have to, of course. And I'll let you hear from me. Probably be a week or so.

On 9 January 1993, the trial court signed a judgment concluding that the City had jurisdiction "over the Defendant's land disturbing activities," that "Defendant is in violation of the City . . . Ordinances governing land disturbing activities," and that "Defendant failed to take proper corrective measures to prevent further erosion." The defendant was ordered to pay the City a civil penalty of $90,910. There is nothing in this record that indicates that the judgment was entered at any time prior to 9 January 1993.

The issues presented are whether (I) any portion of the construction of the project was "funded in whole or in part by the State or the United States" thereby depriving the City of the authority under N.C. Gen. Stat. § 113A-56 to regulate the project; and (II) the judgment is void because it was signed out of session.

Although the City approved the sedimentation and erosion control measures which the defendant had installed by the completion of the project, the defendant nonetheless was required, under Section 8-83 of the ordinance, to "take additional protective action" if the City determined "that significant erosion and sedimentation continue[d] as a result of [the] land-disturbing activity." In this case, the City claims, and the trial court concluded, that the defendant has failed to take the "additional protective action" needed to prevent erosion and sedimentation resulting from the "land-disturbing activity" which occurred during the construction of the project. The defendant does not contest this conclusion by the trial court. The defendant only assigns error to the determination by the trial court that the City has jurisdiction over the "land-disturbing activity."

I

[1] Pursuant to the North Carolina Sedimentation Pollution Control Act of 1973, N.C. Gen. Stat. § 113A-50 to -71 (1989), the City adopted an ordinance to establish and permit enforcement of an erosion and sedimentation control program for the City. The stated purpose of the ordinance was to regulate, within the City's jurisdiction, certain "land-disturbing activity" in an effort to "control accelerated erosion and sedimentation in order to prevent the pollution of water and other damage to lakes, water-courses, and other public and private property by sedimentation." City of Asheville, N.C., Code § 8-72 (1984). The ordinance excepted from its coverage "land-disturbing activities over which the state by statute, has exclusive regulatory jurisdiction." *Id.* § 8-74(d). The State has exclusive regulatory jurisdiction over all "land-disturbing activities" which are:

(1) Conducted by the State;

(2) Conducted by the United States;

(3) Conducted by persons having the power of eminent domain;

(4) Conducted by local governments; or

(5) Funded in whole or in part by the State or the United States.

N.C.G.S. § 113A-56(a)(1) to (5) (1989).

A "land-disturbing activity" is defined by state statute as "any use of the land by any person in residential, industrial, educational, institutional or commercial development, highway and road construction and maintenance that results in a change in the natural cover or topography and that may cause or contribute to sedimentation." N.C.G.S. § 113A-52(6) (Supp. 1993). The City's ordinance defines "land-disturbing activity" using essentially the same language. City of Asheville, N.C., Code § 8-73(o).

There is no dispute that the construction of the project involved "land-disturbing" activities, and indeed, the cutting and filling of the slopes on the project site, as well as the removal of the trees, constitute "land-disturbing" activities within the meaning of the ordinance and the statute. The parties do dispute, however, whether this "land-disturbing activity" was "[f]unded in whole or in part by the State or the United States."

"Funded," although not defined in either the ordinance or the statute, is not ambiguous and must therefore be given its plain and ordinary meaning. *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). A common dictionary definition, which can be used to establish the plain meaning of a word, for the verb "fund" is "to provide funds for." *Webster's New World Dictionary* 241 (1990). The noun "funds" is defined as a "sum of money set aside for a [specific] purpose." *Id.; see also Black's Law Dictionary* 673 (6th ed. 1990). Thus if the State or United States provides a sum of money to be used for the purpose of construction, which involves some "land-disturbing activity," the governmental entity has "funded" that "land-disturbing activity" within the meaning of Section 113A-56(a)(5).

HUD Guarantee of the Deed of Trust

Defendant first argues that because the loan on the project site was insured by HUD it was "funded" by the United States. We disagree. Even if we assume that HUD's insuring of the loan involves some federal spending, *see Conille v. Secretary of Housing and Urban Dev.*, 840 F.2d 105, 113 (1st Cir. 1988), that money was not used for the construction of the project but was instead used to induce some other party to provide money for the construction of the project. Although the federal spending is somewhat related to the construction of the project, we believe it is too remote to qualify as funding within the meaning of Section 113A-56(a)(5).

Furthermore, because the "land-disturbing activity" at issue in this case occurred before 1990, it is immaterial that HUD purchased the note and deed of trust in 1990 and after that date attempted to correct the sedimentation and erosion problems. The expenditure of federal funds in an attempt to correct problems caused by earlier "land-disturbing activity" does not qualify as federal funding of the earlier "land-disturbing activity" and there is no claim by the City in this case that HUD's efforts to correct the problems are themselves "land-disturbing" activities within the meaning of the ordinance.

The $15,000 Grant

Defendant next argues that because it received a $15,000 grant from the NCHFA, the project was partially "funded" by the United States. We disagree. We agree that a grant, funded with either federal or state monies, does qualify as funding within the meaning of Section 113A-56(a)(5). In this instance, however, the grant monies were not used to fund any "land-disturbing" activities on the project site. The money from the grant was to be used, and was in fact used, to install water and sewer lines to the project site. The defendant is not charged with violating the ordinance with regard to the off-site "land-disturbing" activities related to the installation of the water and sewer lines to the project site. The violations in this case relate to "land-disturbing" activities on the project site.

Accordingly, the regulation of the "land-disturbing activity" by defendant on the project site during those periods of time at issue in this action was within the jurisdiction of the City. The trial court thus correctly denied the defendant's motions to dismiss.

II

[2] The defendant contends in the alternative that the judgment signed by Judge Allen is void because it was entered out of session without the consent of the parties. We disagree. Generally, absent consent of the parties, an order of the superior court must be entered "during the term, during the session, in the county and in the judicial district where the hearing was held." *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984). An order entered in violation of this rule is "null and void and of no legal effect." *Id.; Capital Outdoor Advertising, Inc. v. City of Raleigh*, 109 N.C. App. 399, 401, 427 S.E.2d 154, 155, *disc. rev. allowed*, 333 N.C.

789, 430 S.E.2d 424 (1993). If, however, consent of the parties to entry outside the session appears "by fair implication from what appears in the record," *Capital Outdoor*, 109 N.C. App. at 401, 427 S.E.2d at 155 (quoting *Godwin v. Monds*, 101 N.C. 354, 355, 7 S.E. 793, 794 (1888)), the judgment is valid.

In this case, the record does not indicate that the judgment was entered within the session in which the case was tried. Furthermore, there is no writing signed by the parties consenting to the entry outside the session and the judgment does not recite the consent of the parties to that effect. The record does show that at the end of the trial, which occurred on Wednesday, 9 December 1992, Judge Allen indicated that it might be a "week or so" before he decided the case and there was no objection. Thus it appears "by fair implication" that the parties consented to the entry outside the session and this assignment is overruled.

Because the City of Asheville had jurisdiction to regulate the "land-disturbing activity" in question, and because the record reveals a fair implication that defendant consented to entry of the order out of session, the decision of the superior court is

Affirmed.

Judge COZORT concurs.

Judge ORR concurs with separate opinion.

Judge ORR concurring.

While I concur that the issues raised by the defendant are correctly decided by the majority, I am troubled by the City's reliance on Section 8-77 of the Code as a basis for the violation in question. Section 8-77 deals with the mandatory standards for "land-disturbing activity." According to the trial court's finding of fact number seven, "Immediately following completion of the project, the Defendant was in compliance with the plans and specifications of the land disturbing permit."

Therefore, any subsequent complaints against the defendant would appear to fall under Section 8-82 "Responsibility for maintenance." The responsibility for installation and maintenance for all necessary permanent erosion and sedimentation control

measures falls on the land owner or persons in possession or control of the land. Whether this makes any difference is unclear. However, in light of the claim by the defendant that the federal government is in control of the land by virtue of the purchase of the note and deed of trust, calls into question, at least in my opinion, the validity of the assessment of damages against this defendant.

STATE OF NORTH CAROLINA v. THOMAS EUGENE DEGREE

No. 9327SC86

(Filed 19 April 1994)

1. Jury § 248 (NCI4th)— peremptory challenges—no use for racially discriminatory reason

The trial court did not err in finding that the prosecutor did not exercise his peremptory challenges for a racially discriminatory reason in the selection of the petit jury where the prosecutor peremptorily challenged one black man because he was young and unmarried and he peremptorily challenged one black woman because she had a son who was to be involved in a court proceeding the next day, and she had tried to have herself removed from the jury.

Am Jur 2d, Jury § 235.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

2. Criminal Law § 530 (NCI4th)— juror reading newspaper—article about defendant—no mistrial

The trial court did not err in failing to declare a mistrial where a juror allegedly read a newspaper during an overnight recess which revealed that defendant may have been HIV positive, since the trial court examined the jurors and had the opportunity to observe their demeanor and their responses; and it was reasonable for the court to conclude that the juror did not read the article and had formed no opinion that would jeopardize defendant's right to a fair trial.

Am Jur 2d, Trial §§ 1081, 1082.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal. 46 ALR4th 11.

Appeal by defendant from judgment entered 24 June 1992 by Judge C. Walter Allen in Cleveland County Superior Court. Heard in the Court of Appeals 6 October 1993.

The defendant was indicted on 16 December 1991 for the alleged rape and kidnapping of Carol Denise Littlejohn. The evidence presented by the State tended to show that on 19 November 1991 the defendant, who was acquainted with the victim through their employment, came to her home. After threatening to kill her, he forced her into his car and instructed his companion to proceed to a remote location in Cleveland County. The victim testified that he forced her out of the automobile and raped her, then continued to another rural spot, where he raped her again. The defendant offered no evidence.

The jury returned verdicts of guilty of all charges. The court imposed sentences of life for the rape convictions and a sentence of nine years for the kidnapping conviction to be served at the expiration of the sentences in the former convictions. The defendant appeals those convictions.

Attorney General Michael F. Easley, by Associate Attorney General John G. Barnwell, for the State.

Clinton C. Hicks for defendant-appellant.

ORR, Judge.

The defendant argues two issues before this Court. First, he contends that the trial court erred in finding that the prosecutor did not exercise his peremptory challenges for a racially discriminatory reason in the selection of the petit jury; and second, that the trial court erred in failing to declare a mistrial when a juror read a newspaper during an overnight recess which revealed that the defendant may have been HIV positive. We reject these contentions for the reasons set forth below.

I.

[1] It is well established in North Carolina that the use of peremptory challenges on the basis of race is prohibited by both the

State and Federal constitutions. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986); *State v. Beach*, 333 N.C. 733, 430 S.E.2d 248 (1993). In *Batson*, the United States Supreme Court said that

> [t]o establish such a case, the defendant first must show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96, 90 L. Ed. 2d at 87-88 (citations omitted).

When a defendant has made a *prima facie* case of racial discrimination, the State must rebut it by showing racially neutral reasons for the exercise of peremptory challenges. "[A] prosecutor's racially neutral explanations for peremptory challenges must be 'clear and reasonably specific' and 'related to the particular case to be tried.' " *State v. Thomas*, 329 N.C. 423, 431, 407 S.E.2d 141, 147 (1991). Great deference is accorded "to the trial court's decision on the ultimate question of the prosecutor's discriminatory intent in peremptory challenges." *Id.* at 432, 407 S.E.2d at 147-48.

> Deference to the trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding will "largely turn on evaluation of credibility." . . . In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "particularly within a trial judge's province."

Id., 407 S.E.2d at 148, quoting *Hernandez v. New York*, 500 U.S. 352, 114 L. Ed. 2d 395, 409 (1991).

In the instant case, the defendant raised *Batson* challenges following the exclusion of Jimmy Thompson and Dorothy Lowe, both African-American, from the panel. Beyond those facts, we have no further information in the record on the composition of the jury venire nor the total number of peremptory challenges that the prosecutor used.

Similarly, in *State v. McNeill*, 326 N.C. 712, 392 S.E.2d 78 (1990), there was no record of the jury selection process but only the defense counsel's reiteration of the *Batson* objection. In *McNeill*, the defendant contended that the exclusion of the only black juror from the jury amounted to a violation of defendant's equal protection rights under *Batson* and its progeny.

In response, the North Carolina Supreme Court stated:

> Assuming without deciding that the defendant established a prima facie case of discrimination based solely on the fact that the prosecutor's use of a peremptory challenge resulted in the removal of the only black person in an otherwise all white jury, the facts before the trial court provide plenary support for the conclusion that the challenge was for legitimate, racially neutral reasons. . . . However, there being no showing of a history of discriminatory practice on behalf of the district attorney, the trial court had no reason to suspect the genuineness of the state's explanation supporting the dismissal of this juror. We hold that even if the defendant can be said to have established a prima facie showing of discrimination in the challenge of this juror, the state properly rebutted the presumption created by that showing in accord with the standard set forth in *Batson*.

Id. at 719, 392 S.E.2d at 82 (citation omitted).

We decline to address whether the defendant in the case at bar has made out a *prima facie* case of purposeful discrimination in the district attorney's use of peremptory challenges. Where the prosecutor offers racially neutral explanations for his peremptory challenges and the trial court finds them to be true and not pretextual, the issue of the *prima facie* case is moot. *Hernandez*, 500 U.S. 352, 114 L. Ed. 2d 395 (1991).

In the present case, the record reflects the following exchanges between defense counsel, the trial court, and the district attorney:

MR. HICKS: Mr. Thompson was discharged from the jury or released from the jury based on the government's use of its peremptory challenge. . . . [T]he District Attorney indicated that he discharged Mr. Thompson because of his age and he also discharged another young man who was white who he indicated was also, in his opinion, young—Mr. Elmore, ... [W]e believe, [the discharge of the juror] was the result of an attempt to make sure that no blacks served on this jury and that was supported, we contend, by the fact that Ms. Lowe was summarily discharged . . . .

THE COURT: What does the State say?

MR. YOUNG: Your Honor, as to Jimmy Thompson, looking at Jimmy Thompson and Jeffrey—Jimmy Thompson was the black man and Jeffrey Elmore, if the Court will recall, was juror number eleven, and the Court could find that he was obviously of the white race. That looking at both these men, they were young men and in the State's opinion, they were less than twenty-one years old. I did not inquire as to—specifically as to their age. I draw on my common sense. Also, neither one of these men . . . were married men. They were both single men, and the State—me, as the prosecutor, trying to find jurors who are representative of the community and who can be good, fair jurors, not based on the color but on such things as how old they are and what kind of family life do they have, and in particular, in this particular case, I felt that a young juror is not the best juror to sit on this case, and I think I made an example of that. At the same time I took the black man from the jury who was young, I took a young white—the only other what I considered to be young person under twenty-one—on the jury.

As to Ms. Lowe, Ms. Lowe earlier in the day tried to get off sitting on the jury and the Court denied it for cause, but I—I think when she tries to get off sitting on the jury herself that it falls easily into the realm of the proper use of a peremptory when she's got a son that is supposed to be in another court tomorrow and regardless of how serious this case may be, it's not as serious to her as to someone in her own family who has a court proceeding that they have to go to and that was the reason for the State—because I

was sitting here when she herself tried to get off sitting on the jury.

In surrebuttal, the defense counsel pointed out that a third juror was also young, at twenty-eight. The court responded that "I didn't think he looked as young as either of the other two young people. I really didn't. He—he's balding just slightly. Maybe premature. Obviously premature if he said he was twenty-eight." The court then found:

> The Court will find that there has been no purposeful discrimination by the State with regard to the peremptory challenge of Jimmy Thompson and also of Dorothy Lowe, the State having satisfied this Court with the explanation on the record as to its reasons for excusing Mrs. Lowe, as well as Mr. Thompson, and Mr. Vess, and again, also, Mr. Elmore. I believe Mr. Elmore and Mr. Vess both were young—apparently—appeared to be younger than the other jurors. . . .

The defendant challenges the credibility of the prosecutor's rebuttal, noting that some of the white veniremen who were also young were nevertheless included in the petit jury. We disagree.

In response to a similar argument in *Thomas*, our Supreme Court held that

> [t]his argument falls short of showing discrimination in a practice as complex as jury selection, which we have recognized is "more art than science" and in which "[r]arely will a single factor control the decision-making process." . . . Therefore, "[s]o long as the motive does not appear to be racial discrimination, the prosecutor may exercise peremptory challenges on the basis of 'legitimate "hunches" and past experience.' "

Thomas at 432, 407 S.E.2d at 147 (citations omitted).

Furthermore, in both *Hernandez* and *Thomas* the Court "specifically held that it would not overturn the trial court's finding on the issue of discriminatory intent 'unless convinced that its determination was clearly erroneous.' " *Thomas* at 432, 407 S.E.2d at 148, quoting *Hernandez*, 500 U.S. at ---, 114 L. Ed. 2d at 412. "It is not enough for defendant to raise the mere possibility of discrimination. 'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " *Id.* at 433, 407 S.E.2d at 148 (citations omitted). In

applying "this extremely deferential standard" to the facts in the case *sub judice*, we find that the trial court's ruling that no purposeful discrimination occurred should be upheld. The defendant's assignment of error is overruled.

II.

[2] The defendant next calls our attention to the trial court's denial of a mistrial when it was discovered that during an overnight recess, a juror inadvertently read a portion of a newspaper article which reported that the defendant had Acquired Immune Deficiency Syndrome (AIDS). The ruling on a motion for a mistrial will be disturbed on appeal only if so clearly erroneous as to amount to a manifest abuse of discretion. *State v. Stroud*, 78 N.C. App. 599, 337 S.E.2d 873 (1985). We find that the trial court did not abuse his discretion, and accordingly overrule this assignment of error.

The defendant argues that the juror could not possibly have known that the article was about him without first learning that the defendant had AIDS, because the reference to the disease was in the first paragraph while the defendant's name did not appear until the third paragraph. He contends that this knowledge "is so inflammatory" that it inevitably tainted the juror's decision. However, we are not persuaded by this reasoning.

N.C. Gen. Stat. § 15A-1061 states in pertinent part: "The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case."

> Whether a mistrial should be granted pursuant to N.C. Gen Stat. § 15A-1061 (1988) is a matter which rests in the sound discretion of the trial judge. . . . Because such a ruling is within the trial judge's discretion, a mistrial is only appropriate where such serious procedural or other improprieties would make it impossible for a fair and impartial verdict to be rendered under the law.

State v. Joyce, 104 N.C. App. 558, 563, 410 S.E.2d 516, 519 (1991), *disc. review denied*, 331 N.C. 120, 414 S.E.2d 764 (1992) (citations omitted).

The record in the instant case reveals the following exchange between the Court and the jurors:

> THE COURT: I understand that there have been certain news accounts of this matter. Have any of you read anything about this case since it started?
>
> JUROR: It was in the Shelby Star, but I saw it about eight fifteen last night. I was reading and I saw the defendant's name and I quit.
>
> THE COURT: You didn't read it?
>
> JUROR: No, sir.
>
> THE COURT: All right, fine. You're Mr.—
>
> JUROR: Macks.
>
> THE COURT: Macks, right. All right, anybody else? Did any of you listen to the radio or was anything on t.v. or the radio concerning—

Upon determining that no other juror had been exposed to the media reports, the trial judge retired the jury to complete its deliberations. The jury returned about an hour later with the verdicts. The defendant moved for a mistrial at that time based on the juror's response to the article.

" 'The denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown.' " *State v. Jones*, 50 N.C. App. 263, 268, 273 S.E.2d 327, 330, *cert. denied*, 302 N.C. 400, 279 S.E.2d 354 (1981). In *Jones*, inadmissible evidence concerning prior convictions of the defendant was included in a newspaper article during the trial. Three jurors read the article. In finding that there was no abuse of discretion, this Court held that:

> The exposure of jurors to news media reports during trial has been a very real problem for a long time. . . . The ever-widening coverage by the press, radio, and television is likely to bring the problem before the courts with increasing frequency. The problem is primarily one for the trial judge, who must weigh all the circumstances in determining in his sound judicial discretion whether the defendant's right to a fair trial has

been violated when information or evidence reaches the jury which would not be admissible at trial.

Id. at 268, 273 S.E.2d at 330 (citations omitted).

Our review of the record indicates that the trial court in the instant case examined the jurors and had the opportunity to observe their demeanor and their responses. It was reasonable to conclude that juror number two, Mr. Macks, did not read the article and had formed no opinion that would jeopardize the defendant's right to a fair trial. We therefore conclude that there was no abuse of discretion in the decision of the trial judge to deny the defendant's motion for a mistrial.

No error.

Judges EAGLES and GREENE concur.

JAMES K. REYNOLDS, PLAINTIFF v. ROYCE REYNOLDS AND JAMES B. RIVENBARK, DEFENDANTS

No. 9314SC514

(Filed 19 April 1994)

Duress, Coercion, and Undue Influence § 11 (NCI4th)— stock purchase agreement for automobile company—no economic duress—agreement not rescinded

Plaintiff was not entitled to rescind a stock purchase agreement on the ground of economic duress and to recover the amount he paid in excess of the price at which defendant had originally contracted to sell the stock to plaintiff since a breach or threatened breach of the original agreement by defendant was insufficient, without more, to establish a claim for duress; plaintiff was an experienced businessman with 25 years involvement in automobile dealerships, the subject of the stock purchase agreement; plaintiff chose to buy the stock in order to make a profitable business deal for himself; and by paying the higher price for the stock, plaintiff received defendant's resignation from the board of directors of the com-

pany and the right to receive all of the proceeds from the sale of one dealership.

Am Jur 2d, Duress and Undue Influence §§ 19, 20.

Appeal by plaintiff from judgment entered 4 February 1993 by Judge George R. Greene in Durham County Superior Court. Heard in the Court of Appeals 28 February 1994.

Plaintiff brought this action seeking to recover an alleged $182,000 overpayment paid to defendant Reynolds under the terms of a Stock Purchase Agreement. For the most part, the facts are undisputed. In 1977, plaintiff and defendant Reynolds created a corporation known as Star Automobile Company (hereinafter Star). Star's assets included several automobile franchises, including Buick, Volkswagen, Audi, Porsche, and Jaguar. Initially, ownership in the company was equally divided between plaintiff and defendant Reynolds.

In 1983, plaintiff and defendant Reynolds executed a series of documents which controlled both the management and ownership of Star. The primary agreement was the General Agreement, which was executed on 1 November 1983. This agreement amended the existing by-laws of the corporation to require 100% attendance to meet a quorum for shareholder and director meetings. The agreement provided that actions taken by shareholders and directors must be unanimous to be effective. Finally, the agreement contained a provision in which plaintiff agreed that defendant Reynolds would be elected to the Board of Directors of Star for a period of not less than fifteen years, with defendant Reynolds holding such position regardless of his stock ownership in Star.

Plaintiff and defendant Reynolds also entered into a Management Agreement. This agreement provided that Southwestern Automotive Management Company (hereinafter Southwestern), a separate company owned and controlled by defendant Reynolds, would provide certain management services to Star in return for a payment of 15% of the net profits of Star. The parties also entered into a Stock Purchase Agreement which provided for the gradual purchase of defendant Reynolds' stock in Star by plaintiff.

On 1 December 1987, plaintiff and defendant Reynolds, along with their respective spouses, entered into a Buy-Sell Agreement. This agreement contained provisions concerning the transfer and

ownership of plaintiff's and defendant Reynolds' shares of stock in Star. At the time this agreement was executed, plaintiff was the owner of 324,960 shares of Star's common stock, having purchased 121,860 shares from defendant Reynolds. Defendant Reynolds retained ownership of 81,240 shares of Star's common stock.

The terms of the Buy-Sell Agreement granted to plaintiff the option, at any time, to purchase all of the Star stock then owned by defendant Reynolds. The agreement granted to defendant Reynolds the option to sell to plaintiff, at any time, all of the Star stock then owned by him. The agreement further provided that the price for any such sale of Star stock would be determined by reference to the book value of the stock. The book value was to be determined by Star's accountants through a formula set forth in the agreement.

In late 1988, Star suffered net operating losses for a number of months. Plaintiff, President of Star, felt that the losses would continue to build, and decided that it would be in the best interests of Star to sell the corporation. In December of 1988, plaintiff and defendant Reynolds began negotiating about either the purchase by defendant Reynolds of the assets of the corporation, or the sale to a third party of those assets. The parties did not reach an agreement.

In March of 1989, plaintiff approached defendant Reynolds about the possibility of selling the assets of Star to a third party known as the Boyd and Land Group (hereinafter Boyd and Land). Plaintiff contacted defendant Rivenbark, as attorney for both Star and plaintiff and defendant Reynolds individually, to prepare the documents which would grant plaintiff the appropriate authority from defendant Reynolds to negotiate and execute a contract for the sale of Star's assets to Boyd and Land.

On 28 March 1989, plaintiff executed an assignment to defendant Reynolds of plaintiff's interest in a Virginia partnership, known as RER Properties, to defendant Reynolds in return for defendant Reynolds' agreement to terminate the Management Agreement of 1 November 1983.

On 31 March 1989, an asset purchase agreement between Star and Boyd and Land was executed. Plaintiff, as President of Star, and defendant Rivenbark, as Secretary of Star, signed the agreement. The agreement covered the Buick, Audi, Volkswagen, Saab

and Porsche dealerships, but did not provide for the sale of the Jaguar franchise which was owned by Star. The agreement also provided for the sale of all automobile inventory and parts, as well as for the goodwill of Star. By separate agreement, plaintiff, who individually owned the real estate upon which Star was located, agreed to sell the real estate to Boyd and Land. The closing date for this agreement was 1 June 1989.

On or about 22 May 1989, plaintiff sent defendant Reynolds written notice that plaintiff was exercising his option to purchase all of defendant Reynolds' stock in Star under the December 1987 Buy-Sell Agreement. The purchase price would be the book value of defendant Reynolds' shares. The book value of Star had fallen drastically from December of 1988 to May of 1989. The book value of defendant Reynolds' 20% interest had fallen from over $200,000 to $85,000.

Defendant Reynolds informed plaintiff of his displeasure at plaintiff's efforts to immediately acquire his 20% stock interest in Star, since defendant Reynolds would be effectively cut out of any proceeds from the eventual sale of the Jaguar dealership if plaintiff were to immediately purchase his stock. Defendant Reynolds also informed plaintiff that if plaintiff continued in that course of action, defendant Reynolds would not sign the consent forms which would be necessary to close the sale of the assets to Boyd and Land.

Plaintiff and defendant Reynolds met to discuss the situation. Defendant Reynolds demanded the sum of $267,000 from plaintiff for the sale of his stock to plaintiff and for his written consent to the sale to Boyd and Land. Plaintiff contacted another attorney, experienced in the management and trading of automobile dealerships, who advised him that he "had better take what [he] could get."

On 31 May 1989, plaintiff and defendant Reynolds met at defendant Rivenbark's office. They executed an agreement, which was signed by plaintiff in both his individual capacity and as President of Star. Defendant Rivenbark signed the agreement as Secretary of Star. Defendant Reynolds also signed the agreement. The agreement provided that plaintiff would purchase defendant Reynolds' stock in Star for $267,000. In return, defendant Reynolds would agree to give written consent to the transaction to sell Star's assets to Boyd and Land and would resign as director of Star.

On 6 June 1989, the Asset Purchase Agreement between Star and Boyd and Land was closed. Defendant Reynolds gave written consent to the sale and was paid the sum of $267,000 for his Star stock. Defendant Reynolds then waived any other rights in and to any remaining assets of Star. Additionally, defendant resigned as director of Star.

On 20 June 1989, plaintiff and defendant entered into a written agreement in which plaintiff exercised his option to sell his stock in Crown Automobile of Richmond, Inc. to defendant, for which defendant paid plaintiff $609,465.

On 18 August 1989, plaintiff entered into an agreement to sell the Jaguar dealership, including the franchise and its assets. On 1 February 1990, the sale of the Jaguar dealership was closed. The assets of Star's Jaguar dealership were paid for as such and $1,000,000 was paid to plaintiff in the form of an $800,000 covenant not to compete and a $200,000 reduction in the price paid by Reynolds for the real estate which was part of an Acura dealership exchanged for the Jaguar franchise.

Plaintiff brought this action seeking to rescind the Stock Purchase Agreement of 31 May 1989 and to recover from defendant Reynolds the difference between the book value of his stock and the price paid by plaintiff for the stock, which is approximately $182,000. Plaintiff also asserted a claim of negligence against defendant Rivenbark for the failure of defendant Rivenbark to have properly obtained the written consent of defendant Reynolds to the Asset Purchase Agreement with Boyd and Land prior to the execution of the Asset Purchase Agreement. Defendant Reynolds asserted a counterclaim against plaintiff, rooted in the various agreements and transactions between himself and plaintiff, seeking damages for plaintiff's breach of their various agreements.

After depositions were taken, defendant Reynolds moved for summary judgment. The trial court granted this motion. Plaintiff now appeals.

Charles F. Carpenter; and Newsom, Graham, Hedrick, Kennon & Cheek, P.A., by Sherrod Banks; for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey and James H. Jeffries, IV, for defendant-appellee Royce Reynolds.

WELLS, Judge.

Although not addressed by either party to this appeal, we must address its interlocutory nature. As the judgment below did not dispose of all claims as to all parties, and the trial court did not certify it for immediate appeal, its immediate appeal would contravene the provisions of N.C. Gen. Stat. § 1A-1, Rule 54(b) of the Rules of Civil Procedure. Our review of the record reveals that: (1) defendant Reynolds' counterclaim will remain viable only if summary judgment for him was not proper; and (2) the action for negligence against defendant Rivenbark will continue to be viable only if summary judgment for defendant Reynolds is reversed. In the interest of judicial economy, we therefore deem it appropriate to dispose of this appeal on its merits.

Plaintiff contends that the stock purchase agreement of May 1989 should be rescinded because it was entered into under conditions which amounted to economic duress; therefore, the trial court erred in granting defendant's motion for summary judgment. We disagree.

Summary judgment is a device whereby judgment is rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). In ruling on a motion for summary judgment, the court does not resolve issues of fact and must deny the motion if there is any issue of material fact. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E.2d 400 (1972). The burden of establishing that a lack of any triable issue exists rests with the movant. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985).

Plaintiff contends that there are alleged facts which, if proved, would allow a trier of fact to conclude that defendant induced the stock purchase agreement by duress. We now must inquire whether the record before us, taken in the light most favorable to plaintiff, reveals sufficient evidence that plaintiff entered into the stock purchase agreement because of duress.

Duress exists when a person, by an unlawful or wrongful act of another, "is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise

of free will." *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971). An act is wrongful "if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings." *Id.* Generally, actions taken by a person voluntarily will not be said to be given under duress. *See* 25 Am. Jur. 2d *Duress and Undue Influence* § 3 (1966).

Plaintiff argues that defendant Reynolds was obligated by the Buy-Sell Agreement to sell his stock to plaintiff for book value, and therefore defendant's demand for $287,000 was a threat of breach of contract and constituted economic duress. We are not persuaded by plaintiff's argument, however, since "[m]ere breach or threat of breach of contract without more is insufficient to establish a claim or defense of duress." *George Shinn Sports, Inc. v. Bahakel Sports, Inc.*, 99 N.C. App. 481, 393 S.E.2d 580, *disc. rev. denied*, 328 N.C 571, 403 S.E.2d 511 (1991), *see also Dan B. Dobbs, Dobbs Law of Remedies*, § 10.2(3) (2d ed. 1993). Thus, even if defendant Reynolds were obligated by contract to sell his stock for less than $267,000, this threat alone does not constitute economic duress.

Many other factors lead us to conclude that plaintiff acted freely and voluntarily, and did not enter into the stock purchase agreement because of economic duress. Plaintiff was an experienced businessman who had been involved in automobile dealerships for 25 years. The events and transactions which lead up to the 31 May agreement were many and varied, involving and reflecting the contrasting and at times conflicting views about the operations of Star between these brothers, and the considerable free-will bargaining between them resolved by the 31 May agreement. Plaintiff was not required by any agreement or contract to make the purchase, and was under no obligation to buy the stock; rather, plaintiff chose to buy the stock in order to make a profitable business deal for himself. Moreover, defendant Reynolds was not attempting to force plaintiff to buy his stock at that time; in fact, he objected to plaintiff's efforts to acquire his stock because he would effectively be cut out of the proceeds from the sale. Defendant Reynolds eventually agreed to sell plaintiff his stock, provided that he receive a fair value of his 20% interest in the tangible and intangible assets of the company, as well as consideration for the other valuable non-stock rights defendant held in Star under the previous agreements. By paying defendant Reynolds $267,000, plaintiff in turn received defendant Reynolds' resignation from the board of directors, and he subsequently received all the proceeds from the

sale of Star's assets, including the Jaguar franchise. This bargaining process eliminates any validity to plaintiff's argument that he entered into the agreement only because he was faced with circumstances amounting to duress.

For the reasons stated above, we affirm the order of the trial court.

Affirmed.

Judges ORR and WYNN concur.

JAMES W. CLARK, ADMINISTRATOR OF THE ESTATE OF KATHY CLARK FOGLEMAN, DECEASED, PLAINTIFF v. THE RED BIRD CAB COMPANY (RED BIRD CAB, INC.), A CORPORATION; LEONARD WARNER; THE CITY OF BURLINGTON, A MUNICIPAL CORPORATION; RICHARD HALL; AND RAYMOND SHELTON, DEFENDANTS

No. 9215SC1294

(Filed 19 April 1994)

Municipal Corporations § 450 (NCI4th); Sheriffs, Police, and Other Law Enforcement Officers § 22 (NCI4th)— decedent killed by cab driver—convicted felon with dangerous tendencies—allegedly negligent failure to investigate credentials—defendants protected by public duty doctrine

Plaintiff's claim against a city, its police chief and a police officer for the death of his daughter who was raped and murdered by a taxicab driver was barred by the public duty doctrine where plaintiff alleged that the taxicab driver had previously been convicted of a felony and was known to have dangerous tendencies, and that defendants were negligent by failing properly to investigate the credentials of the driver when he applied for a permit to operate a taxicab, since plaintiff did not allege any "special relationship" between defendants and decedent or any "special duty" or actual promise of protection made by defendants to decedent which would exempt plaintiff's claim from the public duty doctrine. City code provisions setting out the procedure for issuance of taxicab permits created no special duty owed by police officers

to taxicab customers over and above the duty owed to the general public.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 184 et seq., 648 et seq.; Sheriffs, Police, and Constables §§ 90-180.

Modern status of rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances. 38 ALR4th 1194.

Appeal by plaintiff from orders entered 14 September 1992 and 2 October 1992 by Judge Steven D. Michael in Alamance County Superior Court. Heard in the Court of Appeals 28 October 1993.

Robert S. Cahoon for plaintiff appellant.

Michael B. Brough & Associates, by Michael B. Brough and Jan S. Simmons, for the City of Burlington, Richard Hall and Raymond Shelton, defendant appellees.

COZORT, Judge.

Plaintiff appeals the trial court's dismissal, based on the public duty doctrine, of his complaint against defendants City of Burlington and two police officers. The complaint alleged that defendants were negligent by failing to properly investigate the credentials of an applicant for a permit to operate a taxicab. Plaintiff contends the defendants' negligence was the proximate cause of his daughter's murder by a taxicab driver, who had previously been convicted of a felony and was known to have dangerous tendencies. We affirm, holding that defendants did not owe the decedent a legal duty and that plaintiff's allegations did not fall within an exception to the public duty doctrine.

Plaintiff James W. Clark, administrator of the estate of his daughter, Kathy Clark Fogleman, filed this action on 4 June 1992 against defendants The Red Bird Cab Company (Red Bird Cab); Leonard Warner, the owner of Red Bird Cab; the City of Burlington; Richard Hall (as a police officer employed by the City of Burlington); and Raymond Shelton (as Chief of Police of the City of Burlington). The facts as alleged in plaintiff's complaint are as follows: In August of 1990, Keith Allen Brown applied to the City of Burlington for a permit to operate a taxicab. Mr. Brown had previously been convicted in North Carolina of common law robbery and assault

with a deadly weapon inflicting serious injuries. In addition, Mr. Brown's general reputation was that of being a dangerous individual.

The Burlington City Code establishes certain procedures which must be followed by the Chief of Police when any person applies for a permit to operate a taxicab within the city's corporate limits. Once a person submits an application for a permit to drive a cab, "[t]he chief of police or a member of the police department designated by him is hereby charged with the duty of investigating the facts stated in any application received . . . ." Burlington City Code, Sec. 35-64. Under grounds for refusal, "[t]he chief of police may refuse to grant or renew a taxi driver's permit in case of an application from any person . . . [w]ho has been convicted of a felony[.]" Burlington City Code, Sec. 35-63. If the chief of police concludes the applicant has satisfied other requirements and is not "an habitual violator of traffic laws, or other criminal laws, the chief of police shall issue a permit to the applicant to drive a taxicab." Burlington City Code, Sec. 35-65.

Plaintiff alleges that Chief of Police Raymond Shelton gave Officer Richard Hall the responsibility of investigating Mr. Brown's application for a taxicab permit. Sometime after filing his application, Mr. Brown was issued an operator's permit. On 3 November 1990, Ms. Fogleman telephoned Red Bird Cab to have a taxi take her to a local restaurant. Red Bird Cab dispatched Mr. Brown to Ms. Fogleman's residence. Mr. Brown drove Ms. Fogleman to a rural area where he assaulted, raped, and murdered her. Mr. Brown committed suicide prior to trial on the criminal charges. Defendants admit that Brown killed Ms. Fogleman after being dispatched to her residence.

Defendants City of Burlington, Richard Hall, and Raymond Shelton made a motion to dismiss plaintiff's complaint on 29 July 1992. In an order dated 14 September 1992, the trial court dismissed plaintiff's cause of action as to those defendants for failure to state a claim upon which relief could be granted. A second order, identical to the 14 September order, except for a provision indicating there was "no just reason for delay in the entry of this judgment," was filed 2 October 1992. Plaintiff argues on appeal that his complaint was sufficient to survive the defendants' motion to dismiss.

The appeal in this case is interlocutory, since it fails to "[dispose] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of*

Durham, 231 N.C. 354, 361-62, 57 S.E.2d 375, 377 (1950). Generally, there is no immediate appeal from an interlocutory order. "Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment." *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951). Where, however, the interlocutory order deprives the appellant of a substantial right which would be lost if not reviewed prior to final judgment, an appeal will lie. *See* N.C. Gen. Stat. § 1-277 (1983).

This Court has found cases which have presented defenses of governmental or sovereign immunity to be immediately appealable because such orders have affected a substantial right. *See, i.e., Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744 (1993). The rationale for the exception to the general rule stems from the nature of the immunity defense. "A valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit. Were the case to be erroneously permitted to proceed to trial, immunity would be effectively lost." *Id.* at 425, 429 S.E.2d at 746 (citing *Corum v. Univ. of North Carolina*, 97 N.C. App. 527, 389 S.E.2d 596 (1990), *aff'd in part, rev'd in part on other grounds*, 330 N.C. 761, 413 S.E.2d 276 (1992)). In this case, the defendants have asserted governmental immunity from suit through the public duty doctrine. Plaintiff's appeal is therefore properly before this Court.

On a Rule 12(b)(6) motion to dismiss, "[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). The complaint must be liberally construed, and the trial court should not dismiss the complaint unless plaintiff has not set forth facts to support a claim which would entitle him or her to relief. *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987). Even construed liberally, however, plaintiff's complaint falls short of setting forth facts entitling him to relief.

In tort, there will be no liability unless the law imposes a duty. *Paschall v. N.C. Dep't of Correction*, 88 N.C. App. 520, 364 S.E.2d 144 (1988). Actionable negligence is based on the failure to exercise proper care in the performance of a legal duty which

an individual owes to another under the circumstances surrounding them. *Mattingly v. R.R.*, 253 N.C. 746, 117 S.E.2d 844 (1961). The breach of duty may be a negligent act or a negligent failure to act. *Williams v. Kirkman*, 246 N.C. 510, 98 S.E.2d 922 (1957).

This case is governed by the "public duty doctrine," or the general common law rule that "a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals." *Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901, *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1991) (citing *Coleman v. Cooper*, 89 N.C. App. 188, 193, 366 S.E.2d 2, 6, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988)). In adopting the public duty doctrine in *Braswell*, our Supreme Court recognized the limited resources of law enforcement personnel and refused to judicially impose liability for their failure to prevent every criminal act. However, the Court also noted:

> While this policy is a necessary and reasonable limit on liability, exceptions exist to prevent inevitable inequities to certain individuals. There are two generally recognized exceptions to the public duty doctrine: (1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) "when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered." *Coleman v. Cooper*, 89 N.C. App. at 194, 366 S.E.2d at 6 . . . .

Id. at 371, 410 S.E.2d at 902.

Our courts have applied the two exceptions to the public duty doctrine very narrowly in this State. For example, in *Prevette v. Forsyth County*, 110 N.C. App. 754, 431 S.E.2d 216 (1993), this Court declined to find that animal control officers created a "special relationship" with the intestate. The Court held a special relationship was not established merely because the animal control officers patrolled the neighborhood where the intestate was attacked and killed by two dogs known to have dangerous tendencies. In *Hull v. Oldham*, 104 N.C. App. 29, 407 S.E.2d 611, *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991), this Court refused to apply the "special duty" exception where the plaintiffs' complaints did

not allege that a sheriff and his deputies promised to protect the victims of a sniper and there was no allegation that defendants assumed any greater duty to the victims than that owed to the general public.

In this case, plaintiff does not allege the existence of any "special relationship" between defendants and decedent which would exempt plaintiff's case from the public duty doctrine under the first exception. As for the "special duty" exception, "plaintiff must show that an actual promise was made by the police to create a special duty, that this promise was reasonably relied upon by plaintiff, and that this reliance was causally related to the injury ultimately suffered by plaintiff." *Braswell v. Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. "[T]he 'special duty' exception to the general rule against liability of law enforcement officers for criminal acts of others is a very narrow one; it should be applied only when the promise, reliance, and causation are manifestly present." *Id.* at 372, 410 S.E.2d at 902. Here, plaintiff has not alleged facts which indicate the City of Burlington made an overt promise to protect Ms. Fogleman, giving rise to a special duty owed to her by Chief Shelton or Officer Hall. As such, plaintiff's complaint fails to properly allege the special duty exception articulated in *Braswell*. Plaintiff attempts to meet the special duty exception by arguing that the city code provisions setting out the procedure for issuance of taxicab permits create a special duty of care. Plaintiff cites *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), to support his proposition that a special duty of protection to an individual can arise by statute, the breach of which could form the basis of a negligence suit. Although this Court determined that N.C. Gen. Stat. § 7A-517, *et seq.*, created a special duty owed to individuals in *Coleman*, we conclude the present case is distinguishable from *Coleman*. In *Coleman*, this Court found that N.C. Gen. Stat. § 7A-517, *et seq.*, which deals with the treatment of juveniles who had been found to be abused or neglected, created a special duty owed to the juveniles by the Wake County Department of Social Services and a Department of Social Services employee. The Court held the statutes created a special duty for those defendants to protect a specific class of individuals—abused children. The *Coleman* Court nonetheless rejected an argument advocating a special duty of protection as it related to law enforcement personnel, and affirmed summary judgment in favor of defendants the City of Raleigh and the Raleigh Police Department.

Here, a review of the applicable city code provisions reveals no specific identification of a particular class of persons being singled out for protection by the city. We find no language creating a special duty which the police officers would owe to taxicab customers over and above the duty owed to the general public. Consequently, because plaintiff is unable to demonstrate a duty owed to Ms. Fogleman by the defendants, the trial court did not err in dismissing plaintiff's claim.

Finally, plaintiff argues that because his complaint alleges that defendants' conduct was "grossly negligent" as well as "wilful" and "wanton," the complaint is somehow removed from the shield of the public duty doctrine. Plaintiff's argument is without merit. The public duty doctrine previously has barred claims of gross negligence. *See, e.g., Hull*, 104 N.C. App. 29, 407 S.E.2d 611; *Lynch v. N.C. Dep't of Justice*, 93 N.C. App. 57, 376 S.E.2d 247 (1989). Only where the conduct complained of rises to the level of an intentional tort does the public duty doctrine cease to apply. We have examined plaintiff's complaint and find no difference between the allegations used to support negligence, gross negligence, and the actions plaintiff describes as "wanton," "wilful," and "reckless." As long as the claim is negligence, even couched in terms of "gross," "wanton," or "wilful," the public duty doctrine supports the dismissal of the complaint based on the failure to state a claim. Accordingly, the trial court's dismissal of plaintiff's cause of action is

Affirmed.

Judges EAGLES and ORR concur.

HADLEY NEWGENT, ADMINISTRATOR OF THE ESTATE OF JOSEPH LEVI NEWGENT, DECEASED MINOR, PLAINTIFF v. BUNCOMBE COUNTY BOARD OF EDUCATION, DEFENDANT

No. 9310IC610

(Filed 19 April 1994)

State § 63 (NCI4th)—death of a child crossing road to catch bus—allegedly negligent acts of bus driver—driver not operating bus in course of employment when acts occurred

In an action to recover for the death of a child who was struck and killed when attempting to cross the highway in order to await the arrival of his school bus, the Industrial Commission properly found that it did not have jurisdiction over the action because the bus driver was not operating the vehicle in the course of her employment at the time of the alleged negligent acts, which included not reporting to the principal that the stop had limited visibility and that she could stop the bus and pick up students on the other side of the highway, and not informing the principal or the child's parents that the child had previously crossed the highway by himself. N.C.G.S. § 143-300.1.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 649-651.

Judge ORR dissenting.

Appeal by plaintiff from order of the Industrial Commission issued 12 April 1993. Heard in the Court of Appeals 7 March 1994.

On 10 December 1990, at approximately 6:50 a.m. near the intersection of N.C. Highway 63 and Frisbee Road in Buncombe County, Joseph Levi Newgent was struck by an automobile and killed when attempting to cross Highway 63 in order to await the arrival of his school bus. On 21 November 1991, plaintiff filed a Tort Claim Affidavit pursuant to N.C. Gen. Stats. §§ 143-297 and 143-300.1. The affidavit alleged that Jean Freeman, the driver of the school bus which Joseph rode to school and was planning to board when he crossed the highway and was struck by another vehicle, was negligent by: not reporting to the principal that the bus stop that Joseph used every morning was in an area with limited visibility, not informing the principal that she could stop

the bus in the mornings and pick up Joseph on the west side of the road so that he would not need to cross the highway, and by not informing the principal and Joseph's parents that he had previously crossed the highway by himself prior to being struck and killed by an automobile on 10 December 1990.

On 12 December 1991, defendant filed a motion to dismiss. Following a hearing, Commissioner J. Randolph Ward entered an Order dismissing the claim, concluding that, at the time of the negligent acts complained of, Jean Freeman was not operating the school bus in the course of her employment and therefore the Industrial Commission had no jurisdiction. Plaintiff then appealed to the Full Commission. From the Commission's Order confirming the order of dismissal, plaintiff now appeals.

Long, Parker, Hunt, Payne & Warren, P.A., by Ronald K. Payne, for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Richard L. Griffin, for defendant-appellee.

WELLS, Judge.

Plaintiff assigns as error the Industrial Commission's finding and concluding that it lacked jurisdiction over this action and the dismissal of his claim. After examining the record before us, we must conclude that this assignment is without merit.

This action is governed by G.S. § 143-300.1, which provides in pertinent part:

> The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education . . . which claims arise as a result of any alleged mechanical defects or other defects which may affect the safe operation of a public school bus . . . resulting from an alleged negligent act of any maintenance personnel or as a result of any alleged negligent act or omission of the driver of a public school bus . . . and which driver was *at the time of the alleged negligent act or omission operating a public school bus . . . in the course of his employment by or training for that administrative unit or board.* (Emphasis added.)

The Commission found and concluded that the school bus driver "was not operating a public school bus in the course of her em-

ployment" at the time of the alleged negligent acts complained of; therefore, the Commission lacked jurisdiction under the statute.

Since the applicable statute is in derogation of sovereign immunity, it must be strictly construed and its terms strictly adhered to. *Etheridge v. Graham*, 14 N.C. App. 551, 188 S.E.2d 551 (1972). We can discern no way that defendant's employee could be considered to have been operating the bus at the time of the negligent acts complained of—not reporting to the principal that the stop had limited visibility and that she could stop the bus and pick up students on the west side of the highway, and not informing the principal or Joseph's parents that Joseph had previously crossed the highway by himself. In order to be held liable under this statute, the negligent acts or omissions complained of must have occurred while the employee was operating the bus in the course of her employment.

There is competent evidence to support the Commission's finding that the bus driver was not operating the vehicle in the course of her employment at the time of the alleged negligent acts; therefore, the findings are conclusive on appeal. *See* G.S. § 143-293; *Mitchell v. Board of Education*, 1 N.C. App. 373, 161 S.E.2d 645 (1968). For the reasons stated above, the order concluding that the Commission lacked jurisdiction over the claim is hereby

Affirmed.

Judge ORR dissents in a separate opinion.

Judge WYNN concurs.

Judge ORR dissenting.

Because the majority, in my opinion, construes the jurisdictional statute too narrowly, I respectfully dissent.

I do not believe that the Legislature intended for N.C. Gen. Stat. § 143-300.1 to preclude the Industrial Commission from hearing tort claims wherein certain alleged negligent acts or omissions arose out of, and were inseparably connected to, events occurring at the time a school bus driver was operating the bus in the course of her employment.

In the present case, in accordance with N.C. Gen. Stat. § 143-297, plaintiff filed an affidavit with the Commission that included a statement of facts and circumstances surrounding the injury giving rise to the claim. In this affidavit, plaintiff stated that her child, decedent, Joseph Levi Newgent, was a student at West Buncombe Elementary School assigned to bus number 463. Plaintiff stated that she and decedent lived on Cole Road, located on the West side of N.C. Hwy. 63, "a very busy highway currently under expansion by the North Carolina Department of Transportation to five lanes." Further, the affidavit stated:

> The school bus driver, Jean Freeman, took the school bus (#463) home with her on a daily basis. Ms. Freeman lived North of the point where Frisbee Road (off of which Cole Road is located) intersects with NC Highway 63. In the mornings, Mrs. Freeman would drive by Frisbee Road, the side on which the deceased child lived, traveling in a southerly direction. She would turn the school bus around and travel the same route in a Northerly direction. She would proceed to make one stop and then pick up Joseph Levi Newgent on the East side of NC Highway 63. Therefore, it was necessary for Joseph Levi Newgent to cross NC Highway 63 in order to board the school bus.
>
> The bus stop where Joseph Levi Newgent was picked up was located on a[n] incline, in a curve to the right with very limited visibility. Ms. Freeman has stated . . . that Joseph Levi Newgent had crossed the road twice before on his own. She further stated that she had not reported his crossing NC Highway 63 by himself to any person, including the principal of the elementary school nor to his parents. On the day of 10 December, 1990 at approximately 6:50 a.m., a period of time where there was very limited visibility, my son[, Joseph Levi Newgent,] was killed while crossing NC Highway 63 in order to await the arrival of the school bus.

Also in this affidavit, plaintiff stated that she "believe[d] Ms. Freeman was negligent by" failing to inform the principal and decedent's parents of facts Ms. Freeman observed and alternative routes Ms. Freeman should have taken while operating the bus in the course of her employment.

Under N.C. Gen. Stat. § 143-297, in "all claims which may . . . be filed against the various . . . agencies of the State, the

claimant . . . shall file with the Industrial Commission an affidavit . . . setting forth the following information: . . . A brief statement of the facts and circumstances surrounding the injury and giving rise to the claim." "Adherence to formal rules of pleading is not required but the claim should state facts sufficient to identify the agent or employee and a brief statement of the negligent act that caused the injury." *Turner v. Gastonia City Bd. of Educ.*, 250 N.C. 456, 460, 109 S.E.2d 211, 214 (1959).

> No formal pleadings are required in a proceeding under our State Tort Claims Act. It is only necessary in order to invoke the jurisdiction of the Industrial Commission for the claimant or person in whose behalf the claim is made to file with the Industrial Commission an affidavit in duplicate setting forth the material facts, as required by G.S. 143-297.

Branch Banking & Trust Co. v. Wilson County Bd. of Educ., 251 N.C. 603, 607-08, 111 S.E.2d 844, 848 (1960). I would conclude, therefore, that plaintiff's affidavit contained sufficient facts in compliance with N.C. Gen. Stat. § 143-297 to confer jurisdiction on the Industrial Commission under N.C. Gen. Stat. § 143-300.1.

If, however, "the claim, upon its face, shows that the State department or agency sought to be charged is not liable, then the Commission may end the proceeding." *Turner*, 250 N.C. at 460, 109 S.E.2d at 214. Prior to the enactment of our Rules of Civil Procedure, the proper way to take advantage of this defect was by demurrer. *Id.* Under our Rules of Civil Procedure, " '[a] motion to dismiss "for failure to state a claim upon which relief can be granted [pursuant to Rule 12(b)(6)]" is the modern equivalent of a demurrer.' " *Sutton v. Duke*, 277 N.C. 94, 99, 176 S.E.2d 161, 163 (1970) (adopting the treatment of a demurrer under the Federal Rules of Civil Procedure) (citations omitted).

The present case was not, however, brought under a Rule 12(b)(6) motion to dismiss for failure to state a claim. Instead, this action was brought under Rule 12(b)(1) and (2) for lack of personal and subject matter jurisdiction. Based on the liberal pleading rules applying N.C. Gen. Stat. § 143-297, I do not find that this action was a proper one for dismissal based on lack of jurisdiction.

In her affidavit, plaintiff set out the circumstances surrounding the alleged negligent acts of Ms. Freeman. These circumstances show that at the time Ms. Freeman was operating the bus in

the course of her employment, she saw the decedent, an elementary aged child, cross the busy road twice on his own, and she could allegedly see that the bus stop was in an area of limited visibility for a pedestrian. Further, while she was operating the bus in the course of her employment, every morning Ms. Freeman would drive by Frisbee Road in a southerly direction. If Ms. Freeman had picked up decedent while she was traveling in a southerly direction instead of turning the bus around and picking him up while she was driving the bus in a northerly direction, decedent would not have had to cross the highway and thus be exposed to the danger of crossing the highway.

The alleged acts and omissions of failing to inform the principal and decedent's parents arose out of events that occurred while Ms. Freeman was operating the bus in the course of her employment. In light of the fact that plaintiff is not required under N.C. Gen. Stat. § 143-297 to adhere to formal rules of pleading, the events described in the affidavit, in my opinion, are sufficient for jurisdictional purposes to show that the alleged acts or omissions occurred while Ms. Freeman was operating the bus in the course of her employment.

While the majority relies on the language of N.C. Gen. Stat. § 143-300.1 requiring that the driver be operating the public school bus "at the time of the alleged negligent act or omission" to defeat plaintiff's claim based on a lack of jurisdiction, I find the affidavit sufficient to set out facts arising from the actual operation of the school bus and would reverse the order of the Industrial Commission and remand for a hearing on plaintiff's claim.

HOLLY FARM FOODS, INC., PLAINTIFF v. HENRY R. KUYKENDALL, JOHN R. KUYKENDALL, AND LOUANN COULTER, DEFENDANTS

No. 9323SC206

(Filed 19 April 1994)

1. Landlord and Tenant § 84 (NCI4th)— ejectment—termination of lease—obligation to pay future rent terminated

Since the lease in question did not contain a provision expressly holding the tenant liable for future rents after eject-

ment, the lease was terminated when defendants were removed and the lessor was placed in possession pursuant to the summary ejectment proceeding; thus, defendants' obligation to pay future rent was also terminated and the trial court erred by concluding to the contrary.

Am Jur 2d, Landlord and Tenant §§ 626 et seq.

2. **Judgments § 302 (NCI4th)— action for rent—prior action for rent as res judicata**

Plaintiff's prior action in district court for back rent, filed after defendants had been ejected, operated as a bar to this action for subsequent rent payments under the doctrine of res judicata, since all of plaintiff's damages resulted from defendants' breach of the lease agreement between the parties; the ejectment of defendants terminated the lease and plaintiff's resulting claim was for damages for breach of contract, not future rent; in the district court action plaintiff's damages for breach of contract could have easily been ascertained; and plaintiff therefore could have raised the issue of its damages for defendants' breach of the lease.

Am Jur 2d, Judgments § 428.

Judge GREENE concurring in the result.

Appeal by defendants from judgment entered 18 December 1992 by Judge James A. Beaty in Wilkes County Superior Court. Heard in the Court of Appeals 7 December 1993.

John N. Ogburn, Jr., for defendants-appellants.

McElwee, McElwee & Warden, by William C. Warden, Jr., for plaintiff-appellee.

WYNN, Judge.

On 28 June 1976, John E. Chapman, Jr. (Chapman), as lessor, and HTL Enterprises, Inc. (HTL), as lessee, entered into a lease agreement for a commercial property in Randolph County. The lease ran for a term of twenty years from April 1977 to March 1997 and rent was established at $1,350.00 per month. Plaintiff Holly Farms Foods, Inc., which owned HTL, executed a written guaranty covering HTL's rental obligation. On 13 January 1987 HTL assigned the lease to defendants Henry R. Kuykendall, John

R. Kuykendall, and Louann Coulter to use the property as a restaurant and plaintiff continued its guaranty. Defendants failed to pay rent from May 1987 through July 1988. Chapman then instituted a summary ejectment proceeding against defendants pursuant to N.C. Gen. Stat. § 42-26 and on 2 May 1988 the magistrate ordered defendants removed from the premises and that Chapman be placed in possession.

Plaintiff, as guarantor, then brought a civil action in district court against defendants for the rent from May 1987 through July 1988 which plaintiff had paid to Chapman as provided by the guaranty. Plaintiff obtained a default judgment in the amount of $20,250 and a declaratory judgment that:

> defendants are hereby adjudged to be jointly and severally liable for any additional sums paid by the plaintiff to the landlord, John E. Chapman, Jr., for rental due upon the premises leased by the defendants, except this sum is to be reduced by any future rentals received by the plaintiff or John E. Chapman, Jr., from any new tenants of the leased premises.

On 30 July 1991 plaintiff brought this action for rent plaintiff paid to Chapman from August 1988 through July 1991. After a hearing, the trial court entered judgment for plaintiff in the amount of $31,500.00. From this judgment, defendants appeal.

I.

[1] Defendants first argue that summary ejectment terminates the lease and relieves the tenant of liability for future rent absent a contrary provision in the lease. We agree.

The summary ejectment statute, N.C. Gen. Stat. § 42-26, provides three separate remedies for the lessor: "(i) possession of the premises; (ii) an award of unpaid rent; and (iii) an award for the tenant's occupation of the premises after the cessation of the estate." *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 86, 398 S.E.2d 628, 632 (1990), *disc. rev. denied*, 328 N.C. 570, 403 S.E.2d 509 (1991). A breach of the lease, such as the failure to pay rent, cannot be the basis of summary ejectment unless the lease provides for termination by such breach or reserves a right of reentry for the breach. *Stanley v. Harvey*, 90 N.C. App. 535, 537, 369 S.E.2d 382, 384 (1988). "A successful summary ejectment action terminates a lease and a tenant's obligation to pay future rent. Consequently, if a landlord does not want this result,

he should file a suit for rent instead." Janice L. Mills, *North Carolina Landlord and Tenant Breaches and Remedies* § 6-1, at 107 (1991); *see also Nylen v. Park Doral Apartments*, 535 N.E.2d 178, 181 (Ind. App. 1989) ("It is a general rule that a tenant will be relieved of any obligation to pay further rent if the landlord deprives the tenant of possession and beneficial use and enjoyment of any part of the demised premises by an actual eviction."); *McArthur v. Rostek*, 483 P.2d 1351, 1352 (Colo. App. 1971) ("[T]ermination of the lease agreement or eviction of the tenant by the landlord relieves the tenant from all liabilities to accrue in the future, including rent, except where the parties, by express agreement, have contracted to the contrary."); 50 Am. Jur. 2d *Landlord and Tenant* § 1224 (1990) ("After the dispossession of a tenant in summary proceedings for nonpayment of rent, the lease is at an end, and his liability thereafter is for damages, and not for rent.").

After the lease is terminated, the former tenant is no longer liable for rent but rather for damages from his breach of contract. *United States Rubber Co. v. White Tire Co.*, 231 S.C. 84, 95, 97 S.E.2d 403, 407 (1956); *Schneiker v. Gordon*, 732 P.2d 603, 608 (Colo. 1987); 51C C.J.S. *Landlord and Tenant* § 250(2) (1968); *see Chrisalis*, 101 N.C. App. at 88, 398 S.E.2d at 633 (holding that damages for future rents could be ascertained at the summary ejectment proceeding). The measure of damages is the amount of rent the lessor would have received in rent for the remainder of the term, less the amount received from the new tenant. *White Tire*, 231 S.C. at 95, 97 S.E.2d at 409; *see Isbey v. Crews*, 55 N.C. App. 47, 284 S.E.2d 534 (1981). The lessor has a duty to mitigate his damages. *Isbey*, 55 N.C. App. at 51, 284 S.E.2d at 538 (1981); *Weinstein v. Griffin*, 241 N.C. 161, 84 S.E.2d 549 (1954).

In the instant case the lease contained a default provision which provided in pertinent part:

> If Tenant shall continue in default in the payment of any rental or other sum of money becoming due hereunder for a period of fifteen (15) days after notice of such default has been given to Tenant . . . then in any such event Landlord shall have the right and option to terminate this Lease and shall have the immediate right of reentry to remove all persons and property from the Demised Premises and dispose of or store such property as it sees fit, all without resort to legal process and

without being deemed guilty of trespass, and without prejudice to other remedies available to Landlord at law.

The trial court made the following conclusion of law:

5. The summary ejectment proceedings before the Magistrate were for the recovery of possession of the leased premises only, and no claim was made for past-due rent. The judgment of the Magistrate giving possession of the leased premises to the landlord did not have the effect of terminating the Defendants' obligations under the lease and did not relieve the Defendants of any further obligations.

Since this lease does not contain a provision expressly holding the tenant liable for future rents after ejectment, the lease was terminated when defendants were removed and Chapman was placed in possession pursuant to the summary ejectment proceeding. *See Stanley*, 90 N.C. App. at 537, 369 S.E.2d at 384; *McArthur*, 483 P.2d at 1352. Thus defendants' obligation to pay future rent was also terminated and the trial court erred by concluding to the contrary. *See Mills*, § 6-1 at 107.

II.

[2] Defendants next argue that the district court's judgment operates as a bar to this action under the doctrine of *res judicata*. Plaintiff counters that the district court's judgment adjudicated the defendants' liability regarding future rents and that the instant case determined the amount of that liability. We agree with defendants.

The doctrine of *res judicata* provides that a final judgment on the merits in a prior action precludes a second suit based on the same cause of action between the same parties or those in privity with them. *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993); *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986). *Res judicata* not only bars the relitigation of matters determined in the prior proceeding but also " 'all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence could and should have brought forward.' " *Ballance v. Dunn*, 96 N.C. App. 286, 290, 385 S.E.2d 522, 524 (1989) (quoting *Bruton v. Carolina Power & Light Co.*, 217 N.C. 1, 7, 6 S.E.2d 822, 826 (1940)); *McInnis*, 318 N.C. at 428, 349 S.E.2d at 556. All of a party's damages resulting from a single wrong must be recovered in a single action. *North-*

western Financial Group, Inc. v. County of Gaston, 110 N.C. App. 531, 538, 430 S.E.2d 689, 694, *disc. rev. denied*, 334 N.C. 621, 435 S.E.2d 337 (1993); *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161; *Chrisalis*, 101 N.C. App. at 88, 398 S.E.2d at 633. The purpose of the doctrine of *res judicata* is to protect litigants from the burden of relitigating previously decided matters and to promote judicial economy by preventing unnecessary litigation. *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161.

In the instant case, all of plaintiff's damages resulted from defendants' breach of the lease agreement between the parties. We have already determined that the ejectment of defendants terminated the lease and that plaintiff's resulting claim was for damages for breach of contract, not future rent. In the action before the district court, since defendants had already been ejected, plaintiff's damages for the breach of contract could have easily been ascertained. Plaintiff, therefore, could have raised the issue of its damages for defendants' breach of the lease. *See Chrisalis*, 101 N.C. App. at 88, 398 S.E.2d at 633. The doctrine of *res judicata* applies to issues which could have been raised in the prior action but were not. *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 306 S.E.2d 513 (1983). *See Chrisalis*, 101 N.C. App. at 88, 398 S.E.2d at 633 ("Absent evidence raising an issue of mitigation of damages, plaintiff's damages for future rents could have been determined at the time of the summary ejectment proceeding.") Therefore, under the doctrine of *res judicata*, plaintiff's claims in the present action merged into the district court's judgment and plaintiff is barred from subsequently raising the claims. *Chrisalis*, 101 N.C. App. at 88, 398 S.E.2d at 633.

Based upon our disposition of this case, we need not address defendants' remaining assignment of error. For the foregoing reasons, the judgment of the trial court is

Reversed.

Judge COZORT concurs.

Judge GREENE concurs in the result in a separate opinion.

Judge GREENE concurring in the result.

I agree with the majority that the eviction of the tenant terminated the lease and that the tenant is therefore no longer liable

for rent accruing after the eviction. Robert S. Schoshinski, *American Law of Landlord and Tenant* § 6.1, at 382 (1980) (liability for rent ceases upon termination of lease). The lease at issue specifically provided that the landlord had the right to terminate and, upon termination, to reenter. I do not agree that an evicted tenant is, nonetheless, liable for damages in the amount of "the rent for the remainder of the term, less the amount received from the new tenant." In the absence of a residual liability or indemnity clause in the lease agreement, *American Law of Landlord and Tenant* § 6.1, at 383-84, which this lease does not contain, the tenant is not liable for any rent or damages after the cessation of the estate. 11 Samuel Williston, *A Treatise on the Law of Contracts* § 1403 (Walter H.E. Jaeger ed., 3d ed. 1968) (eviction of tenant precludes recovery for damages for loss of lease); *see Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 86, 398 S.E.2d 628, 632 (1990) (evicted tenant responsible for unpaid rent due at time of actual eviction plus damages for occupation of premises after cessation of lease estate), *disc. rev. denied*, 328 N.C. 570, 403 S.E.2d 509 (1991).

Thus the landlord was not entitled to any damages after 2 May 1988, the date of the eviction, and the judgment of the trial court must be reversed. I would not therefore reach the *res judicata* issue raised by the tenant and addressed by the majority.

WILLIAM A. WESTON, JR., PLAINTIFF v. CHRISTOPHER C. DANIELS AND DANIELS ALIGNMENT, INC., DEFENDANTS

No. 9210SC653

(Filed 19 April 1994)

1. Automobiles and Other Vehicles § 466 (NCI4th)— auto accident—fog—sudden emergency—not applicable

The trial court erred by instructing on sudden emergency in an automobile accident case where defendant ran through an intersection in fog, crashed through an embankment into a tree, and plaintiff, who was riding with defendant, was injured. It is apparent that there was fog in the area the entire time that defendant was driving that morning; the fact that patchy fog continued to create a problem and obscured defend-

ant's clear view of the intersection was neither sudden nor an emergency. Defendant could easily have anticipated that the threat of hazardous fog conditions would continue in light of the previous four miles of foggy conditions; he was aware of the upcoming stop and did not brake until he actually saw the sign.

Am Jur 2d, Automobiles and Highway Traffic § 421.

2. **Evidence and Witnesses § 3068 (NCI4th)— automobile accident—cross-examination of plaintiff—previous lawsuit—cheating in fishing tournament**

The trial court abused its discretion in an automobile accident case by allowing plaintiff to be questioned regarding a lawsuit in which plaintiff participated in 1979 regarding an incident which occurred in 1977. Plaintiff's testimony denying cheating in a fishing tournament (apparently the subject of the suit) clearly denied specific conduct, but the defense recalled plaintiff for the express purpose of further questioning regarding this conduct, read from the complaint, depositions, and court rulings, and asked over sixty questions referencing the action. These inquiries related to an extremely remote event, were minimally probative compared to their prejudicial effect, and reflected the harassment and needless consumption of time which N.C.G.S. § 8C-1, Rule 611(a) prohibits. N.C.G.S. § 8C-1, Rules 608(b) and 403.

Am Jur 2d, Witnesses §§ 901-904, 968, 969.

Appeal by plaintiff from order entered 8 November 1991 by Judge Dexter V. Brooks in Wake County Superior Court. Heard in the Court of Appeals 24 May 1993.

This case arises out of a civil action filed in Wake County on 18 June 1990. The plaintiff, William Weston, instituted suit against the defendant, Christopher Daniels, alleging that he was negligent in the operation of a vehicle in which the plaintiff was a passenger. The defendant denied any negligence and raised several affirmative defenses, including the doctrine of sudden emergency.

Trial began on 9 September 1991. At the close of all the evidence, plaintiff moved for directed verdict on the defense of sudden emergency. The motion was denied by the court, and the jury was given an instruction on sudden emergency. After deliberation,

the jury returned a verdict in favor of the defendant. The plaintiff moved for judgment notwithstanding the verdict and alternatively, a new trial. Both motions were denied. Plaintiff appeals from the entry of judgment finding no negligence.

Crisp, Davis, Schwentker, Page, Currin & Nichols, by Cynthia M. Currin and Elizabeth T. Dierdorf, for plaintiff-appellant.

Broughton, Wilkins, Webb & Jernigan, by Charles P. Wilkins and Roy J. Baroff; and Petree, Stockton & Robinson, by M. Gray Styers, for defendant-appellees.

ORR, Judge.

[1] The plaintiff appeals from the jury verdict and raises six assignments of error. Four of those issues involve the trial court's denials of a directed verdict, judgment notwithstanding the verdict, and motion for a new trial. The gravamen of these arguments is that there was insufficient evidence of a sudden emergency to warrant application of the doctrine for the jury's consideration. Plaintiff argues that the fog that appeared in the intersection just prior to the accident was neither sudden nor did it create an emergency previously unknown to the defendant. We agree and accordingly reverse the verdict in favor of the defendants and remand for a new trial.

The doctrine of sudden emergency applies when a defendant is confronted by an emergency situation not of his own making and requires defendant only to act as a reasonable person would react to similar emergency circumstances. *Massengill v. Starling*, 87 N.C. App. 233, 360 S.E.2d 512 (1987). The defendant is not to be held liable for failure to act as a calm, detached reflection as a later date would dictate. *Id.* at 236, 360 S.E.2d at 514.

> An "emergency situation" has been defined by our courts as that which "compels [defendant] to act instantly to avoid a collision or injury . . . ." For the doctrine to apply, the jury must first find that "in fact a sudden emergency did exist" and second, that "the emergency was in fact not brought on by the negligence of the defendant."

Keith v. Polier, 109 N.C. App. 94, 98-99, 425 S.E.2d 723, 726 (1993) (citations omitted).

However, the doctrine of sudden emergency is not available to a defendant if the defendant's own negligence or wrongful act caused the emergency in whole or in material part. *Moreau v. Hill*, 111 N.C. App. 679, 433 S.E.2d 10 (1993), quoting *Gupton by Gupton v. McCombs*, 74 N.C. App. 547, 328 S.E.2d 886, *disc. review denied*, 314 N.C. 329, 333 S.E.2d 486 (1985).

In the case *sub judice*, the evidence presented at trial tended to show that during the early morning of 15 September 1987, the plaintiff and defendant were traveling through rural Wake County en route to a fishing trip at Kerr Lake. The Chevrolet Suburban driven by defendant was towing a boat and trailer. At the time that defendant picked up plaintiff at approximately 5:00 a.m., there was dense fog throughout the area. The plaintiff and defendant traveled down Highway 70 onto Jones Sausage Road. The fog continued and was variously described at trial by plaintiff and defendant as "thick", "intermittent", "real soupy", and "patchy" prior to the accident. Both men also testified that the roads were wet that morning. The State Highway Patrol officer who investigated the accident testified that, "It was pretty much foggy everywhere in that area. It was foggy back down Jones Sausage; and it was foggy on Rock Quarry, both directions."

The parties continued down Jones Sausage Road toward a "T" intersection with Rock Quarry Road, which had a downhill grade. The defendant picked up speed as he approached the intersection. Defendant testified that he traveled the road often, that he was aware of the upcoming intersection, and was also aware that there was a stop sign at the intersection. Even so, the fog thickened as the parties approached, and the defendant did not stop at the stop sign. The automobile crashed into the woods through an embankment on the opposite side of the intersection, finally stopping when it struck a tree. The boat then left the trailer and rammed into the Suburban, causing a second impact. The accident occurred at 5:15 a.m., only four miles from the tackle shop where the defendant had earlier picked up the plaintiff.

From the above evidence, it is apparent that there was fog in the area the entire time that the defendant was driving the automobile that morning. The fact that patchy fog continued to create a problem in driving conditions, and that fog obscured the defendant's clear view of the intersection was neither sudden nor an emergency situation. "As a general rule, every motorist driving

upon the highways of this state is bound to a minimal duty of care to keep a reasonable and proper lookout in the direction of travel and see what he ought to see." *Keith* at 99, 425 S.E.2d at 726, quoting *Lawson v. Walker*, 22 N.C. App. 295, 297, 206 S.E.2d 325, 327 (1974). "Within this duty is a requirement that the motorist drive and anticipate dangers in a manner consistent with the circumstances . . . ." *Id.*

Under the facts of this case, the defendant could easily anticipate that the threat of hazardous fog conditions would continue in light of the previous four miles of foggy conditions. The defendant was not entitled to instructions on the defense of sudden emergency where there was no evidence presented of any road condition or highway exigency that had not existed since the beginning of the trip. The evidence presented at best showed that at the bottom of the hill there were more of the same foggy conditions of which the defendant was already aware. The defendant was aware of the upcoming stop and did not brake until he actually saw the sign. We find that the trial court's instruction on the doctrine of sudden emergency constituted prejudicial error and accordingly, that the plaintiff is entitled to a new trial on this basis.

[2] In his second assignment of error, the plaintiff argues that the trial court abused its discretion in allowing the defendant to challenge the plaintiff's credibility by questioning him regarding a lawsuit in which the plaintiff participated in 1979. We agree. The 1979 action arose out of an incident occurring in 1977.

N.C. Gen. Stat. § 8C-1, Rule 608(b) provides in pertinent part:

> *Specific incidents of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, ...

The rule "is supplemented by more general rules requiring that 'probative value not be outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury', and barring 'harassment and undue embarrassment' of the witness." K. Broun, *Brandis and Broun on North Carolina Evidence* § 97, 4th Ed. (1993).

In the case at bar, we find that the questioning of the plaintiff was improper under the Rules. Assuming without deciding that the plaintiff was under continuing cross-examination by the defendant when he was recalled, and therefore within the scope of Rule 608(b), the transcript reveals that the plaintiff had already testified as to the prior conduct and had denied any wrongdoing. During the defendant's first day of cross-examination of the plaintiff, the following exchange took place:

> Q. Have you ever had any problems or disciplinary actions by [Bass Anglers Sportsman's Society]?
>
> A. I haven't had any disciplinary problems with them, no.
>
> Q. Have you ever had any problems with that society based on a fishing tournament up at Kerr Lake?
>
> (Plaintiff's counsel objects, objection overruled)
>
> Q. Mr. Weston, have you ever been disciplined by the B. A. S. S. for cheating in a fishing tournament?
>
> A. No, sir.
>
> Q. Never in your life?
>
> A. No, sir.

These responses are clearly denials of specific conduct by the plaintiff. Nonetheless, the defense recalled the plaintiff for the express purpose of further questioning regarding the conduct of the plaintiff. During defense questioning, counsel read from the civil complaint, depositions, and rulings of the trial court.

While

> [e]ffective cross-examination demands that some allowance be made for going into matters of this kind . . . safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that the probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

Rule 608, Advisory Committee Notes.

In the case at bar, counsel for the defendant asked over sixty questions referencing the action arising out of events occurring some twelve to fourteen years earlier. These inquiries related to an extremely remote event, they were minimally probative when compared to their prejudicial effect, and were therefore proscribed by Rule 403. Further, the continued repetitive questioning regarding the B. A. S. S. tournament reflects the harassment and "needless consumption of time" that Rule 611(a) prohibits.

Under the facts of this case, we find that the trial court abused his discretion in allowing the continuing examination of the plaintiff by the defense counsel regarding the allegations and subsequent suit. In any future trial on the merits of this case, such questioning, if any, should be limited by the trial court.

New trial.

Chief Judge ARNOLD and Judge MARTIN concur.

WALTER COLE, ALFREDA COLE LEE, LEONDAS COLE, VIRGINIA COLE BEMBURY, HERCULES COLE, PLAINTIFFS v. CLEVELAND HUGHES, RICHARD JOHNSON, JAMES L. WEEKS, WILLIAM L. SHARPE, JR., AND HERCULES COLE, SR., DEFENDANTS

No. 931SC191

(Filed 19 April 1994)

1. **Courts § 20 (NCI4th) — Virginia lottery ticket — North Carolina residents — ticket in Virginia — in rem jurisdiction**

The trial court erred by entering an order declaring that plaintiffs are the owners of a Virginia lottery ticket when the ticket was in Virginia when the suit and counterclaim were filed. *In rem* jurisdiction may not be invoked over property located outside North Carolina; the North Carolina courts do not have the jurisdiction to assert, nor the power to enforce, a decision that some North Carolina party owns a ticket which had been presented to lottery authorities in Virginia and which remains there.

Am Jur 2d, Courts §§ 119, 120.

2. Joint Ventures § 1 (NCI4th)— purchase of Virginia lottery ticket—illegal—against public policy

The trial court did not err by determining that a joint venture was illegal and dismissing a counterclaim to enforce the venture where the parties entered an agreement to purchase Virginia lottery tickets and purchased such tickets over a period of time. Under any statement of facts, it is indisputable that the agreement is void as against public policy and in violation of N.C.G.S. § 16-1.

Am Jur 2d, Joint Ventures § 7.

Appeal by defendants from orders entered 8 December 1992 by Judge Steven D. Michael in Pasquotank County Superior Court. Heard in the Court of Appeals 5 January 1994.

Happy, Mulkey & Warley, L.C., by J. Nelson Happy, for plaintiffs-appellees (Brief filed by Frank W. Ballance Jr. & Associates, P.A., by Frank W. Ballance Jr., and John H. Harmon, who were permitted to withdraw as counsel of record).

Clark & Stant, P.C., by Stephen C. Swain, and C. Everett Thompson, II, for defendants-appellants Cleveland Hughes, Richard Johnson, James L. Weeks, and William L. Sharpe, Jr.

LEWIS, Judge.

On 30 September 1992 plaintiffs filed an action in Pasquotank County Superior Court seeking a declaratory judgment that they are the sole owners of a winning Virginia lottery ticket and its proceeds. Defendants filed an answer and counterclaim contending that the ticket is the property of a joint venture of which both plaintiffs and defendants were members. The trial court granted plaintiffs' motion for a judgment on the pleadings and declared plaintiffs to be the sole owners of the ticket. The court also dismissed defendants' counterclaim on the basis that the joint venture was illegal and against North Carolina public policy. Defendants now appeal, alleging, among other things, that the trial court lacked subject matter jurisdiction over the Virginia lottery ticket and its proceeds, and that the trial court erred in determining the joint venture to be illegal.

In late 1989 defendants Johnson, Weeks, and Hughes, plaintiff Walter Cole, and several others who are not parties to this lawsuit,

formed a joint venture for the purpose of pooling their money to purchase Virginia Lotto tickets. Membership in the group changed over time, and, at the time of the incident in question, included the parties to this lawsuit. Members of the venture periodically agreed upon the numbers to be chosen for their Lotto tickets. Various people were designated to buy the tickets over the years with the understanding that any money won would be divided among the members. On 9 September 1992, plaintiff Walter Cole purchased six tickets on behalf of the venture. According to Cole, he also purchased an additional ticket for himself, using a number which had previously been agreed upon and used by the venture. On 12 September 1992 the Virginia Lottery Department drew the numbers Cole had played on the additional ticket, thereby entitling the owner of the ticket to about $9,000,000. When members of the group contacted Cole, rejoicing in their good fortune at having one of their numbers chosen, Cole informed them that he would be keeping the money for himself and his children. Before Cole could claim the proceeds, however, defendants filed a Bill of Complaint seeking injunctive relief in a Virginia court. That court entered a preliminary injunction and ordered the Virginia Lottery Department to retain the lottery ticket and its proceeds pending a determination of "jurisdiction, venue, and other matters."

I.

[1] The threshold issue is whether the trial court had subject matter jurisdiction to adjudicate ownership of the Virginia lottery ticket and to determine the validity of the joint venture. Defendants characterize this case as an in rem proceeding regarding the lottery ticket, and argue that the North Carolina trial court lacked in rem jurisdiction because the ticket itself was located in Virginia at the time the suit and counterclaim were filed. Plaintiffs, on the other hand, characterize this case as a declaratory judgment proceeding to determine the validity of, and the rights of the parties under, an alleged lottery-sharing agreement or venture. According to plaintiffs, the court did not attempt to exercise in rem jurisdiction over the lottery ticket. We agree with defendants that the trial court attempted to exercise in rem jurisdiction in adjudicating title to the Virginia lottery ticket.

> In rem jurisdiction encompasses any action to
>
> determine title to or to affect interests in specific property located within territory over which [the] court has jurisdic-

> tion[,] . . . [and also encompasses] [a]ctions in which the court is required to have control of the thing or object and in which an adjudication is made as to the object which binds the whole world and not simply the interests of the parties to the proceeding.

Black's Law Dictionary 793 (6th ed. 1990) (citations omitted). In North Carolina, a court is authorized to exercise in rem jurisdiction "[w]hen the subject matter of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein." N.C.G.S. § 1-75.8(1) (1983). In rem jurisdiction may not be invoked over property located outside this State. *See, e.g., Kirstein v. Kirstein*, 64 N.C. App. 191, 306 S.E.2d 552 (1983) (real property); *Lessard v. Lessard*, 68 N.C. App. 760, 316 S.E.2d 96 (1984) (stating that court had in rem jurisdiction because the personal property, the estate of the defendant's deceased daughter, was located in North Carolina and the relief demanded was the exclusion of the defendant from the estate); *Koob v. Koob*, 283 N.C. 129, 195 S.E.2d 552 (1973) (stating that a court may exercise in rem jurisdiction over personal property which is in the legal custody of the court).

Plaintiffs contend in their brief that their primary objective in filing this lawsuit was not to obtain a declaration of ownership of the ticket, but to obtain a declaration that the joint venture was unenforceable. Regardless of their primary objective, it is clear that at least part of plaintiffs' requested relief was a determination of ownership so as to exclude defendants from any interest in the lottery ticket. The ticket may or may not have been taken to North Carolina. The only question for us is where the ticket was located when plaintiffs sought to put the matter before the Superior Court of Pasquotank County, North Carolina. It is undisputed that it had been presented to the lottery authorities in Virginia, and that it is there now. Should we proclaim that some North Carolina party owns the ticket and all or part of the proceeds and the Virginia court disagrees, we would have done a vain thing. We do not have the jurisdiction to assert, or the power to enforce, such a decision in Virginia.

We note that the trial court entered two separate orders. In the first, the court declared that plaintiffs "are the sole and individual owners of Virginia lottery ticket 03-07-08-15-27-42 . . .

and all proceeds arising from the ownership of said ticket . . . ." In the second, the court dismissed defendants' counterclaim, which sought to establish a claim to the proceeds under the joint venture, on the basis that the venture was illegal and against the public policy of North Carolina.

The first order adjudicated title to an item of personal property located in Virginia. In determining title to the ticket, the court attempted to exercise in rem jurisdiction over it. We find that this order is invalid, because the ticket was in Virginia, and the court could not exercise in rem jurisdiction over personal property located outside this state. That order must be vacated. The second order adjudicated the rights of the parties under the alleged joint venture agreement. It is clear that the court had jurisdiction as to this issue: all parties to the agreement are North Carolina residents, and they entered into the venture in North Carolina.

II.

[2] Defendants second contention on appeal is that the trial court erred in determining their joint venture to be illegal. We disagree. North Carolina public policy is against gambling and lotteries. *See, e.g., State v. McCleary*, 65 N.C. App. 174, 308 S.E.2d 883 (1983) (discussing North Carolina's public policy against gambling), *aff'd per curiam*, 311 N.C. 397, 316 S.E.2d 870 (1984). Several North Carolina statutes specifically render certain forms of gambling illegal. *See* N.C.G.S. §§ 14-290 (dealing in lotteries a misdemeanor, and mere possession of lottery ticket prima facie evidence of a violation of this section), -291.1 (selling or bartering lottery tickets "to be drawn or paid within or without the State" a misdemeanor, and possession of lottery ticket prima facie evidence of a violation of this section), -292 (operating or playing a game of chance a misdemeanor), -299 (money or property exhibited to allure persons to bet on any game is subject to seizure by court) (1993); N.C.G.S. § 16-1 (1983). We find that N.C.G.S. § 16-1 is applicable to the case at hand. That section provides:

> All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful; and all contracts, judgments, conveyances and assurances for and on account of any money or property, or thing in action, so wagered, bet or staked, or to repay, or to secure any money, or property or thing in action, lent or

advanced for the purpose of such wagering, betting, or staking as aforesaid, shall be void.

The parties to the case at hand paid money and entered into an agreement, the outcome of which was dependent upon the Virginia Lotto, a contingent event, a chance, a lot, however "high tech." We believe that the trial court properly dismissed defendants' counterclaim, because it sought to enforce a contract or joint venture which is illegal and against the public policy of North Carolina.

III.

In their final argument to this court, defendants contend that the trial court erred in granting plaintiffs' motions for a judgment on the pleadings and to dismiss. Because the motion for a judgment on the pleadings related to the in rem portion of the trial court's proceedings, we will not address it further. A claim should be dismissed only if it appears that the pleader is entitled to no relief under any statement of the facts which could be proven. *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 401 S.E.2d 133 (1991). A dismissal is warranted if there is insufficient law to support the claim, if there are insufficient facts to support the claim, or if the disclosure of some fact will necessarily defeat the claim. *Id.*

We find the trial court properly granted plaintiffs' motion to dismiss the counterclaim. Taking the allegations to be true, defendants' counterclaim reveals that the parties entered into an agreement to purchase lottery tickets and purchased such tickets over a period of time. Under any statement of the facts, it is indisputable that the agreement is void as against North Carolina public policy and in violation of N.C.G.S. § 16-1. The agreement is unenforceable in North Carolina.

In conclusion, we find that the North Carolina courts may not exercise in rem jurisdiction over an item of personal property located in another state, nor may our courts enforce an agreement which is illegal and in violation of our public policy. We recognize that our disposition of this case leaves resolution of the issue of ownership of the lottery ticket and entitlement to its proceeds to the Virginia authorities.

Vacated in part and affirmed in part.

Judges ORR and JOHN concur.

GE CAPITAL MORTGAGE SERVICES, INC., A NEW JERSEY CORPORATION, PLAINTIFF-APPELLANT v. TYRON E. AVENT, BRANCH BANKING & TRUST COMPANY OF NORTH CAROLINA, AND HERBERT HENDERSON, JR. AND WIFE, DEBORAH L. HENDERSON, DEFENDANTS-APPELLEES

No. 937SC233

(Filed 19 April 1994)

Vendor and Purchaser § 9 (NCI3d)— real estate closing—escrow funds—misappropriation of funds—burden of loss

The trial court correctly granted summary judgment for defendants in an action to determine the burden of loss where plaintiff sold a lot and house to the Hendersons, financing was arranged through BB&T, the net proceeds of the sale were placed in escrow at the closing because a cancelled deed of trust had not been received by the attorney, Avent, the cancelled deed of trust was subsequently obtained, it was determined that Avent had misappropriated the funds, Avent executed a confession of judgment which was apparently uncollectible, and plaintiff brought this action to determine whether the seller, the buyers, or the lender should bear the loss. The purpose of the escrow was to insure that the funds were available to obtain cancellation of the deed of trust if plaintiff (the seller) failed to do so; or, if the deed of trust was otherwise released and cancelled by plaintiff, the funds were to be paid to plaintiff. In either situation, the funds were held by Avent for the benefit of plaintiff; in no event were the funds to be returned to the Hendersons. Thus, plaintiff must bear the loss resulting from Avent's embezzlement of the escrow funds.

Am Jur 2d, Vendor and Purchaser §§ 366, 367.

Appeal by plaintiff from judgment entered 10 December 1992 by Judge Thomas S. Watts in Nash County Superior Court. Heard in the Court of Appeals 9 December 1993.

Womble Carlyle Sandridge & Rice, by Elizabeth L. Riley and Susan S. McFarlane, for plaintiff-appellant.

Ward and Smith, P.A., by John M. Martin, Timothy C. Barber and Andrew H. D. Wilson, for defendant-appellee Branch Banking & Trust Company.

William W. Aycock, Jr., for defendant-appellees Herbert Henderson, Jr., and Deborah L. Henderson.

MARTIN, Judge.

Plaintiff appeals from the entry of summary judgment in favor of defendants Branch Banking and Trust Company of North Carolina (BB&T) and Herbert Henderson, Jr., and wife Deborah L. Henderson (the Hendersons). The facts giving rise to this action are not in dispute. Plaintiff performs relocation services for corporate employees. As part of its services, plaintiff pays relocating employees a sum equal to their home equity and satisfies any outstanding mortgage liens against their property. In exchange for these payments, plaintiff receives the right to market and sell the employee's home and receive the proceeds therefrom.

On 2 October 1990, plaintiff contracted with Mr. and Mrs. David Selheim to purchase the Selheims' Rocky Mount residence for the sum of $147,950.00. Pursuant to this agreement, plaintiff paid the Selheims $80,071.99, an amount equal to their equity in the property, and was obligated to satisfy the balance due on the Selheims' mortgage, which was held by Nancy Selheim, who was David Selheim's mother. Plaintiff was entitled to receive the proceeds from the eventual sale of the property. On 6 October 1990, plaintiff paid the balance due on the Selheims' mortgage to Nancy Selheim. However, plaintiff did not have the Selheim deed of trust cancelled of record.

On 19 October 1990, the Hendersons agreed to purchase the property from plaintiff for the sum of $147,500.00. The Hendersons obtained financing for the purchase from BB&T and retained Tyron E. Avent as their closing attorney. BB&T forwarded to Avent its Uniform Specific Closing Instructions. These instructions provided that Avent was not to disburse the loan proceeds until he was in a position to obtain from the title insurance company a policy insuring BB&T a first mortgage lien.

The closing of the sale occurred on 28 November 1990. On that date, plaintiff delivered a deed to the property to the Hendersons, which was duly recorded on the same date. However, because the Selheim deed of trust had not been cancelled of record, the net proceeds of the sale, $136,723.74, were placed in escrow, with Avent acting as the escrow agent, until plaintiff could produce the cancelled Selheim deed of trust.

On 18 January 1991, plaintiff notified Avent that the outstanding deed of trust had been cancelled and requested, pursuant to

the escrow agreement, that Avent wire to plaintiff the funds which he held in escrow, but Avent failed to do so. After repeated unsuccessful attempts to obtain the funds, it was determined that on or about 28 December 1990, Avent had misappropriated the funds. On 18 October 1991, Avent was disbarred and surrendered his license to practice law in the State of North Carolina. On 15 June 1992, Avent executed a Confession of Judgment in favor of plaintiff in the amount of $136,723.74.

The present action came for hearing on 7 December 1992 upon motions by plaintiff and by defendants Henderson and BB&T for summary judgment. The court granted summary judgment in favor of defendants. Plaintiff appealed.

The parties agree that the loss at issue resulted from the illegal act of former attorney Avent and that he is the party who should bear ultimate responsibility for the repayment thereof. However, because the judgment against Avent is apparently uncollectible, the question with which we are presented is whether plaintiff, as seller, the Hendersons, as buyers, or BB&T, as lender, should bear the loss occasioned by Avent's embezzlement of the escrow funds.

Although this is an issue of first impression in this jurisdiction, the parties agree that generally when property in the custody of an escrow holder is lost or embezzled by the holder, as between the buyer and the seller, the loss falls on the party who was entitled to the property at the time of the loss or embezzlement. This rule is followed in numerous other jurisdictions. *Ward Cook, Inc. v. Davenport*, 243 Or. 301, 413 P.2d 387 (1966); *Schmidt v. Fitzsimmons*, 190 Or. 415, 226 P.2d 304 (1951); *Foster v. Elswick*, 176 Ark. 974, 4 S.W.2d 946 (1928); *Crum v. City of Los Angeles*, 110 Cal. App. 508, 294 P. 430 (1930); *Angell v. Ingram*, 35 Wash.2d 582, 213 P.2d 944 (1950); *Zaremba v. Konopka*, 94 N.J.Super. 300, 228 A.2d 91 (1967); *Asher v. Herman*, 49 Misc.2d 475, 267 N.Y.S.2d 932 (1966); *Van Dyke v. Lauer*, 9 Wis.2d 141, 100 N.W.2d 335 (1960); *see generally*, 15 A.L.R. 2d 870, 871; 28 Am Jur. 2d *Escrow* § 20 (1966).

Ordinarily, the determination as to which party is entitled to the escrow property depends upon whether the conditions of the escrow were satisfied prior to the loss or embezzlement. *Crum v. Los Angeles*, 110 Cal. App. 508, 294 P. 430. For example, if the escrow agent embezzles the purchase price prior to the seller's performance of the escrow condition, the buyer has retained title

to the money and must therefore bear the loss. *Id.* Conversely, if the embezzlement occurs after the seller has performed the escrow condition, then the seller must bear the loss because he was entitled to it at the time of the embezzlement. *Id.; see also, Cradock v. Cooper*, 123 So.2d 256 (Fla.App. 1960).

There is an exception, however, to this general rule; where the buyer would under no circumstance be entitled to return of the escrow funds, the burden of loss is upon the seller whether the embezzlement occurs before or after the performance of the escrow condition. *Cradock, supra.* In *Cradock*, the defendant contracted to purchase property from the plaintiff and the transaction was closed as scheduled. However, the IRS had a claim against the seller which the defendant's attorney contended was a lien against the property. The parties therefore agreed to escrow a portion of the purchase price with the defendant's attorney acting as the escrow agent. The escrow funds were to go to the seller if the IRS claim was satisfied; and, if not, it would go first to satisfy the claim with the remainder to the seller. The IRS claim was eventually settled but the defendant's attorney had by then misappropriated the funds and the seller filed suit to establish a lien against the buyer's property for the misappropriated portion of the purchase price.

The court held that the loss should be borne by the seller because the escrow funds were to be paid either to satisfy the IRS claim, or to the sellers if the claim was otherwise satisfied. The buyer retained no title to the funds because he was not entitled, under any circumstance, to have the funds repaid to him. Thus, the court placed the burden of the loss on the seller. *See also, Paul v. Kennedy*, 376 Pa. 312, 102 A.2d 158 (1954); *Lipman v. Noblit*, 194 Pa. 416, 45 A. 377 (1900).

This exception to the general rule was also recognized in *Stuart v. Clarke*, 619 A.2d 1199 (D.C.App. 1993), a case that bears a strong factual resemblance to the present case. In *Stuart*, the plaintiff contracted to sell a parcel of real property to the defendant. At the time of the contract, the seller was aware that there was an unreleased deed of trust on the property. Prior to closing, the seller was advised that he could not convey clear title to the property without first obtaining a release of the deed of trust. Despite this knowledge, the seller took no action to obtain a release of the deed of trust prior to the date of closing. Conversely, the

buyers came to the closing prepared to meet their contractual obligations and pay for the property. Due to the seller's inability to convey good title, the parties agreed to escrow a portion of the purchase price until the seller obtained a release of the deed of trust. *However, the deed to the property was delivered to the buyers at the closing.* The escrow agent thereafter absconded with the escrow funds.

In arriving at its decision to place the loss on the seller, the court recognized the rule which places the loss on the party entitled to receive the funds at the time of their loss. The court then said:

> [T]his case is distinguishable from other, more typical escrow situations because the title to the property has passed to the buyer, and thus the proceeds of the sale—including the amount retained in escrow—have passed to the seller, subject to his performance of a condition subsequent entitling him to release of the escrowed funds. The buyers cannot logically be the owners of both the purchased property and the portion of the money in escrow.

Stuart v. Clarke, 619 A.2d at 1200.

Like the buyers in *Stuart*, the Hendersons came to the scheduled closing prepared to fulfill all of their obligations under their contract for the purchase the Selheim property. Plaintiff, however, came to the closing knowing that it had not obtained cancellation of the outstanding Selheim deed of trust and that it was unable to convey to the Hendersons the marketable title for which they had bargained. Despite plaintiff's failure to meet its contractual obligations, the Hendersons agreed to proceed with the closing and to the deposit of the net proceeds of the sale due plaintiff in Avent's trust account pending cancellation of the Selheim deed of trust. In return, plaintiff delivered the deed to the property to the Hendersons which they promptly recorded.

Clearly, the purpose of the escrow was to insure that the funds were available to obtain cancellation of the Selheim deed of trust if plaintiff failed to do so; or, if the Selheim deed of trust was otherwise released and cancelled by plaintiff, the funds were to be paid to plaintiff. In either situation, the funds were held by Avent for the benefit of plaintiff; in no event were the funds to be returned to the Hendersons. Having obtained title to the

property, the Hendersons no longer held title to the funds in escrow. Thus, under *Cradock* and *Stuart*, plaintiff must bear the loss resulting from Avent's embezzlement of the escrow funds.

Our holding is consistent with the equitable principle that " 'where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss.' " *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 30, 209 S.E.2d 795, 799 (1974). While it is true that Avent was retained by the Hendersons, and consented to by BB&T, it was plaintiff who gave him the opportunity to abscond with the escrow funds by failing to meet its contractual obligations, thereby necessitating the escrow agreement as a means of closing the transaction as scheduled.

In conclusion, we hold that plaintiff was entitled to the funds held in escrow at the time of the embezzlement and that plaintiff must therefore bear the loss resulting therefrom. The trial court's entry of summary judgment in favor of defendants Henderson and BB&T is affirmed.

Affirmed.

Judges JOHNSON and McCRODDEN concur.

STATE OF NORTH CAROLINA v. JAMES A. O'ROURKE

No. 9310SC549

(Filed 19 April 1994)

1. Evidence and Witnesses § 1811 (NCI4th)— driving while impaired—refusal to submit to chemical analysis—admissible

The trial court did not err in a prosecution for driving while impaired by not granting defendant's motion *in limine* to exclude evidence of defendant's refusal to submit to a chemical analysis where DMV had rescinded defendant's license revocation after a hearing. Rescission of a revocation is provided on any one of five grounds, including that petitioner did not willfully refuse to submit to a chemical analysis, and the record does not reveal which of the five grounds DMV relied upon.

Even assuming that DMV found that defendant did not willfully refuse, the decision by DMV to rescind the revocation was independent of and inconsequential to defendant's criminal trial for DWI. N.C.G.S. § 20-16.2(d); N.C.G.S. § 20-139.1(f).

Am Jur 2d, Automobiles and Highway Traffic § 379.

Admissibility in criminal case of evidence that accused refused to take test of intoxication. 26 ALR4th 1112.

2. Judgments § 237 (NCI4th)— driving while impaired—refusal to submit to chemical analysis—DMV conclusion that refusal not willful—no collateral estoppel

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion *in limine* to exclude evidence relating to defendant's refusal to submit to a chemical analysis where DMV had concluded that defendant did not willfully refuse and defendant argued that the doctrine of collateral estoppel barred the State from introducing the refusal in his trial. The parties at issue are the Commissioner of Motor Vehicles, the district attorney, and the defendant; in addition to the separate interests involved, it is important to note that the district attorney had no role in the administrative proceeding and therefore was not fully protected in that proceeding. The requirement of privity cannot be satisfied and collateral estoppel does not apply.

Am Jur 2d, Judgments § 578.

3. Automobiles and Other Vehicles § 845 (NCI4th)— driving while impaired—evidence sufficient

The evidence was sufficient to support a conviction for driving while impaired, and the trial court did not err by denying defendant's motion to dismiss, where the evidence tended to show that defendant drank three glasses of wine over a period of approximately four hours at a retirement dinner and began driving toward Research Triangle Park; a Trooper observed defendant weave in his lane of travel five to seven times over a distance of one to three miles; the Trooper testified that he smelled a strong odor of alcohol about defendant's person and observed that defendant was unsteady on his feet when he got out of the car; when they arrived at the Public Safety Center, defendant wobbled but did not fall on the one-leg-stand test; did not walk heel-to-toe

as instructed; swayed slightly on the sway test; missed his nose on the finger-to-nose test; the Trooper was of the opinion that defendant was appreciably impaired; and the chemical analyst testified that he detected a moderate amount of alcohol about defendant's person and defendant's eyes were red, his face was flushed, and he was thick-tongued.

Am Jur 2d, Automobiles and Highway Traffic §§ 375-380.

4. Automobiles and Other Vehicles § 852 (NCI4th) — driving while impaired — submission on two theories — error

The trial court erred in a driving while impaired prosecution by instructing the jury that it could find defendant guilty on the theory that there was an appreciable impairment of defendant's bodily or mental faculties or that defendant had an alcohol concentration of .10 or more grams of alcohol per 210 liters of breath where there was no evidence whatever regarding defendant's blood alcohol level, as defendant had refused to submit to a chemical analysis, and the jury returned a general verdict of guilty without specifying the theories upon which it relied. Where the trial court instructs on alternative theories, one of which is not supported by the evidence, and it cannot be discerned from the record upon which theory the jury relied in arriving at its verdict, the error entitles the defendant to a new trial.

Am Jur 2d, Automobiles and Highway Traffic §§ 296-310.

Appeal by defendant from judgment suspending sentence entered 10 March 1993 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 1 March 1994.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Robert T. Hargett, Assistant Attorney General, for the State.

Bass, Bryant & Moore, by John Walter Bryant and John K. Fanney, for defendant.

LEWIS, Judge.

Defendant appeals from a conviction of driving while impaired ("DWI"). Defendant was arrested on 28 August 1992, and he refused to submit to a chemical analysis test known as a "breathalyzer".

On 10 September, defendant was notified that his North Carolina driving privilege would be revoked. Defendant then requested a revocation hearing before the Division of Motor Vehicles ("DMV"), pursuant to N.C.G.S. § 20-16.2(d) (1993). The hearing was held in December of 1992. After the hearing, DMV rescinded defendant's revocation. On 10 March 1993, defendant's jury trial on the DWI charge commenced in Wake County Superior Court. The jury returned a verdict of guilty, and the trial court entered judgment suspending sentence.

[1] Defendant's first argument on appeal is that the trial court erred in not granting his motion *in limine* to exclude evidence of his refusal to submit to a chemical analysis. Defendant argues that DMV concluded that he did not willfully refuse to submit and that the decision of DMV is binding on the trial court. We note that the only evidence of such a conclusion by DMV is defendant's testimony at trial. Section 20-16.2(d) provides for the rescission of a revocation on any one of five grounds, one of those being that the petitioner did not willfully refuse to submit to a chemical analysis. The record does not reveal which of the five grounds DMV relied on to rescind the revocation. However, even assuming that DMV found that defendant did not willfully refuse, the trial court did not err in admitting the State's evidence of defendant's refusal.

N.C.G.S. § 20-139.1(f) (1993) provides that evidence of a defendant's refusal to submit to a chemical analysis is admissible against him in a DWI prosecution. Defendant first argues that section 20-16.2 provides for the final determination of whether a person willfully refused to submit and that this determination by DMV precludes the State from offering evidence of a refusal at a subsequent criminal trial.

In *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971), the defendant was convicted of driving under the influence. The trial court revoked his driver's license for one year with limited driving privileges. Because the defendant had willfully refused to submit to a chemical analysis, DMV notified him that his driver's license would be revoked for sixty days. DMV's decision was sustained by a hearing officer and by the superior court. The defendant appealed the superior court's ruling, arguing that the revocation of his driver's license by the trial court in his criminal case constituted his "full penalty" and he was, thus, exempted from the

mandatory sixty-day revocation for willful refusal. In rejecting the defendant's argument, the Supreme Court held:

> 'It is well established that the same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other, and the outcome of one is of no consequence to the other.'

Id. at 238, 182 S.E.2d at 562 (quoting *Ziemba v. Johns*, 163 N.W.2d 780, 781 (Neb. 1968)).

We find the Court's reasoning in *Joyner* applicable to the instant case. The decision by DMV to rescind the revocation of defendant's driver's license was independent of, and inconsequential to, defendant's criminal trial for DWI.

[2] Defendant next argues that the doctrine of collateral estoppel barred the State from introducing evidence of his refusal to submit to a chemical analysis, after DMV had concluded that defendant did not willfully refuse. This is apparently an issue of first impression in this state.

The doctrine of collateral estoppel provides that a party will be estopped from relitigating an issue where 1) the issue has been necessarily determined previously and 2) the parties to that prior action are identical to, or in privity with, the parties in the instant action. *County of Rutherford ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 75, 394 S.E.2d 263, 265 (1990).

As to the first requirement, we again note that the only evidence supporting defendant's contention that DMV found that he did not willfully refuse to submit is defendant's own testimony. However, even assuming that defendant has satisfied the first requirement, we conclude that the privity requirement has not been met.

This Court, in *Whitener*, explored the privity requirement of collateral estoppel. The Court stated that privity exists where one party is so identified in interest with the other that it represents the same legal right as the other. *Id.* at 76, 394 S.E.2d at 266. However, privity is not established from the mere fact that two

parties may happen to be interested in the same question or in proving the same facts. *Id.* Further, a party should be estopped from contesting an issue only where that party was fully protected in the earlier proceeding. *Id.*

In the instant case, the parties at issue are the Commissioner of Motor Vehicles, the District Attorney, and the defendant. Defendant contends that because both the Commissioner and the District Attorney represent the rights of the State, privity exists. We disagree, and we find instructive the analysis of the Appellate Court of Connecticut, which recently addressed the precise issue now before us in *State v. Barlow*, 618 A.2d 579 (Conn. App. Ct. 1993).

In that case, the court held that there was no privity. The court reasoned that the purpose of the administrative proceeding is to enforce licensing requirements within the state, while the District Attorney's interest is in having guilt beyond a reasonable doubt or innocence determined under the criminal law. *Id.* at 581. Further, the District Attorney represents the broader public interest in the effective administration of criminal justice. *Id.* The administrative decision did not address the broader questions of criminal guilt, nor did the Commissioner represent the public interest in the effective administration of criminal justice. *Id.* Rather, the administrative proceeding focused only on the issue of licensing. Thus, the court concluded, the Commissioner and the District Attorney were not in privity. *Id.*

In addition to the separate interests involved, it is important to note that in the instant case, the District Attorney had no role in the administrative proceeding and, therefore, was not "fully protected" in that proceeding. *See Whitener*, 100 N.C. App. at 76, 394 S.E.2d at 266. We conclude that the requirement of privity cannot be satisfied in the present case, and, therefore, the doctrine of collateral estoppel does not apply to the issue of defendant's willful refusal to submit to a chemical analysis.

Thus, the trial court did not err in denying defendant's motion *in limine* to exclude evidence relating to defendant's refusal. Evidence of a refusal is admissible in a defendant's DWI trial. § 20-139.1(f). Likewise, the defendant may introduce evidence that he did not refuse to submit. However, neither the State nor the defendant can introduce the conclusions of DMV on this issue, as it is the province of the jury to decide disputed questions of fact.

[3] Defendant's next argument on appeal is that the trial court erred in denying his motions to dismiss, because the evidence was insufficient as a matter of law to support all the elements necessary for a conviction. Defendant argues that the State failed to prove that defendant was under the influence of an impairing substance while driving.

In ruling on a motion to dismiss for insufficiency of evidence, the evidence must be viewed in the light most favorable to the State, and the State must be afforded every reasonable inference arising from the evidence. The credibility of the witnesses and the weight to be given their testimony is for the jury to determine. The question for the court is whether there is substantial evidence of each element of the crime charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Mooneyhan*, 104 N.C. App. 477, 481, 409 S.E.2d 700, 703 (1991).

In the present case, the evidence by the defendant tended to show that on the evening of 28 August 1992 defendant, while attending a retirement dinner in Raleigh, drank three glasses of wine over a period of approximately four hours. After the dinner, defendant began driving toward Research Triangle Park. Trooper Anthony Farmer observed defendant weave in his lane of travel five to seven times over a distance of one to three miles. Trooper Farmer testified that when he pulled defendant over, he smelled a strong odor of alcohol about defendant's person, and observed that defendant was unsteady on his feet when he got out of the car. After questioning defendant, Trooper Farmer placed him under arrest. When they arrived at the Public Safety Center, Trooper Farmer asked defendant to perform various psycho-physical tests. On the one-leg-stand test, defendant wobbled, but did not fall. On the walk-and-turn test, defendant did not walk heel-to-toe as instructed. On the sway test, defendant swayed slightly. On the finger-to-nose test, defendant missed his nose, touching his upper lip instead. Trooper Farmer was of the opinion that defendant was appreciably impaired. The chemical analyst testified that he detected a moderate amount of alcohol about defendant's person and that defendant's eyes were red, his face was flushed, and he was thick-tongued. This evidence was sufficient to support the conviction.

[4] Defendant next contends that the trial court erred in instructing the jury that it could find defendant guilty on either or both

of two theories: 1) that there was an appreciable impairment of defendant's bodily or mental faculties or 2) that at any relevant time after driving, defendant had an alcohol concentration of .10 or more grams of alcohol per 210 liters of breath. We find merit in this contention.

At trial, there was no evidence whatever regarding defendant's blood alcohol level, as defendant had refused to submit to a chemical analysis and neither a blood test nor any other test was done. The jury returned a general verdict of guilty, without specifying upon which of the above theories it relied. This was error.

Where the trial court instructs on alternative theories, one of which is not supported by the evidence, and it cannot be discerned from the record upon which theory the jury relied in arriving at its verdict, the error entitles the defendant to a new trial. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990). Thus, defendant must be afforded a new trial. We need not address defendant's remaining argument, as it is not likely to recur at retrial.

For the reasons stated, defendant must have a new trial.

New trial.

Chief Judge ARNOLD and Judge COZORT concur.

JAMES BLACK AND SUSAN BLACK AND PANSY S. OWENSBY AND PAUL N. OWENSBY, PLAINTIFFS v. KIMBERLY DAWN GLAWSON AND HUSBAND, CHRIS GLAWSON AND DAVID DEMPSEY AND MARK HUTCHINS, DEFENDANTS AND KIMBERLY BLACK HUTCHINS, PLAINTIFF v. DARRYL MARK HUTCHINS, DEFENDANT

No. 9229DC1307

(Filed 19 April 1994)

Divorce and Separation § 337 (NCI4th)— child custody—natural parent or third party—standard of determination

The trial court did not abuse its discretion by awarding custody of a minor child to the biological father where the mother, now deceased, had indicated that she wanted custody to be with plaintiffs, her relatives. Prior to the enactment

of the present version of N.C.G.S. § 50-13.2(a), the Supreme Court held that custody must be awarded to a natural parent absent a finding of unfitness, *Jolly v. Queen*, 264 N.C. 711 (1965); however, after that decision, the legislature amended the statute to state that a court "shall" rather than "may" award custody based upon the best interest of the child. Recent decisions discussing this statute and the best interest test indicate that it is not necessary to prove a natural parent unfit in order to award custody to a third party, although there is a rebuttable presumption in favor of a natural parent. In this case, the trial court's order refers to a presumption in favor of defendant and the fact that the presumption has not been rebutted, then concludes that the best interest of the child requires that she be placed with her father. There is no reason to disturb this finding.

Am Jur 2d, Divorce and Separation §§ 963 et seq.

Award of custody of child where contest is between child's father and grandparent. 25 ALR3d 7.

Judge McCRODDEN concurring in the result.

Appeal by plaintiffs from order entered 1 June 1992 by Judge Robert S. Cilley in Rutherford County District Court. Heard in the Court of Appeals 29 October 1993.

J. Christopher Callahan for plaintiffs-appellants.

J.H. Burwell, Jr., for defendant-appellee Mark Hutchins.

LEWIS, Judge.

This case concerns the trial court's decision to award custody of Brittney Dawn Hutchins to defendant Mark Hutchins (hereinafter "Hutchins"), her biological father. Plaintiffs are relatives of Kimberly Dawn Glawson (hereinafter "Glawson"), Brittney's mother, who is now deceased. Before her death, Glawson indicated that she wanted plaintiffs to have custody of her children. Plaintiffs filed an action for custody in November 1989. In June 1992 the court entered an order declaring Hutchins to be the biological father of Brittney and awarding him custody. Plaintiffs now appeal.

The sole issue to be addressed in this case is the proper standard to be used in determining whether to award custody of a

minor child to a natural parent or to a third party. The standard actually used by the trial court is somewhat ambiguous. Plaintiffs contend the court erroneously believed it had to award custody to the natural parent absent a finding of unfitness. Hutchins replies that the court correctly awarded custody based upon the best interest of the child.

According to the relevant statute,

> [a]n order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child.

N.C.G.S. § 50-13.2(a) (1987). Prior to the enactment of the present version of this statute, the Supreme Court held that custody must be awarded to a natural parent absent a finding of unfitness. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965). When *Jolly* was decided, the statute read that a court "may" award custody based upon the best interest of the child. *See* N.C.G.S. § 17-39.1 (1965) (repealed in 1967). After the *Jolly* decision, the legislature amended the statute to state that a court "shall" award custody based upon the best interest of the child. We believe the *Jolly* Court was able to reach its result because, under the "may" version of the statute, a court was not limited to a strict "best interest and welfare" analysis. It could impose other requirements, such as unfitness of the natural parent, in addition to the best interest test. Now, with the statutory change, a court must award custody based only upon the best interest and welfare of the child. A court must have discretion to determine the best interest of a child, and should not be restricted to awarding custody to a natural parent in the absence of a finding of unfitness.

Moreover, recent decisions of this Court discussing this statute and the best interest test indicate that it is not necessary to prove a natural parent unfit in order to award custody to a third party. Although there is a rebuttable presumption in favor of a natural parent, *see, e.g., Best v. Best*, 81 N.C. App. 337, 344 S.E.2d 363 (1986), it is not necessary to prove unfitness in order to overcome the presumption. *Id.* We note that the statute itself imposes no presumption at all in favor of a natural parent, but find that we are bound by the decisions of this Court imposing such a presumption.

In the case at hand, the trial court's order refers to a presumption in favor of defendant and the fact that the presumption has not been rebutted. The court concludes that the best interest of the child requires that she be placed with her father. We see no reason to disturb this finding. We have reviewed plaintiffs' other contentions and find them to be meritless.

The order of the trial court is

Affirmed.

Judge WYNN concurs.

Judge McCRODDEN concurs in a separate opinion.

Judge McCRODDEN, concurring in the result.

I write separately to disagree with the majority in its determination that N.C. Gen. Stat. § 50-13.2(a) (1987) modified the common law rule that, absent a showing of unfitness, a natural parent was entitled to the custody of his or her child.

"The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights.' " *Stanley v. Illinois*, 405 U.S. 645, 651, 31 L.Ed.2d 551, 558 (1972) (citations omitted). Although our Court has previously interpreted N.C.G.S. § 50-13.2(a), which was enacted in 1967, to have modified the common law in this regard, *see, e.g., In Re Gwaltney*, 68 N.C. App. 686, 315 S.E.2d 750 (1984); *Campbell v. Campbell*, 63 N.C. App. 113, 304 S.E.2d 262, *disc. review denied*, 309 N.C. 460, 307 S.E.2d 362 (1983); *In Re Kowalzek*, 37 N.C. App. 364, 246 S.E.2d 45, *disc. review denied*, 295 N.C. 734, 248 S.E.2d 863 (1978), I do not believe that this is a proper interpretation.

N.C.G.S. § 50-13.2(a) states in pertinent part:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child.

Prior to the enactment of this statute, N.C. Gen. Stat. § 17-39.1, enacted in 1957 and repealed in 1967, contained similar language:

> [T]he judge may award the charge or custody of the child to such person, organization, agency or institution for such time, under such regulations and restrictions, and with such provisions and directions, as will, in the opinion of the judge, best promote the interest and welfare of said child.

Our Supreme Court did not, however, read that statute to repeal the common law doctrine that a natural parent, absent a finding of unfitness, is entitled to the custody and care of a child. In *Jolly v. Queen*, 264 N.C. 711, 716, 142 S.E.2d 592, 596 (1965), Justice Sharp stated this principle in no uncertain terms: "[T]he parents' paramount right to custody would yield only to a finding that they were unfit custodians because of bad character or other, special circumstances." *See also Brake v. Mills*, 270 N.C. 441, 154 S.E.2d 526 (1967); *Wilson v. Wilson*, 269 N.C. 676, 153 S.E.2d 349 (1967).

Justice Sharp imagined some of the mischief that could come from abandoning the principle that, as against non-parents, a natural parent, absent unfitness, is entitled to custody of his child: "Conceivably, a judge might find it to be in the best interest of a legitimate child of poor but honest, industrious parents, who were providing him with the necessities, that his custody be given to a more affluent neighbor or relative who had no child and desired him." *Jolly*, 264 N.C. at 715, 142 S.E.2d at 596. The Supreme Court, therefore, did not read the language of N.C.G.S. § 17-39.1, the precursor to N.C.G.S. § 50-13.2(a), as abrogating the common law principle. Because "the common law . . . which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, [is] . . . in full force within this State," N.C. Gen. Stat. § 4-1 (1986), I believe that prior cases of this Court renouncing the principle are in error.

The majority would have us believe that when the legislature changed the word *may* found in N.C.G.S. § 17-39.1 to *shall* in N.C.G.S. § 50-13.2(a), it altered the common law presumption. The statutory requirement, however, that the trial court must award the custody of a child in a way that will best promote the interest of the child in no way abrogates the common law presumption that, absent parental unfitness, the best interest of the child is that he remain with his natural parent(s). As the characteristic that will defeat the presumption, unfitness is an integral part of the presumption, and the majority's abrogation of that part encourages exactly the mischief Justice Sharp feared.

Furthermore, the majority's reading of the two statutes promotes the conclusion that, prior to the amendment, a trial court, acting under the permissive (as opposed to mandatory) language of section 17-39.1, could have ignored the common law presumption if it had so chosen. This reading, however, is contrary to N.C.G.S. § 4.1.

I realize that prior rulings of panels of this Court bind succeeding panels. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). However, prior holdings eroding the common law principle concerning custody are in conflict with the Supreme Court's rulings, are ill-advised, and do not bind us.

I would affirm the trial court on the basis that, since there was no showing that the natural father was unfit, he is entitled to the custody of his child. Such a ruling would send a clear signal to our courts and would stop the mischief Justice Sharp envisioned.

NOTIE J. COBLE, EXECUTRIX OF THE ESTATE OF ROSS COBLE AND NOTIE J. COBLE, INDIVIDUALLY, PLAINTIFF v. KATHLEEN C. PATTERSON, AGNES C. WHITE, HELEN C. BYERS, REBECCA C. ROBERTSON, CORNELIA C. STANTON, LARRY M. PATTERSON, T. MICHAEL PATTERSON, BOBBY WHITE, JANET GRIZZLE, PENNY SUE SIMON, AND KAY STANTON COMBS, DEFENDANTS

No. 9315SC319

(Filed 19 April 1994)

1. Wills § 34 (NCI3d) — devise of real property — multiple clauses — fee simple

The trial court did not err by declaring plaintiff the fee simple owner of property where Item 2 of the decedent's will states, "I have 7 acres in Albright Township goes [sic] to my wife Notie J. Coble," but defendants argue that decedent's paramount intent as gathered from the entire will was to make plaintiff the lifetime beneficiary of a testamentary trust. Under N.C.G.S. § 31-38, any devise of real property is presumed to be a devise in fee simple unless the plain and express words of the devise or other language in the will itself clearly shows the testator's intent to convey a lesser estate. The decedent's will in this case does not plainly reflect an unam-

biguous intention to establish a testamentary trust for plaintiff sufficiently to rebut the statutory presumption in N.C.G.S. § 31-38.

Am Jur 2d, Estates § 43.

2. **Wills § 41 (NCI3d)— future interest in income from certificates—time for termination of trust not provided—remaindermen not named—Rule Against Perpetuities—no violation**

There was no violation of the Rule Against Perpetuities where a decedent stated in his will that, if his wife (plaintiff in this action) should predecease him, or at her death, money and certificates remaining after certain other items were paid would be kept in certificates with the interest to keep the taxes paid on the land and any remainder to be divided as stated. Although the trial court essentially found that the remainder interest in the principal would not vest within the perpetuities period because decedent failed to provide a time for the termination of the trust and because decedent failed to name remaindermen to the principal of the trust, defendants have a vested remainder interest in the income interest from the certificates since they are entitled to the interest income immediately upon plaintiff's death and a vested remainder interest in the certificates since the gift of the interest income amounted to a gift of the principal also. In the absence of a disposition of the principal, a testamentary gift of the income or interest of a fund, such as a trust, without limitation as to its duration amounts to a gift of the principal.

Am Jur 2d, Estates § 43; Perpetuities and Restraints on Alienation §§ 6 et seq.

Appeal by defendants from judgment entered 30 October 1992 by Judge C. Preston Cornelius in Alamance County Superior Court. Heard in the Court of Appeals 13 January 1994.

Plaintiff brought this declaratory judgment action in her capacity as executrix of decedent's estate and individually as decedent's widow to determine the proper construction of decedent's holographic will. The following portions of decedent's will are in dispute:

Item 2: I give and bequeath all of my personal property to my wife, Notie J. Coble. If I still own property in Burlington,

my half of it goes to my wife Notie J. Coble. I have 7 acres in Albright Township goes [sic] to my wife Notie J. Coble. She shall have lifetime right to live on the property of Shellie G. & Mattie Thompson Coble that I inherited or given to [sic] from my mother Mattie Thompson Coble with right to rent the land & right to have timber or trees cut for repairing buildings and for fuel to heat home. The machinery to go to my wife Notie J. Coble to be used by my wife Notie J. Coble & my sister & their [sic] husband if they were to need them for anything.

. . . .

Item 5: If I have any money or certificates left after expenses, Indowment [sic] fund & church are taken care of the rest goes in certificates to draw interest for my wife Notie J. Coble to help pay taxes on the farm & for her personal upkeep.

. . . .

Item 7: If my wife, Notie J. Coble should Predecease me or at her death, I bequeath that the seven (7) acres I own in Albright township and the land I received form [sic] my mother Mattie T. Coble goes to my five sisters, Kathleen C. Patterson, Agnes C. White, Helen C. Byers, Rebecca C. Robertson, and Cornelia C. Stanton. Should any of these sister predecease me or at my wife, Notie J. Coble death there [sic] share goes to their children. . . .

Item 8: If my wife, Notie J. Coble should predecease me or at her death, I bequeath that the money and certificates left after all expenses, endowment & church are taken care of the rest of the money or certificates be kept in certificates to take the interest and keep taxes paid on the land that I left my sisters. If any left over after taxes are paid to be divided equally among my sister and their children.

Defendants are decedent's five sisters and their children. Defendants claim that they have a remainder interest in the Albright Township property and the certificates used to pay taxes on the Albright Township property. The trial court found that decedent's unrestricted devise of the Albright Township property to plaintiff in Item 2 gave plaintiff a fee simple title to the property and that the subsequent devise of the property in Item 7 to defendants on plaintiff's death was void. The trial court also found that the

interests created in Item 8 concerning the money kept in certificates was void under the Rule Against Perpetuities and that money in the certificates passed by intestacy to plaintiff. Defendants appeal.

Charles L. Bateman, P.A., by Charles L. Bateman and Linda J. Hartwell, for plaintiff-appellee,

Frederick J. Sternberg, P.A., by Fredrick J. Sternberg, and Latham, Wood, Hawkins & Whited, by B.F. Wood and G. Keith Whited, for defendant-appellants.

EAGLES, Judge.

Defendants bring forward two assignments of error. After careful review of the record and briefs, we affirm the trial court's judgment declaring plaintiff the fee simple owner of the Albright Township property. We reverse the trial court's judgment declaring that the interests created in Item 8 of decedent's will violated the Rule Against Perpetuities.

I.

[1] Defendants first contend that the trial court erred in declaring plaintiff the fee simple owner of the Albright Township property. We disagree. Item 2 of decedent's will states, "I have 7 acres in Albright Township goes [sic] to my wife Notie J. Coble." Under G.S. 31-38, any devise of real property is presumed to be a devise in fee simple unless the plain and express words of the devise or other language in the will itself clearly shows the testator's intent to convey a lesser estate. G.S. 31-38; *Leonard v. Dillard*, 87 N.C. App. 79, 82, 359 S.E.2d 497, 499 (1987). Defendants contend that decedent intended to convey plaintiff a life estate because in Item 7 defendant provided that:

> If my wife, Notie J. Coble should predecease me or at her death, I bequeath that the seven (7) acres I own in Albright township and the land I received form [sic] my mother Mattie T. Coble goes to my five sisters, Kathleen C. Patterson, Agnes C. White, Helen C. Byers, Rebecca C. Robertson, and Cornelia C. Stanton. Should any of these sister [sic] predecease me or at my wife, Notie J. Coble death there [sic] share goes to their children. . . .

We disagree.

> [I]t is a general rule of testamentary construction that an unrestricted devise of real estate carries the fee, and a subsequent clause in the will expressing a wish, desire or even direction for the disposition of what remains at the death of the devisee, is not allowed to defeat the devise, nor limit it to a life estate.

Taylor v. Taylor, 228 N.C. 275, 277, 45 S.E.2d 368, 369 (1947); *See also Quickel v. Quickel*, 261 N.C. 696, 698, 136 S.E.2d 52, 54 (1964); *Leonard v. Dillard*, 87 N.C. App. 79, 82, 359 S.E.2d 497, 499 (1987). Under this rule of construction, decedent's unrestricted devise of the Albright Township property to plaintiff in Item 2 was a devise in fee simple and the later devise of the property to defendants in Item 7 did not limit plaintiff's estate to a life estate.

Defendants contend, however, that this rule of construction must "yield to the paramount intent of the testator as gathered from the four corners of the will." *Taylor v. Taylor, supra.* Defendants contend that decedent's paramount intent as gathered from the entire will was to make plaintiff the lifetime beneficiary of a testamentary trust. Defendants argue that decedent intended for his entire estate to be put into a trust for plaintiff for her lifetime and that upon her death, the trust corpus would be distributed to defendants. Defendants argue that decedent's intention of making plaintiff the lifetime beneficiary of a testamentary trust explains why decedent gave certain property to plaintiff in Items 2 and 5 and then made repeated giftovers of the same property to defendants in Items 6 through 10 with the condition "If my wife, Notie J. Coble should predecease me **or at her death.**"

The trial court found that decedent's intent as gathered from each and every item of the will was "to provide materially both real and personal property for his wife, to control or limit the further disposition of certain real property the testator devised in Item 7 to his sisters and their children, and to direct the disposition of his wife's property at her death." We conclude that decedent's will does not **plainly** reflect an unambiguous intention to establish a testamentary trust for plaintiff sufficiently to rebut the statutory presumption in G.S. 31-38 that an unrestricted devise of real property is a devise in fee simple. Accordingly, we hold that plaintiff is the fee simple owner of the Albright Township property.

II.

[2] Defendants also contend that the trial court erred in concluding that the interests created in Item 8 of decedent's will violated the Rule Against Perpetuities. We agree and conclude that the devise in Item 8 conveys the property to defendants in fee.

The Rule Against Perpetuities provides that:

> [N]o devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not less than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest. If there is a possibility such future interest may not vest within the time prescribed, the gift or grant is void.

McQueen v. Trust Co., 234 N.C. 737, 741, 68 S.E.2d 831, 835 (1951). Items 5 and 8 of decedent's will concern the same property and provide as follows:

> Item 5: If I have any money or certificates left after expenses, Indowment [sic] fund & church are taken care of the rest goes in certificates to draw interest for my wife Notie J. Coble to help pay taxes on the farm & for her personal upkeep.
>
> Item 8: If my wife, Notie J. Coble should predecease me or at her death, I bequeath that the money and certificates left after all expenses, endowment & church are taken care of the rest of the money or certificates be kept in certificates to take the interest and keep taxes paid on the land that I left my sisters. If any left over after taxes are paid to be divided equally among my sister and their children.

The trial court made the following conclusion of law regarding the interest created by Item 8:

> e) Item 8 creates a future interest in the interest income from the certificates which the testator states are to be kept in certificates "to take interest & keep taxes paid on the land that I left my sisters." In that item, the testator does not name remaindermen as to the principal, nor does he state a point in time at which the principal is to be divided, but devises a perpetual fund, interest income in perpetuity to pay the taxes on the land he left his sisters and their children forever and ever. There is no vesting of a complete interest

> in this property—interest and principal. Either interest could vest beyond the period of the Rule Against Perpetuities. . . . There are no named remaindermen as to principal who will take possession on the natural termination of the preceeding [sic] estates. Therefore, these interests violate the Rule Against Perpetuities and the money and certificates pass by intestacy to the Plaintiff, the widow of [decedent].

The trial court essentially found that because decedent failed to provide a time for the termination of the trust and because decedent failed to name remaindermen to the principal of the trust, the remainder interest in the principal would not vest within the perpetuities period. We disagree with the trial court's analysis.

A remainder is vested if the only impediment to the right of immediate possession is the existence of the preceding estate. *Pridgen v. Tyson*, 234 N.C. 199, 201, 66 S.E.2d 682, 684 (1951). In Item 8, decedent stated that at plaintiff's death, the certificates held in trust for plaintiff were to be maintained and the interest from the certificates were to be used to pay taxes on the land decedent left to defendants. Since defendants are entitled to the interest income immediately upon plaintiff's death, defendants have a vested remainder interest in the income interest from the certificates.

The question we must now answer is whether the failure to provide for the termination of the trust and for the distribution of the principal violates the Rule Against Perpetuities and voids the gift of the interest income to defendants. We conclude that here it does not. Defendants here have a vested right to receive the interest income from the certificates. Although decedent's will does not provide explicitly for the termination of the trust or the distribution of the principal, "[i]n the absence of a disposition of the principal, a testamentary gift of the income or interest of a fund, such as a trust, without limitation as to its duration amounts to a gift of the principal." *Wing v. Trust Co.*, 301 N.C. 456, 465, 272 S.E.2d 90, 97 (1980). Accordingly, we hold that decedent's gift to defendants of the interest income of the certificates amounted to a gift of the principal also. Since defendants are entitled to receive the certificates in fee after plaintiff's death, defendants have a vested remainder interest in the certificates. Accordingly, the devise in Item 8 does not violate the Rule Against Perpetuities.

III.

For the reasons stated, we affirm the judgment of the trial court declaring plaintiff the fee simple owner of the Albright Township property. Based on our discussion of the Rule Against Perpetuities, *supra*, we reverse the judgment of the trial court declaring the devise in Item 8 void.

Affirmed in part; reversed in part.

Judges JOHNSON and LEWIS concur.

BEN RAY KING v. CAROLYN LAWHORN KING

No. 938DC721

(Filed 19 April 1994)

Divorce and Separation § 13 (NCI4th) — separation agreement — not unconscionable

The trial court did not err by granting defendant's motion for summary judgment where plaintiff and defendant had entered into a separation agreement; defendant was represented by counsel and plaintiff was not; the agreement vested plaintiff with property valued at $11,000 and debts valued at $24,000 while defendant received property valued at $54,600 and debts valued at $6,000; and plaintiff brought this action to set aside the agreement as unconscionable. Assuming that the agreement is procedurally unconscionable, the evidence does not support a determination that the agreement is substantively unconscionable. It cannot be said that the inequality of the distribution shocks the judgment of a person of common sense because it cannot be determined on this record whether the distribution is very much smaller than plaintiff would have received in an equitable distribution trial.

Am Jur 2d, Divorce and Separation § 836.

Appeal by plaintiff from order entered 12 February 1993 in Wayne County District Court by Judge Arnold O. Jones. Heard in the Court of Appeals 23 March 1994.

Bruce & Baskerville, by R. Michael Bruce, for plaintiff-appellant.

Hollowell & Albertson, P.A., by Jean P. Hollowell, for defendant-appellee.

GREENE, Judge.

Ben Ray King (plaintiff) appeals from an order entered 12 February 1993 in Wayne County District Court, granting Carolyn Lawhorn King's (defendant) motion for summary judgment in plaintiff's action to set aside and declare null and void a separation and property agreement (the Agreement).

The evidence, in the light most favorable to plaintiff, *Patterson v. Reid*, 10 N.C. App. 22, 28, 178 S.E.2d 1, 5 (1970) (evidence viewed in light most favorable to non-movant in summary judgment hearing), shows that plaintiff and defendant, who were married, separated on 22 April 1992. On 19 May 1992, they entered into and signed the Agreement. Although defendant was represented by counsel, Mr. William A. Holland, Jr. (Mr. Holland), during the preparation and negotiation of the Agreement, plaintiff was not represented by counsel at that time. Under the terms of the Agreement, plaintiff conveyed $8,100.00 in personal property to defendant and retained $11,000.00 in personal property. He also conveyed real property with a fair market value of $46,600.00 to defendant and retained no real property for himself. Plaintiff agreed to pay marital debts of $24,040.00 while defendant agreed to pay marital debts totaling approximately $6,000.00.

On 15 September 1992, plaintiff filed a verified complaint in Wayne County District Court seeking to have the Agreement set aside and declared null and void because the Agreement is "manifestly unfair to the plaintiff because of the overreaching of the defendant and her attorney" and "is unconscionable." In his complaint, plaintiff stated that defendant and Mr. Holland never advised him that he "was entitled to an equitable distribution of the marital property notwithstanding any marital misconduct" on his part. He also alleged that he "was not given the opportunity to consult with counsel prior to the signing of the . . . Agreement and did not understand the extent to which he was not being treated fairly." Plaintiff also alleged defendant "stated that if [he] did not sign the agreement and deeds, she would go to his employer, place of business, create a scene, and have [him] fired." Defendant, in her verified answer, alleged that plaintiff "did not want counsel

although he was informed that he had the right to counsel and was encouraged to get separate counsel by W.A. Holland, attorney at law." She also alleged that the Agreement "was agreed upon by both parties and in particular, the plaintiff had ample opportunity to negotiate the terms and discuss them with counsel. That he entered into this Agreement voluntarily and without any collusion, fraud, overreaching or any other unconsionable [sic] act."

On 3 December 1992, defendant filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. She supported her motion with the pleadings and an affidavit by Mr. Holland which provides in pertinent part:

> 6. [Plaintiff], during his discussion with me, was told that he was entitled to assistance of counsel, and if he had any questions about the agreement that he did not understand, it would be necessary for him to seek his own counsel, as I could not advise him on the agreement since I represented [defendant].
>
> 7. [Plaintiff] informed me that the agreement contained all of the matters he and his wife had agreed upon; however, he had changed his mind with regard to a few of the matters, and those were the ones he had discussed with me. He indicated he did not desire to retain private counsel for the purpose of executing this agreement, since he had agreed to all of it and only wanted to retain the farming implements, which [defendant] agreed to allow him to retain.
>
> 8. [Plaintiff], in my opinion, voluntarily and knowingly executed the Separation Agreement and Property Settlement, the Deeds and the Voluntary Support Agreement for the purpose of having child support paid through the Clerk of Superior Court of Johnston County.

In opposition to defendant's motion for summary judgment, plaintiff submitted his own affidavit which states in pertinent part:

> 2. [Defendant] told the plaintiff that Mr. Holland would be representing both the plaintiff and the defendant and that he, the plaintiff, would be required to pay one-half of the lawyer's fee.
>
> . . . .

4. Between May 12 or May 13, 1992, and Tuesday, May 19, 1992, the defendant threatened to go to the plaintiff's employer's place of business, create a scene, and get the [plaintiff] fired.

5. On May 19, 1992, the plaintiff, in order to prevent the defendant from carrying out such threats, went to the office of W.A. Holland, Jr. and signed the papers.

6. At no time was the plaintiff ever told by W.A. Holland, Jr. that he was entitled to the assistance of counsel. The plaintiff understood that W.A. Holland, Jr. was representing both the plaintiff and the defendant in the preparation of the separation agreement.

7. At no time on May 12, 13, or 19, 1992, did W.A. Holland, Jr. tell the plaintiff that he was entitled to an equitable share of the marital property. The plaintiff understood that he was obligated to support his wife because he made more money than she did.

. . . .

9. At the time that the [plaintiff] signed the separation agreement on May 19, 1992, he did not realize that paragraph 14 was a part of the agreement and certainly did not know that W.A. Holland, Jr. was representing [defendant] and not representing [plaintiff].

Based on this evidence, the trial court granted defendant's motion for summary judgment.

The issue presented is whether the evidence in this record can support a conclusion that the Agreement is unconscionable and consequently unenforceable.

Separation agreements which must be executed "while the [married] parties are separated or are planning to separate immediately," *Morrison v. Morrison*, 102 N.C. App. 514, 518, 402 S.E.2d 855, 858 (1991), property settlement agreements which may be executed "[b]efore, during or after marriage," N.C.G.S. § 50-20(d) (1987), and premarital agreements which must be executed "in contemplation of marriage," N.C.G.S. § 52B-2(1) (1987), are not enforceable if the terms of the agreement are unconscionable. *Howell v. Landry*, 96 N.C. App. 516, 525, 386 S.E.2d 610, 615 (1989) (premarital and

postmarital agreements), *disc. rev. denied*, 326 N.C. 482, 392 S.E.2d 90 (1990); N.C.G.S. § 52B-7(a) (1987) (premarital agreements); *Stegall v. Stegall*, 100 N.C. App. 398, 401, 397 S.E.2d 306, 307 (1990) (separation and property settlement agreements), *disc. rev. denied*, 328 N.C. 274, 400 S.E.2d 461 (1991); *Knight v. Knight*, 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985) (separation agreements); *Brenner v. School House, Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981) (contracts in general); *Unif. Marriage and Divorce Act* § 306(b), 9A U.L.A. 135 (1979) (separation and property agreements).

Unconscionability has both procedural and substantive elements. *Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 19, 411 S.E.2d 645, 648 (1992). "Procedural unconscionability involves 'bargaining naughtiness' in the formation of the contract," i.e., fraud, coercion, undue influence, misrepresentation, inadequate disclosure. *Id.* at 20, 411 S.E.2d at 648. "Substantive unconscionability . . . involves the harsh, oppressive, and 'one-sided terms of a contract,' " i.e., inequality of the bargain. *Id.* The inequality of the bargain, however, must be "so manifest as to shock the judgment of a person of common sense, and . . . the terms . . . so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Brenner*, 302 N.C. at 213, 274 S.E.2d at 210. Although this language is not precise, "it does suggest that . . . [an] agreement would be set aside if it just provides an amount of alimony or property for a spouse which appears to be very much larger or very much smaller than a court would consider appropriate." *Homer H. Clark, Jr., The Law of Domestic Relations in the United States* § 18.2, at 762 (2d ed. 1988).

The question of unconscionability must be determined as of the time the contract was executed, N.C.G.S. § 52B-7(a)(2) (1987), and after any issues of fact are resolved, presents a question of law for the court. *Rite Color*, 105 N.C. App. at 21, 411 S.E.2d at 649. A conclusion that the contract is unconscionable requires a determination that the agreement is both substantively and procedurally unconscionable. *Id.* at 20, 411 S.E.2d at 649. Thus, there is no requirement for the trial court to make an "independent determination regarding the 'fairness' of the substantive terms of the agreement, so long as the circumstances of execution were fair." *Hill v. Hill*, 94 N.C. App. 474, 480, 380 S.E.2d 540, 545 (1989).

Assuming without deciding that the Agreement is procedurally unconscionable, the judgment for the defendant must nonetheless be affirmed because the evidence does not support a determination that the Agreement is substantively unconscionable. The Agreement vested the plaintiff with personal and real property valued at $11,000.00 and debts valued at $24,040.00. The defendant received personal and real property valued at $54,600.00 and debts valued at $6,000.00. Whether this distribution is "very much smaller" than plaintiff would have received in an equitable distribution trial is a question we cannot answer on this record. Therefore, we cannot hold that the inequality of the distribution "shock[s] the judgment of a person of common sense."

Affirmed.

Judges JOHNSON and JOHN concur.

JACK L. ADAMS, PLAINTIFF-APPELLANT v. LARRY D. COOPER, WILLIAM A. GRIFFIN, WILLIAM M. HOOPER, JIMMY R. JENKINS, DEFENDANTS-APPELLEES

No. 931SC561

(Filed 19 April 1994)

Mortgages and Deeds of Trust § 119 (NCI4th) — sale of restaurant — action against guarantors on purchase money note — anti-deficiency statute — not applicable

The trial court erred by dismissing plaintiff's action against defendants as guarantors of a note used for the purchase of a restaurant on the grounds that the action was barred by the anti-deficiency statute. The enactment of N.C.G.S. § 45-21.38 was intended to benefit and protect purchasers of real property; defendants here were not the purchasers of real property and nothing in the language of the statute indicates a legislative intent to extend the statute's protection to persons other than purchase money mortgagors. Moreover, the liability of a guarantor is unlike the liability of the principal debtor; a judgment against defendants based on their independent promise to pay the debt upon maturity if not paid by the principal would not be a deficiency judgment.

Am Jur 2d, Mortgages § 920.

Mortgages: effect upon obligation of guarantor or surety of statute forbidding or restricting deficiency judgments. 49 ALR3d 554.

Judge McCRODDEN dissenting.

Appeal by plaintiff from order entered 11 May 1993 by Judge Gary E. Trawick in Dare County Superior Court. Heard in the Court of Appeals 3 March 1994.

On or about 3 January 1989, One December Enterprises, Inc., contracted to purchase from plaintiff a restaurant located in Dare County, North Carolina. Pursuant to the terms of the contract, One December (1) made a cash down payment, (2) assumed two notes which were secured by a first and a second deed of trust, and (3) executed a promissory note in the principal amount of $156,330.71 which was secured by a third deed of trust. Defendants signed the purchase money note as guarantors.

One December thereafter defaulted on its indebtedness to plaintiff and the second deed of trust was foreclosed. The foreclosure of the second deed of trust had the effect of destroying the security for the third deed of trust.

Plaintiff filed this action to recover the amount owed on the purchase money note secured by the third deed of trust from defendants as guarantors of the note. Defendants thereafter moved, pursuant to G.S. 1A-1, Rule 12(b)(6), to dismiss the action, contending that plaintiff's action is barred by the anti-deficiency statute. The trial court allowed defendants' motion and plaintiff appealed.

Trimpi & Nash, by John G. Trimpi, for plaintiff-appellant.

Twiford, Morrison, O'Neal & Vincent, by Edward A. O'Neal, for defendant-appellees.

MARTIN, Judge.

The sole issue presented by this appeal is whether North Carolina's anti-deficiency statute, G.S. § 45-21.38, bars an *in personam* action against a non-mortgagor guarantor of a purchase money promissory note. For the reasons set forth herein, we hold that such a action is not statutorily barred and reverse the order of the trial court dismissing plaintiff's claim.

Our decision in this case requires us to interpret G.S. § 45-21.38 which provides in pertinent part:

> In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust . . . to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust, or obligation secured by the same . . . .

When interpreting a statute, the intent of the Legislature is the controlling factor. *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991). It is well settled that the intent of the Legislature in enacting G.S. § 45-21.38 was "to protect *vendees* from the oppression by vendors and *mortgagors* from oppression by mortgagees." (Emphasis added.) *Realty Co. v. Trust Co.*, 296 N.C. 366, 371, 250 S.E.2d 271, 274 (1979). "The protection it offers is afforded to all *purchasers of realty* who secure any part of the purchase price with a deed of trust on the realty they are purchasing." (Emphasis added.) *Bank v. Belk*, 41 N.C. App. 356, 365, 255 S.E.2d 421, 427, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 911 (1979). The Legislature feared that without the statute real property would be overpriced at sale and underpriced at foreclosure. *Sink v. Egerton*, 76 N.C. App. 526, 333 S.E.2d 520 (1985). The statute was intended to prevent the possibility of wholesale foreclosures followed by executions on deficiency judgments which would leave a potentially large number of purchasers without their land and without the assets necessary for subsistence. *Bank*, at 366, 255 S.E.2d at 427-28. To effect this end, the Legislature took away from creditors the option of suing upon the note in a purchase money mortgage transaction. *Realty Co., supra.*

As the foregoing authorities plainly illustrate, the enactment of G.S. § 45-21.38 was intended to benefit and protect purchasers of real property. In the present case, defendants were not the purchasers of the realty conveyed by plaintiff and nothing in the language of the statute indicates a legislative intent to extend the statute's protection to persons other than purchase money mortgagors. As non-owners of the property conveyed, defendants are not faced with the possibility of losing both their land and the assets

necessary for subsistence. Thus, extending the statute's protection to defendants would not effectuate the intent of the Legislature.

Moreover, defendants signed the purchase money note in question as "guarantors." The liability of a guarantor is unlike the liability of the principal debtor.

> A guarantor's liability arises at the time of the default of the principal debtor on the obligation or obligations which the guaranty covers. A guaranty of payment is an absolute promise by the guarantor to pay a debt at maturity if it is not paid by the principal debtor. This obligation is independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity. (Citations omitted.)

Gillespie v. DeWitt, 53 N.C. App. 252, 258, 280 S.E.2d 736, 741, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 832 (1981).

As guarantors, defendants are being sued on a promise independent of the promise of the principal debtor. A judgment against defendants on this separate contract cannot be construed as a judgment for a deficiency. By definition, a deficiency judgment is a judgment against the principal debtor for the debt remaining unsatisfied following the foreclosure sale of the mortgaged property. Defendants' obligation, unlike the obligation of the principal debtor, is unsecured. Thus, a judgment against defendants based on their independent promise to pay the debt upon maturity if not paid by One December would not be a *deficiency* judgment.

We hold that G.S. § 45-21.38 does not bar an action against a guarantor of a purchase money note secured by a mortgage or deed of trust to recover the debt represented by the note. The order of the trial court dismissing plaintiff's claim is reversed.

Reversed.

Judge EAGLES concurs.

Judge McCRODDEN dissents.

Judge McCRODDEN, dissenting.

I respectfully dissent. There is nothing in N.C. Gen. Stat. § 45-21.38 (1991) that limits the protection afforded by the prohibition against deficiency judgments to the purchasers of property. None of the cases cited by the majority addresses the issue raised by this case, and the Court should not read the reasoning of those decisions to exclude, by silence, reasoning that may be appropriate here. To say that the cases not addressing this issue "plainly illustrate" by omission is fallacious reasoning.

There are sound reasons for allowing the guarantor the protection of N.C.G.S. § 45-21.38. One is that it encourages guarantors to assist in commerce without being held to a higher level of liability than those they are attempting to assist. To extend the guarantor's liability beyond that of the mortgagor has a chilling effect on such transactions. Another reason is that it properly puts upon the mortgagor and mortgagee the responsibility of assuring that the loan amount is in line with the value of the property being mortgaged.

The majority opinion also ignores *Bank v. Belk*, 41 N.C. App. 356, 255 S.E.2d 421, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 911 (1979), in which this Court, while not addressing the issue directly, at least suggested the possibility that the guarantor could use the anti-deficiency statute as a defense, as well as the very recent case *Smith v. Childs*, 112 N.C. App. 672, 437 S.E.2d 500 (1993), in which this Court concluded that a reasonable purchase money mortgagee would not seek to enforce a personal guaranty against a guarantor because "in all likelihood, G.S. § 45-21.38 would operate to bar recovery." *Smith* at 685, 437 S.E.2d at 508.

I vote to affirm.

STATE OF NORTH CAROLINA v. JOHN STACEY HAIR

No. 9312SC786

(Filed 19 April 1994)

1. **Bribery § 3 (NCI4th)— bribery of ABC officer—authority to arrest for driving while impaired—corrupt intent—evidence sufficient**

There was sufficient evidence of bribery of a public officer where the State presented evidence that defendant offered an ABC enforcement officer $20 to arrest an individual for driving while impaired because the individual owed him a gambling debt. Although defendant contends that the official duties of ABC enforcement officers do not include arresting or stopping persons for driving while impaired, official duties include any actions authorized and there was evidence in the record that officers had the authority to arrest for driving while impaired. There was substantial evidence of corrupt intent in that defendant's intent in offering the bribe was to use the officer's authority for defendant's personal gain. N.C.G.S. § 14-218.

Am Jur 2d, Bribery §§ 12 et seq.

2. **Criminal Law § 1430 (NCI4th)— bribery of public official—payment of gambling debt—restitution—repayment of gambling debt**

A portion of a judgment requiring a bribery defendant to pay in restitution the amount of a gambling debt which had been paid to him was vacated because the amount could not have been recovered in a civil suit. Gambling debts incurred in North Carolina are not enforceable in the courts of the state and there is no statute which allows one who pays a gambling debt to recover what he has paid. N.C.G.S. § 15A-1343(d).

Am Jur 2d, Criminal Law §§ 588 et seq.

Appeal by defendant from judgment entered 19 February 1993 in Cumberland County Superior Court by Judge Wiley F. Bowen. Heard in the Court of Appeals 9 March 1994.

Michael F. Easley, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

Harris, Mitchell & Hancox, by Ronnie M. Mitchell and G. Robert Hicks III, and Doran J. Berry, by Doran J. Berry, for defendant-appellant.

GREENE, Judge.

John Stacey Hair (defendant) appeals from judgment entered upon a jury verdict finding him guilty of offering a bribe to an official in violation of N.C. Gen. Stat. § 14-218.

At trial, the State presented evidence that on 18 June 1992, while in the office of Michael Tolbert (Tolbert), the chief law enforcement officer for the Cumberland County Alcohol Beverage Control Board (the ABC Board), defendant told Tolbert that he had a friend [Lacy Leroy Cashwell (Cashwell)] who owed him a $140 gambling debt and that if Tolbert "would arrange to arrest this individual and put some pressure on this individual to pay [the debt], that he [defendant] would pay [Tolbert] or either one of [his] officers $20." Tolbert, after reporting this conversation to his supervisor, on 14 August 1992 again met defendant and on this occasion, recorded the conversation on a concealed tape recorder.

A transcript of the recorded conversation was admitted into evidence and included the following exchange:

Tolbert: . . . You said it was a $20 reward or a $30 reward.

Hair: $20.

Tolbert: $20.

Hair: Yeah.

. . . .

Hair: Here [handing Tolbert a $20 bill].

. . . .

Hair: This is, this is for Cashwell.

Tolbert: Oh, this is for Cashwell.

Hair: Yeah.

. . . .

Tolbert: . . . I will tell him [Officer Corbett, who worked for Tolbert] when I see him that I, uh, I will tell him that I've got his $20 bill, but when he earns it, I will give it to him.

Hair: Alright [sic].

Tolbert: Well, do you want him to arrest him, or just harass him[?]

Hair: Just, just, no he is being, no I don't want him arrested right now, as long as he is paying, if he pays the thing off, that's all I'm concerned with. Paying me was not the big thing. Not letting him get by with it was the big thing.

On 17 and 18 August 1992, defendant visited the office of Richard Sams (Sams), a Federal Bureau of Investigation agent. Sams testified that defendant told him that he had asked Tolbert if Tolbert could get Cashwell stopped or arrested for driving while impaired and that if he could, defendant would give Tolbert $20.

Tolbert testified that his duties are to "see that the laws and regulations relating to alcohol and controlled substances are enforced." He stated that he did not have a "specific duty relating to [driving while impaired] offenses" but that he had "authority" to arrest for any criminal offense that occurred within his jurisdiction.

On 10 December 1992, Cashwell paid the gambling debt in full.

At the close of the State's evidence, defendant's motion to dismiss was denied. Defendant renewed this motion at the close of all the evidence and it was again denied.

Defendant received a suspended two year sentence, a $1,000 fine, and was ordered to pay restitution of $140 to Cashwell.

The issues presented are whether (I) the offer of money to an ABC enforcement officer with the request that the officer arrest or stop a person for driving while impaired is a bribe within the meaning of N.C.G.S. § 14-218 (1993); and (II) restitution as a condition of a criminal judgment can include the requirement that defendant return, to the loser, money paid on a gambling debt.

I

[1] The North Carolina statute making it a felony to offer a bribe, N.C. Gen. Stat. § 14-218, "neither defines bribery, nor sets forth its essential elements." *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 919 (1953). Our Supreme Court has defined bribery in general terms as

> the voluntary offering [or] giving . . . of any sum of money, present or thing of value with the corrupt intent to influence the recipient's action as a public officer or official, or a person whose ordinary profession or business relates to the administration of public affairs, . . . in the performance of any *official duty* required of him. The bribe must be intended, however, to influence the recipient in the discharge of a legal duty, and not a mere moral duty.

Id. at 328, 77 S.E.2d at 920 (emphasis added).

Defendant contends the evidence in this case is insufficient in two respects. First, that the official duties of Tolbert and the other ABC enforcement officers do not include arresting or stopping persons for driving while impaired. Second, that defendant had no corrupt intent.

Official Duty

The evidence in this record is that the Cumberland County ABC enforcement officers had the "authority" to arrest for driving while impaired. There is no evidence that they had a specific duty to do so. This evidence is consistent with the statute which provides that a local ABC officer "may arrest . . . for any criminal offense; however, the primary responsibility . . . is enforcement of the ABC [and controlled substance] laws." N.C.G.S. § 18B-501(b) (1989).

Defendant contends that the offer of money to a public official with intent to influence that official in the performance of some act which the official is authorized to perform, but not obligated to perform, cannot be bribery. We disagree. We do not construe the term "official duty," as used in *Greer* as having reference only to those duties the official is obligated to perform. Official duties include any actions authorized. "Sufficient it is if he has official power, ability or apparent ability to bring about or contribute to the desired end." *State v. Stanley*, 19 N.C. App. 684, 688, 200 S.E.2d 223, 225 (1973), *cert. denied*, 284 N.C. 622, 201

S.E.2d 692 (1982) (quoting *State v. Begyn*, 167 A.2d 161, 167 (N.J. 1961)); *see* 4 Charles E. Torcia, *Wharton's Criminal Law* § 687 (14th ed. 1981) (only necessary that act fall within the general duties of the official); 11 C.J.S. *Bribery* § 2, at 846-47 (1938).

Corrupt Intent

Defendant argues that corrupt intent "implies an effort to obstruct lawful performance of an act" and because he did not seek "an illegal arrest or any improper detention" there was no corrupt intent. We disagree. A corrupt intent means "a wrongful design to acquire some pecuniary profit or other advantage." 1 William L. Burdick, *Law of Crime* § 292, at 434-35 (1946). The offeror of a bribe to a public official therefore possesses a corrupt intent if his purpose in offering the bribe is to gain some advantage for himself, without regard to whether he seeks the performance or the nonperformance of an official duty. *See* N.C.G.S. § 14-217 (bribery for official to receive anything of value "for performing or omitting to perform any official act").

In this case, there is substantial evidence that defendant's intent in offering the bribe to Tolbert was to use Tolbert's authority, which was apparent to defendant, as an ABC officer for his own personal gain, i.e., the harassment of Cashwell into paying off a gambling debt. *See State v. Shipman*, 202 N.C. 518, 540, 163 S.E. 657, 669 (1932).

In summary, the State offered substantial evidence of each element of the crime of bribery, and therefore, the trial court did not err in denying defendant's motion to dismiss. *See State v. McCoy*, 303 N.C. 1, 24, 277 S.E.2d 515, 532 (1981) (substantial evidence required to withstand motion to dismiss).

II

[2] As a condition of probation, a court may order a defendant to "make restitution or reparation to an aggrieved party or parties . . . for the damages or loss caused by the defendant arising out of the offense or offenses committed by the defendant." N.C.G.S. § 15A-1343(d) (Supp. 1993). "Restitution" is defined as "compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil suit," *id.*, although "civil liability need not be established as a prerequisite to the requirement of restitution as a probation condition." *State v. Smith*, 99 N.C. App. 184,

187, 392 S.E.2d 625, 626 (1990) (quoting *Shew v. Southern Fire & Casualty Co.*, 307 N.C. 438, 298 S.E.2d 380 (1983)).

Gambling debts incurred in North Carolina are not enforceable in the courts of this state. *MGM Desert Inn, Inc. v. Holz*, 104 N.C. App. 717, 718, 411 S.E.2d 399, 400 (1991), *disc. rev. denied*, 331 N.C. 384, 417 S.E.2d 790 (1992). Furthermore, one who pays a gambling debt owed to another, may not subsequently attempt to recover that which he has paid. *See Teague v. Perry*, 64 N.C. 39, 41-42 (1870); *Warden v. Plummer*, 49 N.C. 524, 526 (1857).

> Independent of statute, the rule is that there is no remedy for the loser where money or property is delivered in payment of or on account of a gambling contract or transaction, since the law will not lend its aid to a party in either the execution or the rescission of such a contract, the maxim, "ex turpi causa non oritur actio," applying, and the loser being regarded as in pari delicto with the winner in such cases.

38 Am. Jur. 2d *Gambling* § 212, at 259 (1968). There is no statute in North Carolina which allows one who pays a gambling debt to recover what he has paid. Accordingly, Cashwell could not recover the $140 he paid defendant from defendant in a civil suit. As such, that portion of the trial court's judgment requiring defendant to pay $140 restitution to Cashwell must be vacated.

We have reviewed and overrule the other assignments of error made by defendant.

Trial: No error.

Judgment: Vacated in part.

Judges JOHNSON and JOHN concur.

STEPHEN BOSLEY, SR. v. R. LEWIS ALEXANDER, JR., REPRESENTATIVE OF MOZELLE BURCHETTE BAUGUESS ESTATE

No. 9323SC133

(Filed 19 April 1994)

Automobiles and Other Vehicles § 305 (NCI4th)— highway worker—flagman—struck by auto—contributory negligence—instructions

The trial court erred in its instructions on contributory negligence in an action which arose from plaintiff-highway worker being struck while his back was turned to traffic and in which the jury found contributory negligence. A road worker is entitled to a special instruction established in *Kellogg v. Thomas*, 244 N.C. 722; the proper question is whether plaintiff exercised reasonable care in view of his work and the surrounding circumstances.

Am Jur 2d, Automobiles and Highway Traffic § 475.

Appeal by plaintiff from judgment entered 26 October 1992 by Judge James A. Beaty, Jr. in Wilkes County Superior Court. Heard in the Court of Appeals 2 December 1993.

Franklin Smith for the plaintiff-appellant.

Everett & Everett, by James A. Everett, for the defendant-appellee.

WYNN, Judge.

Plaintiff Stephen Bosley, Sr. appeals from a verdict entered 26 October 1993 in favor of defendant R. Lewis Alexander, representative of the estate of Mozelle Burchette Bauguess.

The plaintiff's evidence tended to show the following. Plaintiff was employed as a flagman in Elkin, North Carolina. On 7 December 1989 he worked as one of four flagmen directing traffic at the four-way intersection of Oakland Drive, Claremont Drive, and North Bridge Street while Oakland Drive was being paved. Plaintiff wore an orange vest, carried an orange sign and faced west on Oakland Drive with his back to the stoplight at the intersection with North Bridge Street.

Defendant Mozelle Burchette Baugess drove her 1971 Ford automobile west on Claremont Drive. Another flagman directed

her to proceed into the intersection onto Oakland Drive. Defendant then struck plaintiff in the back, thrusting him into the air over her windshield, and into the paving machine. Plaintiff suffered severe injuries to his head and leg. Defendant later told the investigating police officer that she did not see plaintiff when she ran into him.

Defendant's evidence tended to show that prior to the accident, plaintiff walked away from his flag station and his supervisor had instructed him to return to his station. As plaintiff returned to his station with his back to defendant's automobile, she struck him. At the time of the accident, the only oncoming traffic was behind plaintiff, there was no traffic coming towards him.

The trial court instructed the jury on negligence and contributory negligence. The jury found defendant negligent and found plaintiff was contributorily negligent and not entitled to damages. The trial court entered judgment on the verdict. From this judgment, plaintiff appeals.

From the outset, we recognize that there are serious questions regarding the validity of the doctrine of contributory negligence as evidenced by the fact that forty-six states have abandoned the doctrine in favor of comparative negligence. *See* Henry Woods, *Comparative Fault* § 1.11 (2nd ed. 1987 and Cum. Supp. 1993); Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray, 4 *The Law of Torts* § 22.1 (2nd ed. 1986 and Cum. Supp. 1993). We further acknowledge that the United States Supreme Court has described contributory negligence as a "discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 98 L. Ed. 143, 150 (1953). The doctrine of contributory negligence, which is a creature of common law followed in this State since *Morrison v. Cornelius*, 63 N.C. 346 (1869), remains the law of this State until our Supreme Court overrules *Morrison*. *See Corns v. Hall*, 112 N.C. App. 232, 435 S.E.2d 88 (1993); *see also Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985). It is also clear that although there is no statutory basis for the doctrine of contributory negligence in North Carolina, the General Assembly, in the face of inaction by our Supreme Court, could choose to adopt a system of comparative negligence. *See Corns*, 112 N.C. App. at 237, 435 S.E.2d at 91.

Plaintiff assigns error to the trial court's submission of the issue of contributory negligence to the jury due to the absence of any evidence of contributory negligence. We conclude that there was sufficient evidence to submit the issue of contributory negligence to the jury. In his brief, however, plaintiff argues that as a road worker he is not required to maintain the same lookout as a pedestrian and cites *Kellogg v. Thomas*, 244 N.C. 722, 94 S.E.2d 903 (1956). Although plaintiff did not properly assign error to the trial court's failure to instruct the jury in accordance with the Supreme Court's holding in *Kellogg v. Thomas*, we exercise our discretion to review this issue. N.C.R. App. P. 2; *see State v. Petty*, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Contributory negligence is "negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant . . . to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967). The defendant bears the burden of proving that certain acts or conduct of the plaintiff constituted contributory negligence. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970); *Mims v. Dixon*, 272 N.C. 256, 158 S.E.2d 91 (1967). The defendant must prove by the greater weight of the evidence that the plaintiff's negligence was one of the proximate causes of his injury or damages. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E.2d 506 (1976). The issue of contributory negligence should be submitted to the jury if all the evidence and reasonable inferences drawn therefrom viewed in the light most favorable to the defendant tend to establish or suggest contributory negligence. *Wentz v. Unifi*, 89 N.C. App. 33, 365 S.E.2d 198, *disc. rev. denied*, 322 N.C. 610, 370 S.E.2d 257 (1988). " 'If there is more than a scintilla of evidence, contributory negligence is for the jury.' " *Blankley v. Martin*, 101 N.C. App. 175, 178, 398 S.E.2d 606, 608 (1990) (quoting *Tatum v. Tatum*, 79 N.C. App. 605, 607, 339 S.E.2d 817, 818, *modified and aff'd*, 318 N.C. 407, 348 S.E.2d 813 (1986)). A finding of contributory negligence is a bar to recovery from a defendant for acts of ordinary negligence. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 423 S.E.2d 72 (1992).

In *Clark v. Roberts*, 263 N.C. 336, 139 S.E.2d 593 (1965), our Supreme Court explained the doctrine of contributory negligence:

> Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to

> do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.

Clark, 263 N.C. at 343, 139 S.E.2d at 597. A road worker, however, is entitled to a special instruction established in *Kellogg v. Thomas*, 244 N.C. 722, 94 S.E.2d 903 (1956). The Court held in *Kellogg* that a road worker:

> occupies a different status from an ordinary pedestrian crossing a street, and this status must be considered in determining the degree of care he must exercise for his own safety, and in determining the question of contributory negligence. Because he is not required to neglect his work to escape collision with motorists not exercising reasonable care for his safety, or not obeying statutes regulating in the interests of public safety the operation of motor vehicles, he is not obliged to keep a constant lookout for approaching vehicles, and his failure to do so, does not necessarily constitute contributory negligence as a matter of law. Whether such a worker has exercised reasonable care for his own safety in view of his work and surrounding circumstances is ordinarily for the jury under proper instructions from the court.

Kellogg, 244 N.C. at 729, 94 S.E.2d at 908. This rule also applies to workers directing traffic. *Sizemore v. Raxter*, 73 N.C. App. 531, 327 S.E.2d 258, *aff'd*, 314 N.C. 527, 334 S.E.2d 391 (1985).

In the instant case, the trial court instructed the jury on contributory negligence as follows:

> [T]he law provides that one who has a right-of-way, such as the Plaintiff would have had as an employee working on the city streets in the Town of Elkin, that he has, the one with the right-of-way has a duty to exercise ordinary care for his own safety, which includes the keeping of a reasonable lookout, however, he is not required to anticipate that the operator of a motor vehicle will fail to obey the law by not yielding him the right-of-way. He may assume, even up to the last moment, that the operator will obey the law and yield the right-of-way to him.

If, however, the circumstances put, or should put the Plaintiff on notice, that an operator might fail to yield the right-of-way, then the Plaintiff must heed that notice and exercise ordinary care for his own safety.

A flagman directing traffic, however, does not have to keep a constant lookout for his own safety. *See Sizemore*, 73 N.C. App. at 534, 327 S.E.2d at 261. The proper question under *Kellogg* is whether the plaintiff exercised reasonable care for his own safety in view of his work and the surrounding circumstances. *Kellogg*, 244 N.C. at 729, 94 S.E.2d at 908. Since the trial court erred by failing to instruct the jury that it should consider whether plaintiff exercised reasonable care in view of his work and the surrounding circumstances, plaintiff is entitled to a new trial. *See Wade v. Grooms*, 37 N.C. App. 428, 246 S.E.2d 17 (1978).

New Trial.

Judges COZORT and GREENE concur.

SOUTHERN RAILWAY COMPANY, PLAINTIFF v. BISCOE SUPPLY COMPANY, INC., DEFENDANT v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, THIRD-PARTY DEFENDANT

No. 9326SC376

(Filed 19 April 1994)

1. **Railroads § 43 (NCI4th); Negligence § 93 (NCI4th)— railroad crossing accident—proximate cause—view of tracks—conflicting testimony—directed verdict**

The trial court did not err in a negligence action by a railroad against the owner of a truck involved in a crossing accident by directing a verdict that the accident was proximately caused by the negligence of defendant's employee, the truck driver, where defendant's evidence included the testimony of the driver and defendant's president that there was no place prior to the crossing from which to see down the track, so that the driver's failure to slow down could not have been the cause of the accident, but plaintiff's evidence included the testimony of a state trooper that there was a

point prior to the crossing where the driver could have seen a sufficient distance down the track and several photographs which showed such a point. The photographic evidence, supported by the testimony of the trooper, clearly showed that defendant's negligence proximately caused the collision, and, as a matter of law, the evidence could support no other conclusion.

Am Jur 2d, Railroads §§ 480-493, 632, 633.

2. **Railroads § 32 (NCI4th)— railroad crossing accident—contributory negligence—speed of train—refusal to instruct**

The trial court did not err in a negligence action by a railroad arising from a crossing accident by failing to submit to the jury as grounds for plaintiff-railroad's contributory negligence the failure of the engineer to abide by plaintiff's operating rule regarding track speed limits. A violation of a company safety rule is only some evidence of negligence; thus, defendant's contention that the engineer's failure to follow plaintiff's operating rule constituted negligence is an incorrect statement of law.

Am Jur 2d, Railroads §§ 499, 500.

3. **Evidence and Witnesses § 890 (NCI4th)— railroad crossing accident—bill for damages—illustrative—not hearsay**

The trial court did not err in a negligence action by a railroad arising from a crossing accident by admitting into evidence the bill for damages which plaintiff-railroad sent to defendant. The document was admitted only for illustrative purposes, not to prove the truth of the matter asserted, and was not hearsay.

Am Jur 2d, Evidence § 498.

4. **Damages § 178 (NCI4th)— railroad crossing accident—action by railroad—damages—not excessive**

There was no error in the award of damages in a negligence action brought by a railroad arising from a crossing accident where defendant did not argue that the award was excessive under Rule 59 as being the result of passion or prejudice and did not argue that the court's instructions on damages were improper. Both plaintiff and defendant had the opportuni-

ty to present evidence and argue to the jury and the jury chose to believe plaintiff.

Am Jur 2d, Damages §§ 1017, 1018.

Appeal by defendant from judgment filed 2 September 1992 and order filed 21 September 1992 by Judge Judson D. DeRamus, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 February 1994.

Jones, Hewson & Woolard, by Harry C. Hewson and Kenneth H. Boyer, for plaintiff-appellee.

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

LEWIS, Judge.

Plaintiff commenced this action to recover damages arising out of a railroad crossing accident between its train and defendant Biscoe Supply Company, Inc.'s (hereinafter "defendant") cement truck. The trial court directed a verdict for plaintiff on the issues of whether defendant was negligent and whether that negligence proximately caused the accident. The jury found that plaintiff was not contributorily negligent and awarded damages of $260,819.26 to plaintiff. Defendant's claims against the Department of Transportation were dismissed by the trial court, from which there was no appeal.

The evidence tended to show that on 15 December 1988, defendant's employee, Early Valley, was driving defendant's cement truck on Prison Camp Road in Montgomery County. Valley was traveling at the speed limit of fifty-five m.p.h. As he entered a curve in the road about 700 feet before the railroad crossing, Valley applied the brakes, and he continued to apply the brakes until he reached the crossing at a speed of approximately forty to forty-five m.p.h. The crossing had no gates or lights and was obscured by the topography of the area. However, between the curve and the crossing, there were several markings that gave notice of the crossing. The first was a warning sign painted on the pavement 471 feet before the crossing. The second was a warning sign on the side of the road eighty-nine feet before the crossing. Finally, there was a white cross-buck sign at the crossing about fifteen feet from the first rail, and a white line was painted across the

pavement at the cross-buck sign. Further, Valley testified that he was very familiar with the crossing. When he reached the warning sign eighty-nine feet before the crossing, he looked to the right, the direction from which the train was coming, and saw no train. He then looked left. The next time he looked right was when he was partially over the track. At that point he saw the train for the first time, and the train was approximately ten feet from him. The train struck the last set of tandem wheels on the truck, about three feet from the rear of the truck. The impact caused the train to derail, resulting in damage to the engines, cars and track. At no time prior to the collision did Valley reduce his speed to a speed that would have enabled him to stop before reaching the track.

Plaintiff's employees testified that the engineer sounded the train's horn from the time the train was about 1,500 feet from the crossing until it reached the crossing. Valley testified that he did not hear the horn. However, Valley further testified that the windows in his truck were rolled up, the heater was on, the mixer was turning, the truck's engine was backing down, and the two-way radio was on. In fact, Valley admitted that it was possible that the horn sounded and he did not hear it.

[1] Defendant's first argument on appeal is that the trial court erred in directing a verdict finding that the accident was proximately caused by the negligence of Valley. Defendant contends that when viewed in the light most favorable to it, the evidence showed that because the track was obscured by the topography, there was no point prior to the crossing where Valley could have seen a train approaching even if he had slowed down or stopped. Accordingly, his failure to slow down could not have been a proximate cause of the accident. Therefore, defendant argues, the jury should have been allowed to decide whether Valley's failure to slow down or stop proximately caused the accident.

The trial court's granting of a directed verdict for plaintiff on the issue of proximate cause will be upheld where the evidence, taken in the light most favorable to defendant, so clearly shows that defendant's negligence proximately caused the collision that it will support no other conclusion as a matter of law. *Neal v. Booth*, 287 N.C. 237, 241, 214 S.E.2d 36, 39 (1975). Defendant's evidence included the testimony of Valley and Ernest Foushee, defendant's president, both of whom testified that there was no

place prior to the crossing from which to see down the track. Plaintiff's evidence included the testimony of a state trooper, who testified that there was a point on the road prior to the crossing where Valley could have seen a sufficient distance down the track. Plaintiff also introduced several photographs which showed such a point prior to the crossing.

In *Helvy v. Sweat*, 58 N.C. App. 197, 200, 292 S.E.2d 733, 735, *disc. review denied*, 306 N.C. 741, 295 S.E.2d 477 (1982), this Court, in reviewing the trial court's granting of a directed verdict, held that the physical facts of the case, supported by the testimony of disinterested witnesses, spoke louder than the conflicting testimony of the nonmovant, and that the conflicting testimony was not sufficient to take the case to the jury. In the present case, the photographic evidence, supported by the testimony of the trooper, clearly showed that defendant's negligence proximately caused the collision, and, as a matter of law, the evidence could support no other conclusion. Accordingly, the trial court properly granted plaintiff's motion for a directed verdict.

[2] Defendant next assigns error to the trial court's failure to submit to the jury as grounds for plaintiff's contributory negligence the failure of the engineer to abide by plaintiff's operating rule requiring compliance with track speed limits.

A trial court may properly refuse to give an instruction which is not a correct statement of the law applicable to the evidence. *Pasour v. Pierce*, 76 N.C. App. 364, 370, 333 S.E.2d 314, 319 (1985), *disc. review denied*, 315 N.C. 589, 341 S.E.2d 28 (1986). This Court has held that a violation of a company safety rule is only *some* evidence of negligence. *Robinson v. Seaboard System R.R., Inc.*, 87 N.C. App. 512, 526, 361 S.E.2d 909, 918 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). Thus, defendant's contention that the engineer's failure to follow plaintiff's operating rule constituted negligence is an incorrect statement of the law, and the trial court properly declined to submit the issue to the jury.

[3] Defendant's last two assignments of error relate to plaintiff's damages. First, defendant argues that the trial court erred in admitting into evidence Plaintiff's Exhibit Number 2, the bill for damages that plaintiff sent to defendant. Defendant contends that the document was hearsay and that its admission did not comport with the requirements of the business records exception to the hearsay rule. " 'Hearsay' is a statement, other than one made by

the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1992). In the instant case, the document was admitted into evidence only for illustrative purposes, not to prove the truth of the matter asserted. Thus, the document was not hearsay, and its admission was proper.

[4] By its final assignment of error, defendant argues that the damages awarded were in excess of plaintiff's actual loss. We note that defendant does not argue that the award of damages was excessive under Rule 59 as being the result of passion or prejudice. Nor does it argue that the trial court's instructions on damages were improper.

The issues of a defendant's negligence and the amount of damages to award for such negligence are within the province of the jury to decide. *Adams v. Carolina Tel. & Tel. Co.*, 59 N.C. App. 687, 691, 297 S.E.2d 785, 788 (1982). After hearing the evidence and the arguments of counsel, the jury determined that plaintiff was damaged in the amount of $260,819.26. Both plaintiff and defendant had the opportunity to present evidence of plaintiff's actual damages and to argue that issue to the jury. The jury chose to believe plaintiff and awarded damages accordingly. This was within the jury's province. Therefore, this assignment of error is overruled.

For the reasons stated, we find no error.

No error.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. JERRY FRANKLIN McGILL, DEFENDANT

No. 9325SC833

(Filed 19 April 1994)

1. Automobiles and Other Vehicles § 813 (NCI4th)— driving while impaired—right to pre-arrest test—not requested

The contention of a defendant in a driving while impaired prosecution that he was denied his statutory rights to a pre-

arrest test was without merit. Although a person stopped for investigation of an implied consent offense may request a chemical analysis before any arrest or charge is made, defendant did not make such a request. The Court of Appeals agreed with the State that the arresting officer did not have a duty to inform defendant of his pre-arrest right to a chemical analysis.

Am Jur 2d, Automobiles and Highway Traffic §§ 302, 305-308.

Driving while intoxicated: duty of law enforcement officer to offer suspect chemical sobriety test under implied consent law. 95 ALR3d 710.

2. **Criminal Law § 1493 (NCI4th)— driving while impaired—condition of probation—Alcoholics Anonymous—reasonably related to rehabilitation**

The trial court did not err when sentencing defendant for driving while impaired by requiring as a special condition of probation that defendant attend Alcoholics Anonymous meetings at least two times per week during the period of his supervised probation and provide his probation officer with verification of such attendance. Although defendant contends that this condition violated N.C.G.S. § 20-179(m) in several respects, Alcoholics Anonymous is a support group rather than a treatment program and was reasonably related to defendant's rehabilitation. The trial court could properly require as a special condition of probation that defendant satisfy any conditions determined by the court to be reasonably related to rehabilitation. N.C.G.S. § 15A-1343(b1)(10).

Am Jur 2d, Criminal law §§ 570-576.

Appeal by defendant from judgment entered 10 June 1993 by Judge James C. Davis in Catawba County Superior Court. Heard in the Court of Appeals 11 April 1994.

Attorney General Michael F. Easley, by Associate Attorney General Robert T. Hargett, for the State.

Sigmon, Sigmon, and Isenhower, by W. Gene Sigmon, for defendant-appellant.

JOHNSON, Judge.

Defendant Jerry Franklin McGill was charged on 14 October 1991 with driving while subject to an impairing substance in violation of North Carolina General Statutes § 20-138.1 (1993). Defendant was tried and convicted in district court. Appealing to superior court, defendant entered a plea of not guilty and the case was tried at the 6 June 1993 session of Catawba County Superior Court.

Evidence presented at trial showed the following: At approximately 8:20 p.m. on 14 October 1991, Raymond Griffin, a trooper with the North Carolina Highway Patrol, observed a 1978 Ford pickup truck turning from NC 150 onto East Maiden Road in or near Newton, North Carolina. While turning, the pickup truck came within one foot of hitting Trooper Griffin's stationary vehicle. Trooper Griffin observed the pickup truck in his rear view mirror as it passed his vehicle and noticed that the pickup truck crossed the center line two times as it traveled out of his sight. Trooper Griffin turned his vehicle around in the intersection and caught up with the pickup truck as it turned into a driveway.

Trooper Griffin approached defendant, the driver of the pickup truck, and asked for his driver's license and registration. Defendant had a moderate odor of alcohol about his person, mainly coming from his breath, and his speech was mumbled. Trooper Griffin observed defendant as he walked to the patrol car and noticed that he was unsteady on his feet.

Trooper Griffin transported defendant to jail for the purpose of administering a chemical analysis of defendant's breath. While at jail, Trooper Griffin asked defendant to perform several field sobriety tests. The first test was a one leg stand, where defendant was asked to stand with his arms to his side, to put one foot in front of the other, and to count to 101. Defendant counted to twenty and was wobbly and leaning. Defendant then performed a sway test where he was asked to stand with both feet together and his hands to his side, and to lean his head back and close his eyes. During this test, he leaned and swayed forward. Trooper Griffin then asked defendant to perform a finger to nose test requiring defendant to place his arms at his side, then to extend his arms and touch his nose with his index finger. Defendant performed this unsatisfactorily, placing his right hand to the side of his nose instead of to the tip of his nose.

Trooper Don Fleetwood performed a chemical analysis of defendant's breath to determine the alcohol concentration. Trooper Fleetwood testified that he was a certified chemical analyst and had worked in law enforcement with the Highway Patrol for many years. The results of the test showed that defendant had an alcohol concentration of 0.11.

At the close of all of the evidence, defendant was convicted of driving while impaired. The trial court sentenced defendant to a level three punishment pursuant to North Carolina General Statutes § 20-179(i) (1993) and also required defendant to attend Alcoholics Anonymous two times per week for the period of his supervised probation. From this verdict and judgment, defendant appeals to our Court.

[1] Defendant first argues the trial court committed reversible error in failing to receive evidence that defendant was denied his statutory rights to a pre-arrest test. The State argues that the arresting officer in this case did not have a duty to inform defendant of his pre-arrest right to a chemical analysis of his breath and further, that such evidence was irrelevant and properly excluded from trial. We agree with the State.

Defendant correctly points out that "[a] person stopped or questioned by a law-enforcement officer who is investigating whether the person may have committed an implied-consent offense may request the administration of a chemical analysis before any arrest or other charge is made for the offense." North Carolina General Statutes § 20-16.2(i) (1993). However, in the case *sub judice*, defendant did not request the administration of a chemical analysis before the arrest or charge was made for driving while subject to an impairing substance. North Carolina General Statutes § 20-16.2(a) (1993) was the applicable portion of the statute in the instant case, stating that "[a]ny person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense." Defendant's argument is, therefore, meritless.

Defendant next argues the trial court erred in limiting defendant's right of cross-examination of the witnesses appearing against him. We have carefully reviewed the testimony of all of the witnesses cross-examined by defendant and find that the trial judge appropriately ruled on all objections and matters pertaining to such cross-

examination. We therefore reject defendant's argument as to these assignments of error.

[2] Defendant last argues the trial court erred in requiring as a special condition of probation that defendant attend Alcoholics Anonymous meetings during the period of his supervised probation at least two times per week, and further requiring that defendant provide his probation officer with verification of such attendance.

Defendant notes that North Carolina General Statutes § 20-179(m) (1993) states in pertinent part:

> [i]f a defendant being sentenced under this section is placed on probation, he shall be required as a condition of that probation to obtain a substance abuse assessment. . . . If the assessing agency recommends that the defendant participate in a treatment program, the judge may require the defendant to do so, and he shall require the defendant to execute a Release of Information authorizing the treatment agency to report his progress to the Court or the Department of Correction. . . . An order of the court shall not require the defendant to participate in any treatment program for more than 90 days unless a longer treatment program is recommended by the assessing agency and his alcohol concentration was .15 or greater as indicated by a chemical analysis taken when he was charged or this was a second or subsequent offense within five years.

Relying on North Carolina General Statutes § 20-179(m), defendant argues that the trial court erred because no assessing agency recommended that defendant participate in a treatment program. Defendant further argues that the trial court was not permitted to require defendant to attend Alcoholics Anonymous for a period exceeding 90 days because a longer treatment program was not recommended by an assessing agency and because defendant's alcohol concentration was not .15 or greater and the offense was not a second or subsequent offense within five years.

We disagree with defendant. Defendant incorrectly characterizes Alcoholics Anonymous as a "treatment program," when it is, in fact, a support group for recovering alcoholics. As a special condition of probation, the trial court could properly require defendant to "[s]atisfy any . . . conditions determined by the court to be reasonably related to [defendant's] rehabilitation." North Carolina

General Statutes § 15A-1343(b1)(10) (Cum. Supp. 1993). The requirement that defendant attend Alcoholics Anonymous meetings during the period of his supervised probation at least two times per week and that defendant provide his probation officer with verification of such attendance is reasonably related to defendant's rehabilitation.

Therefore, in the trial of defendant's case, we find no error.

Judges WELLS and JOHN concur.

UNIVERSAL MECHANICAL, INC. v. WILL HUNT, D/B/A INTERSTATE MECHANICAL PIPING, INTERSTATE MECHANICAL, INC., AND/OR INTERSTATE MECHANICAL & PIPING, INC., MARRIOTT CONSTRUCTION, AND DUNN CONSTRUCTION COMPANY, INC.

No. 9326SC409

(Filed 19 April 1994)

1. **Liens § 32 (NCI4th)— perfection of subcontractor's lien— necessity for claim of lien and notice**

Under N.C.G.S. § 44A-23, a subcontractor's claim of lien against real property is perfected upon the filing and service of both a claim of lien pursuant to N.C.G.S. § 44A-12 and a notice of claim of lien pursuant to N.C.G.S. § 44A-19. Therefore, plaintiff second tier subcontractor failed to perfect its lien against motel property where plaintiff filed a claim of lien against the owner and the general contractor but did not also file a notice of a claim of lien.

Am Jur 2d, Mechanics' Liens §§ 49-237.

2. **Liens § 35 (NCI4th)— claim of lien—not notice of claim of lien**

Plaintiff second tier subcontractor's claim of lien did not meet the requirements of a notice of a claim of lien because it did not name the general contractor or assert rights available to plaintiff via a notice of a claim of lien.

Am Jur 2d, Mechanics' Liens §§ 170-237.

3. Liens § 35 (NCI4th)— notice of claim of lien—claim of lien, complaint and motion to amend insufficient

Plaintiff second tier subcontractor's claim of lien, complaint and motion to amend the complaint did not together amount to a notice of a claim of lien under N.C.G.S. § 44A-19 because all of the information necessary to constitute a claim of lien was not contained in a single document purported to be a claim of lien. The notice of a claim of lien must be a single document substantially in the form prescribed by N.C.G.S. § 44A-19.

Am Jur 2d, Mechanics' Liens, §§ 171-173, 210-222.

Appeal by plaintiff from judgment entered 26 February 1993 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 February 1994.

Philip L. Whitson for plaintiff-appellant.

Edward F. Hennessey, IV for defendants-appellees.

JOHNSON, Judge.

Plaintiff, Universal Mechanical, Inc. was a second-tier contractor on a project involving the construction of a hotel upon the real property of defendant, Marriott Corporation (hereinafter defendant Marriott), located in Mecklenburg County, North Carolina. Plaintiff's contract was through defendant, Will Hunt, d/b/a Interstate Mechanical Piping, Interstate Mechanical, Inc., and/or Interstate Mechanical & Piping, Inc. (hereinafter defendant Interstate) who was the first-tier subcontractor to defendant Dunn Construction Company, Inc. (hereinafter defendant Dunn), the General Contractor. (Defendant Interstate has filed a petition in bankruptcy and has never appeared in this action.) From 15 October 1989 to 18 June 1990, plaintiff supplied defendants with materials and building supplies. Upon the completion of the contract, the amount of forty-seven thousand six hundred sixty three dollars and sixty nine cents ($47,663.69) was due to plaintiff.

On 10 July 1990, plaintiff properly filed a "Claim of Lien" with the Clerk of Superior Court of Mecklenburg County, North Carolina. On 25 September 1990, plaintiff filed a complaint against defendants Interstate and Marriott, claiming a lien against the real property of defendant Marriott. On 12 February 1991, plaintiff

filed a motion to amend its complaint to add defendant Dunn as a defendant. An order granting plaintiff's motion was entered on 2 April 1991.

The stipulated issue of whether plaintiff provided proper notice to defendants Marriott and Dunn pursuant to North Carolina General Statutes § 44A-19 (1989) was heard on 26 February 1993 before Judge Marvin K. Gray in the Superior Court of Mecklenberg County, North Carolina. Judge Gray entered judgment dismissing plaintiff's claim against defendants Marriott and Dunn because plaintiff had not perfected its claim of lien. From this judgment plaintiff appealed to our Court.

[1] By plaintiff's first assignment of error, plaintiff argues that the trial court erred in dismissing plaintiff's lien and claim of lien against the real property of defendant Marriott on the grounds that plaintiff failed to perfect its claim of lien under North Carolina General Statutes § 44A-23(1989).

North Carolina General Statutes § 44A-23 provides:

> A first, second, or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S.44A-12. Upon the filing of the notice **and** claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent. (Emphasis added.)

Under this provision, a claim of lien against real property is perfected, or enforceable, upon the filing and service of both a claim of lien pursuant to North Carolina General Statutes § 44A-12 (1989) and a notice of claim of lien pursuant to North Carolina General Statutes § 44A-19.

Plaintiff, however, contends that the perfection of a claim of lien under North Carolina General Statutes § 44A-23 does not require the filing and service of a notice of lien pursuant to North Carolina General Statutes § 44A-19. Plaintiff argues that the requirements for perfection of a claim of lien under North Carolina General Statutes § 44A-23 are set forth in North Carolina General

Statutes § 44A-12. Plaintiff argues that this is evident by the following language in North Carolina General Statutes § 44A-23: "The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12." However, we find that this portion of the statute merely refers to the effective date of a lien. The language is not to be construed to mean that once a claim of lien has been filed pursuant to North Carolina General Statutes § 44A-12, the lien is perfected. The necessity of filing both documents is made clear by the last sentence of North Carolina General Statutes § 44A-23 which provides: "Upon the filing of the notice **and** claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent." (Emphasis added.) Therefore, it is clear that in order to have perfected its claim of lien, plaintiff should have filed and served on all parties a notice of claim of lien in compliance with North Carolina General Statutes § 44A-19. We overrule plaintiff's first assignment of error.

Plaintiff next argues that the trial court erred in ruling that plaintiff failed to provide "notice" to defendant, Marriott, as required by North Carolina General Statutes § 44A-23, because said notice was complete upon plaintiff filing its claim of lien on 10 July 1990; or, alternatively, when plaintiff properly served its complaint upon defendant Marriott on 12 February 1991.

North Carolina General Statutes § 44A-23 provides that: "[a] first, second or third tier subcontractor, who gives **notice** as provided in this Article, may, to the extent of his lien enforce the lien of the contractor[.] . . ." (Emphasis added.) North Carolina General Statutes § 44A-19 sets forth the requirements for giving notice and provides in pertinent part:

> (a) Notice of a claim of lien shall set forth:
>
> (1) The name and address of the person claiming the lien,
>
> (2) A general description of the real property improved,
>
> (3) The name and address of the person with whom the lien claimant contracted to improve real property,
>
> (4) The name and address of each person against or through whom subrogation rights are claimed,
>
> (5) A general description of the contract and the person against whose interest the lien is claimed, and

(6) The amount claimed by the lien claimant under his contract.

(b) All notices of claims of liens by first, second or third tier subcontractors must be given using a form substantially as follows:

. . .

Plaintiff argues that its claim of lien or its complaint and motion to amend complaint in this action, read together with its claim of lien, amount to a notice of claim of lien. We disagree.

[2] A claim of lien may not serve as a notice of claim of lien because a notice of claim of lien must identify all the parties in the "contractual chain" between the claimant and the owner. A claim of lien, however, need only identify the owner, the claimant, and the party with which the claimant contracted. While plaintiff's claim of lien met the requirements of North Carolina General Statutes § 44A-12, the claim of lien did not met the requirements of North Carolina General Statutes § 44A-19, because the claim of lien did not name defendant Dunn or assert rights available to plaintiff via a notice of claim of lien.

[3] Plaintiff's claim of lien, complaint, and motion to amend the complaint read together, do not amount to a notice of a claim of lien under North Carolina General Statutes § 44A-19, because all the information necessary to constitute a notice of claim of lien was not contained in a single document purported to be a notice of claim of lien. Our Supreme Court in *Contract Steel Sales, Inc. v. Freedom Const. Co.*, 321 N.C. 215, 362 S.E.2d 547 (1987) held that a lien claimant is not required to use the model statutory form set out in North Carolina General Statutes § 44A-19. However, the Court also held that deviation from the statutory form is permissible only if all the information set out in the statutory form is contained in the notice. *Id.* at 222, 362 S.E.2d at 551. We interpret this to mean that the notice of claim of lien must be a single document substantially in the form prescribed. We find no authority for plaintiff's argument that a collection of documents may be read together to establish a notice of claim of lien.

Therefore, we find that plaintiff's complaint and motion to amend the complaint do not constitute a sufficient notice of claim of lien within the meaning of North Carolina General Statutes § 44A-19, and conclude that plaintiff did not properly perfect any

lien that may have been available to it under North Carolina General Statutes § 44A-23. Accordingly, the decision of the trial court is affirmed.

Affirmed.

Judges EAGLES and LEWIS concur.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF EARL L. PICKETT ENTERPRISES, INC.

No. 9314SC277

(Filed 19 April 1994)

Mortgages and Deeds of Trust § 109 (NCI4th)— foreclosure sale—bidder's refusal to pay amount bid—resale—improper addition of debtor to proceeding

Where the high bidder in a foreclosure proceeding instituted only against the corporate debtor refused to pay its bid price because certain secured equipment had been removed from the property, and the ten-day period for an upset bid had passed, the clerk of court properly held that the bidder would be liable on its bid to the extent that the final sales price on a resale was less than the amount of its bid. However, the trustee improperly issued a new notice of hearing on foreclosure adding the individual debtor, and the clerk of court improperly conducted a new foreclosure hearing allowing the addition of the individual debtor as a party, since the trustee cannot now attempt to obligate the individual debtor to what may turn out to be a deficiency judgment because of the original high bidder's liability on its bid.

Am Jur 2d, Mortgages §§ 754 et seq.

Appeal by Earl L. Pickett, individually, from order entered 18 November 1992 by Judge A. Leon Stanback in Durham County Superior Court. Heard in the Court of Appeals 11 January 1994.

King, Walker, Lambe & Crabtree, by Daniel Snipes Johnson, for Earl L. Pickett, individually, appellant.

Stubbs, Cole, Breedlove, Prentis & Biggs, by Terry D. Fisher, for Central Carolina Bank and Trust Company, appellee.

JOHNSON, Judge.

The real property which is the subject of the foreclosure proceeding in this matter was commercial property owned by Earl L. Pickett Enterprises, Inc. (hereafter, Pickett Enterprises) and was the location of a self service car wash. In March 1991, Pickett Enterprises and appellant Earl L. Pickett, individually (hereafter, Pickett) executed a promissory note in favor of appellee Central Carolina Bank and Trust Company (hereafter, CCB) in the amount of $225,000.00. This note was secured by a line of credit deed of trust from Pickett Enterprises. The note was further secured by a security agreement granting a security interest in certain personal property owned by the corporation. This personal property consisted of vacuum units, a bill changing machine, car wash units and other related items. The note went into default and a foreclosure proceeding was instituted against Pickett Enterprises pursuant to a 15 May 1992 petition for hearing prior to a foreclosure sale filed by the substitute trustee. A notice of hearing addressed to Pickett Enterprises along with the petition and notice of sale was served by mail on Picket Enterprises on 16 May 1992.

On 16 June 1992, a foreclosure hearing was held by the assistant clerk of superior court who entered an order on that date authorizing the substitute trustee to hold the foreclosure sale. No appeal to superior court was taken from this 16 June 1992 order.

In June 1992, prior to the foreclosure sale, officers of CCB inspected the subject property and found all portions of the equipment described in the security agreement to be in place except for one or two vacuum units.

Pursuant to the foreclosure order, the foreclosure sale was held on 7 July 1992, at which sale CCB became the last and highest bidder for the subject property at a price of $130,000.00. The trustee filed a report of the sale on 7 July 1992. On 8 July 1992, an officer of CCB returned to the subject property and discovered that a substantial portion of the equipment earlier found at the car wash had been removed.

No upset bid was placed with the clerk within ten days of the filing of the report of sale. Thereafter, CCB notified the substitute trustee that it would refuse to accept tender of a deed to the subject property at the bid price of $130,000.00. We note that this action, in essence, was a refusal by CCB to pay the bid price which it had bid at the foreclosure sale of the subject property. The trustee did not take any action against CCB for its failure to pay the bid price pursuant to its bid at the 7 July 1992 foreclosure sale.

On 31 July 1992, the trustee issued a new notice of hearing on foreclosure of the deed of trust naming both Pickett and Pickett Enterprises as parties. This new notice scheduled a foreclosure hearing for 31 August 1992. The substitute trustee served this notice on Pickett as well as Pickett Enterprises. On 31 August 1992, Pickett and Pickett Enterprises objected in writing to the new notice of foreclosure hearing. The hearing originally scheduled for 31 August 1992 was rescheduled for 8 September 1992 before the clerk of superior court.

After this 8 September 1992 hearing was held, the clerk of superior court by order dated 18 September 1992 granted Pickett Enterprises' objection to the new foreclosure hearing, but denied Pickett's objection. The clerk then conducted a new foreclosure hearing allowing the addition of Pickett as a party. In this order the clerk also held that CCB would be liable on its bid to the extent that the final sales price on the resale was less than the amount of its bid.

On 24 September 1992, Pickett filed an appeal to the superior court from the 18 September 1992 order. CCB cross-appealed from the finding of the clerk that it was liable on its 7 July 1992 bid. By order dated 18 November 1992, the superior court adopted the findings of fact and conclusions of law contained in the clerk's order, except that the court found "that the issue of whether the high bidder at the July 7, 1992 sale held in this proceeding should be held liable on its bid to the extent that the final sales price on re-sale is less than the amount of such bid, plus costs of re-sale or re-sales, is not properly before the Court at this time."

After notice of appeal to our Court, the property was resold at a sale held on 14 December 1992, and CCB was once again the highest and last bidder for the subject property, this time with a bid of $120,000.00.

The issue before this Court on appeal is whether the trial court erred in allowing the trustee to hold a new hearing and sale in this foreclosure proceeding, adding a new deficiency debtor, after the assistant clerk had held a foreclosure hearing and sale and the sale of the property had been confirmed by passage of the upset bid period.

We note initially that North Carolina General Statutes § 45-21.16 (Cum. Supp. 1993) requires the clerk of court to examine four issues in determining whether to proceed with a foreclosure by power of sale, those being (1) the existence of a valid debt; (2) the existence of a default; (3) the trustee's right to foreclose; and (4) sufficiency of notice. *Phil Mechanic Construction Co. v. Haywood*, 72 N.C. App. 318, 325 S.E.2d 1 (1985). Once the clerk of court has determined the existence of each of these items, the clerk authorizes the trustee to proceed with the power of sale contained in the mortgage instrument.

After the trustee conducts the sale of the foreclosed real property, and the ten day period for an upset bid authorized pursuant to North Carolina General Statutes § 45-21.27 (Cum. Supp. 1993) has passed, "the rights of the parties to the sale . . . become fixed." The failure of the high bidder to comply with the bid is governed in part by North Carolina General Statutes § 45-21.30(c) (Cum. Supp. 1993):

> When the highest bidder at a sale or resale or any upset bidder fails to comply with his bid upon tender to him of a deed for the real property or after a bona fide attempt to tender such a deed, the clerk of superior court may, upon motion, enter an order authorizing a resale of the real property. The procedure for such resale shall be the same in every respect as is provided by this Article in the case of an original sale of real property *except that the provisions of G.S. 45-21.16 are not applicable to the resale.* (Emphasis added.)

We find that the trustee improperly issued a new notice of hearing on foreclosure of the deed of trust naming both Pickett and Pickett Enterprises as parties and that the clerk of court improperly conducted a new foreclosure hearing in this proceeding allowing the addition of Pickett as a party. We observe that when CCB refused to pay the bid price which it had bid at the 7 July 1992 foreclosure sale of the subject property, the clerk of court properly held that CCB would be liable on its bid to the extent

that the final sales price on the resale was less than the amount of its bid, pursuant to North Carolina General Statutes § 45-21.30(d) (Cum. Supp. 1993) which states that "[a] defaulting bidder at any sale or resale or any defaulting upset bidder is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all the costs of the resale." However, when the trustee decided, in his discretion, to hold a resale, he was required to follow North Carolina General Statutes § 45-21.30(c), which clearly indicates that "[t]he procedure for such resale shall be the same in every respect as is provided by this Article in the case of an original sale of real property *except that the provisions of G.S. 45-21.16 are not applicable to the resale.*" Therefore, the new notice of hearing on foreclosure of the deed of trust and the new foreclosure hearing in this proceeding were improper.

In ruling as such, we note that if the subject property had been sold on 7 July 1992 to a bidder who did not default, and if a deficiency had remained after the sale, the holder would have been estopped from asserting liability against Pickett as Pickett did not receive notice of the foreclosure hearing. North Carolina General Statutes § 45-21.16 (Cum. Supp. 1993). Likewise, the trustee herein cannot now attempt to obligate Pickett to what might turn out to be a deficiency judgment because of CCB's liability on its original bid.

Therefore, we find the trial court erred in allowing the trustee to hold a new hearing and sale in this foreclosure proceeding.

The decision of the trial court is reversed.

Judges EAGLES and MARTIN concur.

PRINCIPAL MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF v. BURNUP & SIMS, INC., DEFENDANT

No. 9326DC157

(Filed 19 April 1994)

Appeal and Error § 249 (NCI4th)— summary ejectment—appeal to district court—failure to pay costs—dismissal

The trial court properly denied defendant's motion to reinstate its appeal from the magistrate to district court where plaintiff had initiated a summary ejectment action against defendant in magistrate's court; judgment was entered against defendant; defendant gave notice of appeal to district court; and defendant's appeal was subsequently dismissed for failure to pay costs of court to appeal within 20 days after entry of judgment. An appeal is not perfected under N.C.G.S. § 7A-228(b) unless the costs of court to appeal have been paid within 20 days after the entry of judgment; failure to pay the costs within 20 days results in the automatic dismissal of the appeal. Moreover, under N.C.G.S. § 7A-228, plaintiff has the responsibility of ascertaining and paying the costs of the appeal and the 20 day period begins to run the day the judgment is entered.

Am Jur 2d, Appeal and Error §§ 323 et seq.; Justices of the Peace §§ 112 et seq.

Appeal by defendant from order signed 4 November 1992 by Judge Brent McKnight in Mecklenburg County District Court. Heard in the Court of Appeals 3 January 1994.

Plaintiff initiated a summary ejectment action against defendant in magistrate's court for possession of its premises. On 20 July 1992, judgment was entered against defendant. Defendant gave oral notice of appeal to the district court for a hearing *de novo*. Defendant gave written notice of appeal on 27 July 1992. On 12 August 1992, defendant's appeal was dismissed pursuant to G.S. 7A-228(b) for failure to pay costs of court to appeal within 20 days after entry of judgment. Defendant's motion to reinstate its appeal was denied by the district court. Defendant appeals.

Justice & Eve, P.A., by R. Michael Eve, Jr., for plaintiff-appellee.

Robinson Maready Lawing & Comerford, by Jerry M. Smith, for defendant-appellant.

EAGLES, Judge.

Defendant appeals the district court's denial of its motion to reinstate its appeal. We affirm.

Defendant's appeal from the summary ejectment proceeding was dismissed pursuant to G.S. 7A-228(b) because defendant failed to pay the costs of court to appeal within 20 days after the entry of judgment. G.S. 7A-228(b) provides that, "Failure to pay the costs of court to appeal within 20 days after entry of judgment shall result in the *automatic dismissal* of the appeal." (Emphasis added.) The statutory provisions regarding the costs of court to appeal are found in G.S. 7A-305.

Defendant contends that defendant's appeal should not have been dismissed under G.S. 7A-228 because defendant's counsel did not receive a bill of costs from the clerk of superior court. Defendant argues that it is the duty of the clerk of superior court to collect court costs in advance of appeal. Defendant relies on G.S. 7A-305 and this court's decision in *Porter v. Cahill*, 1 N.C. App. 579, 162 S.E.2d 128 (1968). We are not persuaded.

G.S. 7A-305(c) states that "The clerk of superior court, at the time of the filing of the papers initiating the action or the appeal, shall collect as advance court costs, the facilities fee and General Court of Justice fee . . . ." In *Cahill, supra*, the plaintiff appealed a decision of the magistrate to the district court and did not pay the $11 in advance court costs when he filed the appeal. Plaintiff's appeal was dismissed by the district court for plaintiff's failure to pay the advance court costs. This court held that the district court erred in dismissing plaintiff's appeal and stated:

> Under the provisions of G.S. § 7A-305(c), *supra*, it is clear that the duty of collecting the additional costs at the time of the filing of the papers initiating an appeal is imposed upon the Clerk. But a failure of the Clerk to perform his duty in this respect should not operate to prejudice the appealing party.

Porter v. Cahill, 1 N.C. App. 579, 581, 162 S.E.2d 128, 130 (1968).

We find *Cahill* distinguishable. The question presented in *Cahill* was whether the deposit of the $11 in court costs was necessary to perfect the appeal under G.S. 7A-228. *Id.* at 580, 162 S.E.2d at 130. At that time, G.S. 7A-228 did not require payment of the costs of appeal in order to perfect the appeal. G.S. 7A-228 at that time provided:

> Appeal is perfected by serving written notice thereof on all other parties and by filing written notice with the clerk of superior court within 10 days after entry and indexing of the judgment on the civil judgment docket. Notice of appeal may also be given orally in open court upon announcement of or rendition of the judgment, and shall thereupon be noted in writing by the magistrate upon the judgment.

In *Cahill*, this court noted that, "It is abundantly clear from the record that the plaintiff gave notice of appeal in open court before the magistrate, and that the magistrate duly noted the appeal upon the judgment. This complies with the provisions of G.S. § 7A-228." *Cahill v. Porter*, 1 N.C. App. 579, 581, 162 S.E.2d 128, 130 (1968). It is clear that our holding in *Cahill* was based on our interpretation of G.S. 7A-228 as it existed at that time.

Since *Cahill* was decided, G.S. 7A-228 has been amended. G.S. 7A-228(b) now provides that:

> (b) The appeal shall be perfected by (1) oral announcement of appeal in open court; or (2) by filing notice of appeal in the office of the clerk of superior court within 10 days after entry of judgment, pursuant to subsection (a) . . . . Failure to pay the costs of court to appeal within 20 days after entry of judgment shall result in the automatic dismissal of the appeal.

An appeal is not perfected under G.S. 7A-228(b) unless the costs of court to appeal have been paid within 20 days after the entry of judgment. Failure to pay the costs within 20 days results in the *automatic dismissal* of the appeal.

Although this court held in *Cahill* that it is the duty of the clerk of superior court to collect the costs of appeal, that case was decided before the effective date of the amendment to G.S. 7A-228 requiring the payment of the costs of appeal to perfect the appeal. It is the appellant's responsibility to perfect its appeal. The clerk of superior court has no duty to perfect an appellant's

appeal. Accordingly, we hold that under G.S. 7A-228, plaintiff has the responsibility of ascertaining and paying the costs of appeal.

Defendant also contends that the 20 day period in which appellant must pay costs of appeal does not begin to run until after the clerk of superior court has properly assessed the costs of court to appellant. This contention is without merit. The plain language of G.S. 7A-228 requires that costs of appeal be paid "within 20 days after entry of judgment." Accordingly, the 20 day period begins to run the day the judgment is entered.

For the reasons stated, we affirm the order of the district court denying defendant's motion to reinstate its appeal.

Affirmed.

Chief Judge ARNOLD and Judge WELLS concur.

TOWN OF PINEVILLE, A MUNICIPAL CORPORATION v. ATKINSON/DYER/WATSON ARCHITECTS, P.A., AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND

No. 9226SC1249

(Filed 19 April 1994)

1. Principal and Surety § 48 (NCI4th)— public performance bond—statute of limitations

Since the public bond statute does not specify a limitations period for performance bonds, parties entering into a public performance bond could thus contract for any reasonable limitations period, and the two-year period provided in a performance bond for construction of a town community center was valid. N.C.G.S. § 44A-33(a).

Am Jur 2d, Limitations of Actions § 425.

Validity of contractual time period, shorter than statute of limitations, for bringing action. 6 ALR3d 1197.

2. Limitations, Repose, and Laches § 9 (NCI4th)— public performance bond—equitable tolling of limitations inapplicable

The two-year limitations period provided in a public performance bond for construction of a community center was not equitably tolled because the contractor made cosmetic repairs which concealed structural defects where there was no evidence that the surety ever made any misrepresentations to plaintiff town.

Am Jur 2d, Limitations of Actions §§ 422 et seq.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action. 15 ALR2d 500.

Appeal by plaintiff from judgment on the pleadings entered 17 September 1992 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 December 1993.

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

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Robin K. Vinson, for defendant-appellee.

WYNN, Judge.

On 19 August 1987 the plaintiff Town of Pineville, North Carolina, a municipal corporation, entered into a construction contract with the Fox Firm, Inc. (hereinafter "Fox") as general contractor to build the town's Belle Johnston Community Center. The contract required Fox to provide a performance bond. On 6 October 1987, defendant Fidelity and Deposit Company of Maryland (hereinafter "F & D") issued a performance bond to Fox, under which it agreed to act as surety securing Fox's performance as a general contractor. The bond stated that any action pursuant to it must be instituted within two years from the date upon which the final payment falls due. The building was substantially completed in December 1988 and plaintiff issued final payment under the contract on 22 December 1988. On 25 August 1989, plaintiff notified Fox of several items of corrective work to be performed. Sometime thereafter, Fox performed cosmetic repairs which merely concealed serious structural defects in the building. Plaintiff admits that it did not realize the problems had not been adequately remedied until late 1991. On 17 December 1991, almost three years after

the date upon which final payment was made, plaintiff filed the present action against F & D to recover damages under the bond. On 18 August 1992 F & D moved for judgment on the pleadings on the ground that the period of limitations for the action had already run. The motion was granted on 17 September 1992.

This case centers on the enforceability of the two-year limitations provision set forth in F & D's public performance bond. The bond provided that if Fox defaulted under its contract with Pineville, F & D would either complete the contract or obtain a bidder to complete the contract. The bond specified, "Any suit under this bond must be instituted before the expiration of two (2) years from the date on which final payment under the contract falls due."

Plaintiff did not sue F & D until after the two-year contractual period had expired. However, plaintiff argues, alternatively, that the parties' relationship should be governed by the three-year statutory limitations period or that the two-year contractual period should be equitably tolled because the existing cause of action was concealed. We reject both of these theories and affirm the trial court's dismissal for failure to state a claim.

[1] Initially, we note the distinction between the statutory limitations period for bringing a cause of action and a limitations period set forth in a public performance bond. The statute of limitations for civil actions specifies the outer time limit in which a suit can be initiated. In contrast, a public performance bond is a contract, governed by the law of contracts. Parties entering into public performance bonds are free to contract for any terms they so desire, and are presumed competent to do so. Here, F & D contracted to limit its liability to two years. Plaintiff, in turn, accepted this bond as fulfillment of Fox's duty to provide a bond.

A time limit in a bond will be held void if it conflicts with any express limitations period in the public bond statute. *Horne-Wilson, Inc. v. National Surety Co.*, 202 N.C. 73, 161 S.E. 726 (1932). In *Pyco Supply Co. v. American Centennial Ins. Co.*, 85 N.C. App. 114, 354 S.E.2d 360 (1987), *rev'd on other grounds*, 321 N.C. 435, 364 S.E.2d 380 (1988), we held that parties could not contract to shorten the one-year limitations period for payment bonds required by the public bond statute. N.C. Gen. Stat. § 44A-28(b) (1989). However, in contrast to the provisions governing payment bonds, our public bond statute does not specify alimitations period

for performance bonds. *See* N.C. Gen. Stat. § 44A-33(a) (1989). Therefore, parties entering into a public performance bond are free to contract for any reasonable limitations period they choose.

Performance bond limitations periods shorter than the three-year statute of limitations have been upheld in North Carolina. In *Horne-Wilson, Inc. v. National Surety Co.*, 202 N.C. 73, 161 S.E. 726 (1932), our Supreme Court upheld a twelve-month contractual limitations period in a public performance and payment bond. *See also Hood ex rel. First Bank and Trust Co. v. Rhodes*, 204 N.C. 158, 167 S.E. 558 (1933).

[2] Alternatively, plaintiff argues that, even if we uphold the two-year limitations period, it should be equitably tolled because Fox concealed the building's defects. Under the doctrine of equitable tolling, equity will deny a party's right to assert a technical defense, such as lapse of time, "when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Nowell v. Great Atlantic & Pacific Tea Co.*, 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959). However, a plaintiff who seeks to obtain equitable tolling of a limitations period must show that the misrepresentations he reasonably relied upon were made by the party raising the defense, here, defendant F & D. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976); *Duke University v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987). In this case, there is no evidence that F&D ever made any representations to plaintiff. Therefore, as a matter of law, the equitable tolling doctrine does not apply to the limitations period in this bond.

Judgment is affirmed.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. DARREN DANIELS

No. 935SC729

(Filed 19 April 1994)

Criminal Law § 136 (NCI4th)— armed robbery—guilty plea—voluntariness—failure to inform defendant about parole eligibility

Defendant's plea of guilty to armed robbery was not rendered involuntary by the trial court's failure to inform defendant that the mandatory minimum sentence of 14 years included a provision that he would have to serve seven years before being eligible for parole. Rather, defendant's plea of guilty was entered freely, understandingly and voluntarily where the trial court examined defendant concerning his guilty plea and the possible sentence he could receive in compliance with N.C.G.S. § 15A-1022(a), and defendant signed a plea transcript which detailed the offense to which he was pleading guilty and the possible sentence he could receive, including the mandatory minimum sentence of 14 years.

Am Jur 2d, Criminal Law §§ 473-480.

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. 97 ALR2d 549.

Appeal by defendant from judgment entered 16 December 1991 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 7 March 1994.

Defendant pleaded guilty to one count of armed robbery pursuant to a plea arrangement and retained counsel to represent him on this charge. On 11 December 1991, defendant's counsel moved to be allowed to withdraw for defendant's failure to pay as he had agreed. A hearing on this motion was scheduled for 16 December 1991.

On the day of the hearing, defendant pleaded guilty to the crime charged. Before accepting defendant's plea, the trial court examined defendant concerning his guilty plea and the possible sentence he could receive. Defendant was informed by the trial court that he would be sentenced to 14 years in prison. Defendant

also signed a plea transcript indicating, *inter alia*, that he understood that he would be sentenced to 14 years in prison and that the mandatory minimum sentence for armed robbery was 14 years. The trial court accepted defendant's guilty plea and sentenced defendant to 14 years.

Defendant stated in his affidavit that he and his attorney had always discussed going to trial and that he had informed his attorney of an alibi witness. On the morning of the hearing, defendant's attorney told defendant that he should take the plea because the other party indicted for the robbery, Peterson, was planning to testify that defendant committed the crime in exchange for a common law robbery plea deal. Defendant stated that his attorney also informed him that his prior conviction of breaking and entering and larceny would not look good to the jury. Defendant stated that he did not understand that a mandatory minimum sentence included a provision that he would have to serve seven years before being eligible for parole, and had he known this, he would not have entered a guilty plea.

Attorney General Michael F. Easley, by Assistant Attorney General Archie W. Anders, for the State.

Nora Henry Hargrove for defendant-appellant.

WELLS, Judge.

In his sole assignment of error, defendant argues that the trial court erred in failing to fully inform defendant of the consequences of his plea, thereby rendering the plea involuntary and depriving defendant of his right to due process guaranteed by the North Carolina and United States Constitutions and Chapter 15A of the North Carolina General Statutes. We find no error.

Defendant argues that he did not understand that a mandatory minimum sentence of 14 years included a provision that he would have to serve seven years before being eligible for parole, and had he known that, he would not have pleaded guilty. Therefore, defendant contends that his guilty plea was not entered freely, understandingly and voluntarily. We disagree.

Upon tender of a plea of guilty, our trial courts are under a statutory duty to examine the defendant personally about his plea. The elements of that examination are set forth in N.C. Gen. Stat. § 15A-1022(a):

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), 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; and

(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.

The statute does not contain a requirement that the trial court attempt to discuss or explain to a defendant any aspect of our law pertaining to parole; thus, the court was under no duty to do so.

This Court has held that evidence that defendant signed a plea transcript and that the judge made careful inquiry of the defendant concerning his plea is sufficient to show that the plea was entered into freely, understandingly and voluntarily. *State v. Thompson*, 16 N.C. App. 62, 190 S.E.2d 877, *cert. denied*, 282 N.C. 155, 191 S.E.2d 604 (1972). *See also State v. Crain*, 73 N.C. App. 269, 326 S.E.2d 120 (1985). In the case *sub judice*, defendant signed a plea transcript which detailed the offense to which he was pleading guilty and the possible sentence he could receive, including the mandatory minimum sentence of 14 years. After careful examination of the record before us, we conclude that defendant tendered his guilty plea freely, understandingly and voluntarily.

For the reasons stated above, we affirm the judgment of the trial court.

No error.

Judges ORR and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 APRIL 1994

CALVIN HEIGHTS BAPTIST CHURCH v. LOWERRE No. 9325SC590	Burke (89CVS1219)	Affirmed
CUMMINGS v. BURROUGHS WELLCOME No. 9310IC116	Ind. Comm. (975922)	Affirmed
DAIL v. HARDEE'S FOOD SYSTEMS No. 9310SC345	Wake (91CVS8735)	Affirmed
DAVIS v. ARRINGTON No. 9321DC426	Forsyth (91CVS7115)	Affirmed
EAST CAROLINA FARM CREDIT, ACA v. GREENE GIN & COTTON CO. No. 933SC415	Pitt (92CVS640)	Affirmed
FRENCH v. BROWN No. 9323SC39	Yadkin (91CVS460)	Appeal Dismissed
GRABAREK & PHILLIPS v. SADDLE CLUB, INC. No. 9314SC365	Durham (91CVS663)	Dismissed & Remanded
HAITHCOX v. FURNITURE INDUSTRIES No. 9210IC510	Ind. Comm. (843349)	Affirmed
HOOTS v. WILKINS No. 9229SC1277	Henderson (86CVS351)	Vacated & Remanded
HOUSTON & ASSOC. v. COUNTY OF BRUNSWICK No. 9313SC505	Brunswick (91CVS779)	No Error
JACK ECKERD CORP. v. BRENCO, A/P No. 9328SC106	Buncombe (90CVS03947)	Appeal dismissed & petition for writ of certiorari denied
MENZIES v. MENZIES No. 9320DC624	Moore (92CVD49)	Dismissed
MORETZ v. MILLER No. 9324SC323	Watauga (91CVS452)	Dismissed

NATIONSBANK OF N.C. v. AMERICAN DOUBLOON CORP. No. 9225SC1338	Catawba (89CVS185)	Affirmed
PATE v. CRAMERTON AUTOMOTIVE PRODUCTS No. 9327SC600	Gaston (92CVS4534)	Affirmed
R. G. SWAIM & SONS v. JIMMY R. LYNCH & SONS No. 9321SC488	Forsyth (91CVD2343)	Remanded
RAYBURN v. GETTINGER No. 9328SC214	Buncombe (91CVS1551)	Affirmed
SHONEY'S OF ENKA v. BD. OF ADJUSTMENT FOR CITY OF ASHEVILLE No. 9328SC326	Buncombe (92CVS2287)	Remanded
STATE v. LEWIS No. 935SC329	New Hanover (91CRS20791) (91CRS20792)	No Error
STATE v. PRICE No. 933SC812	Carteret (92CRS11149) (92CRS11151)	No Error
STATE v. RAYNOR No. 938SC421	Wayne (81CRS9705)	New Trial
STATE v. SCHENCK No. 9327SC767	Cleveland (92CRS1581)	No Error
TRULL v. PATHFINDER DETECTIVE & RECOVERY, INC. No. 9330SC465	Haywood (90CVS631)	Affirmed
WARD TRANSFORMER CO. v. ELECTRIC ENGINEERING CO. No. 9310SC697	Wake (90CVS5732)	Affirmed

LILLIAN E. MURRAY, WIDOW OF HUGH H. MURRAY, JR., DECEASED EMPLOYEE, AND WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF HUGH H. MURRAY, JR., PLAINTIFFS v. ASSOCIATED INSURERS, INCORPORATED, EMPLOYER; VIRGINIA MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 9310IC5

(Filed 3 May 1994)

1. **Workers' Compensation § 152 (NCI4th)— workers' compensation—trip combining work and personal business—automobile accident—decedent not off duty—trip within course of employment**

In an action to recover death benefits under N.C.G.S. § 97-38 where decedent was in a collision on his way from his primary residence in Raleigh to his home in Hound Ears for a week-end during which he planned to go to a dinner party and to call on customers, among other activities, the Industrial Commission erred in finding that, even if decedent had business to conduct on 28 June 1986, he was off duty and not about that business on 27 June 1986 when the collision in which he was injured occurred, since decedent's accident occurred on the direct route he would have had to take from Raleigh to reach his destination in Hound Ears; there was no deviation or departure from his employment; and accordingly decedent was not "off duty" and was within the course of his employment at the time of his accident on 27 June 1986, if he in fact had business to conduct on 28 June 1986.

Am Jur 2d, Workers' Compensation § 294.

2. **Workers' Compensation § 152 (NCI4th)— workers' compensation—decedent on business trip—dual purpose rule—evidence not considered—error**

In an action to recover death benefits under N.C.G.S. § 97-38, the Industrial Commission erred in finding that plaintiffs' witnesses' testimony concerning the business related purpose of decedent's trip was of "no consequence to the ultimate outcome of this case," since, if the Commission found that plaintiffs' witnesses' testimony established that decedent had a business purpose for traveling from Raleigh to Hound Ears on 27 June 1986, under the dual purpose rule, decedent was in the course of his employment during the trip to Hound

Ears even though he had additional personal motivations for making the trip as long as he was on the direct route he would have had to take to accomplish the business purpose.

Am Jur 2d, Workers' Compensation § 294.

3. Workers' Compensation § 387 (NCI4th)— decedent killed on trip—trip for business or personal reasons—decedent's statements to others—admissibility

In an action to recover death benefits under N.C.G.S. § 97-38 where there was a question as to whether decedent traveled from Raleigh to Hound Ears to conduct business or purely for personal reasons, decedent's statements to his wife, daughter, and another customer tending to show his intent or motive in travelling to Hound Ears was admissible under the state of mind exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Workers' Compensation §§ 582-585.

4. Workers' Compensation § 115 (NCI4th)— automobile accident—stroke—cause of accident unknown—death arising out of employment

Although medical experts testified that it was impossible to tell whether a stroke suffered by decedent occurred before his automobile accident and was thus a cause of the accident or whether the stroke occurred as a result of the accident, decedent's accident arose out of his employment if the Industrial Commission finds that decedent was in the course of his employment at the time of the accident.

Am Jur 2d, Workers' Compensation §§ 269, 271.

5. Workers' Compensation § 363 (NCI4th)— death benefits for employee—claim filed by executor but not widow—jurisdiction of Commission

Even if decedent's widow did not technically file a claim for decedent's death benefits, the Industrial Commission had jurisdiction to determine her rights to receive death benefits if the Commission otherwise had jurisdiction to hear the claim, since the Commission acquired jurisdiction when the executor of decedent's estate filed a claim for decedent's injuries which ultimately resulted in death within two years of the accident.

Am Jur 2d, Workers' Compensation §§ 554, 557.

6. Workers' Compensation § 114 (NCI4th)— death of employee— cause of death—sufficiency of evidence

Though the immediate cause of decedent's death was pneumonia, there was sufficient evidence to support the Industrial Commission's finding that decedent died as a result of injuries received in an automobile accident.

Am Jur 2d, Workers' Compensation §§ 269, 271.

Judge COZORT dissenting.

Appeal by plaintiffs from opinion and award of the North Carolina Industrial Commission filed 11 August 1992. Heard in the Court of Appeals 17 November 1993.

Decedent Hugh H. Murray Jr. was the founder of Associated Insurers, Inc. He sold the company in 1982 to five coworkers but continued to work as an employee of the company for a salary plus an automobile allowance and operating expenses. On Friday 27 June 1986, decedent was severely injured in a car accident on his way from Raleigh to Hound Ears, North Carolina. Decedent died on 5 September 1987 as a result of his injuries. Plaintiffs filed a claim with the Industrial Commission for death benefits under G.S. 97-38. After a hearing, the Deputy Commissioner entered an opinion and award denying plaintiffs' claims for death benefits. The relevant portions of the Deputy Commissioner's opinion and award are as follows:

EVIDENTIARY RULING

Plaintiff's objection to Defendants' Documentary Evidence, dated 22 February 1991, is SUSTAINED. The undersigned's ruling sustaining defendants' objection to testimony by Mrs. Lillian Murray about statements by her husband that he was going to conduct business at Hound Ears on the weekend of 27 June 1986, remains unchanged and defendants' objections to such statements made by other witnesses, to the extent that they do not conform to the North Carolina Rules of Evidence, are SUSTAINED as well.

. . . .

FINDINGS OF FACT

. . . .

3. Hugh H. Murray, Jr. married Lillian E. Murray in 1960. They lived together as husband and wife from then through the date of his death on 5 September 1987.

4. Mr. Murray was the founder of Associated Insurers, Incorporated, an independent insurance agency. In 1982 he sold Associated Insurers, Incorporated to Robert Guthrie, Durant Vick, Robert King, William Aldridge and Conner Murray.

5. On 27 June 1986, Hugh H. Murray, Jr. was an employee of Associated Insurers, Incorporated. At that time, and at his death, he was being paid at the annual rate of $25,000.00, plus an expense account of $400.00 per month automobile allowance, and incidental expenses associated with his automobile, including tires, gas and oil.

6. After his sell [sic] of Associated Insurers, Incorporated to the five new owners, Mr. Murray's account responsibilities decreased substantially, but he still had various personal accounts assigned to him.

7. Mr. Murray's practice in dealing with the servicing of the personal accounts assigned to him was to meet personally with his clients to discuss his recommendations for changes and any additional insurance they might desire, as well as to personally deliver the insureds' policies and bills for such policies. Mr. Murray's practice of meeting personally with the insureds, however, was not necessary for the accomplishment of his business mission of selling insurance.

8. Mr. Murray's permanent residence was in Raleigh, North Carolina but Mr. Murray and his wife, Lillian Murray, also kept a home in Hound Ears, North Carolina. They maintained the home in Hound Ears for many years prior to 27 June 1986.

9. The home in Hound Ears was located in a scenic resort community with a country club to which Mr. Murray belonged. The Murray's [sic] participated in an extremely active social life in the Hound Ears area.

10. Mr. Murray would spend almost every other, if not every, weekend at the Hound Ears home.

11. As of 27 June 1986, Mrs. Murray had arrived at the home in Hound Ears and Mr. Murray, as usual, intended to join her in Hound Ears for a relaxing weekend.

12. Since Mr. Murray was going to be in Hound Ears the weekend beginning 27 June 1986, Mr. Murray contacted three of his customers in the Hound Ears area and made arrangements to meet with them on 28 June or later.

13. Pursuant to plans that had been arranged for Mr. Murray by his wife, Mr. Murray intended to meet her in Blowing Rock, North Carolina on the evening of 27 June 1986, at the home of Mr. William Mauney.

14. While driving from Raleigh to his destination in Blowing Rock to attend a dinner party at the Mauney home, Mr. Murray was involved in a motor vehicle accident, which eventually resulted in his death on 5 September 1987.

15. Mr. Murray was not going to be conducting any employment-related activities at the dinner party on 27 June 1986.

16. At the time of the collision, Mr. Murray was off-duty and was not engaged in any employment-related activities. The drive to Blowing Rock on the evening of 27 June 1986 was not for defendant-employer's benefit but for Mr. Murray's own benefit.

17. At the time of the collision, the insurance-related documentation for the customers with which Mr. Murray had made appointments later in the weekend, was not in the state of completion and was not in a state of readiness for delivery by Mr. Murray. Mr. Murray was not going to be delivering any insurance documentation on the weekend of 27 June 1986.

18. There was no employment-related purpose which created the necessity for Mr. Murray's trip on 27 June 1986. Mr. Murray was traveling to Hound Ears for a social and relaxing weekend with his wife. Mr. Murray's work did not create the necessity for travel.

* * * * * * * *

The foregoing findings of fact and conclusions of law engender the following additional

CONCLUSIONS OF LAW

1. On 27 June 1986, Hugh H. Murray, Jr. was an employee of defendant-employer, Associated Insurers, Incorporated. N.C.G.S. § 97-2(2).

2. On 27 June 1986, Mr. Murray's average weekly wage yielded the maximum compensation rate of $308.00 per week. N.C.G.S. § 97-2(5).

3. On 27 June 1986, while Mr. Murray was driving to Blowing Rock to attend a dinner party and spend time with his wife at their home in Hound Ears, he was not in an employment-related activity and the collision and injuries sustained did not arise out of and in the course of his employment with defendant-employer. N.C.G.S. § 97-2(6).

4. Plaintiffs argue that the "dual purpose rule" is applicable to the facts presented in this case. The "dual purpose rule," in part, states that when a trip serves both personal and business purposes, it is a personal trip if the trip would have been made despite the failure of the business purpose and would have been dropped in the event of the failure of the private purpose, though the business errand remained undone. Humphrey v. Quality Cleaners and Laundry, 251 N.C. 47, 110 S.E.2d 467 (1959).

5. Assuming arguendo that the "dual purpose rule" is applicable to the present case, inasmuch as Mr. Murray's trip would have been made despite the failure of any business purpose for the weekend in question and would have been dropped in the event of the failure of the private purpose, Mr. Murray's trip was a personal trip and, therefore, Mr. Murray's death as a result of the collision on 27 June 1986 is not compensable under the North Carolina Workers' Compensation Act. Id.; N.C.G.S. § 97-2(6).

* * * * * * * * *

Based upon the foregoing findings of fact and conclusions of law, the undersigned enters the following

ORDER

1. Under the law, plaintiff's claim must be, and the same is hereby, DENIED.

Plaintiffs appealed to the Full Commission and the Full Commission entered the following opinion and award:

> The undersigned have reviewed the record with reference to the errors alleged and find no adequate ground to amend the award.
>
> The Findings of Fact and Conclusions of Law, as found by [the Deputy Commissioner], are supported by the competent evidence presented.
>
> The sustained hearsay objections with regard to Mrs. Lillian Murray's testimony and the testimony of other witnesses as to the business purpose of plaintiff's trip are of no consequence to the ultimate outcome of this case. Thus, the need to address this issue becomes moot.
>
> The Full Commission finds that, even if the hearsay evidence was allowed to the extent that it showed a purpose of plaintiff's trip was to conduct business on the weekend in question, at the time of [decedent's] accident, he was in route to a purely non-business related party. Thus, even if [decedent] had business to conduct on June 28, 1986, he was off duty and not about that business on June 27, 1986, when the collision occurred. He was on his way to a dinner party in Blowing Rock (not Hound Ears, where his business was to be conducted), and his purpose was completely a personal one. At the time and place of the collision, [decedent] was not in the course of his employment, even if he would have been at some time the following day.
>
> In view of the foregoing, the Full Commission ADOPTS as its own the Opinion and Award as filed.

Plaintiffs appeal from the opinion and award of the Industrial Commission. Defendants bring cross assignments of error to support the judgment of the Industrial Commission.

Teague, Campbell, Dennis & Gorham, by C. Woodrow Teague and George W. Dennis III, for plaintiff-appellants.

Young, Moore, Henderson & Alvis P.A., by B. T. Henderson, II and J. A. Webster, III, for defendant-appellees.

EAGLES, Judge.

Plaintiffs appeal from the Industrial Commission's opinion and award filed 11 August 1992. Defendants also cross assign error to support the Industrial Commission's opinion and award. After careful review of the briefs, transcripts and record, we reverse and remand to the Full Commission for findings of fact on the question of whether decedent had a concurrent business purpose for travelling to Hound Ears on 27 June 1987.

I.

[1] Plaintiffs contend that the Commission erred in finding that "even if [decedent] had business to conduct on June 28, 1986, he was off duty and not about that business on June 27, 1986, when the collision occurred." We agree.

"Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 41, 167 S.E. 2d 790, 793 (1969). Accordingly, decedent was not "off duty" and was continuously within the course of his employment during the trip on 27 June if decedent was travelling to Hound Ears to conduct business on 28 June. This is true unless it is shown that at the time of the accident decedent had made a distinct departure on a personal errand.

The evidence shows that when decedent's automobile accident occurred, he was traveling on the most direct route from Raleigh to the Hound Ears community in Blowing Rock, North Carolina. In cases where there are both personal and business reasons for making the trip, there is no departure or deviation from employment if the accident occurs while the claimant is on the most direct route to accomplish both the personal and the business objective. 1 A. Larson, *The Law of Workmen's Compensation* § 19.21 (1993). Even if the personal objective would have required a detour if it had been reached, there is no deviation if at the time of the accident, the claimant was on the direct route which he would have had to take to reach his business destination. *Id.* at § 19.22. Since decedent's accident occurred on the direct route he would have had to take to reach his business destination in Hound Ears, there was no deviation or departure from his employment. Accord-

ingly, decedent was not "off duty" and was within the course of his employment at the time of his accident on 27 June 1986, if he in fact had business to conduct on 28 June 1986.

II.

[2] Plaintiffs further contend that the Commission erred in finding that plaintiffs' witnesses' testimony concerning the business-related purpose of decedent's trip was of "no consequence to the ultimate outcome of this case." We agree. If the Commission found that plaintiffs' witnesses' testimony established that decedent had a business purpose for travelling to Hound Ears on 27 June 1986, under the dual purpose rule, decedent was in the course of his employment during the trip to Hound Ears even though he had additional personal motivations for making the trip as long as he was on the direct route he would have had to take to accomplish the business purpose.

Professor Larson summarizes the "dual purpose rule" in his treatise on Workers' Compensation Law. Under the "dual purpose rule":

> Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey. This principle applies to out-of-town trips, to trips to and from work, and to miscellaneous errands such as visits to bars or restaurants motivated in part by an intention to transact business there.

1 A. Larson, *The Law of Workmen's Compensation* § 18.00 (1993). In *Humphrey v. Quality Cleaners & Laundry*, 251 N.C. 47, 110 S.E.2d 467 (1959), the North Carolina Supreme Court laid out the test to be applied in determining whether a trip that has both personal and business purposes is compensable under the Act. There the *Humphrey* Court adopted Judge Cardozo's test set out in *Marks Dependents v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1920).

> We do not say that the service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. . . . The test in brief is this: If the work of the employee creates the necessity for travel, such is in

> the course of his employment, though he is serving at the same time some purpose of his own. . . . If however, the work has had **no part** in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, **and** would have been canceled upon failure of the private purpose, though the business errand was undone, the travel was then personal, and personal the risk.

Humphrey v. Quality Cleaners & Laundry, 251 N.C. 47, 51, 110 S.E.2d 467, 470 (1959) (emphasis added). Under this test, a trip is personal if the trip would have gone forward even if the business errand had been dropped **and** the trip would have been cancelled upon the failure of the private purpose. In this way, the work would have had no part in creating the necessity for travel. The dual purpose rule does not require that the business purpose be the primary purpose for making the trip. The dual purpose rule only requires that the business purpose be a concurrent cause of the trip. 1 A. Larson, *The Law of Workmen's Compensation* § 18.13 (1993). A concurrent cause is a cause which would have occasioned the making of the trip even if the private mission had been canceled. *Id.*

It is clear that the Full Commission did not properly apply the dual purpose rule to the facts of this case. The Full Commission found in its opinion and award that:

> [E]ven if the hearsay evidence was allowed to the extent that it showed a purpose of plaintiff's trip was to conduct business on the weekend in question, at the time of [decedent's] accident, he was in route to a purely non-business related party. Thus, even if [decedent] had business to conduct on June 28, 1986, he was off duty and not about that business on June 27, 1986 when the collision occurred. . . . At the time and place of the collision, [decedent] was not in the course of his employment, even if he would have been at some time the following day.

Under the dual purpose rule, if a concurrent purpose of decedent's trip to Hound Ears on 27 June was to conduct business there on 28 June, decedent was within the course of his employment at the time of the accident on 27 June. Accordingly, the Commission erred in finding that testimony concerning the business nature of decedent's trip was irrelevant to the ultimate outcome of this case. Whether decedent had business appointments on 28 June 1986 is crucial here because that fact determines whether decedent

had a concurrent business purpose for travelling to Hound Ears on 27 June 1986.

III.

[3] Plaintiffs contend that the Commission erred in excluding plaintiffs' evidence regarding the business-related purpose of decedent's trip. Plaintiffs offered the testimony of five witnesses to show that decedent had made appointments on 28 June 1986 with several of defendant-employer's policyholders at their homes in Hound Ears to discuss their insurance policies. These five witnesses were: 1) Mrs. Lillian E. Murray, decedent's widow, 2) Mr. Thomas M. Gow, 3) Ms. Helen Agnes Cushing, 4) Ms. Jean M. Kelso and 5) Ms. E. Tracy Murray, decedent's daughter.

Defendants objected to all evidence in these witnesses' testimony regarding the purpose of decedent's trip to Hound Ears. The Deputy Commissioner in his opinion and award sustained defendants' objections to decedent's widow's testimony and also sustained defendants' objection to similar statements made by the other witnesses "to the extent that they do not conform to the North Carolina Rules of Evidence." As we have already discussed, the Full Commission, acting under an erroneous application of the law, did not consider plaintiffs' witnesses' testimony to be relevant to the ultimate outcome of the case and did not address the issue of whether the Deputy Commissioner properly excluded the witnesses' testimony.

We conclude that the testimony of Mrs. Lillian Murray, Ms. Helen Agnes Cushing and Ms. E. Tracy Murray should have been admitted into evidence. Mrs. Lillian Murray, decedent's widow, testified at the hearing that her husband was coming to Hound Ears on business and that he had clients to call on to deliver policies. When defense counsel asked Mrs. Murray on cross examination how she knew decedent had clients to see that weekend, Mrs. Murray responded that "He [decedent] told me before I left home that he had an appointment and that was the reason for going that weekend." Ms. Cushing testified in her deposition that decedent told her on the telephone regarding the delivery of her insurance policy that "I'm coming to Hound Ears on Saturday, and I will take care of it. I have it with me. I will have it with me." Finally, Ms. E. Tracy Murray, decedent's daughter, testified in her deposition that on the day of the accident decedent told her that he had "calls" to make in Hound Ears over the weekend

in addition to attending the dinner party that Friday evening. Ms. Murray went on to explain that she knew that making "calls" meant calling on customers.

Plaintiffs offered these witnesses' statements to show that decedent also intended to conduct business in Hound Ears on the weekend of 27-28 June 1986. Under Rule 803(3) of the North Carolina Rules of Evidence, a statement of the declarant's then existing state of mind, such as intent, plan, motive, or design is admissible as an exception to the hearsay rule. G.S. 8C-1, Rule 803(3). Decedent's statements to his widow, his daughter, and Ms. Cushing tend to show decedent's intent or motive in travelling to Hound Ears on 27 June 1986. Accordingly, their testimony is admissible for that purpose.

IV.

In sum, the Full Commission made an error of law in concluding that whether decedent had business appointments on 28 June 1986 was irrelevant since decedent was on his way to the dinner party at the time of the accident. As we have previously discussed, decedent's injuries and resulting death are compensable under the dual purpose rule if decedent had a concurrent business purpose for travelling to Hound Ears on 27 June 1986. Since plaintiffs' right to compensation depends upon whether decedent had a concurrent business purpose for travelling to Hound Ears on 27 June 1986, we remand so that the Full Commission may make specific findings of fact on this question. *See Bee v. Yates Aluminum Window Co., Inc.*, 46 N.C. App. 96, 264 S.E.2d 368 (1980) (case remanded for additional findings of fact on this same question).

Defendants contend that the findings of fact and conclusions of law made by the Deputy Commissioner and adopted by the Full Commission are sufficient to support the Commission's opinion and award. We disagree. When the Commission finds facts or fails to find facts under a misapprehension of the law, the case should be remanded so that the evidence can be considered in its true legal light. *Mills v. Mills*, 68 N.C. App. 151, 158, 314 S.E.2d 833, 838 (1984). Here, the Deputy Commissioner made an error of law in excluding and refusing to consider plaintiffs' witnesses' testimony concerning decedent's business appointments on the weekend of 27 June. The Full Commission, however, under a misapprehension of the dual purpose rule, regarded plaintiffs' evidence relating to decedent's business purpose as irrelevant to its final decision. The

Full Commission erroneously assumed that even if plaintiffs' evidence excluded by the Deputy Commissioner was allowed to the extent that it showed a business purpose, decedent was not in the course of his employment because he was off duty and on his way to a dinner party. We have already discussed, *supra,* how that rationale is erroneous. Nevertheless, the Commission adopted the Deputy Commissioner's opinion and award. Since the Full Commission adopted the Deputy Commissioner's opinion and award under a misapprehension of the dual purpose rule, we vacate the opinion and award and remand this case to the Full Commission to apply the proper legal standard to the admissible evidence.

V.

[4] Defendants cross assign error and contend that even if decedent's injuries arose in the course of his employment, his injuries did not "arise out of" his employment. An injury is compensable under the Act if it results from an "accident arising out of and in the course of the employment." G.S. 97-2(6). "While often interrelated, the concepts of 'arising out of' and 'in the course of' the employment are distinct requirements, and a claimant must establish both to receive compensation." *Roberts v. Burlington Industries,* 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988). "An accident occurring during the course of an employment . . . does not *ipso facto* arise out of it." *Robbins v. Nicholson,* 281 N.C. 234, 238, 188 S.E.2d 350, 354 (1972). An injury arises out of the employment when there is a causal connection between the employment and the injury. *Patterson v. Gaston County,* 62 N.C. App. 544, 546, 303 S.E.2d 182, 183 (1983).

Here, medical records and expert testimony indicated that decedent also suffered a stroke on the day of the accident. Both medical experts who testified at the hearing testified that it was impossible to tell whether decedent's stroke occurred before the accident or whether the stroke occurred as a result of the accident. Defendants argue that if the stroke caused the accident, decedent's injuries resulting from the accident were unrelated to his employment. We disagree.

When an employee's idiopathic condition is the sole cause of the injury, the injury does not arise out of the employment. *Vause v. Vause Equipment Co.,* 233 N.C. 88, 63 S.E.2d 173 (1951). However, "[w]here any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding

the award as 'arising out of employment.' " *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960).

In *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E.2d 476 (1960), the plaintiff sustained severe injuries when his vehicle collided with a pole. There the plaintiff was returning to his employer's place of business from a service call when he "blacked out," lost control of his vehicle, and ran into a pole. Our Supreme Court held that the plaintiff's accident arose out of his employment even though his blackout caused the accident.

> Two circumstances, we think, serve to fix liability on the defendants in this case: First, a blackout to which the claimant had a predisposition; second, the blackout occurred at the time and place the claimant's duties required him to be driving an automobile. The combination of these two produced the accident. In the light of our decisions, the plaintiff's injury may be said to arise out of and in the course of his employment.

Id. at 557-58, 117 S.E.2d at 479.

Here, there is no direct evidence of record that decedent's stroke caused the accident. If the cause of an employee's injury in the course of his employment is unknown and the Commission finds that the injury arose out of the employment, an award will be sustained. *Cole v. Guilford County*, 259 N.C. 724, 727, 131 S.E.2d 308, 311 (1963). However, even assuming *arguendo* that decedent's stroke did cause the accident, under *Allred, supra*, decedent's accident arose out of his employment if decedent was in the course of his employment at the time of the accident. Accordingly, if the Commission on remand determines that decedent was in the course of his employment at the time of the accident, we hold that decedent's accident arose out of his employment.

[5] Defendants next contend that Mrs. Lillian Murray, decedent's widow, never properly filed a claim for decedent's death benefits under the Act and that her claim for death benefits should be dismissed under G.S. 97-24. G.S. 97-24 requires that claims be filed within two years after the date of the accident in order to obtain benefits under the Act. Failure to timely file a claim is a jurisdictional bar and cannot ordinarily be overcome by either waiver or estoppel. *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 86-87, 401 S.E.2d 138, 140-41 (1991).

The Industrial Commission's Form No. 18 is required to institute a claim under G.S. 97-24. Defendants contend that Mrs. Murray never filed a claim for death benefits with the Commission because her attorney, Mr. Teague, signed Form No. 18 on behalf of Wachovia Bank & Trust Company as executor rather than on behalf of Mrs. Murray as dependent. Defendants argue that the executor of decedent's estate is not a proper claimant for death benefits when there are dependents available to bring the claim. *McGill v. Bison Fast Freight, Inc.*, 245 N.C. 469, 476, 96 S.E.2d 438, 444 (1957). Accordingly, defendants contend that since plaintiff's attorney did not sign Form No. 18 on Mrs. Murray's behalf, Mrs. Murray did not file a claim for death benefits within the two year jurisdictional requirement of G.S. 97-24. We disagree.

In *Smith v. Allied Exterminators, Inc.*, 279 N.C. 583, 184 S.E.2d 296 (1971), the Supreme Court held that a father's right to participate in his son's death benefits was not barred by his failure to file a claim. In *Smith*, the insurer filed a request for hearing with the Commission pursuant to G.S. 97-83 to determine whether the mother or father was entitled to their son's death benefits. The Court said that the Commission had jurisdiction at the hearing to determine the rights of the father even though he did not file a claim. *Id.* at 587, 184 S.E.2d at 298. Accordingly, we conclude under the holding of *Smith v. Allied Exterminators, supra*, that even if Mrs. Murray did not technically file a claim for decedent's death benefits, the Commission had jurisdiction to determine her rights to receive death benefits if the Commission otherwise had jurisdiction to hear the claim.

Here, the Commission acquired jurisdiction when the executor of decedent's estate filed a claim for decedent's "[h]ead and body injuries resulting in unconsciousness and eventual death." Decedent's accident occurred on 27 June 1986. The claim was filed on 22 June 1988, within two years of decedent's accident. G.S. 97-24 only requires that "a claim be filed with the Industrial Commission within two years after the accident." The Commission obtains jurisdiction in the case once a claim is timely filed. *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 86-87, 401 S.E.2d 138, 140 (1991); *Tabron v. Gold Leaf Farms, Inc.*, 269 N.C. 393, 396, 152 S.E.2d 533, 535 (1967). Accordingly, we hold that the Commission had jurisdiction to hear the claim for decedent's death benefits and to determine Mrs. Murray's rights under the Act to receive death benefits. "The Worker's Compensation Act should

be liberally construed whenever appropriate so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions." *Deese v. Lawn and Tree Expert Co.*, 306 N.C. 275, 277, 293 S.E.2d 140, 143 (1982). This cross-assignment of error is overruled.

[6] Finally, defendants contend that plaintiffs did not meet their burden of proof in showing that decedent's death was caused by the accident on 27 June 1986. Defendants contend that the immediate cause of decedent's death was pneumonia and that plaintiffs have not shown that decedent contracted pneumonia because of the accident. We disagree.

"The Commission's findings of fact on the issue of causation are conclusive if supported by competent evidence, even where the evidence is conflicting." *Lettley v. Trash Removal Service*, 91 N.C. App. 625, 628, 372 S.E.2d 747, 749 (1988). There is ample evidence here to support the Commission's finding. The evidence in the record shows that decedent sustained numerous injuries as a result of the accident. Decedent sustained a hip fracture that could not be surgically repaired, multiple fragment fractures of the right proximal head of the fibula and tibula which later became infected, rib fractures which led to pulmonary contusions and collapse of the lung, and a closed head injury which affected his mental and motor status. Decedent was bedridden and could not walk or take care of himself following the accident. Decedent was institutionalized in the hospital and thereafter in a nursing home from the day of his accident until his death on 5 September 1987.

Although decedent died from pneumonia, both medical experts who testified at the hearing testified that decedent's injuries from the accident led to his contracting pneumonia. Dr. Wells Edmundson, the medical director of the nursing home where decedent was institutionalized after the accident, testified that decedent's condition as a result of the accident, particularly his collapsed lung, his use of a feeding tube, and his bedridden status, significantly increased his risk of contracting pneumonia. Dr. William J. Senter, an expert in internal medicine, testified that "the pneumonia that he [decedent] later developed was inevitable from his condition." Both doctors testified that in their expert opinions, decedent's pneumonia and resulting death were caused by complications arising from the injuries decedent sustained in the accident on 27 June 1986. Accordingly, we conclude that there is sufficient competent evidence

here to support the Commission's finding of causation. This cross assignment of error is without merit.

VI.

For the reasons stated we vacate and remand to the Full Commission for additional proceedings consistent with this opinion.

Vacated and remanded.

Judge ORR concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I respectfully dissent.

The majority has concluded that this matter must be remanded "for findings of fact on the question of whether decedent had a concurrent business purpose for travelling to Hound Ears on 27 June 1987." I do not believe such remand is necessary, because I find the Industrial Commission has resolved the determinative issue presented.

Judicial review of appeals from the Industrial Commission is limited to two questions: (1) was there any competent evidence to support the Commission's findings? and (2) do the findings of the Commission justify its legal conclusions and decision? *McBride v. Peony Corp.*, 84 N.C. App. 221, 225, 352 S.E.2d 236, 239 (1987). The Commission's findings of fact are conclusive on appeal, even if there is evidence which would support a contrary finding. *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392 (1985).

The evidence below obviously requires application of the "dual purpose rule," which the majority acknowledges. What the majority fails to acknowledge is that the Commission resolved the factual issue presented under the dual purpose rule. In *Humphrey v. Laundry*, 251 N.C. 47, 110 S.E.2d 467 (1959), our Supreme Court said:

> "The test in brief is this: If the work of the employee creates the necessity for travel, such is in the course of his employment, though he is serving at the same time some purpose of his own. * * * If however, the work has had no part in

> creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel was then personal, and personal the risk."

Id. at 51, 110 S.E.2d at 470 (quoting *Marks' Dependents v. Gray*, 251 N.Y. 90, 167 N.E. 181).

In Finding of Fact 18, Deputy Commissioner W. Joey Barnes found, in a finding adopted by the Full Commission:

> 18. There was no employment-related purpose which created the necessity for Mr. Murray's trip on 27 June 1986. Mr. Murray was traveling to Hound Ears for a social and relaxing weekend with his wife. Mr. Murray's work did not create the necessity for travel.

In their brief, plaintiffs have failed to challenge that crucial finding. Even if they had, there is evidence to support the finding. We are thus bound by that finding.

In his conclusions of law, Deputy Commissioner Barnes concluded, in a conclusion adopted by the Full Commission:

> 5. Assuming arguendo that the "dual purpose rule" is applicable to the present case, inasmuch as Mr. Murray's trip would have been made despite the failure of any business purpose for the weekend in question and would have been dropped in the event of the failure of the private purpose, Mr. Murray's trip was a personal trip and, therefore, Mr. Murray's death as a result of the collision on 27 June 1986 is not compensable under the North Carolina Workers' Compensation Act. Id.; N.C.G.S. § 97-2(6).

Plaintiffs have not contested that conclusion of law, which controls the key issue in the case. We should not get sidetracked by the Full Commission's confusing references to the decedent's purpose in meeting his wife for dinner. We should disregard that language as surplusage, recognize that Deputy Commissioner Barnes resolved the dual purpose rule issue presented by the evidence, and affirm the Commission's decision to adopt the Opinion and Award of Barnes. I see no useful purpose in remanding the matter for findings on an issue already resolved by the Commission. I vote to affirm.

KELLY DONOVAN AND TONYA HUNTER v. RICHARD FIUMARA

No. 9218SC582

(Filed 3 May 1994)

1. **Libel and Slander § 35 (NCI4th)— failure to allege special damages—failure to state a claim for slander per quod**

It was uncontroverted that plaintiffs failed to state a claim for slander *per quod* where the complaint contained no assertion of special damages, and plaintiffs in their appellate brief conceded the absence of such allegation.

Am Jur 2d, Libel and Slander §§ 399 et seq.

2. **Libel and Slander § 14 (NCI4th)— falsely claiming person gay or bisexual—no imputation of crime—no slander per se**

There was no merit to plaintiffs' contention that, because engaging in certain activity practiced by homosexuals is a felony in North Carolina, falsely claiming plaintiffs were gay or bisexual imputed to them commission of a crime, and this language thus fell within the first class of utterances considered slanderous *per se*, since referring to a person as gay or bisexual is not tantamount to charging that individual with the commission of a crime violative of N.C.G.S. § 14-177.

Am Jur 2d, Libel and Slander §§ 27 et seq.

Imputation of homosexuality as defamation. 3 ALR4th 752.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation—post-New York Times cases. 57 ALR4th 404.

3. **Libel and Slander § 13 (NCI4th)— slander per se—three categories—holding person up to disgrace, ridicule, or contempt—no fourth category of slander per se**

There was no merit to plaintiffs' contention that dictum taken from *West v. King's Dept. Store, Inc.*, 321 N.C. 698, and repeated or cited by the Court of Appeals in subsequent decisions indicates that North Carolina courts have judicially extended the traditional categories of slander *per se* beyond those of infamous crime, loathsome disease, and impeachment in trade or profession to create another category of holding a person up to disgrace, ridicule, or contempt, words which

regularly appear in libel cases, and the Court of Appeals reaffirms the historical distinction between libel and slander.

Am Jur 2d, Libel and Slander §§ 71 et seq.

4. Libel and Slander § 13 (NCI4th)— allegation that person is gay or bisexual—person not held up to disgrace, ridicule, or contempt

Even if *West v. King's Dept. Store, Inc.*, 321 N.C. 698, did create a new class of slander *per se*, which assumption the Court expressly rejects, the Court is unable to rule the bare allegation that an individual is gay or bisexual constitutes today an accusation which, as a matter of law and absent any extrinsic, explanatory facts, *per se* holds that individual up to disgrace, ridicule or contempt.

Am Jur 2d, Libel and Slander §§ 71 et seq.

Imputation of homosexuality as defamation. 3 ALR4th 752.

Appeal by plaintiffs from judgment entered 12 May 1992 by Judge Judson D. DeRamus, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 29 April 1993.

Smith, Follin & James, by Norman B. Smith, for plaintiff-appellants.

Frazier, Frazier & Mahler, by James D. McKinney and Torin L. Fury, for defendant-appellee.

Moore and Brown, by David B. Puryear, Jr., for defendant-appellee.

JOHN, Judge

On 21 December 1990, plaintiffs filed suit against defendant for slander, setting out in their complaint the following pertinent allegations:

3. In January, 1990, and again in June, 1990, defendant stated to other persons that plaintiffs are gay and bisexual.

4. Defendant's statements concerning plaintiffs were and are false.

5. Defendant's statements concerning plaintiffs amount to slander.

6. Proximately, solely, and directly as a result of defendant's statements concerning plaintiffs, plaintiffs have suffered injury to their reputation, humiliation, embarrassment, anxiety, and other emotional distress. Plaintiffs' actual damages, incurred and to be incurred, are in an amount in excess of $10,000.00 as to each of the plaintiffs.

In answer thereto, defendant moved to dismiss the complaint pursuant to N.C.R. Civ. P. 12(b)(6) (1990) for failure to state a claim upon which relief could be granted. After a hearing, the court allowed defendant's motion by judgment entered 12 May 1992. Plaintiffs appeal, contending the allegations of the complaint set forth a cause of action for slander. We disagree and affirm the action of the trial court.

A motion to dismiss made pursuant to Rule 12(b)(6) tests the legal sufficiency of the pleading against which it is directed. *Hendrix v. Hendrix*, 67 N.C. App. 354, 356, 313 S.E.2d 25, 26 (1984). In ruling upon such a motion, the trial court is to construe the pleading liberally, *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987) (citation omitted), and in the light most favorable to the plaintiff, *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986), *disc. review denied*, 318 N.C. 694, 351 S.E.2d 746 (1987), taking as true and admitted all well-pleaded factual allegations contained within the complaint. *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E.2d 378, 381 (1987). A Rule 12(b)(6) motion to dismiss should be granted only when the factual allegations, so considered, fail as a matter of law to state the substantive elements of some legally recognized claim. *See, e.g., Hendrix*, 67 N.C. App. at 356, 313 S.E.2d at 26-27.

Based upon plaintiffs' contention, the sole question before us is whether the allegations of the complaint, liberally construed and all taken as true (including the assertion defendant made the statements in question as well as the claim the comments were false), set out a cause of action for slander.

Slander has been defined by this Court as "oral defamation," *see, e.g., Tallent v. Blake*, 57 N.C. App. 249, 251, 291 S.E.2d 336, 338 (1982), or "the *speaking* [as opposed to the *writing*] of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood." *Morrow v. Kings Department Stores*, 57 N.C. App. 13, 20, 290 S.E.2d 732, 736 (emphasis added) (citation omitted), *disc. review denied*, 306

N.C. 385, 294 S.E.2d 210 (1982). To be actionable, any such defamatory statement must be false, and must be communicated (published) to some person or persons other than the individual defamed. *Id.* (citations omitted).

Our courts have long recognized two actionable classes of oral defamation: slander *per se* and slander *per quod*:

> That is, the false remarks in themselves (*per se*) may form the basis of an action for damages, 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.

Beane v. Weiman Co., Inc., 5 N.C. App. 276, 277, 168 S.E.2d 236, 237 (1969) (citations omitted).

[1] Slander *per quod* involves a spoken statement of which the harmful character does not appear on its face as a matter of general acceptance, but rather becomes clear "only in consequence of extrinsic, explanatory facts showing its injurious effect . . . ." *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 467-68 (1955). In such cases, "the injurious character of the words and some special damage must be pleaded and proved." *Beane*, 5 N.C. App. at 278, 168 S.E.2d at 238 (citations omitted). In the context of an action for defamation, special damage means "pecuniary loss," *Williams v. Freight Lines and Willard v. Freight Lines*, 10 N.C. App. 384, 387, 179 S.E.2d 319, 322 (1971) (citations omitted); "emotional distress and mental suffering are not alone sufficient . . . ." *Id.* at 390, 179 S.E.2d at 324. In the case *sub judice*, plaintiffs' complaint contains no assertion of special damages, and in their appellate brief they concede the absence of such allegation. Therefore, it is uncontroverted plaintiffs failed to state a claim for slander *per quod*.

However, plaintiffs argue before us that the trial court misapprehended the legal theory under which they were proceeding, and that the allegations of the complaint constitute a claim for relief based upon slander *per se*.

For decades, judicial formulations of the categories of utterances considered slander *per se* have varied not at all in substance. This Court has consistently stated that only three types of defamatory statements, if published to a person other than the one defamed, will support an action for slander *per se*: "those which [1] charge

plaintiff with a crime or offense involving moral turpitude, [2] impeach his trade or profession, or [3] impute to him a loathsome disease." *Id.* at 388, 179 S.E.2d at 322. *See also U v. Duke University*, 91 N.C. App. 171, 182, 371 S.E.2d 701, 709 (citation omitted), *disc. review denied*, 323 N.C. 629, 374 S.E.2d 590 (1988); *Morris v. Bruney*, 78 N.C. App. 668, 675, 338 S.E.2d 561, 566 (1986) (citations omitted).

When language falling within one of these categories is spoken, the "law raises a *prima facie* presumption of malice and a conclusive presumption of legal injury and damage . . . ." *Badame*, 242 N.C. at 756, 89 S.E.2d at 467. Indeed, "the mode of proving the resultant damage" is the primary difference between slander actionable *per se* and *per quod*. *Id.* "As to words actionable *per se*, the law treats their injurious character as a fact of common acceptance, and consequently the courts take judicial notice of it." *Id.* Therefore, a plaintiff may recover under a theory of slander *per se* without specifically pleading or proving special damages. *Id.* (citations omitted).

Although the three *per se* categories mentioned above have developed as exceptions to the original rule that slander was not actionable without allegation and proof of special damages, *see* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 112, at 788-92 (5th ed. 1984), "[t]he policy of the law has much restricted the range of defamatory utterances which are actionable *per se*." *Penner v. Elliott*, 225 N.C. 33, 34, 33 S.E.2d 124, 125 (1945). Consequently courts have consistently refrained from expanding the number or the scope of categories of spoken defamatory words which are actionable without allegation and proof of damages. *See Hayes v. Smith*, 832 P.2d 1022, 1024, 1025 (Colo. Ct. App. 1991) (interprets certain U.S. Supreme Court decisions as "furthering . . . trend to limit and not expand the use of *per se* characterizations and presumed damages in defamation cases").

Bearing these principles in mind, we now consider whether defendant's comments regarding plaintiffs fall within any of the three traditional categories of slander *per se*.

[2] Defendant allegedly referred to plaintiffs as being "gay" and "bisexual." This simple statement neither impeaches plaintiffs in their trade or business (the second traditional category of utterances considered slanderous *per se*) nor alleges them to have a "loathsome disease" (the third traditional category), and plaintiffs do not main-

tain otherwise. Plaintiffs argue in their brief, however, that because engaging in certain activity practiced by homosexuals is a felony in North Carolina, *see* N.C. Gen. Stat. § 14-177 (1993), falsely claiming plaintiffs are gay or bisexual *imputes* to them commission of a crime, and thus falls within the first class of utterances considered slanderous *per se*.

In support of their position, plaintiffs rely on the following language from the Restatement (Second) of Torts: "[o]ne who publishes a slander that imputes serious sexual misconduct to another is subject to liability to the other without proof of special damages." Restatement (Second) of Torts § 574, at 195 (1977). Additionally, plaintiffs call to our attention case law from the state of Texas. *See Buck v. Savage*, 323 S.W.2d 363 (Tex. Civ. App. 1959); *Head v. Newton*, 596 S.W.2d 209 (Tex. Civ. App. 1980). However, we find plaintiff's argument and these authorities unpersuasive.

G.S. § 14-177 provides as follows:

> If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class H felon.

The crime against nature referred to in the statute:

> includes acts with animals and acts between humans *per anum* and *per os*. . . . "[O]ur statute is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character . . . ."

State v. Harward, 264 N.C. 746, 746, 142 S.E.2d 691, 692 (1965) (citations omitted) (quoting *State v. Griffin*, 175 N.C. 768, 769, 94 S.E. 678, 679 (1917)). Thus, the statute prohibits conduct not necessarily embraced within the terms "gay" and "lesbian." *See, e.g., Stein v. Trager*, 36 Misc.2d 227, 228, 232 N.Y.S.2d 362, 364 (1962); *contra Nowark v. MaGuire*, 22 A.D.2d 901, 902, 255 N.Y.S.2d 318, 319 (1964). Nonetheless, "though penetration by or of a sexual organ is an essential element . . . , the crime against nature is not limited to penetration by the *male* sexual organ, *State v. Joyner*, 295 N.C. 55, 66, 243 S.E.2d 367, 374 (1978) (citation omitted), and includes cunnilingus. *See State v. Thacker*, 301 N.C. 348, 356, 271 S.E.2d 252, 257 (1980). However, the statute neither by its terms nor by judicial gloss proscribes sexual preference or the status of being homosexual; in order to violate the statute, a person must commit one of the specific acts coming within the purview of the

statute. *See Joyner*, 295 N.C. at 66, 243 S.E.2d at 374. No allegations in plaintiffs' complaint assert defendant made a statement that plaintiffs engaged in any *act*.

Further, while the Texas case law cited by plaintiffs is to the contrary, numerous other courts considering the question have concluded that a simple statement descriptive of an individual's alleged sexual orientation does not as a matter of law impute to that individual commission of a crime.

For example, the Illinois Court of Appeals in *Moricoli v. Schwartz*, 361 N.E.2d 74 (Ill. Ct. App. 1977), found that while defendant's reference to plaintiff as a "fag" could reasonably only be interpreted to assert plaintiff was homosexual, "[t]he statements complained of . . . do not, of themselves, import commission of a crime . . . ." *Id.* at 76. Similarly, the Supreme Court of Rhode Island has stated:

> we are . . . of the opinion that the mere use of the term in question [meaning coition by one man with another *per os*] . . . unaccompanied by language or other circumstances which, fairly considered, would be understood as charging the plaintiff with having actually committed an act of unnatural coition, is insufficient to support an action for slander.

Morrissette v. Beatte, 17 A.2d 464, 465 (R.I. 1941). Finally, the Court of Appeals for the District of Columbia Circuit recently struck down a Department of Defense directive barring persons of homosexual orientation from serving in our nation's armed forces. *Steffan v. Aspin*, 62 U.S.L.W. 2309 (D.C. Cir. Nov. 16, 1993). The court pointedly observed:

> The secretary's justification for the gay ban presumes that a certain class of persons will break the law or [military] rules solely because of their thoughts and desires. This is inherently unreasonable.
>
> . . . .
>
> . . . A person's status alone . . . *is an inadequate basis* upon which to impute misconduct. Accordingly, the secretary's "propensity" argument, which presumes that "desire" will lead to misconduct, is illegitimate as a matter of law.

Id. at 2309-10.

We agree with these courts that referring to a person as "gay" or "bisexual" is not tantamount to charging that individual with the commission of a crime violative of G.S. § 14-177. The "law contemplates that in order to be actionable *per se* a false statement must impute that a person is guilty of a punishable offense." *Williams*, 10 N.C. App. at 388, 179 S.E.2d at 323 (accusing plaintiffs of being "gangsters" did not charge them with a "specific crime for which they could be indicted and punished"); *see also Stutts v. Power Co.*, 47 N.C. App. 76, 82, 266 S.E.2d 861, 865 (1980) (calling plaintiff "dishonest" or charging that plaintiff was untruthful not actionable *per se*); *cf.* Charles T. McCormick, *The Measure of Damages for Defamation*, 12 N.C.L. Rev. 120, 121-122 (1934) (statement that individual is a "thief" would be slander *per se*). Moreover, the label of "gay" or "bisexual" does not carry with it an automatic reference to any particular sexual activity; indeed, as the District of Columbia appellate court pointed out, it does not necessarily connote sexual activity at all, but rather inclination or preference. *Steffan*, 62 U.S.L.W. at 2309-10.

Based on the foregoing, therefore, we hold as a matter of law that defendant's alleged statements about plaintiffs, liberally construed and taken as true, do not fall within any of the three traditional categories of defamatory utterances considered slanderous *per se*. Consequently, plaintiffs' allegations could support only an action based upon slander *per quod*. As indicated above, this would require the pleading of special damages concededly absent in this case.

[3] Our consideration of plaintiffs' appeal would ordinarily end at this point; however, plaintiffs' primary argument before us is that phraseology taken from a recent decision of our Supreme Court, *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 365 S.E.2d 621, (1988), and repeated or cited by this Court in certain subsequent decisions, *see Friel v. Angell Care Inc.*, 113 N.C. App. 505, 440 S.E.2d 111 (1994); *Shillington v. K-Mart Corp.*, 102 N.C. App. 187, 402 S.E.2d 155 (1991); and *Harris v. Temple*, 99 N.C. App. 179, 392 S.E.2d 752, *disc. review denied*, 327 N.C. 428, 395 S.E.2d 678 (1990), indicates our courts have judicially "extended [the] traditional categories" of slander *per se*. Plaintiffs insist *West* makes it "very clear that defamation *per se* is not limited to the classic categories of infamous crime, loathsome disease, and impeachment in trade or profession." We disagree.

The plaintiffs in *West* were accused of having stolen items they had actually purchased from defendant department store. Plaintiffs subsequently brought suit alleging, *inter alia*, slander *per se*. At the close of plaintiffs' evidence, the trial court directed verdict in favor of defendant; this Court affirmed on the grounds of insufficiency of the evidence. In discussing the propriety of the trial court's ruling with respect to the slander *per se* claim, our Supreme Court stated:

> 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, 321 N.C. at 703, 365 S.E.2d at 624-25 (emphasis added) (citing *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979); *Morrow v. Kings Department Stores*, 57 N.C. App. 13, 290 S.E.2d 732, *disc. review denied*, 306 N.C. 385, 294 S.E.2d 210 (1982)). Plaintiffs rely on the italicized portion of this passage to support their argument that the traditional classifications of slander *per se* were broadened by the Court.

Prior to discussing plaintiffs' reliance on *West*, we briefly consider those recent decisions from this Court which have cited to or quoted from *West*. *See, e.g., Harris*, 99 N.C. App. at 181-82, 392 S.E.2d at 752-53; *Shillington*, 102 N.C. App. at 194, 402 S.E.2d at 159; *Friel*, 113 N.C. App. at 509, 440 S.E.2d at 113-14.

In *Harris*, defendant followed plaintiff to a store's exit door and accused her of writing a worthless check to purchase groceries. This Court held the facts were distinguishable from those in *West* because the plaintiff in *Harris* presented sufficient evidence the statements were published, heard and understood by onlookers. *Harris*, 99 N.C. App. at 181-82, 392 S.E.2d at 753. The *Shillington* Court, citing to *West*, merely stated: "To establish a claim for slander *per se*, a plaintiff must prove: (1) that defendant's statement was slanderous *per se*, (2) the statement was false, and (3) the statement was published or communicated to and understood by a third person." *Shillington*, 102 N.C. App. at 194, 402 S.E.2d at 159. Lastly, in *Friel*, although this Court quoted the precise language from *West* at issue in the case *sub judice*, we held summary judg-

ment for defendant was proper because plaintiff had not produced evidence of the untruth of allegedly slanderous statements made about her (relating to her job performance). *Friel*, 113 N.C. App. at 509, 440 S.E.2d at 113-14. Accordingly, none of our cases citing *West* concern themselves, directly or indirectly, with whether there now exists a judicially created fourth category of defamatory utterances deemed slander *per se*—those tending to hold a person up to "disgrace, ridicule or contempt."

Returning to *West* itself, it is significant preliminarily to note the context in which the language used by the *West* Court arose. The Court stated "[t]o establish a claim for slander *per se*, a plaintiff must prove [the following three things]." *West*, 321 N.C. at 703, 365 S.E.2d at 624. Thus, the Court was merely listing the *elements* of a slander *per se* claim—not specific categories of slander *per se*. In affirming our ruling, the Court observed that "[p]laintiffs failed to produce any evidence that anyone, other than the plaintiffs themselves, heard the accusations made by defendant's manager." *Id.* at 704, 365 S.E.2d at 625. The Court thus based its decision upon plaintiffs' failure to prove publication (an **element** of *any* slander action) and the additional language (specifically the words "or [tended to] hold him up to disgrace, ridicule or contempt") was unnecessary to the court's holding and therefore dictum. *See* Black's Law Dictionary 454 (6th ed. 1990) ("Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are *obiter dicta*, and lack the force of an adjudication."); *see also State v. Scoggin*, 236 N.C. 1, 13, 72 S.E.2d 97, 105 (1952) (Ervin, J., concurring) ("The various statements in the Court's opinion which were not necessary to the decision of that precise question constitute *obiter dicta* and have no effect as declaring the law."). Notably absent was any indication by the Court of its intent to establish a new category of slander *per se* (significant in light of the lack of prior case authority, *see infra*). Moreover, the Court did not address as such the **categories** of slander *per se* or within which particular category the statements at issue might fall. In that regard, we note the defendant in *West* indisputably charged plaintiffs with commission of the crime of theft (shoplifting).

In addition, the *West* Court referred to *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979) and *Morrow v. Kings Department Stores*, 57 N.C. App. 13, 290 S.E.2d 732 (1982), as authority for its statement regarding the elements of a claim of slander *per*

se. However, neither case contains the language employed by the *West* Court.

Presnell states: "[t]he rumors and accusations imputed reprehensible conduct to plaintiff and tended to prejudice her standing among her fellow workers, stain her character as an employee of the public school system, and damage her chances of securing other public employment in the future." *Presnell*, 298 N.C. at 719, 260 S.E.2d at 614. Our language in *Morrow* tracked the long-standing definition of slander generally (not slander *per se*) as "the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business or means of livelihood." *Morrow*, 57 N.C. App. at 20, 290 S.E.2d at 736 (citation omitted). Considered in view of the cases cited for authority, moreover, the dictum in *West* arguably could be read as merely descriptive of a manner of prejudicing one in that individual's business or means of livelihood by holding that person "up to disgrace, ridicule or contempt" *therein*. Such an interpretation is supported by previous case law from our Supreme Court directing that statements impeaching one's trade or profession must do more than merely injure a person "in his business [and] . . . (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." *Badame*, 242 N.C. at 757, 89 S.E.2d at 468 (citation omitted). Considering the *West* language as referring to trade or profession is further strengthened by the fact that our research reveals no case from this State's appellate courts prior to *West* which, in discussing the categories of slander, includes the phraseology "or hold him up to disgrace, ridicule or contempt." *West*, 321 N.C. at 703, 365 S.E.2d at 624. In the words of this Court as recently as 1986, "[t]his broad category [tending to subject one to ridicule, contempt or disgrace] is notably absent from decisions discussing slander," *Morris*, 78 N.C. App. at 675 n.4, 338 S.E.2d at 566 n.4.

However, the words "or hold [one] up to disgrace, ridicule or contempt" do regularly appear in cases concerning the tort of libel (written or printed defamation). *See, e.g., Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 317, 312 S.E.2d 405, 408-09, *reh'g denied*, 310 N.C. 749, 315 S.E.2d 704, *cert. denied*, 469 U.S. 858, 83 L.Ed.2d 121 (1984):

> Under the well established common law of North Carolina, a libel *per se* is a publication by writing, printing, signs or

> pictures which, when considered alone without innuendo, colloquium or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) *otherwise tends to subject one to ridicule, contempt or disgrace.*

(Emphasis added) (citation omitted). *See also Flake v. News Co.*, 212 N.C. 780, 785-86, 195 S.E. 55, 59-60 (1938):

> A libel *per se* is a malicious publication . . . injurious and defamatory, tending either to blacken the memory of one dead or the reputation of one who is alive and expose him to public hatred, contempt or ridicule. . . . [D]efamatory matter . . . may be libelous and actionable *per se* . . . if they [sic] tend to expose plaintiff to public hatred, contempt, ridicule, aversion or disgrace . . . . [B]ut defamatory words to be libelous *per se* must be susceptible of but one meaning . . . and . . . *tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.*

(Emphasis added) (citations omitted).

Professor McCormick comments that formulation of separate rules for libel and slander appears to have been influenced by the growth of education and printing, and he believes there developed a deliberate attempt to tip the scales "against those who deliberately put down on paper a lasting memorial of *any* lie against a neighbor's good name" and to handicap those who complain to the courts for "oral detractions of the more trivial sort." McCormick, *supra*, at 121. The Ohio Court of Claims, discussing the distinction in the treatment of damages between libel and slander, commented as follows:

> In an action for libel, damages may be presumed for a great many categories of publication, considered libelous *per se*, because of the much greater harm and likelihood of malice associated with written publications. Thus, it is sufficient that a written statement merely exposed another to hatred, ridicule, contempt or disgrace in order for a plaintiff to avoid the requirement of proving special damages.
>
> The law of slander, on the other hand, is much more circumscribed so that, except for certain limited categories of

> statements, an action cannot be maintained upon a slander unless the plaintiff is able to prove that he was the object of special damage.

Key v. Ohio Dept. of Rehab. & Corr., 598 N.E.2d 207, 209 (Ohio Ct. Cl. 1990).

This historical development of distinct rules for libel and slander, as well as the trend not to expand *per se* characterizations, *see, e.g., Hayes*, 832 P.2d at 1024, 1025, coupled with the lack of pronouncement by our Supreme Court specifying an intent to create a new slander *per se* category (especially under the circumstance of no previous case authority), all militate against the application of the *West* language which plaintiff urges upon us. In addition, the critical phrase is dictum not relied upon by the Court for its holding, and the language is also susceptible of an interpretation consistent with existing law prior to *West*.

In sum, therefore, we do not read either the dictum in *West* or the cited cases from our Court to have adopted into the general law of slander a fourth category of slander *per se* as contended by plaintiffs, and we reaffirm the historical distinction between libel and slander. *Tallent*, 57 N.C. App. at 251, 291 S.E.2d at 338 ("defamation includes two distinct torts, libel and slander"); *but see Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993) (blurs differentiation by speaking of plaintiff's action as one for defamation and utilizing language from cases dealing with both libel and slander). Accordingly, based upon our previous analysis, we hold the trial court properly allowed defendant's Rule 12(b)(6) motion.

Nonetheless, assuming *arguendo* that a new class of slander *per se* was created in *West*, which assumption we expressly reject, the bald statement that plaintiffs are "gay and bisexual," standing starkly alone and nothing else appearing, does not as a matter of law hold plaintiffs up to "disgrace, ridicule or contempt" so as to constitute slander *per se* under any purported fourth category thereof.

In addressing the question of whether a false designation of homosexuality is slanderous *per se*, courts across the country not surprisingly have taken varying approaches. In addition to the Texas court's rationale referred to above involving imputation of criminal conduct, *Buck*, 323 S.W.2d at 369; *Head*, 596 S.W.2d at

210, other courts have found the allegation slanderous *per se* as implying immorality or unchastity. *See, e.g., Schomer v. Smidt*, 113 Cal. App. 3d 828, 833-35, 170 Cal. Rptr. 662, 664-66 (1980), *disapproved on other grounds, Miller v. Nestande*, 192 Cal. App. 3d 191, 237 Cal. Rptr. 359 (1987), and *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 311-12 (Mo. 1993) (both involving female plaintiffs and relying in part on state case and statutory law that allegation of a woman's unchastity constitutes a category of slander *per se*; North Carolina statute creating similar category repealed in 1975); *Manale v. City of New Orleans*, 673 F.2d 122, 125 (5th Cir. 1982) (words "gay," "fruit," and "ya little fruit" directed at fellow police officer defamatory *per se* according to Louisiana definition ["having a tendency to deprive a person of the benefit of public confidence or to injure him in his occupation or reputation,"] but plaintiff under state law contrary to that of North Carolina nonetheless must plead and prove injury.).

Several courts, on the other hand, citing the ongoing evolution of our social attitudes and mores, have come to the conclusion that a false accusation of homosexuality constitutes in essence slander *per quod* requiring allegation and proof of special damages as a condition of recovery. *See, e.g., Hayes*, 832 P.2d at 1026 ("false statements concerning homosexuality are not slander *per se* even though they arise in an employment context and are directed at plaintiff's business reputation"); *Boehm v. American Bankers Ins. Group, Inc.*, 557 So.2d 91, 94 (Fla. Dist. Ct. App. 1990) ("the modern view considering the issue, has not found statements regarding sexual preference to constitute slander per se . . . ."), *rev. denied*, 564 So.2d 1085 (1990); *Key*, 598 N.E.2d at 209 (action based upon accusation one is a homosexual "constitutes slander *per quod* and cannot be maintained unless plaintiff alleges and proves special and actual damages").

[4] We consider the latter cases to express the better view. As stated by the Illinois appellate court, when expressly declining to adopt a category of slander *per se* for false imputations of homosexuality:

> We feel that in view of the changing temper of the times[,] such presumed damage to one's reputation, from the type of utterances complained of in the instant case, is insufficient to mandate creation of such a category.

Moricoli, 361 N.E.2d at 76. Similarly, as North Carolina progresses through the mid 1990's, we are unable to rule the bare allegation that an individual is "gay" or "bisexual" constitutes today an accusation which, as a matter of law and absent any "extrinsic, explanatory facts," *Badame*, 242 N.C. at 757, 89 S.E.2d at 467, *per se* holds that individual up to "disgrace, ridicule or contempt." *West*, 321 N.C. at 703, 365 S.E.2d at 624. Nonetheless, individuals such as plaintiffs who feel themselves falsely impugned as homosexual are not without remedy in today's society. It remains for them to pursue an action based upon pleading and proof of special damages. *See, e.g., Beane*, 5 N.C. App. at 278, 168 S.E.2d at 238 (citations omitted).

Accordingly, even considering plaintiffs' argument that *West* created a broad new category of slander *per se*, the allegations of their complaint do not set forth a legally sufficient claim for relief based upon that theory. *See, e.g., Hendrix*, 67 N.C. App. at 356, 313 S.E.2d at 26-27.

Based on the foregoing, therefore, the trial court properly granted defendant's Rule 12(b)(6) motion and the court's judgment dismissing plaintiff's complaint is affirmed.

Affirmed.

Judges EAGLES and MARTIN concur.

MAXINE R. MACKINS v. ALONZO MACKINS, JR.

No. 9326SC683

(Filed 3 May 1994)

1. Divorce and Separation § 427 (NCI4th)— child support order—modification—effective date based on filing date—no retroactive modification

Based on the holding in *Hill v. Hill*, 335 N.C. 140, and on the plain language of N.C.G.S. § 50-13.10(a), a trial court has the discretion to make a modification of a child support order effective from the date a petition to modify is filed as to support obligations which accrue after such date. There-

fore, where plaintiff filed a motion to modify child support on 27 March 1991, the trial court's order entered on 18 February 1993 awarding increased child support effective 1 April 1991, and thereby requiring defendant to pay an amount representing increased child support payments for the months of April 1991 through February 1993, was not a retroactive modification.

Am Jur 2d, Divorce and Separation §§ 1078 et seq.

Divorce: power of court to modify decree for support of child which was based on agreement of parties. 61 ALR3d 657.

2. **Divorce and Separation § 446 (NCI4th)— child support—defendant's income—sufficiency of evidence to support findings**

Evidence was sufficient to support the trial court's finding that defendant had an average gross monthly income of $7,340.00.

Am Jur 2d, Divorce and Separation §§ 1078 et seq.

3. **Divorce and Separation § 395 (NCI4th)— child support—extraordinary expenses—court's discretion**

With regard to child support, the trial court has the discretion to determine what expenses constitute extraordinary expenses, the amount of these expenses, and, with the exception of payments for professional counseling or psychiatric therapy which must be apportioned in the same manner as the basic child support obligation, how the expenses are to be apportioned between the parties.

Am Jur 2d, Divorce and Separation §§ 1039 et seq.

What constitutes "extraordinary" or similar medical or dental expenses for purposes of divorce decree requiring one parent to pay such expenses for child in custody of other parent. 39 ALR4th 502.

4. **Divorce and Separation § 398 (NCI4th)— child support—specific extraordinary expenses—award proper**

The trial court did not abuse its discretion in ordering defendant to pay 77% of the actual cost for (1) Sylvan Learning Center while his children attended there, (2) a psychologist, (3) summer camp expenses, which expenses were not to exceed $1,700 per child per year, and (4) orthodontic expenses.

Am Jur 2d, Divorce and Separation §§ 1039 et seq.

What constitutes "extraordinary" or similar medical or dental expenses for purposes of divorce decree requiring one parent to pay such expenses for child in custody of other parent. 39 ALR4th 502.

Judge WYNN concurring.

Appeal by defendant from order entered 18 February 1993 by Judge Jane V. Harper in Mecklenburg County District Court. Heard in the Court of Appeals 22 March 1994.

Defendant Alonzo Mackins, Jr. and Plaintiff Maxine R. Mackins were married on 25 July 1979 and separated on 28 February 1984. Two minor children were born of this marriage, MacKenzie Mackins, born 11 November 1980, and Damion Alonzo Mackins born 14 March 1979. On 14 August 1984, plaintiff filed an action seeking custody of these minor children, child support and attorneys fees. On 18 January 1985, Judge Robert P. Johnston entered an order for temporary child support finding that defendant's gross income was $3,490.03 per month and that plaintiff was entitled to temporary child support, and ordering defendant to pay $872.50 per month in child support.

Thereafter, on 5 June 1986, Judge W. Terry Sherrill entered an order finding that defendant had a reasonable gross income of not less than $3,200 per month and that plaintiff was entitled to child support, and ordering defendant to pay plaintiff $800 per month in child support. On 27 March 1991, plaintiff filed a motion for increased child support based on a substantial change of circumstances, and on 3 December 1992, plaintiff filed a motion for imposition of sanctions for defendant's failure to respond to a court order compelling defendant's response to interrogatories and production of documents.

After a hearing, on 18 February 1993, Judge Jane V. Harper entered an order finding that defendant has an average gross monthly income of $7,340 per month and concluding that the needs of the children have increased substantially since 1985. Further, Judge Harper ordered defendant to pay to plaintiff $1,230 per month in child support effective 1 April 1991, to pay $9,890 as the sum representing the increased amount due for April, 1991 through February, 1993, and extraordinary expenses. Additionally, Judge Harper ordered defendant to pay $1,200 to plaintiff's attorney as partial attorneys fees. From this order, defendant appeals.

William G. Robinson for plaintiff-appellee.

Helms, Cannon, Hamel & Henderson, P.A., by Thomas R. Cannon and William Brady Hamel, for defendant-appellant.

ORR, Judge.

This appeal involves modification of an order for child support. On 5 June 1986, an order for child support was entered ordering defendant to pay plaintiff $800 per month in child support in two monthly installments of $400 each, "with the first installment due and payable on the 1st day of May, 1986, and a like payment due and payable on the 15th day of May, 1986, and similar payments to continue each month thereafter."

On 27 March 1991, plaintiff filed a motion for increased child support based on a substantial change of circumstances. This action came on to be heard during the 4 January 1993 civil term of Mecklenburg County District Court. Subsequently, the trial court found that "[b]oth the incomes of the [p]laintiff and the [d]efendant have increased substantially since the prior order entered in this matter and also as of the filing of this motion [on] March 27, 1991" and that the "needs and expenses of the minor children have increased substantially since 1985." Based on these findings, and upon findings as to the incomes of both plaintiff and defendant, the trial court found that the "[p]laintiff's motion for an increase in child support should be allowed as of the time of filing of this motion . . . ."

The trial court entered its order on 18 February 1993 ordering that

> [d]efendant shall pay the sum of One Thousand Two Hundred, Thirty Dollars ($1,230.00) per month in to the office of the Clerk of Superior Court of Mecklenburg County as child support, said sum payable in two payments per month, with a payment of $615.00 beginning April 1, 1991 and a like payment of $615.00 on April 15, 1991 and similar payments to continue each month thereafter pending further orders of this Court.

Further, the trial court determined and ordered that

> [a]s the effective date of the time the payments are to begin under this order has passed, the [d]efendant shall pay the difference of $9,890.00 into the office of the Clerk of Superior

> Court within 90 days from date. The difference of $9,890.00 is the sum between what the [d]efendant was supposed to be paying under the previous order in the amount of $430.00 per month for the months of April, 1991, through February, 1993 (23 months).

I.

[1] On appeal, defendant contends that the trial court erred in ordering him to pay retroactive child support in the amount of $9,890 in the absence of any evidence of an emergency situation or a finding as to actual past expenses. Based on our finding that the trial court's order was not a retroactive modification of child support, we disagree.

Under N.C. Gen. Stat. § 50-13.7, "[a]n order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested subject to the limitations of G.S. 50-13.10." N.C. Gen. Stat. § 50-13.10 states in pertinent part:

> (a) Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:
>
> (1) Before the payment is due or
>
> (2) 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, then promptly after the moving party is no longer so precluded.

Thus, under N.C. Gen. Stat. § 50-13.10, a child support payment vests when it accrues, and "[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." *Van Nynatten v. Van Nynatten*, 113 N.C. App. 142, 145, 438 S.E.2d 417, 418 (1993). "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." *Id.* (citation omitted).

In the present case, a child support order was entered on 5 June 1986 ordering defendant to pay child support in the amount of $800 per month. Under this order, defendant's child support obligation became due and payable in two $400 installments on the first and fifteenth of each month. Thus, pursuant to N.C. Gen. Stat. § 50-13.10(a), defendant's child support obligation under the 5 June 1986 order vested after the first and fifteenth of every month, and absent the filing of a motion, these payments could not be modified. *See, e.g., Van Nynatten*, 113 N.C. App. 142, 438 S.E.2d 417; *Pieper v. Pieper*, 108 N.C. App. 722, 425 S.E.2d 435 (1993); *Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

Unlike the plaintiffs in the cases cited above, however, on 27 March 1991, plaintiff in the present case filed a motion for an increase in child support based on changed circumstances pursuant to N.C. Gen. Stat. § 50-13.7. Thus, any child support payments which accrued after the filing of this motion could be subject to modification as provided by law.

The law specifically provides that child support payments may not be reduced retroactively, absent a compelling reason. *Van Nynatten*, 113 N.C. App. at 144, 438 S.E.2d at 418. Although we have not specifically addressed whether a child support payment may be increased retroactively, the law seems to be that a child support payment may not be retroactively increased without evidence of some emergency situation that required the expenditure of sums in excess of the amount of child support paid. *See Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963). The present case does not require us, however, to determine whether a retroactive increase in child support payments is permissible, because, based on the recent holding in *Hill v. Hill*, 335 N.C. 140, 435 S.E.2d 766 (1993), we find that the increase in child support from April, 1991 through February, 1993 was not a retroactive modification of child support.

In *Hill*, plaintiff and defendant were married on 14 September 1951 and separated on 1 May 1983. On 4 August 1983, the parties entered into a court approved order in South Carolina in which they settled the issues of alimony, child custody, and distribution of marital assets. Under this order, defendant was obligated to pay

plaintiff alimony payments of $900 per month. The parties were divorced, and plaintiff registered the South Carolina support order in Mecklenburg County, North Carolina on 18 December 1985. On 21 December 1987, plaintiff filed a motion seeking a judgment for alimony arrearages, an increase in the amount of alimony and further modifications of the 1983 support order.

Subsequently, the motion was scheduled to be heard on 9 February 1988 but was not actually heard until 28 September 1988. By order entered 24 July 1990, the trial court, among other things, increased plaintiff's alimony award from $900 to $1,500 per month effective February 1988 and thereafter monthly. The trial court further ordered:

> The Court is informed as of June 29, 1990 that [d]efendant has continued to make alimony payments at the rate of $900.00 per month from February 1988 through the month of June 1990. An arrearage has thus accumulated for a period of 29 months at a rate of $600.00 per month, creating a principal sum due of $17,400.00 in alimony arrearages. Judgment is rendered in favor of [p]laintiff against [d]efendant in that amount plus interest due on each payment ($600.00 per month) from the due date (the first day of each month commencing with the month of February 1988). The Court further directs that this arrearage of $17,400.00 plus accrued interest on each payment shall be liquidated in full by [d]efendant on or before December 1, 1990.

Id. at 142-43, 435 S.E.2d at 767. Defendant appealed to this Court, and this Court unanimously affirmed the trial court's order insofar as it increased the alimony award; a majority of this Court concluded, however, that the trial court was without the authority to make the increase effective February 1988 and reversed only this aspect of the trial court's order, with one judge dissenting on this issue. Defendant appealed to the Supreme Court.

The Supreme Court held that this Court erred in reversing the aspect of the trial court's order making the increase in alimony effective February 1988 and reinstated the order of the trial court. In reversing the decision of this Court, the Supreme Court stated:

> We need not consider whether this state's law authorizes retroactive modifications of alimony because we conclude the trial court's order modifying alimony from the date the matter

was first noticed for hearing is not a retroactive modification. While this issue has not been addressed previously by this Court, we are persuaded by the rule which prevails in other jurisdictions which states:

> Orders which modify alimony or support payments effective as of the date of the petition or subsequent thereto but prior to the date of the order of modification are not subject to the criticism that they have retroactive effect which destroys vested rights. This is true because the modification and the whole proceeding in which it is made are referable to the date of the filing of the petition and any change effective as of that date cannot be said to be retroactive.

Id. at 143-44, 435 S.E.2d at 768 (citations omitted).

The Court went on to favorably cite language from the Court of Appeals of New York that

> [[t]he purpose for the hearing on plaintiff's motion is] to establish the facts upon which the court could act with caution and with justice. So far as the power of the court is concerned, those facts are deemed to have been established as of the date when the motion was made returnable . . . and the order could properly take effect as of that date. Were this not so, a defendant, by repeated adjournments for one excuse or another, might delay [the plaintiff] in procuring . . . the relief and help which [the plaintiff] should have, owing to changed conditions and circumstances.

Id. at 144, 435 S.E.2d at 768 (quoting *Harris v. Harris*, 259 N.Y. 334, 336-37, 182 N.E. 7, 8 (1932)) (bracketed language in original). Subsequently, the Court concluded that "[b]ecause a trial court has the discretion to modify an alimony award as of the date the petition to modify is filed, '[i]t follows, then, a trial court has discretion to make the modification effective as of any ensuing date after a petition to modify is filed.' " *Hill*, 335 N.C. at 145, 435 S.E.2d at 768 (citation omitted). The trial court had ordered the alimony increase effective February 1988. Based on its conclusions, the Supreme Court held, "[b]ecause this date was subsequent to the 21 December 1987 filing of plaintiff's motion, the trial court's order was not a retroactive modification." *Id.* Based on this holding, our Supreme Court reversed this Court's decision and reinstated

the trial court's decision making the increase in defendant's alimony payments effective February 1988.

The defendant in *Hill* argued, however, that *Fuchs* applied to prevent the court from increasing the alimony payments from a point prior to the entry of the order increasing the alimony. Our Supreme Court stated:

> *Fuchs* involved the modification of a child support order. The motion for modification was filed 11 June 1963. The trial court ordered an increase in the amount of child support effective February 1963, five months before the motion was filed. This Court held that "the order making the increased allowance retroactive to and including February 1963, without evidence of some emergency situation that required the expenditure of sums in excess of the amounts paid by the plaintiff for the support of his minor children, is neither warranted in law nor equity." 260 N.C. at 641, 133 S.E.2d at 492. *Fuchs* thus dealt with a true retroactive modification, i.e., a modification ordered to take place before the motion for modification was filed. Here, as we have shown, the modification was not retroactive because it was made to take effect on a date subsequent to the date the motion for modification was made.

Id. at 145, 435 S.E.2d at 768-69.

In the present case, plaintiff filed her motion to modify the child support payments on 27 March 1991. The trial court entered an order on 18 February 1993 increasing defendant's child support obligation from $800 per month to $1,230 per month effective 1 April 1991. The trial court noted that on the date this order was entered, the effective date of the time the payments were to begin had passed and ordered defendant to pay $9,890 to the Clerk of Superior Court representing the increase in child support payments for the months of April, 1991 through February, 1993. Because April, 1991 was subsequent to the 27 March 1991 filing of plaintiff's motion, the trial court's order was not a retroactive modification.

Further, just as the trial court has the discretion to modify an alimony award as of the date the petition to modify is filed, the trial court also has the discretion to modify a child support order as of the date the petition to modify is filed. Thus, based on the holding in *Hill* and on the plain language of N.C. Gen. Stat. § 50-13.10(a), we conclude that a trial court has the discretion

to make a modification of a child support order effective from the date a petition to modify is filed as to support obligations that accrue after such date.

Because the April, 1991 support obligation did not accrue until after the 27 March 1991 petition was filed, it was not a violation of N.C. Gen. Stat. § 50-13.10(a) to modify the support obligation from April, 1991. Accordingly, we find that the trial court did not err in modifying defendant's child support obligation effective April, 1991.

II.

[2] Next, defendant contends that the trial court erred in finding that defendant has an average gross monthly income of $7,340. We disagree.

"This Court is bound by the trial court's findings where there is competent evidence to support them. . . . 'If different inferences may be drawn from the evidence, [the judge sitting without a jury] determines which inferences shall be drawn . . .', and the findings are binding on the appellate court." *Monds v. Monds*, 46 N.C. App. 301, 302, 264 S.E.2d 750, 751 (1980) (bracketed language in original) (citations omitted).

In the present case, the trial court found that plaintiff filed this motion in March, 1991, and in May, 1991, the parties verbally agreed to an order increasing child support. The trial court found that at that time, defendant represented through his attorney that his gross income per month was not less than $7,500. The defendant increased child support on that basis for several months but did not, however, sign the agreement.

Subsequently, the trial court found that defendant was employed "at the bonding business he owns with his family." The court also found that the bonding business had purchased a Jaguar automobile for defendant's use with payments of $1,106 per month, that defendant had purchased a $284,000 home to reside in and pays a monthly mortgage of $2,100, with the bonding business paying $600.00 and defendant paying $1,500, that evidence existed to show that defendant removes some cash from the business for his personal use, and that defendant deposited into his personal checking account the sum of $73,407.23 for ten months in 1992. Our review of the evidence shows that these findings were all supported by competent evidence.

Based on these findings, the trial court found that defendant has an average gross monthly income of $7,340 per month. We conclude that the findings as set out above are competent to support this finding.

Defendant argues, however, that his testimony that he had a gross monthly income for the first eleven months of 1992 of $3,144.83 was uncontradicted and that the trial court erred, therefore in finding that his gross monthly income was $7,340 per month. We disagree.

Where the trial judge sits as a jury and " 'where different *reasonable* inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge.' " *Simon v. Mock*, 75 N.C. App. 564, 568, 331 S.E.2d 300, 303 (1985) (citation omitted) (emphasis in original). The trial judge has the authority to believe all, any, or none of defendant's testimony. *Id.* at 568-69, 331 S.E.2d at 303. Accordingly, we find defendant's argument without merit.

III.

Finally, defendant contends that the trial court erred in ordering defendant to pay child support payments in an amount more than mandated by the North Carolina Child Support Guidelines absent a finding that it was reasonably necessary to deviate from these guidelines. Because we find that the trial court did not deviate from the North Carolina Child Support Guidelines, we disagree.

As his basis for this last assignment of error, defendant excepts to the following order of the trial court:

> The [d]efendant shall further pay directly to the [p]laintiff, and within 15 days after the [p]laintiff incurs additional extraordinary expenses of the children, 77% of the actual cost for Sylvan Learning Center, while the children attend there; orthodontic expenses; psychologist; and summer camp expenses. Camp expenses shall not exceed $1700 per child per year.

The North Carolina Child Support Guidelines state:

> **F. Extraordinary Expenses**
>
> *The Court may make adjustments for extraordinary expenses and order payments for such term and in such manner as the Court deems necessary.* Extraordinary medical expenses

include, but are not limited to, such costs as are reasonably necessary for orthodonture, dental treatments, asthma treatments, physical therapy and any uninsured chronic health problem. At the discretion of the Court, professional counseling or psychiatric therapy for diagnosed mental disorders may also be considered as an extraordinary medical expense. Payments for such expenses shall be apportioned in the same manner as the basic child support obligation and ordered paid as the Court deems equitable.

Other extraordinary expenses are added to the basic child support obligation. Other extraordinary expenses include:

(1) Any expenses for attending any special or private elementary or secondary schools to meet the particular educational needs of the child(ren); (2) Any expenses for transportation of the child(ren) between the homes of the parents.

(Emphasis added.) Based on this language, the court may, in its discretion, make adjustments for extraordinary expenses. *See Lawrence v. Tise*, 107 N.C. App. 140, 150, 419 S.E.2d 176, 183 (1992) (holding uninsured medical and dental expenses are to be apportioned between the parties in the discretion of the trial court).

[3] Further, the language "[e]xtraordinary medical expenses include, *but are not limited to* . . ." and "[o]ther extraordinary expenses are added to the basic child support obligation" contemplate that the list of extraordinary expenses found in this section is not exhaustive of the expenses that can be included under this section. In light of the fact that "[h]istorically our trial courts have been granted wide discretionary powers concerning domestic law cases", we conclude that the determination of what constitutes an extraordinary expense is also within the discretion of the trial court. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Thus, the trial court has the discretion to determine what expenses constitute extraordinary expenses, the amount of these expenses, and, with the exception of payments for professional counseling or psychiatric therapy which must be apportioned in the same manner as the basic child support obligation, how the expenses are to be apportioned between the parties. *See* North Carolina Child Support Guidelines; *See also Lawrence*, 107 N.C. App. at 150, 419 S.E.2d at 183. Further, "[i]t is well established

that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

[4] In the present case, the trial court ordered defendant to pay seventy-seven percent of the actual cost for the Sylvan Learning Center while the children attend the center, of the actual cost for orthodontic expenses, of the actual cost for a psychologist, and of the actual cost for summer camp expenses, which summer camp expenses are not to exceed $1700 per child per year. At the outset, we note that the trial court properly apportioned payment of the psychological expenses pursuant to the child support guidelines of defendant's seventy-seven percent share. We also note that the orthodontic expenses and the expenses for the psychologist are specifically provided for under the child support guidelines as extraordinary expenses.

Further, we note that the child support guidelines specifically list special educational expenses as extraordinary expenses, and under our abuse of discretion standard, we cannot say that the trial court abused its discretion in determining that expenses for a learning center for the children is an extraordinary expense. Finally, as for the camp expenses, the trial court limited the amount of total camp expenses to $1700 per child per year so that the most defendant would have to pay for summer camp would be seventy-seven percent of $1700 per child per year. In light of our standard of review, we cannot say that the trial court clearly abused its discretion in ordering defendant to pay for the summer camp expenses. Accordingly, we find that the trial court did not abuse its discretion in ordering defendant to pay seventy-seven percent of the extraordinary expenses, and defendant's final assignment of error is without merit.

Defendant also argues, however, that the order is ambiguous as to whether his portion of the summer camp expenses should not exceed $1700 per child per year or whether the total expense for summer camp should not exceed $1700 per child per year so that his portion should not exceed seventy-seven percent of $1700 per child per year. We do not agree that the order is ambiguous. The order clearly states that the total camp expenses shall not exceed $1700 per child per year, and defendant would pay seventy-seven percent of these expenses.

Accordingly, we affirm the order of the trial court.

Affirmed.

Judge WELLS concurs.

Judge WYNN concurs with a separate opinion.

Judge WYNN concurring.

I fully concur with the majority's application of *Hill v. Hill*, 335 N.C. 140, 435 S.E.2d 766 (1993) to the facts of this case. *Hill* provides that the trial court " 'has the discretion to make the modification [of an alimony award] effective as of any ensuing date after a petition to modify is filed.' " *Hill*, 335 N.C. at 145, 435 S.E.2d at 768 (quoting *Kruse v. Kruse*, 464 N.E.2d 934, 939 (Ind. App. 1984)). Such modification is not retroactive since " 'the modification and the whole proceeding in which it is made are referable to the date of the filing of the petition.' " *Id.* at 144, 435 S.E.2d at 768 (quoting *McArthur v. McArthur*, 106 So. 2d 73, 76 (Fla. 1958)). The Supreme Court reasoned that a contrary rule would encourage dilatory tactics and frustrate the changed circumstances requirement for modification of an alimony award. *Id.* I agree with the majority that the rule in *Hill* should also be applied to the modification of child support.

Trial judges, however, should exercise great discretion in setting the starting date for increases in the support award. In effect the *Hill* rule creates a liability which did not exist prior to the entry of the order of modification. An innocent party who has faithfully met all prior support obligations nonetheless may be confronted with a considerable previously undetermined debt even in the face of evidence that the party fully cooperated to obtain speedy hearing date. Moreover, since actions seeking an increase in support often do not state the amount of increase sought, the non-moving party may not have any notice as to the amount of debt exposure the party will face when the modification order is entered months and in some cases years later.

Before ordering a modification of child support, the trial court must determine the present reasonable needs of the children based upon the actual past expenditures for the children, their present reasonable expenses, and the parties' relative abilities to pay. *Greer*

v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991); *Smith v. Smith*, 89 N.C. App. 232, 365 S.E.2d 688 (1988); *Norton v. Norton*, 76 N.C. App. 213, 332 S.E.2d 724 (1985). These factors, in my opinion, should also be considered in setting the date for the modification of child support. In addition, I believe the trial court should consider whether the moving party has prosecuted the cause expeditiously and whether the non-moving party has attempted to delay the proceedings in order to avoid paying the increased support award. It should be further noted that the rationale for the *Hill* rule appears to also apply in cases where the support award is decreased. Thus, it is imperative that our courts provide expeditious hearings on motions to modify support awards to avoid unfairness to the parties.

STATE OF NORTH CAROLINA v. PHILLIP MANNING CANNADA

No. 9314SC781

(Filed 3 May 1994)

Homicide § 299 (NCI4th)— second-degree murder—insufficiency of evidence

The trial court erred by failing to dismiss this second-degree murder case at the close of the evidence because the evidence was insufficient as a matter of law to support defendant's conviction in that there were no eyewitnesses who saw defendant with the murder weapon; there was no physical evidence found at the scene of the crime or on defendant connecting him with the murder; defendant made no out-of-court incriminating statements; and the entire case was circumstantial and speculative, resting solely on evidence suggesting defendant may have had a motive to kill the victim because she wanted to break up with him, and because defendant and the victim had an argument shortly before her death.

Am Jur 2d, Homicide §§ 425 et seq.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 29 January 1993 by Judge Robert L. Farmer in Durham County Superior Court. Heard in the Court of Appeals 9 March 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General Francis W. Crawley, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant-appellant.

JOHNSON, Judge.

Defendant Phillip Manning Cannada was tried and found guilty of the second-degree murder of Teresa Gilmore. Defendant was Ms. Gilmore's live-in boyfriend; Ms. Gilmore's body was found on the floor of the kitchen of her two-story home at 3510 Manford Drive in Durham, North Carolina.

The facts of this appeal are as follows: Sergeant Jodie W. Piatt of the Durham City Police Department received a radio transmission at 8:16 p.m. on 17 September 1991 that a person had been shot at 3510 Manford Drive. He arrived at the home four or five minutes later; the door to the residence was open, and defendant was sitting on the front steps of the residence with a man and a woman. When Sergeant Piatt asked who was shot, he received no response; when he asked for the location of the person who was shot, defendant replied, "in the kitchen." When Sergeant Piatt entered the house he observed a five gallon plastic bucket just inside the living room and three empty shotgun shell casings on the floor of the family room. Ms. Gilmore lay face down on the kitchen floor with a large wound on her upper back. When Sergeant Piatt returned to the front porch he asked defendant his name, his place of residence, and what happened; defendant gave his name, told Sergeant Piatt that he lived there, and then said, "I don't know. I went for a walk and my dove gun was sitting inside on the stool and when I came back she was dead and my gun was gone." When Sergeant Piatt asked what Ms. Gilmore's relationship was to defendant, defendant said, "She's my girl friend or whatever." The police did not find the gun or any persons inside the house. Defendant's wallet was found among clothing at the bottom of steps leading to the lower level of the house; the remaining rooms in the house were clean and in order with no signs of anything being out of place.

Officer Nathaniel S. Parker of the Durham City Police Department, the second officer to arrive, found defendant sitting on the front porch and asked defendant who was shot and what had

happened. Defendant told Officer Parker that "she was shot and that she was in the kitchen." Officer Parker placed defendant in investigative detention, patted defendant down for weapons, and placed him in the back seat of the patrol car. Officer Parker advised defendant of his rights; defendant stated he understood and was willing to answer questions. Officer Parker testified that defendant told him the following: that Ms. Gilmore had picked him up from work that day at 4:00 p.m. and they got home about 5:00 or 5:30 p.m. after stopping to check on another job; that he drank four or five beers; that after they finished dinner at 7:00 or 7:15 p.m., he went for a walk toward Brighton Road and Hope Valley Road, leaving Ms. Gilmore washing dishes; that he was not sure how far he went, but he was gone about an hour; that when he left the house, the gun was lying on a stool next to the bucket at the entrance to the den just inside the front door; that the reason the gun was there was because he had gone dove hunting; and when he left for his walk, the gun was not loaded.

When Officer Parker began writing his report, defendant dozed in the back seat of the patrol car. Officer Parker got out and checked the hood of the white BMW in the driveway; the hood was still warm, indicating it had probably been driven in the last hour or so. When defendant awoke and got out of the car to use the bathroom at a neighbor's house, an unfired buckshot shell rolled to the back seat. When asked where the shell came from, defendant said, "I just picked it up when I walked in the house."

Investigator Alvin Jerome Carter of the Durham City Police Department also spoke to defendant while defendant sat in the patrol car at the scene. Defendant told Investigator Carter he had gone for a walk and came back to find Ms. Gilmore dead and his shotgun missing, and he agreed to go downtown and talk further. Defendant seemed calm and was "nodding in and out" and appeared to be under the influence of drugs or alcohol; once at the police station, defendant fell asleep in the interview room prior to questioning. Defendant said he was willing to talk and that he just wanted to help resolve the matter, that he wanted to "get that SOB" who killed Ms. Gilmore "as bad as anybody else," and that he was 100% willing to cooperate. Because of his appearance, defendant was asked if he had taken any drugs, and defendant did not indicate that he had taken any drugs. However, because defendant appeared to be under the influence of alcohol or drugs, he was asked to submit to a blood alcohol test; the

test results showed a blood alcohol content of .04. Defendant also consented to a paraffin test for gunshot residue and a polygraph test, but these tests were not performed that evening. A few days later, defendant refused to take a polygraph test.

While at the police station, defendant told Investigator Carter that Ms. Gilmore normally picked him up at work at 3:30 p.m. and took him home, but that particular day, she took him to look at another job and they got home around 5:30 p.m.; that she went to a doctor's appointment around 5:30 p.m.; that when she returned, they cooked and ate dinner together; that defendant had a few beers and Ms. Gilmore had a mixed drink; that while Ms. Gilmore cleaned up, defendant went for a walk; that defendant pulled the truck into the driveway and put his tools in the house and then parked the truck in the street; and that he then went for a walk which was approximately one hour and when he came back, he found Ms. Gilmore dead, and his shotgun gone. Defendant further stated that he and Ms. Gilmore had been together for three years, that they rarely argued and it had been a long time since they had argued; that he had never hit her; and that he had gone bird hunting on 15 September 1991 and that was why the gun was in the living room.

After the interview at the police station ended, defendant was taken home by a police officer, and investigator Marty Keith Campbell of the Durham City Police Department staked out the residence. Defendant was dropped off at 2:40 a.m., and approximately ten or fifteen minutes later, defendant came out of the house and went to the back of the BMW. Investigator Campbell heard what sounded like the trunk of the BMW opening and closing. Afterward, defendant went inside the house and the lights went off at about 3:05 a.m. Investigator Campbell observed no other activity until daybreak, at which time he joined an officer in an unmarked car at the corner of Brighton Road and Manford Drive. About forty-five minutes later, defendant pulled up at the corner in a red truck, turned left onto Brighton Road, turned left onto Hope Valley Road, and went down a hill across a bridge where he turned left into a cul-de-sac. The unmarked car followed; defendant was driving about twenty or twenty-five miles an hour; the posted speed limit was thirty-five miles an hour. The truck slowed down in front of one of the houses in the cul-de-sac. Defendant appeared to spot the unmarked car at that time, and drove his vehicle out of the cul-de-sac onto Hope Valley Road, and returned to Manford Drive.

On Thursday, 19 September 1991, employees of the City of Durham Water and Sewer Department were working in the area of Hope Valley Road near Dover Road. At the bottom of a hill just before an intersection with Rugby Road, where a small bridge crosses a stream, an employee found a 20-gauge pump shotgun leaning against a tree limb in a wooded area some distance off the roadway past the bridge. The gun was not loaded. The serial number on the gun matched the serial number on the gun box recovered from the residence of Ms. Gilmore. Tests showed the three fired shotgun shells recovered from the residence of Ms. Gilmore had been fired from this weapon. The unfired buckshot shell found in the patrol car was of identical manufacture and load type as the three fired shells, and bore extractor marks identical to those on shells test-fired from the shotgun. This led Agent T. R. Trochum, a State Bureau of Investigation firearms expert, to opine that this shell had been chambered in and then extracted from the shotgun at some time.

Cindy Gilmore Hardy, Ms. Gilmore's daughter, testified that Ms. Gilmore was sixty years old at the time of her death, and that her father, Ms. Gilmore's husband, had committed suicide in 1986. Ms. Gilmore's son, Henry Gilmore, Jr., who lived with Ms. Gilmore, had been a quadriplegic for eight or nine years at the time of Ms. Gilmore's death as the result of an automobile accident. Mr. Gilmore was not in the home the day of the shooting; he had gone into the hospital the previous day for skin grafts. Ms. Gilmore met defendant about a year after her husband's suicide. Defendant was twenty years younger than Ms. Gilmore. Ms. Hardy and her husband did not like defendant because they felt he was free-loading off of Ms. Gilmore. Ms. Hardy stated that defendant was a heavy drinker and would typically be drunk and in bed by 7:30 p.m. Ms. Gilmore had told Ms. Hardy that she was going to leave the BMW to defendant; after buying the truck, Ms. Gilmore told Ms. Hardy she wanted to leave the truck to defendant, and she wanted it in her will that defendant could stay in her house as long as he needed. Until the will was read on 18 September 1991, Ms. Hardy did not know if her mother had made these changes. All of Ms. Gilmore's property was left to Ms. Hardy and her brother.

Dr. Samuel Garten, a close family friend of the Gilmores, testified that he had visited with them about every two weeks for the past couple of years. Dr. Garten saw defendant during these visits and knew he lived with Ms. Gilmore; Dr. Garten testified that the

relationship between Ms. Gilmore and defendant seemed fine in the beginning but that in the last two or two and a half months, Ms. Gilmore had talked to Dr. Garten about problems she was having with defendant. During a cook-out which Dr. Garten attended at the house on one occasion, defendant drank so much that he was too drunk to eat when the meal was ready and he went to bed, and Ms. Gilmore told Dr. Garten and her son that she wanted to get defendant out of the house and that she had given him enough chances and that he was not changing but was just staying drunk.

Patricia Carver Hamilton, Ms. Gilmore's close friend, testified that when Ms. Gilmore's relationship with defendant began, Ms. Gilmore cared about defendant, and that several months before her death, Ms. Gilmore told Ms. Hamilton that she was thinking of changing her will and that there was a vehicle she wanted defendant to have if anything happened to her. As the months progressed, however, Ms. Hamilton noticed a change in the relationship. Ms. Gilmore told Ms. Hamilton in phone conversations that defendant worked early and went to bed early and that she was seeing someone else in the evenings after defendant went to bed. This had been going on for about two or three months. Ms. Gilmore told Ms. Hamilton that she was tired of taking care of defendant and her son, and that she wanted to get on with her own personal life.

Michael Eugene Jennings, Jr., a longtime personal friend of the Gilmores, testified that he had several phone conversations with Ms. Gilmore during September 1991; all but one were initiated by Ms. Gilmore. During the last couple of phone calls, Ms. Gilmore sounded upset and told Mr. Jennings she wanted to see him and talk "about a matter" and when Mr. Jennings offered to come over, Ms. Gilmore said, "No, he'll kill you." She added, "He'll kill us both." Mr. Jennings assumed Ms. Gilmore meant defendant, although she never mentioned his name. Ms. Gilmore also said, "I don't really want to get you hurt."

Dr. Joan Marie Stets, a plastic surgeon Ms. Gilmore had been seeing from June through September 1991, testified that when Ms. Gilmore came in for an appointment between 4:00 and 4:30 p.m. on 17 September 1991, Ms. Gilmore told her that she was going to ask defendant to leave her home.

Wayne Thomas Barbee, a self-employed roofer, testified that he was working outside the home of Ms. Gilmore's neighbor, Diane

Higginbotham, on 17 September 1991 around 5:30 p.m., when Ms. Gilmore stopped by and asked him if he would come over and give her an estimate on repairing her roof. A few minutes later, Mr. Barbee went over to speak with Ms. Gilmore, during which time defendant came outside and told Ms. Gilmore she had a telephone call. When Ms. Gilmore asked him to take a message, defendant insisted she go inside and take the call; Mr. Barbee testified that defendant's tone of voice and demeanor were "very hateful" and "very sharp." Ms. Gilmore went inside to take the telephone call while Mr. Barbee went onto the roof to take measurements. Mr. Barbee could hear both voices arguing loudly from inside the house, lasting for about ten minutes. When this stopped, Mr. Barbee knocked at the door and saw Ms. Gilmore inside; although Ms. Gilmore saw him, she gave no response. Mr. Barbee left and approximately fifteen minutes later Ms. Gilmore walked back over and discussed with Mr. Barbee the possibility of repairing the roof the next day. Mr. Barbee then left the neighborhood. This was at approximately 6:30 or 6:45 p.m.

Michael Anthony Coston rented the guest house behind Ms. Gilmore's home. On 17 September 1991, when Mr. Coston came home around 4:30 p.m., defendant and Ms. Gilmore were home. Mr. Coston left to see his girlfriend around 6:00 p.m. and returned close to dark. When he came back to his house, he saw defendant, who told him Ms. Gilmore had been shot.

Diane Higginbotham, Ms. Gilmore's neighbor who lived across the street, testified that she was in her yard watering her flowers from approximately 7:30 to 7:50 p.m. the night of the shooting. She observed defendant walking up his driveway toward his truck, and spoke to him; defendant was dressed in shorts and a t-shirt and was barefoot; his hair looked greasy or wet and he looked pale. During the time she was outside, Ms. Higginbotham did not see the BMW leave.

Margaret H. Wolfe, a neighbor who lived across the street, testified that she was sitting on her front stoop smoking a cigarette at approximately 7:50 p.m. that evening when Ms. Gilmore's BMW came "barreling" out of the driveway, then went up the road very fast. Ms. Wolfe did not see who was driving.

Mary Alice and John Harris, Ms. Gilmore's next-door neighbors, took their grandson for a walk around the neighborhood from about 7:10 to 7:50 p.m. that same evening. They did not notice anything

unusual at the Gilmore residence when they returned. Mr. and Mrs. Harris, as well as Ms. Wolfe, Ms. Higginbotham, and Mr. Coston all testified that they had never seen defendant take a walk anywhere in the neighborhood during the time he lived there.

Defendant did not present any evidence at trial. After being convicted of second-degree murder, defendant filed notice of appeal to this Court.

Defendant argues that the trial court erred by denying defendant's motion to dismiss at the close of the evidence because the evidence was insufficient, as a matter of law, to support defendant's conviction for second-degree murder. Defendant argues that the State's case must fail because there was no substantial evidence to link defendant to the offense or to raise more than a suspicion or conjecture that defendant was the person responsible for Ms. Gilmore's death.

"Second-degree murder is defined as the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Phipps*, 331 N.C. 427, 457-58, 418 S.E.2d 178, 194 (1992). *See also State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989). "In any prosecution for a homicide the State must prove two things: (1) that the deceased died by virtue of a criminal act; and (2) that the act was committed by the defendant." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971); *State v. Palmer*, 230 N.C. 205, 52 S.E.2d 908 (1949).

We believe the State has failed to prove by substantial evidence that the murder herein was committed by defendant. The evidence presented herein "merely shows it possible for the fact in issue to be as alleged, [raising] a mere conjecture that it was so . . . [and] should not be left to the jury." *State v. Lee*, 287 N.C. 536, 540, 215 S.E.2d 146, 149 (1975), *quoting State v. Vinson*, 63 N.C. 335, 338 (1869).

We note that there were no eyewitnesses to the shooting; that there were no eyewitnesses who saw defendant with the murder weapon; that there was no physical evidence found at the scene of the crime or on defendant connecting him with the murder; that defendant made no out-of-court incriminating statements; and that the entire case was circumstantial and speculative, resting solely on evidence suggesting defendant may have had a motive to kill Ms. Gilmore because she wanted to break up with him,

and because defendant and Ms. Gilmore had an argument shortly before her death. As such, we find the trial court erred by failing to dismiss this case at the close of the evidence because the evidence was insufficient, as a matter of law, to support defendant's conviction for second-degree murder. *See State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971) (where the evidence was insufficient to show the defendant killed his wife where the wife was seen with the defendant in their store the evening of the murder and the wife's body was later found in the store; the evidence indicated the defendant was drunk and violent that evening; the defendant was found with ammunition in his pocket; and the defendant had blood spots on his jacket matching the blood type of the victim and himself); *State v. Cutler*, 271 N.C. 379, 156 S.E.2d 679 (1967) (where the evidence was insufficient to show the defendant committed murder where the victim was stabbed to death; the defendant had been seen driving to the victim's house twice the day of the murder and his truck was parked in the victim's yard; the defendant had a knife which was bloody and had hair on it similar to the hair of the deceased and the defendant claimed the deceased had committed suicide); *State v. Lee*, 287 N.C. 536, 215 S.E.2d 146 (1975); *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924, 54 L.Ed.2d 281 (1977).

In that we vacate on this issue, we need not address defendant's remaining assignments of error.

Vacate.

Judge JOHN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority that there is not substantial evidence in this record to support submitting this case to the jury.

The evidence reveals that the victim and the defendant, who were not married, lived together in a house owned by the victim. The victim had expressed her desire that after her death defendant have her truck and be allowed to live in her house as long as he needed. In the several months preceding her death, however, she had changed her mind, telling several people that she wanted defendant to move out of her residence. On the day she was killed,

the victim told Dr. Joan Stets that she was going to ask defendant to leave her home. At one point, she told a friend not to come to her house because "he'll kill both of us."

About 5:30 p.m. on the evening of the killing, the victim and the defendant, who had been drinking, were overheard arguing loudly with each other inside the victim's house. The victim was last seen alive around 6:30 p.m. The defendant was seen around 7:30 p.m., dressed in a t-shirt and shorts and barefooted, walking from the house to the truck which was parked in the street in front of the victim's house. At 7:50 p.m., the victim's BMW, which had been parked in the victim's driveway, was seen barreling from the house and down the street. No one saw the defendant walking in the neighborhood on the evening of the killing nor had defendant ever been seen walking in the neighborhood.

When the police arrived at the victim's residence at 8:20 p.m., they found the defendant sitting barefooted on the front porch of the house, and the BMW in the driveway. The victim was found lying on the kitchen floor and no gun was found in the house. The defendant told the police that he did not know what had happened as he had been out walking for about an hour and on his return found his gun missing and the victim dead on the floor. He also told the police that it had been a long time since he and the victim had argued. Upon questioning the defendant in one of the patrol cars, an unfired shotgun shell, which was later determined had been chambered in the gun which had killed the victim, fell from the defendant's pocket. The gun was found several days later near a road not far from the victim's residence, at a place where the defendant was seen, the day after the killing, driving by very slowly.

This evidence, although circumstantial, is such that a reasonable mind could accept it as adequate to support the conclusion that defendant unlawfully killed Teresa Gilmore (the victim) with malice, and that conclusion supports the verdict of guilty of second degree murder. *See State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). Accordingly, I believe the trial court correctly denied the defendant's motion to dismiss the charges, and because I do not see any other error that requires a new trial, I vote to affirm the conviction.

LIZZIE LITTLE, PLAINTIFF v. GLENNIE M. MATTHEWSON, II, MATTHEWSON & DANIELS, P.A., AND GLENNIE M. MATTHEWSON, II, ADMINISTRATOR OF THE ESTATE OF JEANNE DANIELS MATTHEWSON, DEFENDANTS

No. 933SC279

(Filed 3 May 1994)

1. Attorneys at Law § 45 (NCI4th)— malpractice action—breach of standard of care—expert testimony not required

In a legal malpractice action against defendant attorneys who improperly stated the date of plaintiff's slip and fall in a complaint against a hospital, thereby causing the case to be dismissed because the judge found that it was barred by the statute of limitations, the trial court erred in directing verdict for defendant attorneys on the ground that plaintiff failed to present expert testimony and evidence establishing a breach of the standard of care, since an attorney with twenty-seven years of experience testified for plaintiff concerning procedural matters in the underlying slip and fall case, and the attorney's testimony was evidence of what other attorneys in the same or a similar community "should do." Furthermore, such expert testimony was not even necessary in this case since having an action dismissed because of a failure to file that action within the applicable statute of limitations is of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation.

Am Jur 2d, Attorneys at Law §§ 202, 203, 223.

Attorney's liability for negligence in preparing or conducting litigation. 45 ALR2d 5.

Legal malpractice by permitting statutory time limitation to run against client's claim. 90 ALR3d 293.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney. 14 ALR4th 170.

2. Attorneys at Law § 48 (NCI4th)— legal malpractice action—plaintiff's underlying claim valid—likelihood of judgment for and recovery by plaintiff—sufficiency of evidence

The trial court erred in directing a verdict for defendant attorneys in a legal malpractice action on the grounds that plaintiff failed to establish that the underlying claim was valid, would have resulted in a judgment in her favor, and would have been collected, since the underlying slip and fall claim was valid, and plaintiff established that she could have recovered compensation from the hospital on her claim, as the hospital had liability and medical payments insurance which would pay for any losses caused by the hospital's negligence and for plaintiff's medical expenses, and the hospital had offered to pay an amount of money to plaintiff.

Am Jur 2d, Attorneys at Law § 223.

Measure and elements of damages recoverable for attorney's negligence in preparing or conducting litigation—Twentieth Century cases. 90 ALR4th 1033.

Judge LEWIS dissenting.

Appeal by plaintiff from order entered 27 October 1992 by Judge Ernest B. Fullwood in Pitt County Superior Court. Heard in the Court of Appeals 11 January 1994.

Jeffrey L. Miller for plaintiff-appellant.

No brief filed for defendants-appellees.

JOHNSON, Judge.

This appeal is a malpractice action brought by plaintiff against defendant-attorneys who previously represented her in a slip and fall case against Pitt County Memorial Hospital.

The facts relative to the slip and fall case are as follows: On 12 July 1983, plaintiff went to Pitt County Memorial Hospital to visit sick relatives; while there, plaintiff slipped on a floor which had just been waxed. There were no warning or caution signs displayed in the area advising plaintiff or others of the hazardous floor condition. Plaintiff suffered personal injuries and incurred medical expenses. Plaintiff employed defendant-attorneys in April 1986 to handle her claim against the hospital.

On 11 July 1986, one day before the statute of limitations would have run, defendant-attorneys filed an application and order for a twenty-day extension to file a complaint, which was granted. The date of the fall was not stated in the application. On 31 July 1986, the last day of the extension, defendant-attorneys filed a formal complaint. In the complaint, defendant-attorneys mistakenly referred to the date of the alleged injury as 7 July 1983 instead of 12 July 1983. Although plaintiff informed defendant-attorneys of the correct date before they filed the complaint on her behalf, defendant-attorneys failed to make the correction. The hospital, accordingly, asserted the statute of limitations as a defense, based on the fact that the complaint alleged that the injury occurred on 7 July 1983, more than three years before the institution of plaintiff's lawsuit on 11 July 1986.

On 7 February 1987, defendant-attorneys filed a voluntary dismissal without prejudice without first seeking to correct the date mentioned in the complaint. On 2 February 1988, another attorney for plaintiff filed an action against the hospital on plaintiff's behalf. The trial judge dismissed that case on 30 March 1988, finding that it was barred by the statute of limitations.

As a result, on 28 June 1989, plaintiff instituted the present action against defendant-attorneys, seeking to recover damages based upon their negligent handling of her slip and fall case. Plaintiff alleged defendant-attorneys were negligent in filing a complaint containing an inaccurate date, in failing to correct the date, in failing to amend the complaint to correct the date, and in dismissing the action without first correcting the date. In their answer, defendant-attorneys admitted the existence of the attorney-client relationship, the correct date of plaintiff's fall, and that they failed to include the correct date in the complaint.

This malpractice action came on for trial at the 26 October 1992 civil session of Pitt County Superior Court. At the close of plaintiff's evidence, the trial court directed a verdict for defendant-attorneys. Plaintiff filed timely notice of appeal to our Court.

Plaintiff argues on appeal that the trial court committed reversible error in directing a verdict for defendant-attorneys. A directed verdict motion tests the legal sufficiency of the evidence to go to the jury. The trial court must consider the evidence in the light most favorable to the plaintiff, giving plaintiff the benefit of all reasonable inferences. *Snead v. Holloman*, 101 N.C. App.

462, 400 S.E.2d 91 (1991). If there is more than a scintilla of evidence supporting each element of the plaintiff's case, the directed verdict motion should be denied. *Id.* Review by an appellate court is limited to examining the grounds asserted in the directed verdict motion. *Southern Bell Telephone & Telegraph Co. v. West*, 100 N.C. App. 668, 397 S.E.2d 765 (1990), *aff'd per curiam*, 328 N.C. 566, 402 S.E.2d 409 (1991).

An attorney's legal obligation to his or her client has been set forth by our Supreme Court, to-wit:

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause. (Citations omitted.)
>
> . . .
>
> [H]e is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care. (Citations omitted.)

Rorrer v. Cooke, 313 N.C. 338, 341, 329 S.E.2d 355, 358 (1985), *quoting Hodges v. Carter*, 239 N.C. 517, 519-20, 80 S.E.2d 144, 145-46 (1954).

"In a professional malpractice case predicated upon a theory of an attorney's negligence, the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, as set forth by *Hodges*, 239 N.C. 517, 80 S.E.2d 144, and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer*, 313 N.C. at 355, 329 S.E.2d at 365-66. "Where the plaintiff bringing suit for legal malpractice has lost another suit allegedly due to his attorney's negligence, to prove that but for the attorney's negligence plaintiff would not

have suffered the loss, plaintiff must prove that: (1) The original claim was valid; (2) It would have resulted in a judgment in his favor; and (3) The judgment would have been collectible." *Id.* at 361, 329 S.E.2d at 369.

Plaintiff argues that defendant-attorneys based their directed verdict motion on two grounds. The first ground is that plaintiff failed to present expert testimony and evidence establishing a breach of the standard of care; the second is that plaintiff failed to establish that the underlying claim was valid, would have resulted in a judgment in her favor, and would have been collected.

[1] We first address whether plaintiff failed to present expert testimony and evidence establishing a breach of the standard of care. In *Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis*, 86 N.C. App. 51, 356 S.E.2d 372 (1987), our Court made reference to *Rorrer*, noting "[a]lthough *Rorrer* does not mandate introducing expert testimony in a legal malpractice action, that case does stress the need to establish the standard of care in the same or similar legal community. . . . [T]he purpose of putting on evidence as to the standard of care in a malpractice lawsuit [is] to see if this defendant's actions 'lived up' to that standard." *Id.* at 56, 356 S.E.2d at 375.

Our Court recently addressed the issue of whether the standard of care was established in a legal malpractice action in *Haas v. Warren*, 112 N.C. App. 574, 436 S.E.2d 259 (1993). After reciting the duties of an attorney promulgated in *Hodges* and expounded upon in *Rorrer*, our Court held that the standard of care in *Haas* had not been established. Our Court noted that the proffered testimony was "evidence of what other attorneys [in the same or similar community] *do*, not evidence of what they *should do* which is what is required by *Hodges* and *Rorrer*." *Id.* at 579, 436 S.E.2d at 262 (emphasis retained).

We believe the standard of care has been established in the case *sub judice*. Attorney T. F. Harris, whose experience included twenty-seven years of practicing law, almost exclusively in civil litigation, testified at trial for plaintiff. Attorney Harris served as attorney for Pitt County Memorial Hospital in the slip and fall case underlying the instant appeal. He testified that pursuant to the North Carolina Rules of Civil Procedure, plaintiff sought and obtained a twenty-day extension of time within which to file her complaint, and Attorney Harris explained that this is a pro-

cedure which is used when a statute of limitations period is about to expire. He testified further that because the complaint alleged that the accident occurred on 7 July 1983, he believed plaintiff had been four days late asking for the twenty-day extension, and that in Attorney Harris' answer to plaintiff's complaint he therefore raised the defense of the statute of limitations, i.e., "that [the] suit [was] not filed within [an] appropriate period of time." Later, while testifying further about the motion to dismiss and how to make an amendment to a complaint, Attorney Harris was asked if the North Carolina Rules of Civil Procedure "are rules that govern the practicing lawyers in North Carolina in the courts and in civil actions[.]" Attorney Harris noted that the North Carolina Rules of Civil Procedure "are the uniform procedural rules that all lawyers have to abide by." We find that Attorney Harris' testimony was evidence of what other attorneys in the same or similar community "should do." Indeed, in matters involving the statute of limitations, we believe a statewide standard for all licensed attorneys in North Carolina exists in that all licensed attorneys have the duty to maintain basic minimum levels of competency. When accepting a case from a client, the applicable statute of limitations is one of the very first matters which an attorney examines. And, as evidenced herein, incorrectly stating the relevant dates on a plaintiff's complaint can result in the dismissal of what might otherwise be a valid claim.

Moreover, as we have stated earlier, because the purpose of putting on evidence as to the standard of care in a malpractice lawsuit is to see if this defendant's actions "lived up" to that standard, we question whether this evidence was even necessary on the facts in this case. The concept of the statute of limitations and the computation of the number of days within which a suit must be filed is not a legally complex question. In fact, in the instant case, plaintiff's action was barred on the face of the complaint. We have observed as to medical malpractice that

> [e]xpert testimony is not required however, to establish the standard of care, failure to comply with the standard of care, or proximate cause, in situations where a jury, based on its common knowledge and experience, is able to decide those issues. [Citation omitted.] The application of this "common knowledge" exception to the requirement of expert testimony in medical malpractice cases has been reserved for those situations in which a physician's conduct is so grossly negligent

> or the treatment is of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation. *See Buckner v. Wheeldon*, 225 N.C. 62, 64, 33 S.E.2d 480, 482 (1945) (plaintiff had compound fracture of leg with bone protruding through open wound, doctor failed to cleanse or sterilize open wound before setting leg in cast, causing infection); *Groce v. Myers*, 224 N.C. 165, 170, 29 S.E.2d 553, 557 (1944) (doctor, in the course of treating plaintiff's insanity, jerked plaintiff's arm, breaking it); *Mitchell v. Saunders*, 219 N.C. 178, 184, 13 S.E.2d 242, 246 (1941) (doctor left sponge in patient's body during surgery).

Bailey v. Jones, 112 N.C. App. 380, 387, 435 S.E.2d 787, 792 (1993). (*See also Waynick v. Reardon*, 236 N.C. 116, 72 S.E.2d 4 (1952), which involved a plaintiff's claim for negligence against a surgeon for his performance of a lumbar sympathectomy which allegedly caused paralysis and amputation of a leg. Our Supreme Court said that "[t]he absence of expert medical testimony, disapproving the treatment or lack of it, is not perforce fatal to the case. There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Id.* at 121, 72 S.E.2d at 7, *quoting Gray v. Weinstein*, 227 N.C. 463, 42 S.E.2d 616 (1947)).

As evidenced in the transcript, all but one of the jurors stated that they knew what a statute of limitations was during jury selection. Moreover, this simple concept was explained at trial. We believe having an action dismissed because of a failure to file that action within the applicable statute of limitations "is of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation." We further note that other states have held in a similar fashion. *See House v. Maddox*, 46 Ill. App. 3d. 68, 73, 360 N.E.2d 580, 584 (1977):

> Where no issue is raised as to defendant's responsibility for allowing the statute of limitations to run, where the negligence of defendant is apparent and undisputed, and where the record discloses obvious and explicit carelessness in defendant's failure to meet the duty of care owed by him to plaintiff, the court will not require expert testimony to define further that which is already abundantly clear.

See also George v. Caton, 93 N.M. 370, 377, 600 P.2d. 822, 829, *cert. quashed*, 93 N.M. 172, 598 P.2d. 215 (1979) ("It does not require expert testimony to establish the negligence of an attorney who is ignorant of the applicable statute of limitations or who sits idly by and causes the client to lose the value of his claim for relief."); *Watkins v. Sheppard*, 278 So. 2d. 890 (La. App. 1973); *Lenius v. King*, 294 N.W.2d 912 (SD 1980); *Berman v. Rubin*, 138 Ga. App. 849, 227 S.E.2d 802 (1976).

[2] We now address the second ground upon which plaintiff argues that defendant-attorneys based their directed verdict motion, that plaintiff failed to establish that the underlying claim was valid, would have resulted in a judgment in her favor, and would have been collected. First, we find the underlying claim was valid. *See Rose v. Steen Cleaning, Inc.*, 104 N.C. App. 539, 410 S.E.2d 221 (1991) and *Rone v. Byrd Food Stores*, 109 N.C. App. 666, 428 S.E.2d 284 (1993). We also find that plaintiff has established that she could have recovered compensation from the hospital on her claim, as the hospital had liability and medical payments insurance which would pay for any losses caused by the hospital's negligence and for plaintiff's medical expenses; indeed, Attorney Harris testified that the hospital had offered to pay an amount of money to plaintiff, and plaintiff also testified that her understanding was that the hospital was going to pay her an amount of money. Based on this and other testimony at trial, and the verified complaints which had been entered into evidence, we believe this case would have resulted in a judgment in plaintiff's favor.

Therefore, we reverse the decision of the trial court and remand this case to the trial division.

Judge EAGLES concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent from the majority opinion. Although I agree that expert testimony is not always necessary to establish the standard of care in attorney malpractice actions, I believe there must be some evidence, expert or otherwise, establishing the standard of care in order to survive a motion for a directed verdict. *See Haas v. Warren*, 112 N.C. App. 574, 436 S.E.2d 259 (1993).

I disagree with the majority's conclusion that Thomas Harris presented sufficient evidence of the standard of care in the case at hand. Harris explained the statute of limitations and explained that defendants-attorneys had failed to file their claim in time. However, simply explaining the mistakes committed is insufficient to establish the standard of care. In *Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis*, 86 N.C. App. 51, 356 S.E.2d 372 (1987), this Court stated:

> The evidence at trial is clear as to what [the attorney] did and did not do. What is not clear is the standard by which [the attorney's] acts and omissions are to be weighed. That is the purpose of putting on evidence as to the standard of care in a malpractice lawsuit; to see if this defendant's actions "lived up" to that standard.

Id. at 56, 356 S.E.2d at 375-76. *See also Haas*, 112 N.C. App. at 579, 436 S.E.2d at 262 (holding that evidence of "what other attorney's *do*" is insufficient to establish standard of care, because need evidence of "what they *should do*").

Furthermore, although he mentioned several other Rules of Civil Procedure, such as Rule 15 and Rule 41, Harris never mentioned that the statute of limitations is an affirmative defense under Rule 8. *See* N.C.G.S. § 1A-1, Rules 8, 15, 41 (1990). Thus, his later statements, made while discussing motions to dismiss and amendments to complaints, that the Rules of Civil Procedure are binding on attorneys practicing in North Carolina are irrelevant and provide no evidence of the standard of care regarding the statute of limitations.

As an alternate basis for its conclusion, the majority indicates that evidence of the standard of care may be altogether unnecessary in cases involving statute of limitations problems. I believe that the present case is more complex than a basic statute of limitations violation. Although a jury may very well calculate the time of the relative statute of limitations, I question whether the jury could as easily understand the other issues discussed in this case, such as amendments to pleadings, the principle of relation-back, and the implications and ramifications of a voluntary dismissal and refiling. The standard of care is the benchmark by which malpractice is measured, be it legal or medical. It must be clear and unequivocal lest the trier of fact be obscured in a cloud of uncertainty and injustice be done.

I believe the jury needed more guidance to determine whether the defendants-attorneys "lived up" to the standard of care in the relevant legal community in this case. I would conclude that plaintiff failed to establish the standard of care, and, therefore, I respectfully dissent.

PATSY SIMPSON WILLIAMS, PLAINTIFF v. WARREN D. PALEY, CLAIRE PALEY, AND PALEY-MIDGETT, A NORTH CAROLINA GENERAL PARTNERSHIP, DEFENDANTS

No. 932SC411

(Filed 3 May 1994)

Deeds §§ 82, 86 (NCI4th)— restrictive covenants to terminate upon certain conditions—no showing that conditions existed—no waiver

The trial court properly concluded that the grantor of the property in question intended that a provision stating that restrictive covenants limiting the property to residential use would terminate when "adjacent or nearby properties are turned to commercial use" should be triggered only upon the substantial commercial use of multiple nearby or adjacent properties rather than upon any commercial use of a sole property in the vicinity at any point in time; furthermore, evidence of historical incidents occurring at different times was insufficient to show that plaintiff waived her right to enforce the restrictions or that the restrictive covenants otherwise terminated.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 196, 270, 281-287.

Appeal by plaintiff from judgment entered 4 December 1992 by Judge Cy A. Grant, Sr., in Hyde County Superior Court. Heard in the Court of Appeals 3 February 1994.

This case involves plaintiff's claim for injunctive relief. The pertinent facts of this case are detailed in *Runyon v. Paley*, 331 N.C. 293, 416 S.E.2d 177 (1992). There, our Supreme Court, in reversing the decision of a divided panel of this Court, 103 N.C. App. 208, 405 S.E.2d 216 (1991), reversed the trial court's dismissal

of plaintiff's claim for failure to state a claim upon which relief could be granted. Our Supreme Court concluded that plaintiff Williams presented sufficient evidence to show that the covenants were real covenants and that she was entitled to seek enforcement of the restrictive covenants against defendants. *Runyon* 331 N.C. 293, 416 S.E.2d 177. Upon remand to the Superior Court, plaintiff moved for summary judgment as to her first cause of action, which sought an injunction against defendants' development of the condominiums on the property at issue. On 4 December 1992, the trial court entered a judgment which *inter alia* granted summary judgment for plaintiff as to her first cause of action and ordered that defendants were "enjoined from violating or continuing to violate the restrictive covenants." The 4 December 1992 judgment also severed "[t]he second and third claims for relief of Charles Runyan . . . from the first cause of action for purposes of trial." The trial court also issued a "stay order" which stayed the mandate of its judgment during the appeal taken by defendants "provided, however, that pending such appeal, defendants shall undertake no further construction upon the 'Gaskins' lot,' nor shall defendants furnish or otherwise prepare for human occupancy units presently wholly or partially constructed, nor shall defendants sell, rent or otherwise transfer title or ownership or right of possession to said units." Defendants appeal.

Parker, Poe, Adams & Bernstein, by Charles C. Meeker and John J. Butler, for plaintiff-appellee.

Young, Moore, Henderson & Alvis, P.A., by John N. Fountain, Henry S. Manning, and R. Christopher Dillon, for defendant-appellants.

EAGLES, Judge.

Defendants contend that the trial court erred in granting summary judgment for plaintiff. We disagree and affirm.

I.

Initially, we note that an "injunction is a proper equitable remedy to enforce a restrictive covenant when the plaintiffs show that their remedy at law is inadequate and that they will suffer irreparable damage if the violation is allowed to continue." *Barber v. Dixon*, 62 N.C. App. 455, 457, 302 S.E.2d 915, 916, *disc. review denied*, 309 N.C. 191, 305 S.E.2d 732 (1983) (*citing Ingle v. Stubbins*,

240 N.C. 382, 82 S.E.2d 388 (1954); *Franzle v. Waters*, 18 N.C. App. 371, 197 S.E.2d 15 (1973)). *See Crabtree v. Jones*, 112 N.C. App. 530, 534, 435 S.E.2d 823, 825 (1993), *disc. review denied*, 335 N.C. 769, --- S.E.2d --- (3 March 1994) (issuance of an injunction depends upon a balancing of the equities between the parties which "is clearly within the province of the trial court"). The injunction here was granted upon plaintiff's motion for summary judgment pursuant to G.S. 1A-1, Rule 56.

Regarding G.S. 1A-1, Rule 56, our Supreme Court has stated:

> The party moving for summary judgment must establish the lack of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972). As this Court remarked in *Koontz*, "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz*, 280 N.C. at 518, 186 S.E.2d at 901. All inferences are to be drawn against the moving party and in favor of the opposing party. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379; *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897.

Branks v. Kern, 320 N.C. 621, 623-24, 359 S.E.2d 780, 782 (1987).

II.

In arguing that the trial court erred by entering summary judgment for plaintiff, defendants argue that "there exists a genuine issue of material fact as to whether nearby properties within 450 feet of the Gaskins lot have been 'turned to commercial use' " in a manner sufficient to terminate the restrictive covenants. We disagree.

The portion of the restrictive covenant, as written by plaintiff's predecessor in interest (Ruth Bragg Gaskins), at issue here provides:

> BUT this land is being conveyed subject to certain restrictions as to the use thereof, running with said land by whomsoever owned, until removed as herein set out; said restrictions, which are expressly assented to by [the Brughs, predecessors in interest to defendants], in accepting this deed, are as follows:

(1) Said lot shall be used for residential purposes and not for business, manufacturing, commercial or apartment house purposes; provided, however, this restriction shall not apply to churches or to the office of a professional man which is located in his residence, and

(2) Not more than two residences and such outbuildings as are appurtenant thereto, shall be erected or allowed to remain on said lot. This restriction shall be in full force and effect until such time as adjacent or nearby properties are turned to commercial use, in which case the restrictions herein set out will no longer apply. The word "nearby" shall, for all intents and purposes, be construed to mean within 450 feet thereof.

TO HAVE AND TO HOLD the aforesaid tract or parcel of land and all privileges and appurtenances thereunto belonging or in anywise thereunto appertaining, unto them, the [Brughs], as tenants by the entirety, their heirs and assigns, to their only use and behoof in fee simple absolute forever, [b]ut subject always to the restrictions as to use as hereinabove set out.

Regarding the interpretation of restrictive covenants, in *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 85, 362 S.E.2d 619, 621 (1987), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988), this Court stated:

> Restrictive covenants are not generally favored in the law; any ambiguities in the restrictions are to be resolved in favor of the free and unrestricted use of the land. *Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981). Nevertheless, such covenants must be reasonably construed to give effect to the intention of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction. *Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967).

Black Horse Run, 88 N.C. App. at 85, 362 S.E.2d at 621. In *Tull v. Doctors Building, Inc.*, 255 N.C. 23, 39-40, 120 S.E.2d 817, 828 (1961), our Supreme Court discussed the termination of restrictions appearing in restrictive covenants:

> The Court said in *Rombauer v. Compton Heights Christian Church*, 328 Mo. 1, 40 S.W.2d 545, 553: "No hard and fast rule can be laid down as to when changed conditions

have defeated the purpose of restrictions, but it can be safely asserted the changes must be so radical as practically to destroy the essential objects and purposes of the agreement."

See also 14 Am. Jur., Covenants, Conditions and Restrictions, Sections 305, 306, 307; 26 C.J.S., Deeds, Section 171; Thompson on Real Property, Permanent Edition, Vol. 7, Section 3651.

On the subject of changed conditions as affecting the enforcement of restrictive covenants, the cases are legion. Many of them are discussed or cited in Notes in 54 A.L.R. 812, 85 A.L.R. 985, 103 A.L.R. 734, 4 A.L.R. 2d 1111. The cases, of course, deal with different facts, and it seems it is not possible to reconcile many of the holdings on substantially similar facts. A full discussion of the subject is likewise to be found in *Booker v. Old Dominion Land Co.*, 188 Va. 143, 49 S.E.2d 314, and in *Pitts v. Brown*, 215 S.C. 122, 54 S.E.2d 538.

The Court said in *Holling v. Margiotta*, 231 S.C. 676, 100 S.E.2d 397: "We find no error in the conclusion of the lower court that the defendants failed to make out their defenses of laches, estoppel and waiver on the part of the plaintiffs. The free parking on the unoccupied portion of Lot No. 2 by customers while shopping in the nearby stores is not an objectionable commercial use of the lot. Utilization of the first floor of the garage apartment as a storage place for the adjacent grocery was an insubstantial commercial use. These very limited uses for nonresidential purposes were not objected to by plaintiffs or the other residents of the subdivision but should not, in equity be held to have estopped them from asserting their right against the subsequent substantial violation by defendants."

. . . .

We are of the opinion, and so hold, that the unchallenged findings of fact do not show that the use of Lots 11, 12, 13, 15, 16, 17 and part of Lot 14 in Block P of this subdivision is such a radical or fundamental change or substantial subversion as practically to destroy the essential objects and purposes of the restriction agreement, as to warrant the removal of the residential restrictions, thereby destroying this residential subdivision with many fine, well kept homes. It would be inequitable to hold otherwise.

Tull, 255 N.C. at 39-40, 120 S.E.2d at 828. At this juncture, we note the following contention of defendants:

> Plaintiff has argued and the Court apparently ruled that the termination provision is not triggered until a "radical change" in the area has occurred. It is true that, in cases when the covenants themselves do not provide for their own termination, the court inquires whether the covenants have been rendered virtually meaningless and obsolete by reason of "radical change" in the use to which other nearby properties have been put.
>
> In this case, however, the covenants do provide for their own termination, and the "radical change" test is not appropriate. Hence, in order to overcome plaintiff's summary judgment motion, the defendants merely need to offer evidence tending to show that there has been some turn to commercial use of adjacent or nearby properties.
>
> . . . .
>
> The facts of the case at bar are entirely different from the authorities cited by the plaintiff [*Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 268 S.E.2d 494, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 442 (1980) (*citing Tull, supra*); *Williamson v. Pope*, 60 N.C. App. 539, 299 S.E.2d 661 (1983) (*citing Tull, supra*); *Black Horse Run v. Kaleel*, 88 N.C. App. 83, 362 S.E.2d 619 (1987), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988) (*citing Tull, supra*)]. This Court is not being called upon to terminate a restrictive covenant which on its face has a perpetual duration. Rather, this Court is being asked to construe restrictive covenants which do contain a termination provision. When construing this termination provision, this Court must do so strictly against the grantor and in favor of the unfettered use of land. The termination provision here does not require "radical change" in the area for it to be triggered. Therefore, this Court should not imply that such a requirement exists. This Court instead should construe the restriction to require merely a showing that one or more adjacent or nearby properties in the area have been "turned to commercial use."

(Emphasis in original.) We disagree. First and foremost, our Supreme Court has stated that "[i]n construing restrictive covenants, the fundamental 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 v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967) (*citing Callaham v. Arenson*, 239 N.C. 619, 80 S.E.2d 619 (1954)) (emphasis in original). After an examination of the covenants at issue here, we find that no ambiguities exist and we accordingly apply to the covenants a "reasonable construc[tion] to give effect to the intention of the parties," *Black Horse Run*, 88 N.C. App. at 85, 362 S.E.2d at 621; *Long*, 271 N.C. 264, 156 S.E.2d 235, rather than the strict construction urged by defendants. *See also Barber*, 62 N.C. App. 455, 302 S.E.2d 915.

While we note defendants' statement regarding the factual distinction between this case and the three cases cited by plaintiffs, we further note that defendants' argument contains no authority of any type for the proposition that a standard other than the "radical change" standard is applicable here. *See* N.C.R. App. P. 28(b)(5) ("The body of the argument shall contain citations of the authorities upon which the appellant relies"). Nevertheless, our construction of the covenants is governed by Mrs. Gaskins' intent at the time the covenants were written. Accordingly, after careful scrutiny, we hold that the trial court properly concluded that Mrs. Gaskins intended that the termination provision only be triggered upon the substantial commercial use of multiple nearby or adjacent properties. We are not persuaded that any period of commercial use of a single property in the vicinity at any point in time, as argued by defendants, will trigger the termination provision. While the standard used by the trial court is not apparent from its order, we conclude that the trial court did not err in entering summary judgment for plaintiff. *Tripp v. Flaherty*, 27 N.C. App. 180, 182, 218 S.E.2d 709, 710 (1975) ("Validity of the judgment does not depend upon the form in which the determination is made, whether express or implied, but upon the correctness of the determination"). On the facts of this case, application of the "radical change" standard, as enunciated in *Tull*, 255 N.C. 23, 120 S.E.2d 817, *Hawthorne*, 300 N.C. 660, 268 S.E.2d 494, *Williamson*, 60 N.C. App. 539, 299 S.E.2d 661, and *Black Horse Run*, 88 N.C. App. 83, 362 S.E.2d 619, would not violate Mrs. Gaskins' intent in her creation of the restrictive covenants.

Defendants contend that they have set forth sufficient evidence of commercial use of the nearby properties, when viewed in the light most favorable to them, to permit the issue of the termination of the covenants to go to the jury. Defendants' evidence includes: (1) rental of nearby residential housing to vacationers and other

temporary guests, including the operation of what plaintiff herself described in a deposition as a "bed and breakfast"; (2) use of residences as rental properties with at least one transaction being handled by a rental agency; (3) prior use of nearby residences by an antique dealer and by the owner of a charter boat "during the 1960's and 1970's" who both allegedly made some transactions on their respective leased properties; (4) the leasing of a lot 15 feet away from the Gaskins lot to store machinery supplies and equipment in connection with a construction project; and (5) the use of the same lot "as a sales office for condominium units, some of which are not located on the Gaskins lot" [emphasis in original].

Here, defendants' evidence is largely composed of historical incidents occurring at different times. Even when viewed in the light most favorable to defendants as nonmovants, it does not compel a conclusion that plaintiff has waived her right to enforce the restrictions or that the restrictive covenants have otherwise terminated. This Court has stated:

> An acquiescence in a violation of restrictive covenants does not amount to a waiver of the right to enforce the restrictions "unless changed conditions within the covenanted area are 'so radical as practically to destroy the essential objects and purposes' of the scheme of development." *Barber v. Dixon*, 62 N.C. App. 455, 459, 302 S.E.2d 915, 918, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 732 (1983); *quoting Tull v. Doctors Building, Inc.*, 255 N.C. 23, 39, 120 S.E.2d 817, 828 (1961). *Accord Williamson v. Pope*, 60 N.C. App. 539, 299 S.E.2d 661 (1983) (plaintiffs' failure to enforce covenant against motel in residential area did not waive plaintiffs' right to enforce covenant against convenience store); *Mills v. Enterprises, Inc.*, 36 N.C. App. 410, 244 S.E.2d 469, *disc. rev. denied*, 295 N.C. 551, 248 S.E.2d 727 (1978) (use of residential lot for business parking was not significant enough to constitute waiver of right to enforce covenant prohibiting commercial use); *Van Poole v. Messer*, 25 N.C. App. 203, 212 S.E.2d 548 (1975) (plaintiffs' failure to enforce covenant against a house trailer on another lot 800 feet from defendants' trailer did not render covenant unenforceable); *Cotton Mills v. Vaughan*, 24 N.C. App. 696, 212 S.E.2d 199 (1975) (plaintiffs' failure to object to the use of four other residences for business purposes does not constitute waiver of protection of restrictive covenant).

Black Horse Run, 88 N.C. App. 83, 87-88, 362 S.E.2d 619, 622-23. *See Walton v. Carignan*, 103 N.C. App. 364, 407 S.E.2d 241, *disc. review denied*, 330 N.C. 123, 409 S.E.2d 611 (1991). *See also* 5 Richard R. Powell, *Powell on Real Property* 679[1], at 60-135 ("Acquiescence, however, in insubstantial violations does not preclude the plaintiff from subsequently enforcing the restrictions when violations result in genuine damage to the plaintiff's interests") (footnote omitted); James A. Webster, Jr., *Real Estate Law in North Carolina* § 389 (Hetrick rev. 1988 & Supp. 1993). Here, the intermittent occurrence of allegedly commercial activity shown by defendants' evidence does not constitute a waiver of plaintiff's right to enforce the restrictive covenants. *See Starkey v. Gardner*, 194 N.C. 74, 77, 138 S.E. 408, 409 (1927) ("Nor should a property owner be held to have waived his rights and to have abandoned the protection conferred upon him by such covenants by reason of disconnected and immaterial violations of the restrictions in the conveyances. This idea is expressed in *Ward v. Prospect Manor Corp.*, 188 Wis., 534, 206 N.W., 856: 'It is now generally recognized by the overwhelming weight of authority in this country that an individual lot owner is not under penalty of waiving his right to the enforcement of a restrictive covenant by his failure to take notice of such violations as do not affect him' "). Based on the language of the restrictive covenants, we conclude that the examples cited by defendants, *even* assuming *arguendo* in the light most favorable to defendants that they were violations, are not so drastic as to trigger the termination of the restrictions. *See Cotton Mills v. Vaughan*, 24 N.C. App. 696, 704, 212 S.E.2d 199, 205 (1975); *Tull*, 255 N.C. at 39-40, 120 S.E.2d at 828. After carefully scrutinizing the evidence forecast by defendants, we hold that defendants have failed to set forth sufficient evidence to raise a genuine issue of material fact as to the existence of any of the conditions upon which the restrictive covenants terminate. *Cf. Van Poole v. Messer*, 25 N.C. App. 203, 212 S.E.2d 548 (1975) (finding no error where trial court declined to submit an issue to the jury regarding whether restrictive covenant had become unenforceable). This assignment of error fails.

III.

Defendants argue that "[t]he trial court erred in granting plaintiff's motion for summary judgment because there exists a genuine issue of material fact as to whether the plaintiff owns land that had been retained by Mrs. Gaskins when she imposed the restric-

tive covenants and that said land is benefitted by the covenants." We disagree. After careful review, we hold that the trial court properly entered summary judgment for plaintiff in that plaintiff has conclusively established that she is the owner of the property originally retained by Mrs. Gaskins, her predecessor in interest, and is accordingly entitled to enforce the terms of the restrictive covenants. *See Runyon*, 331 N.C. at 308, 416 S.E.2d at 188 ("Having reviewed the language of the deed creating the restrictive covenants, the nature of the covenants, and the evidence concerning the covenanting parties' situation and the circumstances surrounding their transaction, we conclude that plaintiff Williams presented ample evidence establishing that the parties intended that the restrictive covenants be enforceable by the owner of the property retained by Mrs. Gaskins and now owned by plaintiff Williams"). Defendants' arguments fail.

IV.

We find no genuine issue of material fact as to plaintiff's cause of action. Accordingly, we affirm the trial court's 4 December 1992 judgment and remand for further proceedings not inconsistent with this opinion.

Affirmed.

Judges JOHNSON and LEWIS concur.

GAIL LEE, PLAINTIFF-APPELLEE/CROSS-APPELLANT v. S. D. GREENE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE NORTH CAROLINA HIGHWAY PATROL; AND BRAD MYERS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE NORTH CAROLINA HIGHWAY PATROL, DEFENDANTS-APPELLANTS/CROSS-APPELLEES

No. 9311SC533

(Filed 3 May 1994)

1. **Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)— excessive force claim against highway patrol officers in official capacity—monetary damages sought—no existence of claim**

When the remedy sought is monetary damages, there can be no 42 U.S.C. § 1983 claim against state officials and agents

in their official capacities; therefore, in this case where plaintiff sought only monetary damages against two highway patrol officers, the trial court erred in not granting summary judgment for defendants on the § 1983 excessive force claim against them in their official capacities.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

When does police officer's use of force during arrest become so excessive as to constitute violation of constitutional rights, imposing liability under Federal Civil Rights Act of 1871 (42 USCS sec. 1983). 40 ALR Fed. 204

2. Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)— defense of qualified immunity—showing required

Ruling on a defense of qualified immunity requires (1) identification of the specific right allegedly violated, (2) determining whether at the time of the alleged violation the right was clearly established, and (3) if so, then determining whether a reasonable person in the officer's position would have known that his actions violated that right.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

3. Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)— excessive force by highway patrol officers—individual capacity—summary judgment improper

The trial court properly denied summary judgment as to plaintiff's 42 U.S.C. § 1983 excessive force claim against defendant highway patrol officers in their individual capacities, based on defendants' claim of qualified immunity, since the facts were clearly in dispute concerning defendants' conduct and the circumstances surrounding plaintiff's arrest; the specific right allegedly violated was clearly identified as plaintiff's Fourth Amendment right to be free from unreasonable seizure; as alleged by plaintiff, the right was violated by defendants' pursuing her into her kitchen, seizing her bodily, and hitting and pushing her; the governmental interest in apprehending plaintiff for obstructing and delaying the arrest of her husband was minor, and the Fourth Amendment intrusion was severe; and defendants' actions, when viewed in this light, violated plaintiff's Fourth Amendment right.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

When does police officer's use of force during arrest become so excessive as to constitute violation of constitutional rights, imposing liability under Federal Civil Rights Act of 1871 (42 USCS sec. 1983). 40 ALR Fed. 204

4. **Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)— allegation of unlawful entry by highway patrol officers—entry authorized by statute—summary judgment proper**

Summary judgment for defendant highway patrol officers on plaintiff's 42 U.S.C. § 1983 claim of unlawful entry was proper, since the right allegedly violated was not a clearly established right, as the evidence revealed that defendants were discussing whether to arrest plaintiff for obstructing and delaying the arrest of her husband when plaintiff began moving toward her house; defendants ran after plaintiff; as plaintiff entered her house and was closing the door, defendants' grabbed the door and entered the house; defendants' actions were not prohibited by the Fourth Amendment but were in fact authorized by N.C.G.S. § 15-401(e); and compliance with the knock and announce requirement was not necessary.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

5. **Sheriffs, Police, and Other Law Enforcement Officers § 19 (NCI4th)— officers' entry into plaintiff's home lawful—summary judgment on trespass claim proper**

Summary judgment was properly entered for defendant highway patrol officers individually and in their official capacities on plaintiff's trespass claim where defendants were authorized by N.C.G.S. § 15A-401(e) to enter plaintiff's residence to arrest her for delaying and obstructing the arrest of her husband.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

Appeal by defendants and cross-appeal by plaintiff from order entered 25 March 1993 by Judge F. Gordon Battle in Lee County Superior Court. Heard in the Court of Appeals 3 March 1994.

Patterson, Harkavy & Lawrence, by Melinda Lawrence and Maxine Eichner, for plaintiff.

Michael F. Easley, Attorney General, by Linda M. Fox, Assistant Attorney General, and Robert T. Hargett, Associate Attorney General, for defendants.

LEWIS, Judge.

Plaintiff commenced this action against defendants individually, and in their official capacities as North Carolina Highway Patrol officers, to recover for injuries sustained as a result of an altercation between plaintiff and defendants. Plaintiff's complaint alleged, *inter alia*, causes of action for excessive force and unlawful entry in violation of 42 U.S.C. § 1983 and for trespass. Defendants asserted the defense of qualified immunity and moved for summary judgment on these three claims only. The trial court denied defendants' motion for summary judgment on the excessive force claim, but granted the motion as to the unlawful entry and trespass claims. From the denial of summary judgment on the excessive force claim, defendants appeal. From the granting of summary judgment on the unlawful entry and trespass claims, plaintiff cross-appeals.

The events giving rise to this appeal occurred on 20 April 1991. At approximately 11:00 p.m. that night, plaintiff, her husband, Robert Lee (hereinafter "Lee"), who was driving, and her fifteen-year-old son were returning home after a visit to plaintiff's mother's house. As they neared plaintiff's house, defendant Greene, a North Carolina Highway Patrol officer, observed Lee driving in an erratic manner and signaled to stop the car. Lee pulled into his own driveway and stopped the car. Greene followed, approached them and repeatedly requested Lee to produce his driver's license, but Lee refused. Greene testified that during this time, plaintiff was yelling at him and using profane language, which plaintiff denies. Greene then arrested Lee and placed him in the patrol car. While Lee was seated in the patrol car, plaintiff stood in front of the open car door and, according to Greene, refused to move. Plaintiff denies being asked to move. Greene testified that he then placed plaintiff under arrest for obstructing and delaying the arrest of Lee, and he radioed for assistance. Plaintiff testified that the only mention she heard about her arrest came when defendant Myers, responding to Greene's call, arrived and Greene told Myers that he had placed Lee under arrest and was considering placing plaintiff under arrest.

By the time Trooper Myers arrived, plaintiff's mother and her mother's boyfriend had arrived on the scene. Plaintiff testified that after Trooper Myers arrived, she walked back to her house to avoid further trouble. Defendants testified that plaintiff ran toward the house, and they pursued her. As plaintiff reached the top outside step leading into her kitchen, defendants caught up to her. The parties disagree sharply as to what happened next.

Defendants testified that when they reached the kitchen and confronted plaintiff, plaintiff was swinging her arms wildly. Each defendant grabbed one arm of plaintiff and subdued her. Plaintiff then went down on her knees and fell on the floor. Defendants noticed a small amount of blood under her right eye. Greene testified that at no time did he intentionally strike plaintiff. Myers testified that he never struck plaintiff.

Plaintiff's testimony, corroborated by the testimony of her son, her mother, and her mother's boyfriend, who were all in the kitchen when the struggle occurred, was markedly different from that of defendants. Plaintiff testified that as she entered the kitchen and was closing the door, defendants flung the door open, grabbed plaintiff, and pushed her onto the sink as plaintiff was attempting to tell defendants that she had done nothing wrong. Plaintiff's mother then informed defendants that plaintiff had back problems. As plaintiff tried to get off of the sink, Greene hit plaintiff in the mouth. Plaintiff's son testified that Greene pulled his fist back even with his shoulder before striking plaintiff. Plaintiff and her witnesses testified that after the blow to the mouth, defendant Myers hit her in the head with his flashlight and then pressed the flashlight into her temple. As a result of the blows, plaintiff lost consciousness and was taken to the hospital.

I. Defendants' Appeal

Defendants contend that the trial court erred in not granting summary judgment for them on plaintiff's section 1983 excessive force claim, based on their defense of qualified immunity. We note that while the denial of a motion for summary judgment is not normally immediately appealable, when the motion for summary judgment is based on a qualified immunity defense to a section 1983 claim, the denial of the motion is immediately appealable. *Corum v. University of North Carolina*, 330 N.C. 761, 767, 413 S.E.2d 276, 280, *cert. denied*, 113 S.Ct. 493, 121 L. Ed. 2d 431 (1992).

[1] Turning to the merits of the case, we first address the excessive force claim against defendants in their official capacities. When the remedy sought is monetary damages, there can be no section 1983 claim against state officials and agents in their official capacities. *Lenzer v. Flaherty*, 106 N.C. App. 496, 513, 418 S.E.2d 276, 287, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992). There can be no claim because in their official capacities, they are not "persons" covered by section 1983. *Id.* In the present case,

because plaintiff seeks only monetary damages, the trial court erred in not granting summary judgment for defendants on the excessive force claim against them in their official capacities. Accordingly, we reverse the order of the trial court as to defendants in their official capacities and remand for entry of summary judgment.

[2, 3] However, as to the excessive force claim against defendants in their individual capacities, the trial court properly denied summary judgment, based on defendants' claim of qualified immunity. The test of qualified immunity for police officers sued under 42 U.S.C. § 1983 is whether in performing discretionary functions, they have engaged in conduct that violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982); *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). Therefore, ruling on a defense of qualified immunity requires (1) identification of the specific right allegedly violated; (2) determining whether at the time of the alleged violation the right was clearly established; and (3) if so, then determining whether a reasonable person in the officer's position would have known that his actions violated that right. *Pritchett*, 973 F.2d at 312. While the first two requirements involve purely matters of law, the third may require factual determinations respecting disputed aspects of the officer's conduct. *Id.* Thus, "[i]f there are genuine issues of historical fact respecting the officer's conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must be reserved for trial." *Id.* at 313.

In the present case, the facts are clearly in dispute concerning defendants' conduct and the circumstances surrounding plaintiff's arrest. Accordingly, the trial court properly denied summary judgment. Defendants argue, however, that the right allegedly violated was not "clearly established," and therefore the trial court should have resolved the issue of qualified immunity as a matter of law, without having to address the third requirement. We disagree, and hold that the right allegedly violated was clearly established.

In determining whether a particular right was clearly established, the focus of the inquiry should be on the application of the right to the specific conduct being challenged. *Id.* at 312. Plaintiff's complaint alleges that the right violated was her Fourth Amendment right to be free from unreasonable seizure. As alleged here, the right was violated by defendants' pursuing her into her kitchen,

seizing her bodily, and hitting and pushing her. As established by the Supreme Court, the test for determining whether this right has been violated requires a balancing of the nature and quality of the intrusion of the Fourth Amendment interest against the governmental interest alleged to justify the intrusion. *Graham v. Connor*, 490 U.S. 386, 396, 104 L. Ed. 2d 443, 455 (1989). In balancing the interests, careful attention must be paid to the facts and circumstances of the case, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.*

On the facts of the present case, taken in the light most favorable to plaintiff, the governmental interest in apprehending plaintiff for obstructing and delaying the arrest of her husband was minor, and the Fourth Amendment intrusion was severe; defendants' actions, when viewed in this light, violated plaintiff's Fourth Amendment right. Accordingly, the right violated was "clearly established," and defendants' argument to the contrary is without merit. For the foregoing reasons, we affirm the denial of defendants' motion for summary judgment as to plaintiff's claim of excessive force against defendants in their individual capacities.

II. Plaintiff's Appeal

Plaintiff contends that the trial court erred in granting summary judgment in favor of defendants on the claims of unlawful entry and trespass. We first address the claim of unlawful entry.

For the reasons stated in section I, summary judgment was properly granted for defendants on the section 1983 unlawful entry claim against them in their official capacities. We also conclude that summary judgment for defendants was proper on the claim of unlawful entry against them individually.

[4] The threshold question regarding a defense of qualified immunity is whether defendants have violated a "clearly established" right. *Pritchett*, 973 F.2d at 313. The right alleged to be violated in the present case is plaintiff's Fourth Amendment right to be free from unreasonable searches and seizures. If the right, as viewed in the context of its application to the specific conduct being challenged, is not a "clearly established" right, summary judgment must be granted in favor of defendants. *Id.* Thus, the circumstances surrounding the challenged conduct must be examined.

The evidence, when viewed in the light most favorable to plaintiff, reveals that defendants were discussing whether to arrest plaintiff for obstructing and delaying the arrest of her husband, when plaintiff began moving toward her house. Defendants then ran after plaintiff. As plaintiff entered her house and was closing the door, defendants grabbed the door and entered the house. We believe that in this context, the right allegedly violated was not clearly established.

Plaintiff has not cited, nor has our research disclosed, any binding authority for the proposition that defendants' actions were prohibited by the Fourth Amendment. Furthermore, such conduct is in fact authorized by North Carolina law. N.C.G.S. § 15A-401(e) (1988) provides that an officer may enter a home to make an arrest when:

> a. The officer has in his possession a warrant or order for the arrest of a person or is authorized to arrest a person without a warrant or order having been issued,
>
> b. The officer has reasonable cause to believe the person to be arrested is present, and
>
> c. The officer has given, or made reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice would present a clear danger to human life.

An officer is authorized to arrest a person without a warrant if the officer has probable cause to believe that person has committed a criminal offense in the officer's presence. § 15A-401(b)(1).

We conclude that the requirements of section 15A-401(e) have been satisfied in the present case. First, defendants were authorized to arrest plaintiff for delaying and obstructing the arrest of her husband, because defendants had probable cause to believe that plaintiff had committed that offense in their presence. Second, defendants had reasonable cause to believe that plaintiff was present in the house. Finally, we hold that under the circumstances, defendants were not required to give notice of their authority and purpose. The knock and announce requirement has as its purpose to identify the official status of the officers and to protect both the officers and the occupant. *State v. Gagne*, 22 N.C. App. 615, 618, 207 S.E.2d 384, 387, *cert. denied*, 285 N.C. 761, 209 S.E.2d 285 (1974). In the present case, plaintiff was well aware of defend-

ants' identities and their reason for being at her house; defendants were uniformed Highway Patrolmen who had arrived on the scene in patrol cars and who had been involved in an altercation with plaintiff minutes before the alleged unlawful entry. Moreover, defendants were about to apprehend plaintiff as she entered the kitchen and attempted to close the door. In such a case, compliance with the knock and announce requirement was not required. *See State v. Rudisill*, 20 N.C. App. 313, 201 S.E.2d 368 (1973) (holding that an open door obviated the demand for admittance by first knocking). Having complied with the requirements of section 15A-401(e), defendants were authorized to enter plaintiff's home to make the arrest.

For the foregoing reasons, we conclude that the right allegedly violated was not a clearly established right. Therefore, summary judgment for defendants on the claim of unlawful entry was proper.

[5] We next address the trial court's granting of summary judgment for defendants on plaintiff's trespass claim. The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass. *Kuykendall v. Turner*, 61 N.C. App. 638, 642, 301 S.E.2d 715, 718 (1983). Summary judgment for the defendant is proper where the defendant shows that an essential element of the plaintiff's claim is nonexistent. *Messick v. Catawba County*, 110 N.C. App. 707, 712, 431 S.E.2d 489, 492-93, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). In the present case, defendants' entry into plaintiff's residence was authorized under section 15A-401(e). Thus, the second element of plaintiff's claim is nonexistent, and summary judgment for defendants individually and in their official capacities was proper.

For the reasons stated, we affirm the order of the trial court insofar as it denied defendants' motion for summary judgment on the excessive force claim against them individually, and granted defendants' motion for summary judgment on the unlawful entry and trespass claims against them individually and in their official capacities. However, we reverse the denial of summary judgment on the excessive force claim against defendants in their official capacities, and we remand for entry of summary judgment in favor of defendants.

Affirmed in part; reversed in part and remanded.

Chief Judge ARNOLD and Judge COZORT concur.

BRUCE M. JOHNSON, PLAINTIFF-APPELEE v. SALLY JEAN JOHNSON, DEFENDANT-APPELLANT

No. 9328SC825

(Filed 3 May 1994)

1. **Divorce and Separation § 121 (NCI4th)— equitable distribution —account in wife's name—funds from wife's father—donative intent not shown—account as marital property**

The trial court in an equitable distribution action properly classified a savings account as marital property where most of the money in the account, which was in defendant's name only, came from defendant's father, but the only evidence of donative intent was defendant's statement that "my daddy wants me to have this and I'm going to keep it separate," and this evidence failed to show that the account in question met the definition of separate property under N.C.G.S. § 50-20(b)(2).

Am Jur 2d, Divorce and Separation §§ 884-886.

2. **Divorce and Separation § 136 (NCI4th)— equitable distribution —value of property—sufficient basis for determination**

The trial court in an equitable distribution action did not err in its valuation of a particular piece of property where the court based its valuation on the testimony of an expert witness as to appraisals of real estate.

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

3. **Divorce and Separation § 123 (NCI4th)— equitable distribution —husband's separate property—increase in value—percentage which was marital property—determination proper**

The trial court in an equitable distribution action did not err in its methodology and determination as to what portion of the increase in the value of plaintiff husband's separate

property, the parties' home, was marital property where the court acknowledged (1) the various improvements to the property and considered whether they were improvements increasing the fair market value of the property or whether they were more in the nature of ordinary upkeep and improvements, (2) the marital estate's contribution to the reduction of mortgage indebtedness, (3) the specific contributions to the property which came solely from plaintiff husband, and (4) the second mortgage taken out during the marriage to make improvements to the house and purchase a business.

Am Jur 2d, Divorce and Separation § 891.

Appeal by defendant from judgment entered 13 February 1993 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 18 April 1994.

Edward P. Hausle, P. A., by Edward P. Hausle and Gum, Hillier & Friesen, P.A., by Howard L. Gum, for plaintiff-appellee.

Hyler & Lopez, P. A., by George P. Hyler, Jr. and Robert J. Lopez, for defendant-appellant.

JOHNSON, Judge.

Plaintiff husband and defendant wife were married on 17 October 1981, separated on 21 September 1990, and divorced on 18 November 1991. This action originally was commenced as an action for absolute divorce. In later pleadings, both parties sought equitable distribution of their marital property. Both parties alleged an unequal distribution in their favor was equitable. A hearing on equitable distribution was held at the 9 November 1992 session of Buncombe County District Court. The parties made numerous stipulations before and during the trial as to various properties of the marriage. After ruling on the remaining properties, the trial court concluded that

[a]n unequal distribution is equitable. The Court basis [sic] this Conclusion on the fact that the Plaintiff made substantial payments on marital obligations subsequent to the date of separation. It is the Court's intention to divide equally the martial estate including equal responsibility for marital debt. In order to do equity between the parties, the Court must take into account that the Plaintiff has discharged the Defend-

ant's share of certain marital debts subsequent to the date of separation. Taking this into account, the Court determines that an unequal division in Plaintiff's favor is equitable.

From the equitable distribution judgment, defendant wife gave notice of appeal to our Court.

[1] Defendant first argues that the trial court incorrectly classified an account identified as the Asheville Federal Savings and Loan Account (hereafter, the Asheville Account) as marital property. It was stipulated that the Asheville Account had a balance of $5,175.20 on the date of separation and was in the name of defendant wife. Defendant testified that the money in the Asheville Account came from her father during the period she was married to plaintiff husband, and that she maintained the account because she "didn't seem to have much say so in what our joint account was spent for, and I thought well, my daddy wants me to have this and I'm going to keep it separate. I didn't have any say so over the other." On cross-examination, defendant testified that she received different amounts of cash between $100.00 and $1,500.00, that she did not file gift tax returns, and did not claim the money as income.

The trial court found the Asheville Account to be marital property, finding "[t]hat much of the monies in this account was deposited from cash funds received from the Defendant's father by the Defendant. There was insufficient evidence to support a finding of donative intent that this was a separate gift to the Defendant and the only evidence on that issue was the Defendant's statement 'he wanted me to have it'."

North Carolina General Statutes § 50-20(b)(1) (Cum. Supp. 1993) states that " '[m]arital property' means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property in accordance with subdivision (2) of this subsection." North Carolina General Statutes § 50-20(b)(2) (Cum. Supp. 1993) defines separate property as "all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage."

The trial court's task is to identify and classify

> "property as marital or separate 'depending upon the proof presented to the trial court of the nature' of the assets." *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991) (citation omitted). The party seeking to have property classified as marital or separate bears the burden of showing by a preponderance of the evidence that the property is marital or separate. *Id.* The party claiming the property to be marital meets this burden by showing that the property
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> (1) was 'acquired by either spouse or both spouses'; and (2) was acquired 'during the course of the marriage'; and (3) was acquired 'before the date of the separation of the parties'; and (4) is 'presently owned.'
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> *Id.* (citation omitted). If the party claiming the property to be marital shows these four elements by a preponderance of the evidence, the burden shifts to the party claiming the property to be separate to show by a "preponderance of the evidence that the property meets the definition of separate property under N.C.G.S. § 50-20(b)(2) [citations omitted]. "If both parties meet their burdens, then under the statutory scheme of N.C.G.S. § 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property." *Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 788[.]

Haywood v. Haywood, 106 N.C. App. 91, 97-98, 415 S.E.2d 565, 569 (1992), *rev'd on other grounds*, 333 N.C. 342, 425 S.E.2d 696 (1993).

In the case *sub judice*, plaintiff husband has met the four part test stated in *Haywood* and thus, the burden that the Asheville Account was marital property. The question, then, is whether defendant wife has met her burden of showing by a preponderance of the evidence that the property meets the definition of separate property under North Carolina General Statutes § 50-20(b)(2) of a "gift."

Defendant argues that because her father gave this money to her, and she deposited it in the Asheville Account which was solely in her name, that the Asheville Account should be classified as her separate property. However, the only evidence which has been presented indicating donative intent as to this gift is defendant's testimony that "I thought, well, my daddy wants me to have this and I'm going to keep it separate." We agree with the trial court that defendant has not met the burden of showing by

a preponderance of the evidence that the Asheville Account meets the definition of separate property under North Carolina General Statutes § 50-20(b)(2). We reject defendant's argument asserting otherwise.

[2] Defendant next contends the trial court committed prejudicial error and abused its discretion in its valuations of the 153 Upper Flat Creek Road property (plaintiff husband's separate property) on the date of the marriage and on the date of separation. Defendant notes that "[p]laintiff purchased the Upper Flat Creek real estate in the fall of [1977] for $47,000. The Trial Court found as a fact that the fair market value of such realty was $77,500 on the date of the marriage (10-17-81) and $92,000 on the date of the separation (9-21-90) which were Appraiser Morris' appraised figures." Defendant argues that because this shows a $30,500 increase in property value over the four year period from 1977-1981, and only a $14,500 increase in property value over the nine year period from 1981-1990, these findings cannot be supported by competent evidence. We disagree.

Mark Morris was tendered as an expert witness as to appraisals of real estate property and testified as to the values of the property on the date of marriage (1981) and on the date of separation (1990). When asked about the apparent inconsistency concerning the appreciation from 1977-1981 and from 1981-1990, Mr. Morris said

> [t]he first initial period you had rapid inflation of the eighties. The second period you have a decline in condition of property. You have other items. Inherent in the definition of market value is the ability to obtain financing, purchase financing. My value as of 1990 reflected incomplete condition. You cannot get—purchase—financing from F.H.A. or V.A. or some form of conventional on a house that's incomplete.

When asked about differences in adjustments made in the two values, Mr. Morris testified that the reduction made in the 1990 value was due to the remoteness of the property and would not have reduced the property value in 1981 because it was then typical of the area, and that a reduction was also made in the 1990 value for incomplete construction.

"Our review of equitable distribution orders is limited to determining whether the court clearly abused its discretion." *Wieneck-*

Adams v. Adams, 104 N.C. App. 621, 623, 410 S.E.2d 525, 526 (1991), *aff'd*, 331 N.C. 688, 417 S.E.2d 449 (1992). We find there has been no abuse of discretion by the trial court in that the trial court properly considered the testimony of the tendered expert, Mr. Morris, concerning the valuations of the 153 Upper Flat Creek Road property.

[3] Next, defendant argues that the trial court committed prejudicial error and abused its discretion in its methodology and determination as to what portion of the increase in the value of the 153 Upper Flat Creek Road property was marital property. The trial court's task was to determine which portion of the appreciation of plaintiff husband's separate property, the 153 Upper Flat Creek Road property, was considered active appreciation and therefore a marital asset. *See Ciobanu v. Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749 (1991).

In so determining, the trial court found:

> (m) That the Plaintiff made improvements to the property after the date he purchased it and prior to the date of the marriage. The Plaintiff made an initial down payment at the time of purchase in the amount of $10,500.00, said sum from his separate property. That after the Plaintiff purchased the real property, he made some improvements including grading work and landscaping valued at $2,800.00; reconstruction of a bridge, the only means of ingress and egress to the property, that was washed out in a storm at a cost of $2,800.00; a solar "sun room"; and commenced construction on a garage. The Plaintiff was unable to provide evidence as to the value of these last two improvements. The Plaintiff also put in new carpet at a cost of $2,100.00 and window treatments at a cost of $800.00. That as to these expenditures the only ones that increased the appraised fair market value of the real estate were the grading and bridge repair valued at $5,600.00. The other repairs were more in the nature of ordinary upkeep and improvements.
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> (n) That the Plaintiff and Defendant made improvements to the home since the date of marriage and prior to the date of separation including pouring of a concrete slab on the deck, planting trees and shrubs, constructing a "shell" of 24 × 24 feet for a room addition on the second floor; cedar siding improvements, roofing additions and improvements; six new win-

dows, an outdoor storage building, and completing and enclosing the garage. That these improvements were contributions by the marital estate to marital investment in the Defendant's separate property.

(o) That the marital estate also contributed to the investment in the Plaintiff's separate property to the extent it reduced the mortgage indebtedness with Asheville Federal Savings and Loan, to-wit: $11,649.77 ($35,722.66 – $24,072.89).

(p) The calculation of the marital interest in such property should be made in such a way as to entitle both the separate estate and the marital estate to an interest in the property in the ratio its contribution bears to the total investment in the property.

(1) Plaintiff's separate contributions consisted of the down payment of $10,500.00, closing costs of an additional $2,000.00, improvements that added value in the sum of $5,600.00, and $777.34 in principal reduction of the original mortgage of $36,500.00 made by Plaintiff prior to separation. Thus, the contributions made by the Plaintiff from his separate estate total $18,877.34.

(2) The marital estate made contributions of $11,649.77 (the principal reduction on the first mortgage). As found above, during the marriage, improvements were made but from the evidence offered by the Defendant, the Court is unable to determine the fair market value added to the property as a result of such improvements. Some of the improvements made during the marriage of these parties would be in the nature of routine maintenance and upkeep which were designed to maintain the value of the property and keep it from deteriorating rather than actually increasing the value of the property and the Defendant has offered insufficient evidence upon which the Court can make a determination on this issue. The marital contributions to the increase in fair market value of the marital estate are, therefore, $11,649.77, the amount of principal reduction on the first mortgage.

(3) Due, in part, to the second mortgage that was taken out during the marriage, the increase in equity (net fair market value) during the marriage is $10,946.38; $52,723.72 (equity date of separation) minus $41,777.34 (equity date of marriage).

As determined above, the contributions of Plaintiff's separate estate were $18,877.34 and the contributions of the marital estate were $11,649.77 yielding total contributions of $30,357.11.

In order to make a distribution practical, the Court will award the property at 153 Upper Flat Creek Road to the Plaintiff and assign to the Plaintiff the responsibility to discharge the second mortgage. In this fashion, the Court will achieve a distribution of both the marital interest in the Upper Flat Creek Road Property and the marital debt represented by the second mortgage on said property. In order to properly account for the marital interest, the Court will determine the ratio of the contributions made by Plaintiff's separate estate and the marital estate and apply that ratio to the increase in equity that occurred during the marriage.

The marital estate contributed 38.16 percent of the total contributions ($10,946.38 [divided by] 30,357.11). 38.16 percent of $10,946.38 is $4,177.14 and this is determined to be the value of the marital interest in the Upper Flat Creek Road Property to be awarded to Plaintiff.

We have reviewed the record and are not convinced that the trial court erred in its determination of which portion of the appreciation of the 153 Upper Flat Creek Road property was considered active appreciation and therefore a marital asset. We note that the trial court acknowledged the various improvements to the property and considered whether they were improvements increasing the fair market value of the property or whether they were more in the nature of ordinary upkeep and improvements; the marital estate's contribution to the reduction of mortgage indebtedness with Asheville Federal Savings and Loan; the specific contributions to the property which came solely from plaintiff husband; and the second mortgage taken out during the marriage, "obtained during the marriage for the purpose of (1) making improvements to the house and (2) purchase of the Dairy Queen business." As a result, we find there has been no abuse of discretion by the trial court, and that the trial court properly determined which portion of this property was marital property.

Defendant's next argument, that the trial judge committed prejudicial error in its distribution of marital assets, is based on de-

fendant's previous arguments. Having rejected those previous arguments, we dismiss this argument.

Finally, defendant argues that the trial court committed prejudicial error in overruling defendant's counsel's objections and thus allowing testimony as to what money was used or invested to buy front-end loaders; as to the price and/or the cost of and/or the value of the labor to do the work that plaintiff performed, and as to the cost of labor and materials to reconstruct a bridge. We note there are no findings of fact, conclusions of law or references to the front-end loaders in the Equitable Distribution Judgment, and therefore can ascertain no showing of prejudice to defendant. As to defendant's argument regarding the price and/or cost of and/or the value of the labor to do the work that plaintiff performed and as to the cost of labor and materials to reconstruct a bridge, we have reviewed the transcript and find that the trial court properly ruled on these objections.

The judgment of the trial court is affirmed.

Judges WELLS and JOHN concur.

LARRY D. OATES, APPELLANT v. NORTH CAROLINA DEPARTMENT OF CORRECTION, APPELLEE

No. 938SC645

(Filed 3 May 1994)

1. Administrative Law and Procedure § 65 (NCI4th)— administrative law judge's decision not adopted—reasons stated by agency—correctness of reasons not reviewed on appeal

Review of an agency decision under N.C.G.S. § 150B-51(a) allows the court to determine whether the "agency's decision states the specific reasons why the agency did not adopt the [administrative law judge's] recommended decision," but that statute does not entitle petitioner to review of whether those stated reasons were correct.

Am Jur 2d, Administrative Law § 730.

2. Public Officers and Employees § 63 (NCI4th)— credibility determinations by administrative law judge—disregard by State Personnel Commission—no error

There was no merit to petitioner's contention that the State Personnel Commission acted arbitrarily in disregarding the administrative law judge's credibility determinations, since credibility determinations as well as conflicts in the evidence are for the agency to determine, and the Commission's findings in this case with regard to credibility of the witness had considerable support in the record.

Am Jur 2d, Administrative Law §§ 678 et seq.

3. Public Officers and Employees § 67 (NCI4th)— correctional officer stealing food from prison kitchen—conclusions of State Personnel Commission—supporting evidence

Evidence was sufficient to support the conclusions of the State Personnel Commission that petitioner, a correctional sergeant at Central Prison, should have known without having to be warned that stealing food from the kitchen was wrong; even if a warning was required, petitioner received such warning by memorandum, but continued to take food; rules of the Department of Correction required employees to be persons of sound moral character; Department of Correction rules provided that no employee would use supplies except as he was legally entitled to do so; and petitioner's actions in stealing food were insubordinate and unbecoming a State employee.

Am Jur 2d, Civil Service § 63.

Appeal by petitioner from order entered 28 April 1993 by Judge George R. Greene in Wayne County Superior Court. Heard in the Court of Appeals 10 March 1994.

This case concerns petitioner's dismissal from employment at Central Prison. Petitioner worked at Central Prison, a maximum security prison, from July 1985 to August 1990. On 28 August 1990, the warden dismissed petitioner for unacceptable personal conduct, namely, misuse of state supplies and insubordination. At the time of his dismissal, petitioner worked as a correctional sergeant and was responsible for several employees and over two hundred prisoners.

Prison officials began an internal investigation in August 1990 after they received notice that staff in unit three, second shift, was consuming dining hall food without payment. The investigation led prison officials to conclude that petitioner had consumed food without payment, an act they considered stealing. In determining an appropriate disciplinary option, prison officials were cognizant of the fact that (1) petitioner engaged the services of subordinate staff and inmates to procure the food, (2) a sergeant, particularly in a facility like Central Prison, is responsible for enforcing policy and maintaining control and must possess integrity and credibility to effectively govern, and (3) petitioner continued this practice even after a 7 May 1990 memorandum directed that all violators cease the practice, amounting to insubordination.

Petitioner appealed his dismissal and a hearing was held before an administrative law judge (ALJ). The ALJ concluded that the Department of Correction (DOC) failed to show that petitioner (1) could no longer effectively supervise, (2) was justifiably dismissed, (3) violated policy after 7 May 1990, and (4) was fired for just cause. Accordingly, the ALJ recommended reinstatement.

On further review, the State Personnel Commission (SPC) declined to adopt several of the ALJ's findings of fact and conclusions of law, as well as the ALJ's recommended decision. The SPC ordered that DOC's decision to dismiss petitioner be upheld for just cause. On petition for review, the superior court affirmed the SPC's decision. From the order affirming the SPC's decision, petitioner appeals.

Eastern Carolina Legal Services, by John R. Keller, for petitioner appellant.

Attorney General Michael F. Easley, by Assistant Attorneys General Valerie L. Bateman and Deborah L. McSwain, for respondent appellee.

ARNOLD, Chief Judge.

[1] Petitioner presents three arguments for our review, all of which maintain, for various reasons, that the superior court erred in affirming the SPC's decision. In his first argument, petitioner contends that the SPC's stated reasons for not adopting the ALJ's recommended decision are erroneous.

Respondent contends this argument is not properly before the Court and that our review is limited to a determination of whether

the superior court failed to apply the standard of review set forth in G.S. § 150B-51. In support of its contention, respondent argues that the petition for review by the superior court alleged only violations reviewable under G.S. § 150B-51(b)(5), which entitles a petitioner to judicial review to determine whether the decision was "unsupported by substantial evidence." N.C. Gen. Stat. § 150B-51(b)(5) (1991).

G.S. § 150B-51(a), under which petitioner contends he is entitled to this review, allows the court to determine whether the "agency's decision states the specific reasons why the agency did not adopt the recommended decision." G.S. § 150B-51(a) (1991). The superior court determined that the SPC's decision satisfied this requirement. Petitioner argues, however, that G.S. § 150B-51(a) also entitles him to review of whether those stated reasons were correct. We disagree, believing that the review urged by petitioner is not contemplated by that portion of G.S. § 150B-51. *See Webb v. N.C. Dept. of Envir., Health, and Nat. Resources*, 102 N.C. App. 767, 404 S.E.2d 29 (1991). We note also that petitioner cites *Webb* for the proposition that a reviewing court must not only gauge whether a reason is specifically stated, but also whether it is correct. Petitioner interprets both *Webb* and G.S. § 150B-51(a) incorrectly. Furthermore, we reject petitioner's contention, made in his reply brief, that he intended the review suggested in his original brief to fall under G.S. § 150B-51(b)(4). At no time did petitioner cite that provision in his original brief, nor did he cite it in his petition for judicial review presented to the superior court. We will not entertain what amounts to a new argument presented in this reply brief. *See Animal Protection Society v. State of North Carolina*, 95 N.C. App. 258, 382 S.E.2d 801 (1989) (stating that the original brief sets the issues to be decided on appeal and that a new matter, raised for the first time in a reply brief, will not be considered).

[2] In his next argument, petitioner contends the SPC acted arbitrarily in disregarding the ALJ's credibility determinations. More specifically, petitioner questions the SPC's failure to adopt the ALJ finding of fact forty-three which states:

> Based upon the inconsistencies in his recollection and upon his demeanor while testifying, the undersigned finds that Bell was not a credible witness and his testimony that he saw the Petitioner eating a sandwich which was made from supplies taken from the Central Prison kitchen was not believable.

In its stead, the SPC added findings of its own pertaining to Officer Bell. These findings state only that Officer Bell saw petitioner and three inmates eating in the sergeant's office, that petitioner offered him food in styrofoam trays, and that his experience told him that the food had come from Central Prison's kitchen.

Credibility determinations "and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness." *Jarrett v. N.C. Dept. of Cultural Resources*, 101 N.C. App. 475, 482, 400 S.E.2d 66, 70 (1991) (upholding the SPC's decision to decline to adopt the ALJ's credibility findings). Moreover, even though the ALJ has made a recommended decision, credibility determinations, as well as conflicts in the evidence, are for the agency to determine. *Webb*, 102 N.C. App. 767, 404 S.E.2d 29; *see also Davis v. N.C. Dept. of Human Resources*, 110 N.C. App. 730, 432 S.E.2d 132 (1993) (stating that the prerogative to determine the credibility of witnesses and to weigh the evidence rests with the SPC). We decline to restrict the SPC in the manner suggested by petitioner, which could foreclose meaningful review in certain situations. We believe also that the SPC's findings concerning Officer Bell have considerable support in the record.

[3] In his last argument, petitioner contends that the SPC's decision is not supported by substantial evidence. Petitioner argues specifically that four of the SPC's conclusions are not supported by substantial evidence. Consequently, he contends the SPC's decision cannot stand and that the ALJ's recommended decision should become the final agency decision.

On review, the superior court applies the whole record test, examining all competent evidence to determine whether the SPC's findings and conclusions are supported by substantial evidence. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887 (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lackey v. N.C. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). If the evidence reveals two conflicting views or contradictory evidence, the superior court may not replace its judgment for that of the SPC. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E.2d 528 (1977). Essentially, the whole record test is used to determine whether the SPC decision has a rational basis in the evidence as a whole. *Henderson*, 91 N.C. App. 527, 372 S.E.2d 887.

On appeal to this Court, our review is limited to a determination of whether the superior court made any errors of law and asks "whether the superior court was correct as a matter of law in holding that the . . . decision and order was supported by substantial evidence in light of the whole record." *Floyd v. N.C. Dept. of Commerce*, 99 N.C. App. 125, 128, 392 S.E.2d 660, 662, *disc. review denied*, 327 N.C. 482, 397 S.E.2d 217 (1990). We will address each conclusion individually.

SPC conclusion three states that:

> Further, the rules of the Office of State Personnel also provide that personal conduct discipline is intended to be imposed for those actions for which no reasonable person could, or should, expect to receive prior warnings. No reasonable State employee could or should expect to be warned that stealing food from the State is wrong. However, even if Petitioner should have been informed that such conduct was wrong, he was so warned by the memorandum of May 7, 1990, and defied that directive when he continued to take food from the kitchen without paying for it after the memorandum was issued.

Petitioner agrees he was not entitled to a warning, but contends that respondent's conduct does not support this conclusion. We can only assume that petitioner is arguing that since the 7 May 1990 memorandum provided a form of warning his termination was somehow improper. We disagree entirely. In fact, this conclusion appears to be only a confirmation of the allegations of insubordination, brought about by petitioner's continued consumption following the 7 May 1990 memorandum.

SPC conclusion four states that:

> The rules of the Department of Correction also require its employees to "be persons of sound moral character. In dealing with inmates and the public, they must firmly establish authority, yet show themselves worthy of trust by maintaining unimpeachable conduct on and off duty." 5 N.C.A.C. 2A. 0201.

Petitioner contends that respondent never specified this rule as a basis for dismissal, foreclosing its use by the SPC as a conclusion in support of upholding dismissal. Assuming, without deciding, that petitioner is correct, its inclusion is harmless. The record contains substantial evidence of other, properly included, grounds for dismissal.

SPC conclusion five states that:

> DOC rules also provide that "No employee will consume or use equipment, facilities, or supplies, including scrap material, except as he may be legally entitled to do. . . . Food, cleansers, and other supplies will be used according to recipes and instructions." 5 N.C.A.C. 2A .0202(e)(2).

Petitioner states, without argument, that the SPC adopted ALJ findings that prior to 7 May 1990 he had not been told that taking food violated this policy and that he did not believe food was a supply. Though it is difficult to discern the nature of petitioner's contention, it appears he is arguing that since he presented evidence that he did not understand the nature of this rule, it cannot be used as a basis for termination.

SPC conclusion six, which should be read in conjunction with conclusion five, states that:

> Petitioner's actions of stealing food from the state both before and after the May 7, 1990, memorandum were insubordinate and unbecoming a State employee and his actions were unlawful and in violation of Division policy. As a result of Petitioner's actions, he was no longer able to function effectively as a supervisor of inmates and/or subordinate staff. The Respondent produced sufficient factual evidence to show that the Petitioner engaged in unacceptable conduct as described in the dismissal letter. Respondent has established just cause for Petitioner's dismissal.

We disagree with petitioner's assertions that conclusions five and six are not supported by substantial evidence. Furthermore, we note that the presence of conflicting evidence is not fatal to a finding or conclusion so long as the finding or conclusion is supported by substantial evidence. In this case, substantial evidence supported the SPC's conclusions. Moreover, the majority of contradictory or conflicting evidence cited by petitioner came from petitioner himself. We note, too, that petitioner admitted reading 5 N.C.A.C. 2A .0202 while studying for the sergeant's exam, and that he knew his job benefits did not include free food. He excuses his conduct by claiming that no one ever said it was wrong.

The record also shows that (1) officers were either told or knew from "day one" that it was wrong to eat food from the kitchen, (2) other units in the prison did not eat food from the

kitchen, (3) petitioner admitted during his predismissal conference, in the presence of the warden, the deputy warden, and the administrator, that he ate food from the kitchen both before and after the 7 May 1990 memorandum, (4) on occasion, petitioner used subordinate staff as well as inmates to procure the food, and (5) petitioner rarely brought food from home. Furthermore, the warden stated that officers must lead by example when dealing with convicts and that once you lose integrity and credibility you lose control, supporting the SPC's conclusion that petitioner could no longer function effectively as a supervisor of staff and inmates.

We have carefully reviewed appellant's remaining contentions under this argument and find them to be unpersuasive. The decision of the superior court affirming the final decision of the SPC is

Affirmed.

Judges COZORT and LEWIS concur.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY v. IRVIN L. NUNN, GERALDINE NUNN, HALLIE W. NUNN, AND VALI L. McKNIGHT v. JIM CRISP D/B/A JIM CRISP INSURANCE AGENCY

No. 9315SC831

(Filed 3 May 1994)

Insurance § 724 (NCI4th)— homeowners insurance—business exclusion provision applicable—patron bitten by dog—injury in connection with business

The business exclusion provision in defendants' homeowners insurance policy prevented them from recovering for liability incurred while operating a business on their insured premises, since defendants who operated a bed and breakfast and held banquets and receptions on their farm were engaged in a business; a patron's injuries suffered when she was bitten by a dog while attending a wedding reception at the premises did not "arise out of" the business operation, as the injuries could have arisen out of negligent supervision of the dog, an act which was in no way linked to the business; but the

injuries did occur in connection with the business, as the injured party's very presence on the premises was in connection with the business.

Am Jur 2d, Insurance §§ 475 et seq.

Construction and application of "business pursuits" exclusion provision in general liability policy. 48 ALR3d 1096.

Personal injuries inflicted by animal as within homeowner's or personal liability policy. 96 ALR3d 891.

Liability of owner or operator of business premises for injury to patron by dog or cat. 67 ALR4th 976.

Appeal by defendants from summary judgment entered 4 May 1993 by Judge Knox Jenkins in Chatham County Superior Court. Heard in the Court of Appeals 19 April 1994.

Morgan & Reeves, by Robert B. Morgan and Margaret Morgan, for plaintiff-appellee.

J. Kirk Osborn for defendants-appellants.

WYNN, Judge.

This case presents the question of whether the business exclusion provision in their homeowners insurance policy prevents appellants from recovering for liability incurred while operating a business on their insured premises.

In the fall of 1986, defendants-appellants Geraldine Nunn, her husband, Irvin L. Nunn, and his mother, Hallie W. Nunn, moved to an estate known as Windy Oaks Farm, in Chatham County, North Carolina. They purchased homeowners insurance for the house from plaintiff Nationwide Mutual Fire Insurance Company. In May of 1987, while living in part of the house, the Nunns began operating a bed and breakfast establishment, the Windy Oaks Inn, in another wing of the house. They also began hosting receptions and dinners there. They have continuously operated the Windy Oaks Inn as a bed and breakfast establishment and reception site since 1987.

On 6 May 1990, the Nunns hosted a wedding reception at the Windy Oaks Inn. Although the reception ended at 7:00 p.m., approximately ten people remained and requested permission to stay on the premises longer. Geraldine Nunn gave them permis-

sion to stay. At approximately 10:00 p.m., she asked these remaining guests to leave. One of these guests, Vali McKnight, was bitten by a dog as she left the premises. Geraldine Nunn testified that she had been temporarily keeping the dog, which belonged to her brother. Nunn, a registered nurse, immediately tended to Ms. McKnight. She then obtained further medical assistance for Ms. McKnight and permitted the other guests, who were too inebriated to drive, to stay on the premises for the night. McKnight sued the Nunns for injuries sustained from the dog bite. On 27 August 1992, plaintiff Nationwide initiated this action seeking declaratory judgment that, due to a business use exclusion provision in the Nunns' homeowners policy, Nationwide has no obligation to defend the suit and no liability for any judgment rendered in it.

The insurance policy provides general coverage for liability arising from accidents occurring on the premises. However, the policy contains the following exclusion provision for liability arising out of or in connection with a business engaged in by the Nunns:

> Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:
>
> . . . .
>
> b. (1) arising out of or in connection with a business engaged in by an insured. This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the business.

We initially consider whether the Nunns were engaged in a business. The insurance policy sets out the following definition: " 'Business' includes trade, profession or occupation." The facts indicate that the Nunns had regularly rented out rooms and held banquets and receptions on the premises for some two years before the dog bite incident. Geraldine Nunn testified that they held ten receptions there in 1989 and twelve in 1990. The 6 May 1990 reception itself was a commercial event. The Nunns did not personally know the reception participants, and they were financially compensated for providing the site, food, and service. We conclude that, under the terms of the policy, giving receptions was a business engaged in by the Nunns.

The next question is whether McKnight's injuries "arose out of" or were "in connection with" this business. The meaning of specific language used in an insurance policy is a question of law for the court. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). We first address the phrase "arising out of." Our Supreme Court interpreted this phrase in *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66 (1986). In that case, defendant Anderson was standing talking to some fellow deer hunters when he saw a deer. He ran to his truck and reached behind the seat to get a rifle he had stored there. As he touched the stock of the rifle, it fired, and a bullet struck his companion, McKinnon. A claim was made under Anderson's homeowners liability policy, which excluded coverage for injury "arising out of the ownership, maintenance, use, loading or unloading" of a motor vehicle. *Id.* at 537, 350 S.E.2d at 68. The Court relied on the two following legal principles. First, ambiguous terms of an exclusion provision are to be construed against the insurer. *Id.* at 547, 350 S.E.2d at 73; *Wachovia Bank & Trust Co. v. Westchester Fire Insurance Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). The Court found that the phrase "arising out of" is ambiguous. *State Capital*, 318 N.C. at 547, 350 S.E.2d at 73-4. Second, coverage will not be denied where there is more than one cause of an injury and only one of the causes is excluded. That is, in order to exclude coverage under the policy, "the sources of liability which are excluded from homeowners policy coverage must be the sole cause of the injury." *Id.* at 546, 350 S.E.2d at 73. In *State Capital*, this principle meant that coverage would not be excluded if there was a proximate cause of the injury that did not "arise out of" the use or unloading of the automobile. Because the Court found that the injuries could have arisen out of Anderson's mishandling of the rifle, it concluded that coverage should not be denied under the exclusion provision.

Here, although McKnight's claim may have arisen out of the Nunns' business operation, the injury could also have arisen out of negligent supervision of the dog, which has not been linked in any way to the business. Because this additional proximate cause exists, coverage is not excluded under the "arising out of" clause.

Next, we look at the phrase "in connection with." This phrase has been held to have a much broader meaning than "arising out of." *See, e.g., Cameron Mut. Ins. Co. v. Skidmore*, 633 S.W.2d 752 (Mo. App. 1982). In *Skidmore*, the insured burned some old

fertilizer sacks on his farm and the fire spread to a neighbor's adjoining property, damaging a building and fixtures. The insured's personal liability policy contained an exclusion for "any act or omission in connection with premises, other than as defined, which are owned, rented or controlled by an insured." *Id.* at 753. The court excluded coverage, reasoning:

> In the manner that the words are ordinarily used [the insured's] acts were "in connection with" the farm. [The insured] was there to check the crop because of his ownership interest in the farm. The sacks were brought to the property and emptied there because their contents were used on the farm. They were burned on the farm.

Id.

In *Jackson v. Lajaunie*, 270 So.2d 859 (La. 1972), a gas station operator fired a pistol at a customer as a prank, mistakenly believing the gun to be loaded with blanks. He was sued under the personal liability section of his homeowners policy, which contained a provision that coverage did not apply "to any act or omission in connection with the premises, other than [the home] which are owned, rented or controlled by [the station operator]." *Id.* at 863. The court denied coverage, holding that the act was "in connection with" the station because it happened at the station and the parties and the gun were present because of the station. The court held, "This tragic prank was linked to the station, associated with the station, related to the station and, in the absence of a new and restrictive definition of an old and well understood word, connected with the station." *Id.* at 864.

The only North Carolina case interpreting "in connection with" is *Nationwide Mut. Ins. Co. v. Prevatte*, 108 N.C. App. 152, 423 S.E.2d 90 (1992), *disc. rev. denied*, 333 N.C. 463, 428 S.E.2d 184 (1993). There, the insurance policy defined the insured location as "any premises used by you in connection with [the residence premises] or [the part of the premises used by you as a resident.]" *Id.* at 156, 423 S.E.2d at 91. We held that property was used "in connection with" the residence property where the insureds had walked and ridden their all-terrain vehicle over it, ending each walk or ride on the residence property.

The "in connection with" provision in *Prevatte* was found to be plain and unambiguous. *Id.* at 156, 423 S.E.2d at 92. Similarly,

in interpreting "in connection with" here, we find that the phrase is unambiguous. Where language is plain and unambiguous, we will enforce a contract according to its terms. *Walsh v. United Ins. Co. of America*, 265 N.C. 634, 144 S.E.2d 817 (1965).

As noted in the discussion of "arising out of," coverage will not be excluded if the excluded cause is but one of several proximate causes of injury. Thus, we must inquire whether there was a proximate cause of the injury that was not "in connection with" the business. Although the reception for which McKnight had originally entered the premises ended several hours before the dog bite incident, she cannot be considered a mere private guest of the Nunns, as they suggest. Rather, McKnight's presence on their premises was linked, associated with, and connected to the reception provided in the course of the Nunns' business. Indeed, but for the reception, McKnight would not have been on the premises and the tort claim would not have arisen. We conclude that, given the broad definition of "in connection with," all of the possible proximate causes of McKnight's injury were in connection with the Nunns' business because McKnight's very presence on the premises was in connection with the business.

This case illustrates the purpose of business use exclusions in homeowners insurance policies. When homeowners change the use of their premises from residential to commercial, they incur a significant increase in the risk of tort claims due to the increased public traffic on the premises. The insurer which issued their homeowners policy should not be expected to underwrite those additional risks without additional consideration. Nor should the company's other premium payers be expected to shoulder the added burden. Rather, the insured should seek an appropriate type of coverage. When the Nunns began operating a commercial establishment, it was their responsibility to purchase adequate insurance for it. We decline to charge their failure to do so to an insurer which specifically contracted to limit its liability.

Affirmed.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. WELDON JACK BURTON

No. 9219SC1085

(Filed 3 May 1994)

1. **Rape and Allied Sexual Offenses § 73 (NCI4th)— child sex abuse offenses—time of offenses—no variance between indictment and proof**

In a prosecution of defendant for incest, taking indecent liberties with a child and first-degree statutory rape where the offenses allegedly occurred years before, there was no fatal variance between the indictments and proof with regard to time, particularly in light of the policy of leniency applicable to temporal discrepancies in child sex abuse indictments; furthermore, defendant suffered no prejudice as his defense was based on denial of the charges rather than alibi during the time frames set out in the indictments.

Am Jur 2d, Rape § 43.

2. **Rape and Allied Sexual Offenses § 19 (NCI4th)— statute under which defendant charged repealed—continued effect given by repealing statute**

There was no merit to defendant's contention that the first-degree statutory rape charge against him should have been dismissed based upon lack of subject matter jurisdiction because the statute under which he was charged was repealed, since the repealing statute expressly reflected the intent of the General Assembly that the statute under which defendant was charged have continued effect as to offenses which occurred prior to the date of repeal.

Am Jur 2d, Rape §§ 15-17.

3. **Criminal Law § 1075 (NCI4th); Appeal and Error § 418 (NCI4th)— acts occurring prior to enactment of Fair Sentencing Act—appropriate law applied by trial court—failure to make assignment of error**

The trial court correctly applied the law existing prior to the Fair Sentencing Act since the offenses for which defendant was charged and convicted occurred before the effective date of the Act; however, defendant's argument that the trial court erroneously applied pre-Fair Sentencing Act sentencing

law was not before the Court where no assignment of error encompassed this assertion.

Am Jur 2d, Appeal and Error §§ 693-696; Criminal Law § 525 et seq.

Appeal by defendant from judgments entered 15 May 1992 by Judge Russell G. Walker, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 13 September 1993.

Attorney General Michael F. Easley, by Associate Attorney General Neil Dalton, for the State.

Pierre Oldham for defendant-appellant.

JOHN, Judge.

Defendant appeals convictions of five counts of incest, two counts of taking indecent liberties with a child, and one count of first degree statutory rape. He contends the trial court erred by: (1) denying his motion to dismiss four of the charges; (2) denying his motion to dismiss 91 CRS 9418 based upon lack of subject matter jurisdiction; and (3) entering sentence. We are not persuaded by defendant's arguments.

The State presented evidence which tended to show the following: In the summer of 1991, three women complained to the Randolph County Sheriff's Department that their step-father (defendant) had sexually molested each of them many years earlier. Sandra, Sherry and Melanie stated defendant began having improper sexual contact with them shortly after he married their mother in April of 1972.

Sandra, the oldest of the three women, was born 23 July 1960 and was eleven (11) years old at the time defendant and her mother married. According to Sandra, defendant's sexual contact with her started in the summer of 1972. His actions included: fondling her breasts, digital penetration, exposing his penis, and forcing her to participate in oral sex. In approximately 1973, when Sandra was thirteen (13) years old and in the eighth grade, defendant initiated sexual intercourse with her which continued until she graduated from high school in 1978.

Sherry, born 7 August 1962, was nine (9) years old when her mother married defendant. According to Sherry, defendant

penetrated her sexual organ with his finger before her tenth birthday. When she was thirteen (13), defendant began having sexual intercourse with her, and in the spring of 1979 she became pregnant; at that time defendant was her only sexual partner. Her pregnancy was subsequently terminated by an abortion.

Melanie, the youngest of the three sisters, was born 18 November 1964. She testified defendant commenced touching her in a sexual manner when she was approximately seven (7) years old, and that sexual intercourse began when she was ten (10) or eleven (11). This behavior occurred two or three times weekly until the summer she was fourteen (14).

Debbie, defendant's biological daughter, was born 18 July 1954. According to Debbie, she lived alone with defendant after her parents' separation until shortly before defendant's remarriage. During that time, defendant would force her to watch him masturbate and to look at sexually oriented magazines. He also would rub her between her legs and tell her he was preparing her for marriage.

Defendant offered several witnesses whose testimony contradicted, in part, that of the prosecuting witnesses. He also testified and denied the allegations.

I.

[1] Defendant first contends the trial court erred by denying his motion to dismiss four of the indictments: 91 CRS 9420, 9423, 9424 and 9425. He argues the State failed to produce sufficient evidence establishing that the incidents alleged therein occurred during the time periods stated in the indictments. This assignment of error cannot be sustained.

Under N.C.G.S. § 15A-924(a)(4) (1988), an indictment must allege the date or the period of time during which the offense was committed. However, it is well established " 'that variance between allegation and proof as to time is not material where no statute of limitations is involved.' " *State v. Riggs*, 100 N.C. App. 149, 152, 394 S.E.2d 670, 672 (1990) (quoting *State v. Trippe*, 222 N.C. 600, 601, 24 S.E.2d 340, 341 (1943)), *disc. review denied*, 328 N.C. 96, 402 S.E.2d 425 (1991). As recently stated by this Court, "the date given in the bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal." *State v. Norris*, 101 N.C. App. 144, 151, 398 S.E.2d 652, 656 (1990), *disc. review denied*, 328 N.C. 335, 402 S.E.2d 843 (1991).

In cases involving allegations of child sex abuse, temporal specificity requirements are further diminished. *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991). Children frequently cannot recall exact times and dates; accordingly, a child's uncertainty as to the time of the offense goes only to the weight to be given that child's testimony. *Id.* Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where, as in the case *sub judice*, the allegations concern instances of child sex abuse occurring *years before*. *See State v. Norris*, 101 N.C. App. at 150-51, 398 S.E.2d at 656. Unless a defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance, the policy of leniency governs. *State v. Young*, 103 N.C. App. 415, 420, 406 S.E.2d 3, 6, *disc. review denied*, 330 N.C. 201, 412 S.E.2d 65 (1991); *Riggs*, 100 N.C. App. at 152, 394 S.E.2d at 672; *see also* G.S § 15A-924(a)(4) ("Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.").

Indictment 91 CRS 9420 alleged defendant took indecent liberties with Sherry between November 1975 and March 1976; Sherry was age thirteen (13) during this time period. She testified defendant began fondling her sexually when she was nine (9) years old and that this behavior progressed to sexual intercourse when she was thirteen. The episodes of sexual intercourse occurred "two or three times a week" from age thirteen until Sherry's high school years. Evidence of sexual intercourse is sufficient to withstand a motion to dismiss a charge of taking indecent liberties with a child. *See State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987).

Indictments 91 CRS 9423 and 9424 charged that defendant committed incest with Sherry in March 1977 and September 1976, respectively. Defendant argues there exists a fatal variance in that Sherry testified to but one instance of sexual intercourse occurring when she was thirteen (13) years old, *i.e.*, at least one month before the time charged in indictment 91 CRS 9224 and at least seven months before the time charged in indictment 91 CRS 9423. We rejected a similar contention in *Norris*. *See Norris*, 101 N.C. App. at 151, 398 S.E.2d at 656. Furthermore, defendant's argument ignores Sherry's testimony that sexual intercourse occurred "two or three times a week" from age thirteen until her high school years.

Finally, indictment 91 CRS 9425 accused defendant of incest with Sandra between September 1975 and May 1976; Sandra was fifteen (15) years old during this time period. She testified at trial that defendant began having sexual intercourse with her in 1973 and continued to do so until 1978, thus presenting evidence the episodes of sexual intercourse were ongoing after 1973 and continued through the time period set out in the indictment.

Based on the foregoing and in light of the policy of leniency applicable to temporal discrepancies in child sex abuse indictments, we hold no fatal variance exists as to any of the four challenged offenses. In any event, we further note defendant has suffered no prejudice as his defense was based upon denial of the charges rather than alibi during the time frames set out in the indictments. *See State v. Effler*, 309 N.C. 742, 750, 309 S.E.2d 203, 208 (1983).

II.

[2] Defendant next maintains the trial court erred by denying his motion to dismiss 91 CRS 9418 based upon lack of subject matter jurisdiction. Defendant in that case number was charged with first degree statutory rape under former N.C.G.S. § 14-21 (repealed effective 1 January 1980). He argues that because the statute was repealed, the indictment charging a violation thereof was without effect. We disagree.

The general rule is that one may not be convicted pursuant to a repealed criminal statute, even though the offense was committed prior to the date of repeal, *unless a contrary intent on the part of the legislature appears in the language of the repealing statute. State v. McCluney*, 280 N.C. 404, 406, 185 S.E.2d 870, 871 (1972); *see also In re Incorporation of Indian Hills*, 280 N.C. 659, 664, 186 S.E.2d 909, 912 (1972). In the case *sub judice*, G.S. 14-21 was repealed by *An Act to Clarify, Modernize and Consolidate the Law of Sex Offenses*, 1979 N.C. Sess. Laws ch. 682, which provides in relevant part as follows:

> This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. *Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof.*

1979 N.C. Sess. Laws ch. 682, 14 (emphasis added). This section expressly reflects the intent of the General Assembly that G.S. § 14-21 have continued effect as to offenses which occurred prior to the date of repeal. Accordingly, we reject this assignment of error.

III.

[3] Defendant's last assignment of error is directed at the trial court's imposition of sentence. Because the alleged offenses were committed prior to passage of the Fair Sentencing Act (FSA), the court sentenced defendant pursuant to pre-Act law. Defendant asserts (1) sentencing should have been conducted according to the provisions of the FSA and that (2) even if the FSA is inapplicable, the trial court erroneously interpreted and applied pre-FSA law. We find these arguments to be unfounded.

The FSA, N.C.G.S. § 15A-1340.1 to -1340.7 (1988), was designed to create uniformity in sentences for the same offenses and to reduce the indeterminate nature of sentences. *See State v. Thompson*, 310 N.C. 209, 219-20, 311 S.E.2d 866, 872 (1984), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). However, the Act specifically provides that it is applicable only to felonies occurring on or after 1 July 1981. N.C.G.S. § 15A-1340.1; *State v. Jones*, 66 N.C. App. 274, 279, 311 S.E.2d 351, 354 (1984). Accordingly, since the offenses for which defendant was charged and convicted occurred *before* the effective date of the FSA, the trial court correctly applied pre-FSA law.

With regard to defendant's insistence that the trial court erroneously applied pre-FSA sentencing law, we note no assignment of error can fairly be considered to encompass this assertion. The scope of appellate review is limited to those issues raised in an assignment of error set out in the record on appeal. N.C.R. App. P. 10(a). Therefore, defendant's argument is not properly before us. *See State v. Thomas*, 332 N.C. 544, 554, 423 S.E.2d 75, 80 (1992). Further, we observe defendant has failed to cite any authority in support of this contention. *See State v. Green*, 101 N.C. App. 317, 320, 399 S.E.2d 376, 378, *supersedeas and temporary stay denied*, 328 N.C. 335, 400 S.E.2d 449 (1991).

No error.

Chief Judge ARNOLD and Judge WYNN concur.

SUE A. MINNEMAN, D.D.S., PLAINTIFF v. JAMES G. MARTIN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF NORTH CAROLINA, DAVID T. FLAHERTY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF NORTH CAROLINA, DON TAYLOR, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF MENTAL HEALTH, MENTAL RETARDATION, SUBSTANCE ABUSE SERVICES OF THE STATE OF NORTH CAROLINA, DR. WALTER W. STELLE, PH.D., IN HIS OFFICIAL CAPACITY AS DEPUTY DIRECTOR OF THE DIVISION OF MENTAL HEALTH, MENTAL RETARDATION, SUBSTANCE ABUSE SERVICES OF THE STATE OF NORTH CAROLINA, B. GENE BARRETT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF JOHN UMSTEAD HOSPITAL, DR. P. J. IRIGARAY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CLINICAL DIRECTOR, JOHN UMSTEAD HOSPITAL, DEFENDANTS

No. 9310SC291

(Filed 3 May 1994)

State § 19 (NCI4th)— whistleblower action—no wrongdoing by defendants—summary judgment on grounds of sovereign immunity appropriate

The trial court in plaintiff's whistleblower action erred in denying summary judgment on the basis of sovereign immunity as to defendant governor, defendant Secretary of the Department of Human Resources, defendant Director of the Division of Mental Health, Mental Retardation, Substance Abuse Services, and defendant Deputy Director where it was clear that these defendants had no part in the alleged whistleblower violations. N.C.G.S. §§ 126-85, 126-86.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 70; States, Territories, and Dependencies §§ 104-107.

Appeal by defendants from order entered 2 December 1992 by Judge Wiley F. Bowen in Wake County Superior Court. Heard in the Court of Appeals 13 January 1994.

Plaintiff brought this action pursuant to N.C. Gen. Stat. § 126-84 *et. seq.* (1993), entitled "Protection for Reporting Improper Government Activities" (hereinafter "Whistleblower Act"). In her complaint, plaintiff challenged her nonselection as a Dentist III. She alleged discriminatory action, stemming from her involvement in the North Carolina State Board of Dental Examiners' (NCSBDE) investigation of Dr. Glenn Woodlief, her immediate supervisor.

Plaintiff began working at John Umstead Hospital (JUH), a facility operated by the Department of Human Resources (DHR)

to serve the mentally and emotionally ill, in 1985 as a Dentist I. Within two years, she was promoted to a Dentist II. Beginning in March of 1987 and ending in February 1988, she met approximately four times with defendant Irigaray, Dr. Woodlief's supervisor, to discuss concerns she had about Dr. Woodlief's treatment of patients. These concerns included what she considered inhumane use of restraints and treatment below the standard of care. Plaintiff alleged that defendant Irigaray never responded to her concerns.

Plaintiff further alleged that in late February 1988, two patient advocates questioned her about Dr. Woodlief's treatment of patients. In March 1988, a patient advocate and an investigator for the NCSBDE questioned her further. Plaintiff provided them with an affidavit detailing her observations of Dr. Woodlief's mistreatment of patients and a complaint was filed against Dr. Woodlief with the NCSBDE in April 1988. Despite expectations of confidentiality, plaintiff's affidavit was provided to both Dr. Woodlief and defendant Irigaray. It was also given to the Internal Peer Review members of the Medical Staff Executive Committee, who questioned her at length about her role in the investigation and commented on her lack of loyalty due to her "whistle-blowing". Over time, plaintiff allegedly experienced general intimidation because of her role in the NCSBDE investigation. In September 1989, the NCSBDE suspended Dr. Woodlief's license.

Plaintiff informally filled Dr. Woodlief's position, Director of Dental Services, since his first leave of absence in 1988. In fall of 1989, JUH advertised for the position. Plaintiff applied for the position and three applicants, including plaintiff, were seriously considered for the job. Plaintiff alleged that, during an interview for the position conducted by defendants Irigaray and Barrett, they questioned her at length about her "whistle-blowing" and sought assurances that she would work within the institutional setting. Plaintiff was not selected, and the job was ultimately offered to and accepted by another dentist. Plaintiff alleged that the dentist chosen was given the job despite evidence of misappropriation of state funds and alleged neglect of patients at another state hospital.

Plaintiff complained that her nonselection was discriminatory, in retaliation for her earlier participation in the NCSBDE investigation, and sought damages as well as injunctive relief. Defendants moved for summary judgment on the basis, among others, of sovereign immunity. The trial court denied their motion. From this denial, defendants appeal.

Attorney General Michael F. Easley, by Special Deputy Attorney General David Roy Blackwell and Assistant Attorney General Victoria L. Voight, for the defendant appellants.

Young, Moore, Henderson & Alvis, P.A., by Brian E. Clemmons and M. Lee Cheney, for the plaintiff appellee.

ARNOLD, Chief Judge.

Defendants first argue the trial court erred in failing to grant summary judgment for defendants Martin, Flaherty, Taylor, Stelle, and Barrett, all of whom were sued in their official capacity, on the basis of sovereign immunity.

In general, denial of a motion for summary judgment is interlocutory and not immediately appealable. *EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resources*, 108 N.C. App. 24, 422 S.E.2d 338 (1992). Despite this general rule, where sovereign immunity is raised as a defense, "a substantial right is affected and the denial is immediately appealable." *Id.* at 27, 422 S.E.2d at 340.

Sovereign immunity protects the State and its agents from suit, *Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744 (1993), and the General Assembly determines "when and under what circumstances the State may be sued." *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 173, 118 S.E.2d 792, 795 (1961). Sovereign immunity applies not only when the State is a named defendant but also when its agencies, departments, and institutions are named defendants. *Jones v. Pitt County Mem. Hospital*, 104 N.C. App. 613, 410 S.E.2d 513 (1991). Waiver will not be inferred lightly, and statutes waiving immunity will be strictly construed. *Id.*

In *Harwood v. Johnson*, our Supreme Court stated that "[a] suit against defendants in their official capacities, as public officials or a public employee . . . is a suit against the State." *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443, *reh'g denied*, 326 N.C. 488, 392 S.E.2d 90 (1990). Where immunity has not been waived, through consent or statutory waiver, these officials may not be sued in their official capacities. *Id.* Conversely, where sovereign immunity does not stand as a bar to suit, such defendants may be sued in their official capacities.

The policy of the Whistleblower Act, as it pertains to this case, is to encourage State employees to "report . . . evidence of activity by a State agency or State employee constituting

. . . (4) Substantial and specific danger to the public health and safety." N.C. Gen. Stat. § 126-84 (1993). It prohibits discrimination by the "head of any State department, agency or institution or other State employee exercising supervisory authority" after an employee reports activities described in G.S. § 126-84 and allows an employee to "maintain an action . . . against the *person or agency* who committed the violation." N.C. Gen. Stat. §§ 126-85, to -86 (1993) (emphasis added). The Act goes beyond merely allowing suit, however, and provides various remedies for the injured employee, including injunctive relief, damages, attorney's fees, and, in some cases, treble damages. N.C. Gen. Stat. § 126-87 (1993).

The Whistleblower Act, in providing for specific remedies, represents a clear statutory waiver of sovereign immunity to redress violations of the nature proscribed in G.S. § 126-85. The question, then, becomes one of scope. Defendants contend that suit may be maintained under the statute solely against defendant DHR, the responsible agency, and defendant Irigaray, the responsible person. They argue that defendants Martin, Flaherty, Taylor, Stelle, and Barrett are protected by sovereign immunity because there is no showing that any of the above named defendants "retaliated" against plaintiff. Plaintiff, in fact, concedes that four defendants—Martin, Flaherty, Taylor, and Stelle—did not discriminate against her. She argues, however, that their inclusion is necessary and permissible solely to effectuate any equitable relief awarded by the courts. Contrary to plaintiff's assertions, however, her complaint reveals that, in addition to the injunctive relief mentioned on appeal, she also seeks compensatory and treble damages from *all* defendants in their official capacities.

We will first address plaintiff's claims for compensatory and treble damages. In *Hare v. Butler*, this Court upheld the dismissal of a negligence claim against Mecklenburg County, the county DSS, and DSS personnel sued in their official capacity. *Hare v. Butler*, 99 N.C. App. 693, 394 S.E.2d 231, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). While that decision was based in part on the complainant's failure to allege the purchase of liability insurance, this Court also noted that the complainant failed to allege negligence on the part of Mecklenburg County and three social workers. *Id.* Here, although plaintiff's complaint contains allegations of Whistleblower violations, plaintiff's concessions make it clear that defendants Martin, Flaherty, Taylor, and Stelle have committed no violations of the Whistleblower Act. Thus, the trial

court should have granted summary judgment on these claims. We note, however, that the trial court properly denied summary judgment as to defendant Barrett since a factual question exists as to whether he committed Whistleblower violations.

Turning to plaintiff's equitable claim, she urgently contends that defendants are subject to suit in their official capacities solely to ensure the enforcement of any prospective equitable relief granted by the courts. She further contends that this Court must use the reasoning employed in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. ---, 121 L. Ed. 2d 431 (1992), a case involving a 42 U.S.C. § 1983 claim. That case states that "official-capacity actions for prospective relief are not treated as actions against the State" and public officials are not protected by immunity. *Corum v. University of North Carolina*, 330 N.C. 761, 771, 413 S.E.2d 276, 283 (1992) (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45 (1989)). We disagree with plaintiff's contention and choose to rely on *Corum* for a different reason.

The plaintiff in *Corum* sought equitable relief against ASU, UNC, President Spangler, and Chancellor Thomas in their official capacities. While the Court held that sovereign immunity did not bar the pursuit of equitable remedies under § 1983, the *Corum* Court also held that plaintiff failed to forecast evidence of wrongdoing by ASU, UNC, President Spangler, or Chancellor Thomas, and that summary judgment should have been entered for those defendants. Though not directly on point, we believe *Corum* is instructive because, here, as in *Corum*, plaintiff presented no evidence of wrongdoing on the part of defendants Martin, Flaherty, Taylor, and Stelle. We conclude that the trial court erred in denying summary judgment as to defendants Martin, Flaherty, Taylor, and Stelle, none of whom had any part in the alleged Whistleblower violations. Plaintiff has presented sufficient evidence, however, to withstand a motion for summary judgment as to defendant Barrett.

In conclusion, the trial court's denial of summary judgment on the basis of sovereign immunity is reversed as to defendants Martin, Flaherty, Taylor, and Stelle, and affirmed as to defendants Barrett and Irigaray. Moreover, in accord with our earlier rulings on the parties' motions, the rest of this appeal is dismissed as interlocutory.

Reversed in part, affirmed in part.

Judges WYNN and MARTIN concur.

DEVEREUX PROPERTIES, INC., PLAINTIFF v. BBM&W, INC., D/B/A SOFAS BY DESIGN, JOHN V. MOORE, JOHN BLACKWELDER, G. GENE WILHELM, AND BILLY BURNETTE, DEFENDANTS

No. 9326SC414

(Filed 3 May 1994)

1. **Guaranty § 13 (NCI4th)— guarantors of lease agreement— modifications of lease—obligation of guarantors**

There was no merit to defendants' contention that their obligations as guarantors of a lease agreement should not extend to modifications of the original lease because their guaranty agreement did not cover modifications, since defendants were estopped from denying responsibility for the modifications in that they were not innocent third parties but were instead experienced businessmen who stood to benefit from the modifications.

Am Jur 2d, Guaranty §§ 26 et seq.

2. **Guaranty § 13 (NCI4th)— guarantor of lease agreement— responsibility for attorney's fees**

Defendants as guarantors of a lease agreement were responsible for attorney's fees where the guaranty agreement covered "each and every obligation of Tenant under this Lease Contract," and the lease required the tenant to pay reasonable attorney's fees in the event of a default.

Am Jur 2d, Guaranty §§ 26 et seq.

3. **Costs § 26 (NCI4th)— reasonable attorney's fees—15% of outstanding balance awarded**

The trial court erred in awarding the actual amount of attorney's fees incurred instead of awarding 15% of the outstanding balance owed on the lease since, if a lease refers

to "reasonable attorney's fees" and does not stipulate a specific percentage, N.C.G.S. § 6-21.2(2) applies and the amount of attorney's fees is 15% of the outstanding balance.

Am Jur 2d, Costs §§ 72-86.

Appeal by plaintiff and defendants from judgment entered 6 January 1993 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 February 1994.

Kennedy Covington Lobdell & Hickman, by Alice Carmichael Richey and Dana E. Handy, for plaintiff.

Helms, Cannon, Hamel & Henderson, by H. Parks Helms and Christian R. Troy, for defendants.

LEWIS, Judge.

Plaintiff sued to recover unpaid rent and costs owed by defendant BBM&W, Inc. (hereinafter "BBM&W") under a lease and guaranty agreement. The trial court entered judgment for plaintiff in the amount of $178,610.32, and also awarded plaintiff attorneys' fees of $9,983.00. The individual defendants appeal from the court's order holding them individually liable, and plaintiff appeals the amount of attorneys' fees awarded.

On 6 May 1987 Crosland-Erwin-Merrifield Associates No. XVII (hereinafter "Crosland") entered into a lease agreement with BBM&W for office space. Defendant G. Gene Wilhelm executed the lease on behalf of BBM&W, and defendant John V. Moore attested to it. On or about 6 May 1987, Wilhelm, Moore, defendant John Blackwelder, and defendant Billy Burnette executed personal guaranties for the performance of all of BBM&W's obligations under the lease. On 30 July 1987 Crosland and BBM&W executed an amendment changing the name on the lease to "BBM&W d/b/a Sofas by Design" and extending the lease term by one month. Two subsequent amendments expanded the square footage and increased the rent. Each of the amendments was executed by Wilhelm as president of BBM&W and attested to by Moore as corporate secretary. All individual defendants stipulated that they consented to each of the amendments in their capacities as corporate officers. There were no corresponding amendments to the guaranty agreement. On 29 March 1990 Crosland assigned the lease to plaintiff Devereux Properties, Inc. (hereinafter "Devereux").

BBM&W repeatedly failed to pay rent and other charges due under the lease. Devereux filed suit on 20 September 1991 to recover the unpaid rent and related charges as well as reasonable attorneys' fees in the amount of 15% of the balance owing under the lease, pursuant to N.C.G.S. § 6-21.2 (1986). On 13 October 1992 defendants stipulated to the fact that the lease obligated BBM&W to pay attorneys' fees to Devereux. Devereux properly notified defendants of their statutory right, under section 6-21.2(5), to pay the outstanding balance owing under the lease without incurring any attorneys' fees.

The individual defendants now appeal from the court's judgment holding them individually liable for sums due under the original lease and each amendment. They contend that their obligation as guarantors is limited to the amount due under the original lease and its one-month extension and does not extend to any modifications of the lease. They further argue that they are not responsible for attorneys' fees. Devereux also appeals, because the trial judge only awarded $9,983.00, the actual attorneys' fees incurred, instead of 15% of the balance due.

I.

[1] Defendants concede that they are responsible for the sums due under the original lease, but argue that their obligation as guarantors should not extend to modifications of the original lease, because their guaranty agreement did not cover modifications. The second and third lease amendments, according to defendants, constitute "major modifications" because they almost tripled the amount of space leased and rent charged. The trial court referred to these changes as modifications in its conclusions of law. The guaranty agreement, however, specifically states that defendants "agree to perform each and every obligation of Tenant under this Lease Contract or any extension or renewal thereof." According to defendants, guaranty agreements usually refer to renewals, extensions and modifications. *See Love v. Bache and Co.*, 40 N.C. App. 617, 618, 253 S.E.2d 351, 353 (1979). Defendants contend that the absence of a reference to modifications in the agreement in the case at hand, therefore, is significant. Defendants also rely on the general rule that a material alteration of a contract between a principal debtor and creditor without the consent of the guarantor discharges the guarantor of its obligation. *Kirkhart v. Saieed*, 98 N.C. App. 49, 54, 389 S.E.2d 837, 840 (1990).

According to plaintiff, defendants should be estopped from asserting either that the modifications were outside the scope of the original guaranty agreement or that they are discharged on the basis of a material alteration. As plaintiff notes, the policy behind these rules is to protect a guarantor from alterations to the underlying contract which increase the guarantor's risk over that which was assumed in the original agreement. *See U.S. Shoe Corp. v. Hackett*, 793 F.2d 161, 162-63 (7th Cir. 1986) (applying Wisconsin law). An exception to these rules holds the guarantor responsible for any changes to which he has either expressly or impliedly consented. *See Bank of Commerce v. Riverside Trails*, 367 N.E.2d 993, 997 (Ill. App. Ct. 1977) (stating that a guarantor's knowledge and express or implied consent to change is a "familiar exception" to the rule relieving a guarantor from liability by reason of change); *Regal Shoe Shops v. Kleinman*, 361 So. 2d 765 (Fla. Dist. Ct. App. 1978) (applying N.Y. law) (stating that guarantor responsible for changes made with guarantor's knowledge and through him as a corporate officer and that guarantor estopped from asserting variation to avoid obligation), *cert. denied*, 368 So. 2d 1369 (Fla. 1979); *Bollinger v. Rheem Mfg. Co.*, 381 F.2d 182 (10th Cir. 1967); *Hackett*, 793 F.2d at 163. Consent to an increase in liability may be implied from a guarantor's actions as a corporate officer. *See Regal*, 361 So. 2d at 766; *Bollinger*, 381 F.2d at 18 (holding that guarantor estopped from asserting modification where guarantor was bookkeeper and secretary-treasurer and had either brought about the modification or had consented to it).

Defendants argue that estoppel should not apply in this case, because their actions in their capacities as corporate officers should not substitute for actions in their capacities as guarantors. Defendants contend that their actions do not fall within any exceptions to the requirement of consent of the guarantors to lease modifications: they have not benefitted from the modifications, *see First Union National Bank of N.C. v. King*, 63 N.C. App. 757, 759-60, 306 S.E.2d 508, 510 (1983) (holding that consent to modification not necessary if the modification would serve to benefit the guarantor), nor did they contemplate such modifications when they entered into the guaranty agreement. *See Love*, 40 N.C. App. at 619, 253 S.E.2d at 353 (holding that guarantor bound by extensions which were within the intent of the agreement)

Although there is no North Carolina law directly on point, there is an analogous case helpful to our resolution of this issue.

In *Caldwell County v. George*, 176 N.C. 602, 97 S.E. 507 (1918), the Court held that the defendant, who had personally assured and guaranteed certain checks, could not complain about a delay in the presentation of the checks, because the delay was at the "special instance and request of defendant." *Id.* at 610, 97 S.E. at 510. The Court further held that the defendant would not be relieved from liability due to changes or modifications of the original contract, because "the action of the plaintiff was with [the defendant's] knowledge and approval and at his instance." *Id.*

Based on the reasoning of *Caldwell* and the decisions from several other jurisdictions, we hold that defendants are estopped from denying responsibility for the modifications. Defendants were not innocent third parties; they were experienced businessmen who stood to benefit from the modifications. *See Bank of Commerce*, 367 N.E.2d at 997-98. "Having authorized the [modifications] and received [their] benefits, they cannot now be regarded as innocent third parties such as the law of guaranty is designed to protect." *Id.* at 999.

II.

[2] Defendants also contend that they are not liable for attorneys' fees, because the guaranty agreement, unlike the lease, did not include a provision regarding attorneys' fees. *See EAC Credit Corp. v. Wilson*, 281 N.C. 140, 187 S.E.2d 752 (1972) (holding that guarantors are not liable for attorneys' fees absent specific language in guaranty regarding attorneys' fees). We find the recent case of *RC Associates v. Regency Ventures, Inc.*, 111 N.C.App. 367, 432 S.E.2d 394 (1993) to be directly on point. In that case the Court held the guarantors liable for attorneys' fees where the guaranty agreement provided that the guarantors "unconditionally guarantee[d] the full and punctual payment of the rent and other charges provided for in [the] lease," and the lease provided for collection of attorneys' fees if necessary to collect rent. *Id.* at 373, 432 S.E.2d at 398.

Similarly, in the case at hand, the guaranty agreement covered "each and every obligation of Tenant under this Lease Contract." The lease required the tenant to pay reasonable attorneys' fees in the event of a default. Defendants, therefore, are responsible for attorneys' fees.

III.

[3] Finally, plaintiff argues the court erred in awarding the actual amount of attorneys' fees incurred instead of awarding 15% of the outstanding balance owed on the lease. According to N.C.G.S. § 6-21.2(2), if a

> note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

Plaintiff argues the statute applies in the present case, because the lease provides for "reasonable attorney's fees" without specifying a percentage.

RC Associates is dispositive of this issue as well. There, the Court held that if a lease refers to "reasonable attorney's fees" and does not stipulate a specific percentage, section 6-21.2(2) applies and the amount of attorneys' fees is 15% of the outstanding balance. 111 N.C. App. at 372, 432 S.E.2d at 397.

We hold the trial court should have awarded 15% of the outstanding balance due as attorneys' fees and accordingly remand for entry of judgment not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges JOHNSON and EAGLES concur.

SHEILA LEDWELL, PETITIONER/APPELLEE v. N.C. DEPARTMENT OF HUMAN RESOURCES, RESPONDENT/APPELLANT

No. 9318SC449

(Filed 3 May 1994)

Social Services and Public Welfare § 20 (NCI4th)— food stamps— definition of household—inclusion of child—parental control provision—definition in conflict with statute

The definition of "household" appearing in 7 CFR 273.1(a)(2)(i)(B) and North Carolina Food Stamp Certification

Manual, Section 1600, which requires inclusion of any child under 18 who is under the parental control of a household member, fatally conflicts with the definition of "household" set forth by the United States Congress in 7 U.S.C. 2012(i). Therefore, even though petitioner and her two fifteen-year-old nephews lived in the same household and petitioner exercised parental control over her nephews, petitioner and her nephews constituted separate households for food stamp purposes where petitioner purchased and prepared her food separately from that of her nephews.

Am Jur 2d, Welfare Laws §§ 26 et seq.

Appeal by respondent from order filed 22 February 1993 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 8 February 1994.

On 22 February 1993, the trial court filed the following order which is the subject of this appeal:

THIS CAUSE being heard before the undersigned Judge Presiding on February 2, 1993, during the February 1, 1993 Civil Non-Jury Session of the Superior Court for Guilford County, and the Court upon reviewing the record and listening to oral argument by counsel, finds the following as facts:

1. Sheila Ledwell lived with her two 15-year old twin nephews. She purchased and prepared her food separately from her nephews.

2. Ms. Ledwell asked her food stamp caseworker to certify her as a one-person household and her two nephews as a two-person household.

3. However, the Guilford County Department of Social Services (DSS) refused to certify the family other than as a three-person household. DSS reasoned that separate household status was not permissible because the nephews were under Ms. Ledwell's "parental control."

4. DSS based its decision on the North Carolina Food Stamp Manual, Section 6100, which states that "[a] child under 18 years of age when he is under the parental control of a household member" must be included in the same household as the adult custodian, regardless of the family's eating ar-

rangements." This Manual section followed the federal regulation's "parental control" provision at 7 C.F.R. 273.1(a)(2)(i).

5. Ms. Ledwell appealed the DSS decision, and on September 21, 1992, a state hearing officer issued a decision affirming the County's denial of separate household status to Ms. Ledwell and her nephews. On October 1, 1993, this became the final decision of the N.C. Department of Human Resources.

6. 7 U.S.C. 2012(i) provides in part that the term food stamp "household" means "a group of individuals who live together and customarily purchase food and prepare meals together for home consumption. . ."

7. While 7 U.S.C. § 2012(i) contains additional language requiring parents and siblings sometimes to be in the same "household" even if they eat separately, the statute has no "parental control" provision.

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

The North Carolina Food Stamp Manual Section 6100, and 7 C.F.R. 273.1(a)(2)(i) impermissibly conflict with the "household" definition in 7 U.S.C. § 2012(i), and thereby are invalid.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. The September 21, 1992, decision of the state hearing officer, is hereby reversed.

2. The Guilford County DSS officer review the food stamp applications of Sheila Ledwell and her nephews, and if eligible, award food stamp benefits to her and her nephews as separate households, commencing on July 2, 1991, and for as long as she and her nephews lived together and were otherwise eligible.

3. The "parental control" provision in 7 C.F.R. 273.1(a)(2)(i), and in North Carolina Food Stamp Manual Section 6100, are declared invalid as conflicting with the definition of a food stamp "household" in 7 U.S.C. § 2012(i).

Respondent appeals.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Marilyn A. Bair, for respondent-appellant.

EAGLES, Judge.

In its sole assignment of error, respondent argues that "[t]he trial court erred in reversing the decision of the state hearing officer and in declaring that the 'parental control' provision in 7 C.F.R. 273.1(a)(2)(i) and in the North Carolina Food Stamp Manual, Section 6100, conflicts with the definition of a food stamp 'household' in 7 U.S.C. 2012(i)." We disagree.

The federal Food Stamp Act provides that:

> "Household" means (1) an individual who lives alone or who, while living with others, customarily purchases food and prepares meals for home consumption separate and apart from the others, (2) a group of individuals who live together and customarily purchase food and prepare meals together for home consumption, or (3) a parent of minor children and that parent's children (notwithstanding the presence in the home of any other persons, including parents and siblings of the parent with minor children) who customarily purchase food and prepare meals for home consumption separate from other persons, except that the certification of a household as a separate household under this clause shall be reexamined no less frequently than once every 6 months; except that (other than as provided in clause (3)) *parents and children, or siblings, who live together shall be treated as a group of individuals who customarily purchase and prepare meals together for home consumption even if they do not do so*, unless one of the parents, or siblings, is an elderly or disabled member.

7 U.S.C. 2012(i) (emphasis added). The federal regulation interpreting this statute, promulgated by the Secretary of Agriculture pursuant to 7 U.S.C. 2013(c), provides as follows:

> (a) *Household definition-* (1) *General definition.* A household is composed of one of the following individuals or groups of individuals, provided they are not residents of an institution (except as otherwise specified in paragraph (e) of this section), are not residents of a commercial boarding house, or are not

boarders (except as otherwise specified in paragraph (c) of this section):

(i) An individual living alone;

(ii) An individual living with others, but customarily purchasing food and preparing meals for home consumption separate and apart from others;

(iii) A group of individuals who live together and customarily purchase food and prepare meals together for home consumption.

(2) *Special definition*: (i) The following individuals living with others or groups of individuals living together *shall* be considered as customarily purchasing food and preparing meals together, even if they do not do so:

. . . .

(B) Children under 18 years of age under the parental control of an adult household member;

. . . .

7 C.F.R. 273.1 (emphasis in original). The North Carolina Food Stamp Certification Manual, Section 6100, mirrors the federal regulation in that it provides:

III. PEOPLE WHO MUST BE INCLUDED IN THE SAME HOUSEHOLD

. . . .

B. A child under 18 years of age when he is under the parental control of a household member. (The household member does not have to be a parent. He can be any member, i.e., uncle, aunt.)

Respondent argues that the federal and state regulations regarding the definition of "household," appearing in 7 CFR 273.1(a)(2)(i)(B) and N.C. Food Stamp Certification Manual, Section 6100, *supra*, do not fatally conflict with the definition of "household" set forth by the U.S. Congress in 7 U.S.C. 2012(i) and accordingly represent a permissible construction of Congress' intent. We disagree.

In another decision interpreting the Food Stamp Act, *Anderson v. N.C. Dept. of Human Resources*, 109 N.C. App. 680, 682-83, 428 S.E.2d 267, 269 (1993), this Court stated:

In reviewing the validity of an agency's regulation, a court "must first determine if the regulation is consistent with the

> language of the statute." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 100 L.Ed.2d 313, 324 (1988). Both the courts and the agencies "must give effect to the unambiguously expressed intent of Congress." *Id.* (*quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 81 L.Ed.2d 694, 703, *reh'g denied*, 468 U.S. 1227, 82 L.Ed.2d 921 (1984)). Therefore, if the language of the statute is clear and unambiguous, and the regulation is contrary to that language, "that is the end of the matter" and the regulation must be declared invalid. *See K Mart*, 486 U.S. at 291-92, 100 L.Ed.2d at 324; *Chevron*, 467 U.S. at 843, 81 L.Ed.2d at 703. While traditionally the courts pay deference to an agency regulation, such deference is inappropriate where the regulation alters the clearly expressed intent of Congress. *K Mart*, 486 U.S. at 291, 100 L.Ed.2d at 324. Only where the language of the statute is unclear, ambiguous, or fails to answer the specific question at issue should deference be paid to a contested agency interpretation. *See Chevron*, 467 U.S. at 842-43, 81 L.Ed.2d at 703.

See also Wilson v. Department of Health and Rehabilitative Services, 561 So.2d 660, 661 (Fla. Dist. Ct. App. 1990) ("state policies must accord with federal eligibility standards, *see Levy v. Toia*, 434 F.Supp. 1081 (S.D.N.Y. 1977), and the federal regulations are valid insofar as they are consistent with the federal governing statute. *See Knowles v. Butz*, 358 F.Supp. 228 (N.D.Ca. 1973)"). Accordingly, our inquiry proceeds by determining whether the regulations are consistent with the language of 7 U.S.C. 2012(i). We conclude that the regulations are not consistent with the statute.

Regarding a household where minor children reside, the statute expressly refers to "a parent of minor children and that parent's children" as a single household unit when a certain condition is met. 7 U.S.C. 2012(i)(3). Contrasted against this specificity, there are no provisions authorizing the grouping of other relatives into a single household based upon one relative's (here the aunt's) exercise of "parental control" or acting as a parent among the other relatives (here the nephews). We find that the federal statute is clear and unambiguous and that the regulations impermissibly alter the clearly expressed intent of Congress. The statutory definition of "household" has undergone several changes since the original passage of the Food Stamp Act in 1964. *See Foster v. Celani*, 683 F. Supp. 84, 87-89 (D.Vt. 1987), *aff'd*, 849 F.2d 91 (2d Cir. 1988).

If Congress had intended to broaden the scope of the definition of "household" to extend to a relative having responsibility for exercising parental control or acting as a substitute for a minor child's parents, Congress could have written 7 U.S.C. 2012(i) to include appropriate language more broad than the term "parent" to connote such a meaning. *Cf. Dion v. Com'r, Maine Dept. of Human Services*, 933 F.2d 13, 16 (1st Cir. 1991) ("Despite the Secretary's assertion [in 7 C.F.R. 273.9(c)(7)] that 'child' in [7 U.S.C.] § 2014 should be read to embody the concept of parental control, nowhere in the statute has Congress explicitly used the concept of parental control to define the status of children under the Act"). In the absence of more broad terminology in the statute, we discern an impermissible conflict between the regulations and the statute. Accordingly, the regulations are invalid. *K Mart*, 486 U.S. at 291-92, 100 L.Ed.2d at 324; *Chevron*, 467 U.S. at 843, 81 L.Ed.2d at 703. Similarly, we conclude that the Secretary's rule-making authority, encompassing the power to "issue such regulations *consistent with this* chapter as the Secretary deems necessary or appropriate for the effective and efficient administration of the food stamp program," 7 U.S.C. 2013(c) (emphasis added), is inapposite here because the regulations are not consistent with the express provisions of 7 U.S.C. 2012(i).

For the reasons stated, the trial court's 22 February 1993 order is affirmed and the cause is remanded for further proceedings.

Affirmed and remanded.

Judges JOHNSON and LEWIS concur.

ALBERT ISAAC DODD, PLAINTIFF v. W. FRANK STEELE, M.D., W. F. STEELE, M.D., P.A., AND VALDESE GENERAL HOSPITAL, INC., DEFENDANTS

No. 9325SC497

(Filed 3 May 1994)

1. Appeal and Error § 176 (NCI4th)— motion to dismiss appeal and for sanctions—motion properly directed to trial court

Because defendant's motion to dismiss the appeal and for sanctions was filed over five months before the appeal was

docketed in the Court of Appeals, defendant's motion was properly directed to the trial court; furthermore, neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions.

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

2. **Pleadings § 63 (NCI4th)— appeal after voluntary dismissal—appeal not warranted by law—sanctions proper**

There was no merit to plaintiff's contention that the trial court erred in imposing Rule 11 sanctions because his appeal after filing a voluntary dismissal was warranted by existing law or a good faith extension of existing law, since, under North Carolina law, it is clear that a voluntary dismissal terminates a case and precludes the possibility of an appeal.

Am Jur 2d, Pleading § 339.

3. **Pleadings § 64 (NCI4th)— sanctions—award of attorney's fees proper**

The trial court did not err in awarding defendant attorney's fees where the court found that defendant incurred the fees as a necessary consequence of plaintiff's notice of appeal filed after plaintiff had taken a voluntary dismissal, that the rate was reasonable, and that defendant would not have incurred any additional attorney's fees after the voluntary dismissal if plaintiff had not appealed.

Am Jur 2d, Pleading § 339.

Appeal by plaintiff from order filed 15 February 1993 by Judge C. Walter Allen in Burke County Superior Court. Heard in the Court of Appeals 10 February 1994.

Law Office of Daniel A. Kuehnert, by Daniel A. Kuehnert, and Stephen T. Daniel & Assoc., P.A., by Stephen T. Daniel, for plaintiff-appellant.

Hendrick, Zotian, Bennett & Blancato, by Richard V. Bennett and Sherry R. Dawson, for defendant-appellee Valdese General Hospital, Inc.

LEWIS, Judge.

In January 1991 plaintiff filed this malpractice action against defendant radiologists and Valdese General Hospital (hereinafter

"Valdese"). In October 1992 the trial court denied plaintiff's motions to compel discovery of certain documents and to continue the case from the 2 November trial date. On 2 November, plaintiff took a voluntary dismissal without prejudice. On 11 November plaintiff filed a notice of appeal from several rulings of the trial court: the denial of plaintiff's motion for a continuance, an order granting summary judgment for several of the defendants, a protective order for Valdese, and an order denying plaintiff's motion to compel discovery. On 2 December 1992 Valdese moved to dismiss plaintiff's appeal and moved for Rule 11 sanctions on the basis that plaintiff acted improperly in appealing after taking a voluntary dismissal. Plaintiff withdrew his appeal on 11 January 1993, and shortly thereafter settled with all remaining defendants.

On 25 January Valdese submitted an affidavit listing $931.00 in attorney's fees. On 15 February the trial judge imposed Rule 11 sanctions and ordered plaintiff's counsel to pay $931.00 to Valdese. The only issue before this Court is the propriety of the Rule 11 sanctions imposed upon plaintiff's counsel.

I.

[1] Plaintiff's counsel (for the purposes of this opinion, plaintiff's counsel will hereinafter be referred to as "plaintiff") first argues that, because he had already filed his appeal in this Court, the trial court had no authority to hear Valdese's motion to dismiss the appeal and impose sanctions. We disagree. According to Rule 25 of the North Carolina Rules of Appellate Procedure, motions to dismiss appeals are made to the court from which the appeal was taken until the appeal has been docketed in the appellate court. N.C.R. App. P. 25 (1994). Plaintiff's appeal was docketed in this Court on 20 May 1993. Because Valdese's motion to dismiss was filed over five months earlier, on 2 December 1992, it was properly directed to the trial court.

Furthermore, neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions. *Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992) ("Dismissal does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated"); *Overcash v. Blue Cross & Blue Shield of N.C.*, 94 N.C. App. 602, 617, 381 S.E.2d 330, 340 (1989) (filing a notice of appeal does not deprive the trial court of jurisdiction to hear Rule 11 motions for sanctions).

Valdese's motion for sanctions, therefore, was also properly before the trial court.

We note that at the time the trial court heard Valdese's motion, plaintiff had withdrawn his appeal to this Court. Although this withdrawal mooted Valdese's motion to dismiss, it did not affect its motion for sanctions.

II.

[2] Plaintiff next contends that the trial court erred in imposing Rule 11 sanctions, arguing that his appeal after filing a voluntary dismissal was warranted by existing law or a good faith extension of existing law. This Court exercises de novo review of the question of whether to impose Rule 11 sanctions. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). If we determine that the sanctions were warranted, we must review the actual sanctions imposed under an abuse of discretion standard. *Id.*

There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. *See* N.C.G.S. § 1A-1, Rule 11(a) (1990); *Bryson*, 330 N.C. at 655, 412 S.E.2d at 332. A violation of any one of these requirements mandates the imposition of sanctions under Rule 11. *Id.* Because we find plaintiff violated the legal sufficiency requirement, we find it unnecessary to address the others. To satisfy the legal sufficiency requirement, the disputed action must be warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. Rule 11(a); *Bryson*, 330 N.C. at 655, 412 S.E.2d at 332.

Plaintiff presents several arguments regarding the legal sufficiency of his appeal. First, plaintiff points out that his appeal to this Court concerned various items, and argues that the voluntary dismissal of some of his claims did not affect the appealability of a summary judgment issue involving other defendants not included in the voluntary dismissal. As Valdese points out, however, it did not challenge the validity of the appeal as to the summary judgment order. That portion of plaintiff's appeal was not a basis for the sanctions imposed, and is therefore irrelevant to the determination of the issue at hand. Three of the orders appealed from related to Valdese. Plaintiff's appeal as to these matters was improper, regardless of any other matter or defendant involved in the case.

Second, plaintiff argues that prior practice in North Carolina supports his position. Before adoption of the Rules of Civil Procedure, North Carolina practice permitted appeals by parties who had taken voluntary nonsuits. *See Rochlin v. P.S. West Constr. Co.*, 234 N.C. 443, 67 S.E.2d 464 (1951). If a trial court's ruling was vital to its recovery, a party could take a nonsuit and appeal that ruling. *See Nowell v. Basnight*, 185 N.C. 142, 148, 116 S.E. 87, 90 (1923).

Third, plaintiff contends that an immediate appeal is in the interest of judicial economy, because without an appeal plaintiff would be forced to refile the action and proceed through discovery to a second trial. According to plaintiff, the main difference between the former voluntary nonsuit and a Rule 41 voluntary dismissal is that a voluntary nonsuit could be used repeatedly without limit, while Rule 41 limits a party to one voluntary dismissal and refiling. A second voluntary dismissal is with prejudice. Furthermore, plaintiff points out that an adverse party may appeal when a plaintiff takes a voluntary dismissal. *See West v. G.D. Reddick, Inc.*, 38 N.C. App. 370, 248 S.E.2d 112 (1978).

Fourth, plaintiff finds support for his arguments from other jurisdictions. According to plaintiff, several states which have a similar statute, such as Minnesota, Iowa, and Georgia, permit appeals after voluntary dismissals. *See Gillis v. Goodgame*, 404 S.E.2d 815 (Ga. App. 1991), *rev'd on other grounds*, 414 S.E.2d 197 (Ga. 1992), *and vacated in part*, 418 S.E.2d 470 (Ga. App. 1992); *Beatty v. Winona Housing and Redevelopment Auth.*, 151 N.W.2d 584 (Minn. 1967); *Decorah State Bank v. Zidlicky*, 426 N.W.2d 388 (Iowa 1988). These cases are either not on point or are distinguishable from the case at hand, and provide no support for plaintiff's contentions.

Under North Carolina law, it is clear that a voluntary dismissal terminates a case and precludes the possibility of an appeal. This Court previously has addressed the issue of attempting to appeal after the entry of a voluntary dismissal. In *Lloyd v. Carnation Co.*, 61 N.C. App. 381, 301 S.E.2d 414 (1983), the plaintiff voluntarily dismissed his claims against the defendant and then attempted to appeal an earlier ruling of the trial court. This Court held that by taking a voluntary dismissal without prejudice, the plaintiff had destroyed his right to appeal the earlier adverse ruling of the trial court. *Id.* at 383-84, 301 S.E.2d at 416. The Court stated,

"[t]here was nothing left on which to appeal after the voluntary dismissal." *Id.* at 384, 301 S.E.2d at 416. *See also Ward v. Taylor*, 68 N.C. App. 74, 314 S.E.2d 814 (voluntary dismissal terminates adversary proceedings in a case), *disc. review denied*, 311 N.C. 769, 321 S.E.2d 157 (1984), and *Lowe v. Bryant*, 55 N.C. App. 608, 286 S.E.2d 652 (1982). Plaintiff's arguments clearly are not warranted by existing law, and we find that they do not qualify as good faith arguments for the extension, reversal or modification of existing law.

III.

[3] Finally, plaintiff contends the court erred in awarding attorney's fees of $931.00. Rule 11 specifically refers to payment of "reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." § 1A-1, Rule 11(a). Plaintiff argues the fees were incurred not because of plaintiff's notice of appeal, but in relation to defendant's Rule 11 motion. According to plaintiff, under North Carolina law it is improper to award attorney's fees if they were incurred for the sole purpose of pursuing a Rule 11 motion. *See Overcash v. Blue Cross and Blue Shield of N.C.*, 94 N.C. App. 602, 381 S.E.2d 330 (1989). Plaintiff contends Valdese could only have incurred $30.00 in attorney's fees as a result of his notice of appeal, noting that no response was required until Valdese was served with a proposed record on appeal. Valdese would be entitled to fees incurred while reviewing the record, however.

Plaintiff's citation to *Overcash* is erroneous. The *Overcash* Court did not state that it would be improper to award attorney's fees under Rule 11 for expenses incurred in pursuing the Rule 11 matter itself. In that case, the Court determined that the defendant's request for attorney's fees under Rule 11 and ERISA was improper, because the trial court had previously denied the defendant's request for attorney's fees under ERISA. The defendant had already appealed from the denial of the ERISA claim for attorney's fees. The Court held that the defendant's post-trial motion for fees "under ERISA and Rule 11" could not be heard, because the substantive basis of the motion had been adjudicated, and the appeal therefrom divested the trial court of jurisdiction over the post-trial motion. *Id.* at 617-18, 381 S.E.2d at 340.

We find no abuse of discretion in the court's imposition of sanctions here. The court found as a fact that Valdese incurred $931.00 as a necessary consequence of plaintiff's notice of appeal,

and that the rate was reasonable. As a result of plaintiff's appeal, Valdese filed a motion to dismiss the appeal and for sanctions. Valdese would not have incurred any additional attorney's fees after the voluntary dismissal if plaintiff had not appealed. Valdese had to review the notice of appeal, research the availability of appeal after a voluntary dismissal, draft the motion to dismiss the appeal and for sanctions, and review plaintiff's notice of withdrawal of the appeal. We conclude that the court did not abuse its discretion in imposing the particular sanctions at issue in this case.

For the above reasons, we hereby affirm the decision of the trial court in all respects.

Affirmed.

Judges JOHNSON and EAGLES concur.

IN THE MATTER OF CAROLYN LOUISE EFIRD; RUBY LEE EFIRD ALMOND AND MARY ELIZABETH EFIRD TUCKER, TESTAMENTARY GUARDIANS

No. 9320SC380

(Filed 3 May 1994)

Incompetent Persons § 12 (NCI4th)— adult daughter not declared incompetent—appointment of guardian in will ineffective

A testatrix may not appoint guardians for an adult daughter through the language of her will when the daughter has not been declared incompetent pursuant to the provisions of N.C.G.S. Ch. 35A.

Am Jur 2d, Incompetent Persons §§ 8-25.

(RUBY LEE EFIRD ALMOND AND MARY ELIZABETH EFIRD TUCKER—APPELLANTS)

Appeal by appellants Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker from order entered 19 November 1992 by Judge James M. Webb in Stanly County Superior Court. Heard in the Court of Appeals 2 February 1994.

This action arises out of an order from the Clerk of Superior Court, Stanly County, in which he appointed Mable Juanita Efird

Carriker as a successor "Testamentary Guardian" of Carolyn Louise Efird, and revoked the letters of testamentary guardianship of Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker, finding that "[i]t is not in the best interest of Carolyn Louise Efird that the Co-Guardianship of Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker continue."

Mrs. Almond and Mrs. Tucker were appointed "testamentary guardians" to their sister, Carolyn Louise Efird, pursuant to the last will and testament of their mother, Daisy Lee Hinson Efird, who died in Stanly County, North Carolina, on 29 February 1988. From 1988 through 1992, the sisters acted as guardians in behalf of Carolyn. All required accountings were submitted to the clerk, and no disputes arose among any of the parties until 1992. During 1992, a controversy apparently arose between the co-guardians.

As a result of the controversy the clerk, on his own motion, issued a notice to the guardians and their brothers and sisters stating that "[t]he purpose of this hearing is to review the Annual Account that was filed by the Guardians on July 30, 1992, and to determine if this guardianship should be allowed to continue with the present fiduciaries." A hearing on the matter was held on 20 August 1992. Upon taking of all the evidence, the clerk found:

> 1. That the Co-Testamentary Guardians cannot agree on the care and custody of Carolyn Louise Efird and they cannot work together in the best interest of Carolyn Louise Efird.
>
> 2. That Ruby Lee Efird Almond has refused on many occasions to allow Carolyn Louise Efird to visit in the home of Mary Elizabeth Efird Tucker and has refused to allow Carolyn Louise Efird to stay for any extended period of time in the home of Mary Elizabeth Efird Tucker.
>
> 3. That Mary Elizabeth Efird Tucker has complained and continues to complain to the Clerk of Superior Court that her sister and co-guardian, Ruby Lee Efird Almond will not allow Carolyn Louise Efird to travel to Oakboro, North Carolina to stay overnight or to live part-time in the residence of Mary Elizabeth Efird Tucker.

Based on these facts, the clerk revoked the sisters' guardianship of Carolyn Louise Efird. This order was appealed to the Superior Court by Ruby Lee Efird Almond. The superior court judge reviewed the findings and conclusions of the clerk's order, found

that those facts were supported by competent evidence and affirmed the order of the clerk. No trial on the issue of incompetency has ever been held. The original testamentary guardians appeal the order of the clerk of the superior court and its subsequent affirmation by the trial judge. Those orders have been stayed pending the outcome of this appeal.

Eugene C. Hicks, III, for appellants Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker.

No brief filed for appellee.

ORR, Judge.

The fundamental issue before this Court is whether a testatrix may appoint guardians for an adult daughter through the language of her will when the daughter has not been declared incompetent pursuant to the provisions of N.C. Gen. Stat. § 35A. The appellants, the "testamentary guardians" named in the will as guardians of their disabled sister, argue that the Clerk of the Superior Court was without authority to appoint them as guardians under their mother's last will and testament, and that he was accordingly without power to revoke their guardianship pursuant to the provisions of N.C.G.S. § 35A-1290(c)(8) and appoint a fourth sister as substitute guardian to Carolyn Louise Efird. We hold that the terms of a will may not create a guardianship for an adult heir who has not been declared incompetent through the provisions of Chapter 35A and therefore vacate all orders of the lower court and remand for the purposes set forth below.

In the instant case, the mother of all of these parties, Daisy Lee Hinson Efird, included the following provision in her will:

ITEM FOUR

> I hereby will, devise and bequeath to my beloved daughter, Carolyn Louise Efird, . . . a lifetime interest in and to the real property hereinafter described and referred to as the "homeplace." I further direct that for so long as my said daughter shall continue to reside at the homeplace, the household and kitchen furnishings situated therein at the time of my death, . . . shall remain at said premies [sic] for the use and enjoyment of my said daughter. . . .
>
> I hereby will and devise the homeplace, subject to the life estate conveyed herein, to my daughters, Ruby Lee Efird

> Almond and Mary Elizabeth Efird Tucker, subject to the condition precedent that they care and provide for the said Carolyn Louise Efird, for so long as she may live. I further direct that Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker serve as the guardians of the person and property of Carolyn Louise Efird, for so long as she may live. . . . In the event that Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker should predecease Carolyn Louise Efird, or otherwise become unable to care and provide for the said Carolyn Louise Efird, . . . I direct that my daughter, Mable Juanita Efird Carriker, shall care and provide for my said daughter, for so long as she might live. . . .

Mrs. Daisy Efird died on 29 February 1988. Subsequent to her death, an application for letters of testamentary guardianship was filed with the clerk by Mrs. Almond and Mrs. Tucker on 8 June 1988. On the same date, the clerk issued an order finding that the above language created a guardianship and further finding that "said Carolyn Louise Efird is incompetent of want of understanding to manage her own affairs . . . ." He then ordered letters of testamentary guardianship issued to the sisters.

It is commonly stated that "the intention of the testator shall govern 'unless it violates some rule of law, or is contrary to public policy.' " N. Wiggins and R. Braun, *Wills and Administration of Estates in North Carolina*, § 133 (3d Ed. 1993). It is apparent that Mrs. Efird intended that Carolyn's sisters, appellants here, take care of Carolyn and her property for the rest of her life. While there is no evidence in the record, the appellants' brief indicates that Carolyn Efird has Down's Syndrome.

Under certain circumstances in North Carolina, a guardian may be appointed to handle the affairs of an adult if that adult is found to be incapable of doing so on his or her own. However, Chapter 35A "establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child." N.C.G.S. § 35A-1102 (1987). In such cases, "[t]he clerk in each county shall have original jurisdiction over proceedings under this Subchapter." N.C.G.S. § 35A-1103 (1987). Upon petition for the adjudication of incompetence, the respondent is entitled to his own counsel or, alternatively, an attorney as guardian ad litem shall appointed by the clerk. Further, due process requirements must be met pursuant to Rule 4 of the Rules of Civil Procedure, and the respondent has a right to a jury trial.

For purposes of the case at bar, the petitioners would be required to prove that their sister was "an adult . . . who lacks sufficient capacity to manage [her] own affairs or to make or communicate important decisions concerning [her] person, family, or property whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C.G.S. § 35A-1101(7) (1987). "If the respondent is adjudicated incompetent, a guardian or guardians shall be appointed in the manner provided for in Subchapter II of this Chapter." N.C.G.S. § 35A-1120 (1987). Incompentency must be proven by clear, cogent, and convincing evidence. N.C.G.S. § 35A-1112(d) (1987). While it is true that pursuant to N.C.G.S. § 35A-1225 (1987), a "parent may by last will and testament recommend a guardian for any of his or her minor children, . . ." a last will and testament cannot operate to appoint a guardian for an adult child regardless of the disability. The superior court judge reviewed only the revocation of the testamentary guardianship in this matter. While an "[a]ppeal from an order adjudicating incompetence shall be to the superior court for hearing *de novo* and thence to the Court of Appeals," N.C.G.S. § 35A-1115 (1987), "[i]n the appointment and removal of guardians, the appellate jurisdiction of the Superior Court is derivative and appeals present for review only errors of law committed by the clerk." *In re Simmons*, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966). The judge's order indicates that he made no finding as to competency, but rather reviewed "a hearing pursuant to N.C.G.S. 35A-1290 to determine if the testamentary guardians, Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker should be removed from their positions as said guardians of Carolyn Louise Efird." We find that as a matter of law, the clerk failed to proceed under Chapter 35A in adjudicating the incompetency of Carolyn Louise Efird, and that therefore the trial court, in its appellate review of the revocation of guardianship, did not address this error.

It may well be that the sisters of Carolyn Louise Efird feel that it is necessary or appropriate that Carolyn have a guardian to administer her life estate or manage any of her other affairs. If such is the case, they must proceed under Chapter 35A. We therefore vacate the order of the superior court and the previous orders of the clerk of court based on the erroneous determination and remand to the superior court for a hearing *de novo* on the issue of incompetency and the appointment of guardians, and if

necessary, on the interpretation of the will. All orders surrounding the incompetence of Carolyn Louise Efird are hereby vacated, and we remand this matter for a hearing consistent with the above opinion.

Vacated and remanded.

Judges COZORT and GREENE concur.

DONALD LEE DEAL, JR., PLAINTIFF v. NORTH CAROLINA STATE UNIVERSITY, DEFENDANT

No. 9310IC534

(Filed 3 May 1994)

Estoppel § 20 (NCI4th); Principal and Agent § 50 (NCI4th)— measles vaccination administered by County Health Department—clinic set up on university campus—no reliance on university for health care—no agency by estoppel

The Industrial Commission properly declined to apply the doctrine of apparent agency, or agency by estoppel, in this action where plaintiff, a student at NCSU, sought to recover for injuries he sustained after being administered a measles vaccine by a temporary nurse at a clinic set up on campus by the Wake County Health Department since it is essential that the person asserting the estoppel shows that he or she acted in reliance on the conduct of the person against whom estoppel is asserted, and in this case all indications were that plaintiff received his vaccination from the nurse because Wake County Health Services chose to set up a clinic at NCSU, not because NCSU represented that the nurse who administered the shot was its agent or because plaintiff relied on NCSU for medical expertise.

Am Jur 2d, Agency §§ 359-371; Estoppel and Waiver §§ 26-113.

Appeal by plaintiff from decision and order of the North Carolina Industrial Commission filed 11 January 1993. Heard in the Court of Appeals 3 March 1994.

In January 1988, a health emergency was declared on the North Carolina State University (NCSU) campus due to an outbreak of measles. Wake County Public Health Services ordered NCSU to determine which students were not immunized against measles and to either (1) exclude those students from classes and campus or (2) to see that those students receive vaccinations and produce proof of vaccination. The Wake County Health Department implemented a plan to vaccinate students with vaccine provided by the State Health Division. NCSU was expected to assist by setting up clinics to administer vaccinations. The clinics were organized by a nurse from the Wake County Health Department. They were staffed by employees from Wake County Health Department and NCSU and by temporary nurses provided by local temporary agencies.

NCSU mailed notices to all students who did not have proof of vaccination on file at NCSU. Plaintiff received one of the notices and went to the campus infirmary for his vaccination. He was directed by an infirmary staff member to a clinic. Upon arriving, plaintiff received a written information sheet which contained a warning not to receive the vaccine if he was suffering from an illness more serious than a cold. Plaintiff told one of the temporary nurses that he had been ill with the flu for the previous five days, but she nonetheless administered the vaccination. After his vaccination, plaintiff was directed to stand in a line to receive a verification of vaccination, and while in this line he fainted and fell, breaking his leg.

Plaintiff initiated this action against NCSU under the Tort Claims Act, alleging that the temporary nurse (the nurse) was NCSU's agent and that her negligence in administering the inoculation was imputed to NCSU. NCSU moved for summary judgment on the ground that the nurse was not an agent or employee, and therefore, plaintiff had no claim against NCSU. The Industrial Commission granted summary judgment on this ground and entered an order dismissing plaintiff's claim. From this order plaintiff appeals.

William E. Brewer for plaintiff appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Robin Michael, for defendant appellee.

ARNOLD, Chief Judge.

Plaintiff concedes that the nurse was not NCSU's actual agent or employee, but he argues that NCSU is liable for her negligence under the doctrine of apparent agency. Apparent agency, also known as agency by estoppel, is a form of equitable estoppel, *see Fike v. Board of Trustees, Teachers' and State Employees' Retirement System*, 53 N.C. App. 78, 279 S.E.2d 910, *disc. review denied*, 304 N.C. 194, 285 S.E.2d 98 (1981), and, that being the case, we are guided by the principles and policies governing equitable estoppel in determining if the doctrine of apparent agency must be applied in this case. The Industrial Commission properly declined to apply the doctrine in this case.

Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment. *Long v. Trantham*, 226 N.C. 510, 513, 39 S.E.2d 384, 387 (1946). This doctrine rests on principles of equity and is designed to aid law in the administration of justice when without its aid injustice would result. It is based on the theory that "it would be against principles of equity and good conscience to permit a party against whom estoppel is asserted to avail himself of what . . . otherwise [might] be his undisputed legal rights." *Redevelopment Comm'n v. Hannaford*, 29 N.C. App. 1, 3, 222 S.E.2d 752, 754 (1976). It is essential that the person asserting the estoppel shows that he or she acted in reliance on the conduct of the person against whom estoppel is asserted, not merely that he or she was aware of certain facts which in retrospect might support the assertion of estoppel.

When estoppel is applied in the agency setting, the rule provides as follows:

> Where a person by words or conduct represents or permits it to be represented that another person 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 existed in fact.

Hayman v. Ramada Inn, Inc., 86 N.C. App. 274, 278, 357 S.E.2d 394, 397, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 87 (1987). Although the language is tailored to the agency setting, the essen-

tial elements of equitable estoppel are present, and reliance on defendant's representations is no less important in the agency setting than in the traditional applications of equitable estoppel. The reliance element is where we find plaintiff's claim lacking.

In prior cases where agency by estoppel, or apparent agency, was asserted, inevitably the question of whether or not the plaintiff was led to act in reliance on the defendant's representation was critical in the Court's decision to apply the doctrine or not. In *Fike*, 53 N.C. App. 78, 279 S.E.2d 910, the plaintiff successfully asserted agency by estoppel to prevent the Retirement System from denying retirement benefits. In that case the plaintiff followed the defendant Retirement System's published guidelines in submitting his claim for benefits to his employer, but the employer failed to submit plaintiff's application in time. The Retirement System denied the application. The Court found that although the plaintiff's employer was not the Retirement System's actual agent, evidence of representations by the Retirement System was sufficient to create an agency by estoppel and that the plaintiff justifiably relied on those representations to his detriment. In *Fike* the Retirement System was the sole entity to which plaintiff could resort for retirement benefits, and he sought to deal with the Retirement System specifically. Plaintiff dealt with his employer only because of his reliance on the Retirement System's representations that his employer was a Retirement System agent. In that case it would have been unjust to allow the Retirement System to deny benefits when it led the plaintiff to believe he was dealing with its agent when plaintiff specifically sought to deal with the Retirement System.

The reliance element was the pivotal distinguishing factor in two cases which were otherwise virtually identical on their facts. In *Hayman*, 86 N.C. App. 274, 357 S.E.2d 394, the plaintiff asserted apparent agency in order to hold defendant Ramada Inn, Inc. liable for a franchisee's negligence. The plaintiff in *Hayman*, a flight attendant trainee, was placed in the Ramada Inn by Piedmont Airlines. While at the hotel plaintiff was assaulted, and she sued Ramada Inn, Inc. for negligently failing to provide adequate security. Ramada Inn, Inc. did not own the hotel; a franchisee did. The franchisee carried the Ramada Inn name and in all respects appeared to be owned by Ramada Inn, Inc. Nonetheless, this Court held that Ramada Inn, Inc. was not liable on the basis of apparent agency because the plaintiff did not choose the particular hotel in reliance on representations that the hotel was owned by Ramada

Inn, Inc. In other words, the plaintiff did not choose the hotel because of the "Ramada Inn" name.

Conversely, in *Crinckley v. Holiday Inns, Inc.*, 844 F.2d 156 (4th Cir. 1988), the court held that Holiday Inns, Inc. was liable for a franchisee's negligence on the basis of apparent agency. The facts were similar to *Hayman* in that the plaintiffs stayed at a privately owned Holiday Inn franchise and were assaulted during their stay. The evidence in this case, however, showed that the plaintiffs specifically wanted to stay at a Holiday Inn, and chose the particular hotel because it was a Holiday Inn. The court distinguished *Hayman* by explaining that the plaintiffs in *Crinckley* relied upon the name "Holiday Inn" in choosing the particular hotel where they stayed.

The common thread in the cases upholding the assertion of apparent agency is the plaintiff's desire to deal with the estopped party for some particular reason and the plaintiff acting because he believed he was dealing with the estopped party's agent. In those cases the policy considerations supporting an estoppel were present. Equity and good conscience demanded the estopped party be held liable for leading a person in the plaintiff's position to act on a faulty assumption. Those considerations are not present here. These facts simply do not support the assertion of apparent agency. NCSU is not in the health care business. All indications are that plaintiff received his vaccination from the nurse because Wake County Health Services chose to set up a clinic at NCSU, not because NCSU represented that the nurse was its agent, or because plaintiff relied on NCSU for medical expertise. Under these facts no injustice results in allowing NCSU to assert its legal defense that the nurse was not an agent. The Industrial Commission's order is affirmed.

Affirmed.

Judges COZORT and LEWIS concur.

ROBERT A. BURGE T/A ROBERT A. BURGE REAL ESTATE INVESTMENTS, AND ACC MANAGEMENT, INC., PLAINTIFFS v. FIRST SOUTHERN SAVINGS BANK, DEFENDANT

No. 9326SC507

(Filed 3 May 1994)

Brokers and Factors § 26 (NCI4th)— broker's contract—prospect purchasing after contract expires—plaintiffs not entitled to commission

Plaintiffs were not entitled to a commission on the sale of defendant's property, though their prospect ultimately purchased the property sixteen months after plaintiffs' marketing contract expired, since plaintiffs' prospect was willing to purchase, but made the offer conditioned upon the acquisition of an additional one and a half acre lot which defendant did not own; defendant was required to negotiate with a third party for the sale of the additional acreage, a duty which defendant did not assume under the contract with plaintiffs; the purchaser was not willing to pay the brokers' commission as the parties' contract required; plaintiffs thus did not find a purchaser ready, willing, and able to purchase the seller's property on the terms provided in the broker's contract; and plaintiffs were not the procuring cause of the sale.

Am Jur 2d, Brokers § 183.

What deviation in prospective vendee's proposal from vendor's terms precludes broker from recovering commission for producing a ready, willing, and able vendee. 18 ALR2d 376.

Appeal by plaintiffs from judgment entered 11 February 1993 by Judge William H. Helms in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 March 1994.

In March 1991, defendant entered into an exclusive marketing contract (the contract) with plaintiff Robert A. Burge Real Estate Investments (Burge) under which Burge was required to find a purchaser for defendant's nine acre lot in Forsyth County. The contract was dated 22 March 1991, and by the express terms of the writing it terminated on 26 March 1991.

Plaintiff ACC Management (ACC) represented a client who was interested in purchasing defendant's lot. Before Burge's contract with defendant expired ACC informed Burge of its client, and Burge and ACC agreed to co-broker defendant's property. Burge and ACC introduced the prospective purchaser to defendant, after which the prospective purchaser offered to purchase defendant's property. The offer was, however, subject to several contingencies, one of which was the prospective purchaser's ability to purchase an additional one and a half acres adjacent to defendant's property. Defendant did not own this additional acreage. On 10 April 1991 defendant met with Burge and agreed to attempt to purchase the additional acreage. Apparently the purchase never materialized.

In July 1991, defendant mailed the prospective purchaser an option to purchase an eleven acre lot which included the original nine acre lot. A letter enclosed with the option indicated that another real estate broker was handling the transaction. After learning of the new broker's involvement, plaintiffs notified defendant that they should handle the sale because they procured the prospective purchaser. Defendant told ACC to contact the new broker if it wished to participate in the sale. ACC did not contact the new broker, and the sale was finally closed in July 1992 without plaintiffs' participation.

Plaintiffs brought suit seeking (1) payment of commission on the sale, (2) punitive damages, and (3) damages under N.C. Gen. Stat. § 75-1.1 for unfair and deceptive practices. Defendant filed a motion to dismiss for failure to state a claim upon which relief may be granted. The court allowed the motion and entered judgment dismissing plaintiffs' claims. From this judgment plaintiffs appeal.

Eugene S. Tanner, Jr. for plaintiff appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, by S. Leigh Rodenbough IV and John W. Ormand III, for defendant appellee.

ARNOLD, Chief Judge.

Plaintiffs argue that they are entitled to a commission on the sale of defendant's property because their prospect ultimately purchased the property. A real estate broker is entitled to a commission if the broker proves (1) the existence of a binding contract between the broker and seller and (2) the broker's performance

of that contract. *Thompson-McLean, Inc. v. Campbell*, 261 N.C. 310, 313, 134 S.E.2d 671, 674 (1964). The performance generally required of the broker is to find a purchaser ready, willing, and able to purchase the seller's property on the terms provided in the broker's contract. *Id.* Plaintiffs here did not procure such a purchaser, and they are therefore not entitled to a commission.

The contract required a purchaser who was willing to purchase the nine acre lot for $100,000.00 per acre, and who was willing to pay the brokers' commission. Although plaintiffs' prospect offered to purchase the nine acre lot, he made the offer conditioned on the acquisition of an additional one and a half acre lot which defendant did not own. As a result, defendant was required to negotiate with a third party for the sale of the additional acreage, a duty which defendant did not assume under the contract with plaintiffs. In addition, the purchaser was not willing to pay the brokers' commission.

Negotiations for the sale of defendant's lot, in which defendant promised to try to acquire the additional acreage, continued past the expiration date of the contract, but no agreement arose from those negotiations. Thus, plaintiff's allegations, from which these facts were drawn, show that plaintiffs did not fulfill their obligations under the contract. They did not produce a purchaser ready, willing, and able to purchase on the terms provided in the contract.

Nonetheless, plaintiffs argue that they are entitled to a commission because they were the procuring cause of the sale. Although plaintiffs originally put the purchaser in contact with defendant, the ultimate sale did not materialize until sixteen months after the initial contact and not until defendant (1) arranged for the sale of a lot in addition to the nine acre lot it owned, (2) contracted for the services of a new broker, and (3) assumed the responsibility for paying the new broker's commission. Plaintiffs cannot contend in the face of these facts that they were the procuring cause of the sale. *See Hecht Realty, Inc. v. Whisnant*, 41 N.C. App. 702, 255 S.E.2d 647, *disc. review denied*, 298 N.C. 299, 259 S.E.2d 912 (1979). The allegations show that plaintiffs did not perform as the contract required, and in failing to perform plaintiffs are not entitled to a commission under a procuring cause theory even though their efforts might have been advantageous to defendant. *Bolich-Hall Realty & Ins. Co. v. Disher*, 225 N.C. 345, 348, 34 S.E.2d 200, 202 (1945).

Plaintiffs also asserted a claim for punitive damages. They were not entitled to punitive damages, obviously, unless they asserted a cause of action through which nominal or compensatory damages were recoverable, *Onslow Wholesale Plumbing & Elec. Supply, Inc. v. Fisher*, 60 N.C. App. 55, 63, 298 S.E.2d 718, 723 (1982), *aff'd*, 308 N.C. 540, 302 S.E.2d 632 (1983), and, as discussed above, plaintiffs failed to state such a claim. Plaintiffs' claim for punitive damages was, therefore, properly dismissed.

Plaintiffs finally argue that their claim for damages under N.C. Gen. Stat. § 75-1.1 (1988) was improperly dismissed. We can say as a matter of law that plaintiffs' allegations are insufficient to create a cause of action for unfair and deceptive practices. Plaintiffs contend that (1) defendant's sale of the property without plaintiffs' involvement and (2) defendant's refusal to reveal the details of the sale to plaintiffs constitute violations of G.S. § 75-1.1. As settled above, defendant was under no obligation to plaintiffs arising out of the sale after plaintiffs failed to fulfill their obligations under the contract. Therefore, defendant's failure to involve plaintiffs does not create a cause of action under Chapter 75.

Affirmed.

Judges COZORT and LEWIS concur.

FRANK ERNEST VAUGHAN, SR. AND WIFE, REBECCA B. VAUGHAN, PLAINTIFFS v. J. P. TAYLOR COMPANY, INC., DEFENDANT

No. 939SC753

(Filed 3 May 1994)

Workers' Compensation § 62 (NCI4th)— employee injured while working on running machinery—no intentional misconduct by employer

There was no genuine issue of material fact as to whether defendant employer engaged in intentional misconduct knowing such conduct was substantially certain to cause death or serious injury to plaintiff employee, and the trial court therefore properly granted summary judgment for defendant, where the evidence tended to show that plaintiff was asked to determine

why a belt on a tobacco blending silo was not operating, but there was no evidence that plaintiff was instructed to repair the machine while it was running; defendant had an established "lock-out" safety procedure (a procedure for shutting down machines prior to repair) for working in or around the silos; plaintiff was aware of the lock-out procedure and of persons with lock-out capabilities; defendant had warning signs on the silo warning workers against working on the conveyer without locking out; plaintiff never asked his supervisor to lock out the silo prior to attempting a repair; and defendant had never received any OSHA citations for violations of safety regulations.

Am Jur 2d, Workers' Compensation §§ 75-87.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Appeal by plaintiffs from order entered 27 May 1993 by Judge B. Craig Ellis in Vance County Superior Court. Heard in the Court of Appeals 13 April 1994.

Eugene C. Brooks, III for plaintiffs-appellants.

Young Moore Henderson & Alvis P. A., by David M. Duke and Dana H. Davis, for defendant-appellee.

JOHNSON, Judge.

The facts pertinent for this appeal are as follows: Plaintiff, Frank Ernest Vaughan, Sr., was a maintenance mechanic for defendant, J. P. Taylor Company, Inc. As a maintenance mechanic, Mr. Vaughan worked in the prize room area of defendant's tobacco manufacturing plant. Mr. Vaughan was responsible for making minor repairs on the machinery, assisting the maintenance department with large repairs, assisting in changing presses, unstopping machinery and operating a forklift. It was also Mr. Vaughan's responsibility to arrive at the plant approximately one hour prior to the arrival of the first shift and turn on the machinery.

On 26 November 1990, Mr. Vaughan arrived at the plant and began turning on the machinery. After Mr. Vaughan turned on the blending silo, Mr. Vaughan's supervisor, Tom Abbott, noticed that the belt on the silo was not "running" and told Mr. Vaughan to check on the belt. Mr. Vaughan climbed the silo and determined

that a chain had fallen off its sprocket. Mr. Vaughan then attempted to put the chain back on the sprocket while holding onto a steel bar and balancing himself above the operating silo. While putting the chain on the sprocket, Mr. Vaughan's right foot slipped off a steel support onto a track where steel wheels roll and over which a chain moves together with an angle iron. Mr. Vaughan's right foot became caught under the steel wheels and was crushed. On 12 December 1990, part of Mr. Vaughan's right foot had to be amputated due to the injury.

On 8 October 1991, Mr. Vaughan and his wife, Rebecca B. Vaughan, filed a complaint against defendant seeking compensatory and punitive damages arising out of the accident which occurred on 26 November 1990. Plaintiffs alleged that defendant was knowledgeable of the dangerous condition which caused Mr. Vaughan's injury and that allowing the condition to exist amounted to intentional or reckless and wanton conduct on defendant's part. Defendant answered, denying that it was negligent and contending plaintiffs' claims were barred by the exclusive remedy provisions of the North Carolina Workers' Compensation Act. Defendant then filed a motion for summary judgment. The motion was heard before Judge B. Craig Ellis in Vance County Superior Court on 26 April 1993. By order dated 27 May 1993, Judge Ellis granted defendant's motion for summary judgment. From this order, plaintiffs appealed to our Court.

By plaintiffs' sole assignment of error, plaintiffs contend that the trial court erred in granting defendant's motion for summary judgment, because a genuine issue of material fact exists as to whether defendant engaged in intentional misconduct knowing this conduct was substantially certain to cause death or serious injury to plaintiff Frank Vaughan.

Summary judgment is appropriate if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. North Carolina General Statutes § 1A-1, Rule 56 (1990). The moving party has the burden of establishing the lack of triable issues, and may meet this burden by proving that an essential element of the opposing party's claim is non-existent. All inferences of fact must be looked at in the light most favorable to the non-moving party. *Bailey v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 47, 434 S.E.2d 625

(1993). Thus, we must examine whether the forecast of evidence viewed in the light most favorable to plaintiffs, establishes that defendant intentionally engaged in misconduct substantially certain to cause injury or death.

Our Supreme Court in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) held that an employee may pursue a civil action against an employer "when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct. . . ." *Id.* at 340, 407 S.E.2d at 228. The Court recognized that "actions against employers must be grounded on more aggravated conduct than actions against co-employees." *Id.* at 342, 407 S.E.2d at 229. Any conduct less than substantial certainty is insufficient to hold an employer liable. *Id.*

Recently in *Pendergrass v. Card Care*, 333 N.C. 233, 424 S.E.2d 391 (1993), our Supreme Court addressed the allegations of an employee ordered to work on dangerous parts of an unguarded machine in violation of OSHA regulations and industry standards. In finding that the allegations were insufficient to meet the substantial certainty standard for employers, the Court opined that "[t]he conduct must be so egregious as to be tantamount to an intentional tort." *Id.* at 239, 424 S.E.2d at 395.

In the case *sub judice*, we find that the forecast of evidence, even when viewed in the light most favorable to plaintiffs, fails to establish that defendant engaged in intentional misconduct. The forecast of evidence tends to show the following: Mr. Vaughan was asked to determine why the belt on the silo was not operating; however, there is no evidence that Mr. Vaughan was instructed to repair the machine while the silo was running. Defendant has an established "lock-out" safety procedure (a procedure for shutting down machines prior to repair) for working in or around the silos. Mr. Vaughan was aware of the "lock-out" procedure, and of the persons who had lock-out capabilities. Defendant had warning signs affixed to the silo cautioning workers against working on the conveyer without "locking-out." Mr. Vaughan never asked his supervisor, Tom Abbott, to "lock-out" the silo prior to attempting to repair the silo. We also note that defendant has never received any OSHA citations for violations of safety regulations.

From this forecast of evidence, we cannot find that defendant intentionally engaged in conduct which was substantially certain

to cause injury or death. The trial court correctly granted defendant's motion for summary judgment.

The decision of the trial court is affirmed.

Judges WELLS and JOHN concur.

DALE G. VANDERVOORT v. GATEWAY MOUNTAIN PROPERTY OWNERS ASSOCIATION, AND BETTY S. GILLIAM

No. 9329SC722

(Filed 3 May 1994)

Judgments § 166 (NCI4th)— easement by prescription over several properties—granting by default judgment over some—denial by summary judgment over others—inconsistent result improper

In an action to establish an easement by prescription over the property of several defendants, the trial court cannot, by entry of a default judgment, grant the easement across the property of a non-answering defendant and by grant of summary judgment deny the easement across the property of an answering defendant, since it would be inconsistent to do so.

Am Jur 2d, Judgments §§ 1160, 1166, 1178 et seq.

Appeal by defendants from judgment entered 27 April 1993 in McDowell County Superior Court by Judge Zoro J. Guice, Jr. Heard in the Court of Appeals 23 March 1994.

Carnes & Franklin, P.A., by Hugh J. Franklin, Everette C. Carnes, and Krinn E. Evans, for plaintiff-appellee.

Robert E. Dungan, P.A., by Robert E. Dungan and James Michael Lloyd, for defendant-appellants.

GREENE, Judge.

Gateway Mountain Property Owners Association (Gateway) and Betty S. Gilliam (Gilliam) appeal from an order filed 27 April 1993

in McDowell County Superior Court, entering judgment by default for Dale G. Vandervoort (plaintiff) in his action requesting an easement by prescription over lands owned by defendants and others.

In June 1987, plaintiff filed a complaint against Cameron McKenzie (McKenzie) and Gateway, alleging an easement by prescription over lands owned by them. On 22 March 1988, McKenzie and Gateway moved for summary judgment, and the court denied their motion on 25 April 1988. Plaintiff filed an amended complaint on 5 October 1988 against McKenzie and his wife, Carmen McKenzie (Mrs. McKenzie), Gateway, Gilliam, Emory Vess (Vess), Johnson, Price and Sprinkle, P.A. (Johnson), Cheryl Kirkland (Kirkland), and Doris Harrison (Harrison). In his amended complaint, plaintiff alleged that he had "for more than twenty (20) years" used a roadway that extended across the properties of the defendants and that his use was "open, notorious, continuous, [and] adverse." He requested that he be declared the owner of an easement by prescription over a roadway through the property of the various defendants. On 7 November 1988, McKenzie, Mrs. McKenzie, Johnson, Kirkland, and Harrison filed an answer to plaintiff's amended complaint denying that the use of the road was open, notorious, continuous or adverse.

On 21 March 1989, plaintiff made a motion for entry of default against Gateway, Vess, and Gilliam pursuant to Rule 55 of the North Carolina Rules of Civil Procedure because they "have not filed an answer or other pleading, nor have the Defendants obtained an extension of time within which to plead, the time within which Defendants might plead has now expired and Defendants are now in default." On 21 March 1989, the clerk of court entered default against Gateway, Vess, and Gilliam. On 11 April 1989, the trial court, by stipulation of counsel, amended the style of the case by changing defendant Vess to "Estate of James E. Vess" (Estate of Vess) and set aside the entry of default as to Estate of Vess.

On 2 October 1990, the trial court granted summary judgment in favor of McKenzie, Mrs. McKenzie, Gateway, Gilliam, Estate of Vess, Johnson, Kirkland, and Harrison and dismissed the action. Plaintiff appealed to this Court which reversed the trial court's entry of summary judgment as to McKenzie because a superior court judge had already denied an earlier motion for summary

judgment made by McKenzie. Because, however, "the parties provided the [trial] court with additional evidence, not available to the court on the first motion, that established defendants' right to judgment as a matter of law," i.e., that "plaintiff's use of the roadway was permissive" and that plaintiff "clearly admitted that he did not intend to hold the easement to the exclusion of others," this Court "affirm[ed] the trial court's order as to the remaining defendants—Estate of Emory Vess; Doris Harrison; Johnson, Price & Sprinkle, P.A.; Cheryl Kirkland; and Carmen Anna McKenzie." *Vandervoort v. McKenzie*, 105 N.C. App. 297, 299-301, 412 S.E.2d 696, 697-98 (1992). This Court did not address the appropriateness of summary judgments for Gateway and Gilliam.

On 27 April 1993, upon motion by plaintiff for default judgment against Gateway and Gilliam, the trial court found that an amended complaint and summons was filed against Gateway and Gilliam on 5 October 1988, that process was duly served on Gateway on 6 October 1988, and on Gilliam on 13 November 1988, and that neither has filed an Answer or other pleading and no extension of time within which to plead has been requested or given and the time within which they might plead expired. The trial court also found that on 21 March 1989, the defaults of Gateway and Gilliam were duly entered and have not been set aside. The trial court then granted default judgment for plaintiff, declaring him the owner of an easement as to Gateway and Gilliam and enjoined them from interfering with plaintiff's use of the roadway.

The issue presented is whether in an action to establish an easement by prescription over the properties of several defendants, the trial court can, by entry of a default judgment, grant the easement across the property of a non-answering defendant and by grant of summary judgment deny the easement across the property of an answering defendant.

Where a plaintiff files a complaint for joint and several liability against several defendants, and one of them does not respond to the complaint, the proper procedure is to *enter* default against the non-answering defendant who loses his standing in court and is not entitled to appear in any way and proceed upon the other defendants' answers. *Harris v. Carter*, 33 N.C. App. 179, 182,

234 S.E.2d 472, 474 (1977); *Leonard v. Pugh*, 86 N.C. App. 207, 210-11, 356 S.E.2d 812, 815 (1987); *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872). If the court decides against the plaintiff on the merits of the claim asserted against the answering defendants, the complaint should be dismissed as to all defendants, including the defaulting party; likewise, if the court decides in favor of the plaintiff, he is entitled to a final judgment against all. *Id.* "It would be unreasonable to hold that because one defendant had made default the plaintiff should have a decree even against him, where the court is satisfied from the proofs offered by the other, that in fact the plaintiff is not entitled to a decree." *Frow*, 82 U.S. (15 Wall.) at 554, 21 L. Ed. at 61. This principle and reasoning which applies to joint and several liability extends to cases where several defendants have closely related defenses or where "it is necessary that the relief against the defendants be consistent." 10 *Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure* § 2690 (1983 & Supp. 1993).

Although plaintiff's claim against the defendants does not seek joint and several liability, the evidence in this case requires that the plaintiff's request for an easement be denied as to all the defendants. The undisputed testimony as reflected in our earlier opinion, *Vandervoort*, 105 N.C. App. 297, 412 S.E.2d 696, is that an essential element of plaintiff's claim did not exist because he "did not intend to hold the easement to the exclusion of [all] others." *Id.* at 301, 412 S.E.2d at 698 (plaintiff must prove that "use is adverse, hostile or under a claim of right"). It would therefore be inconsistent to allow imposition of a prescriptive easement as to the non-answering defendants owning property through which the easement passes while not allowing an easement on other portions of the same roadway passing through property owned by the answering defendants.

For these reasons, the trial court erred in granting the plaintiff an easement over the property of Gateway and Gilliam. The judgment of default therefore must be reversed.

Reversed.

Judges JOHNSON and MARTIN concur.

IN THE MATTER OF THE ESTATE OF: D. ROY WRIGHT, DECEASED

No. 9318SC663

(Filed 3 May 1994)

Wills § 45 (NCI4th) — antenuptial agreement — validity — no jurisdiction of clerk to determine

The clerk of superior court lacked jurisdiction to resolve respondent's claim that an antenuptial agreement was invalid and that it was obtained by misrepresentation, undue influence, and inadequate disclosure of assets or liabilities, and that she was therefore entitled to participate in the administration, settlement, and distribution of her deceased husband's estate, since the issues involved were clearly justiciable matters of a civil nature, original jurisdiction over which was vested in the trial division.

Am Jur 2d, Wills § 850.

Appeal by petitioner from order entered 8 January 1993 by Judge Joseph R. John, Sr. in Guilford County Superior Court. Heard in the Court of Appeals 22 March 1994.

Hugh C. Bennett, Jr. for High Point Bank and Trust Company, petitioner-appellant.

Clarence Mattocks for respondent-appellee Ola Mae Wright.

JOHNSON, Judge.

The pertinent facts of this appeal are as follows: Ola Mae Montgomery, then sixty-five years old, and D. Roy Wright, then seventy-three years old, entered into an antenuptial agreement on 31 March 1977 which provided in pertinent part:

> FIRST — That the party of the first part [Ola Mae Montgomery] shall receive from the estate of the party of the second part [D. Roy Wright] after his death, provided at his death the parties hereto are married and are living together and the party of the first part shall survive such party of the second

part as his widow, the total sum of TWENTY THOUSAND ($20,000.00) DOLLARS.

. . .

THIRD—That the party of the first part hereby agrees and hereby releases, renounces and quitclaims all right she now has or hereafter may acquire, of whatever nature or kind, both real, personal and mixed, by reason of said contemplated marriage, in and to all property, both real, personal and mixed, now owned or hereafter acquired by the party of the second part, including the right to administer upon his estate and the right by the laws of distribution and the rights of descent, widow's year's allowance or any other rights, to any part of the real or personal estate of the party of the second part, SAVE AND EXCEPT the rights of the party of the first part set forth in the preceding Paragraph First of this Agreement.

Ola Mae Montgomery and D. Roy Wright were married 16 April 1977 in Guilford County, North Carolina. Around September 1991, D. Roy Wright was admitted to High Point Regional Hospital following a fall at his Greensboro Road residence in which he incurred a broken hip, bruises and other injuries and remained in said hospital until about 1 October 1991. When D. Roy Wright was released from the hospital and returned to his residence, Ola Mae Montgomery Wright had moved from the marital household and except for two brief visits, never returned to the residence. D. Roy Wright died 8 March 1992, leaving an estate valued at approximately $323,000.00. Decedent's Will, executed 23 June 1981, provided in pertinent part:

ARTICLE III

In the event that my wife, OLA MAE MONTGOMERY WRIGHT, is living at the time of my death, and we were living together at the time of my death, then I direct my Executor to pay to my wife, OLA MAE MONTGOMERY WRIGHT, the sum of TWENTY THOUSAND ($20,000.00) DOLLARS, as provided for in Paragraph First of the Antenuptial Agreement executed on the 31st day of March, 1977, by and between Ola Mae Montgomery, party of the first part, and D. Roy Wright, party of the second part.

High Point Bank and Trust Company, as executor of decedent's estate, filed its petition for hearing on 30 March 1992, requesting instructions from the clerk of superior court as to whether Ola Mae Montgomery Wright was entitled to participate in the administration, settlement and distribution of decedent's estate. On 27 April 1992, Ola Mae Montgomery Wright filed her response to the petition, admitting the authenticity of her signature on the antenuptial agreement, the contents of paragraph "FIRST" of the antenuptial agreement and "ARTICLE III" of the Will of decedent. Ola Mae Montgomery Wright also admitted that she did not cohabit with decedent after 1 October 1991. The response further contended that the antenuptial agreement was invalid and that it was obtained by misrepresentation and undue influence and that there was never adequate disclosure of assets or liabilities.

The matter was heard before the clerk on 22 May 1992. The clerk found that Ola Mae Montgomery Wright was not entitled to participate in the administration, settlement and distribution of decedent's estate, and signed an order to this effect 3 June 1992. Ola Mae Montgomery Wright appealed to superior court; Judge Joseph R. John, Sr. found that the clerk lacked jurisdiction in the matter and voided the clerk's order of 3 June 1992. High Point Bank and Trust Company, as executor of decedent's estate, filed notice of appeal to our Court.

High Point Bank and Trust Company argues on appeal that the superior court judge, sitting as a court of appellate review on appeal from an order of the clerk of superior court, erred in entering its order of 8 January 1993 voiding the clerk's order.

It is undisputed that in North Carolina, the clerk of superior court is given exclusive original jurisdiction of the administration, settlement and distribution of estates except in cases where the clerk is disqualified to act. North Carolina General Statutes § 28A-2-1 (1984); *In re Snipes*, 45 N.C. App. 79, 262 S.E.2d 292 (1980). However, in cases where "claims *arise from* administration of an estate, their resolution is not *a part of* 'the administration, settlement and distribution of estates of decedents' so as to make jurisdiction properly exercisable initially by the clerk." *Ingle v. Allen*, 53 N.C. App. 627, 629, 281 S.E.2d 406, 407 (1981). The claims at issue in the case *sub judice* are claims of misrepresentation, undue influence and inadequate disclosure of assets or liabilities, clearly " 'justiciable matters of a civil nature,' original general jurisdiction over which

is vested in the trial division." *Id.* at 628-29, 281 S.E.2d at 407. North Carolina General Statutes § 7A-240 (1989).

Therefore, we find the superior court judge properly found that the clerk lacked jurisdiction in this matter and properly voided the clerk's order of 3 June 1992.

The decision of the trial court is affirmed.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA, EX REL. EMPLOYMENT SECURITY COMMISSION v. IATSE LOCAL 574

No. 9321SC1018

(Filed 3 May 1994)

Appeal and Error § 137 (NCI4th)— action remanded by trial court to determine amount of refund—interlocutory order—order not appealable

The order appealed from was interlocutory and not immediately appealable where the trial court ordered that appellee be refunded all unemployment taxes erroneously collected or assessed for a specified period of time, and the court further ordered that the action be remanded to the Employment Security Commission for determination of the amount of refund to which appellee was entitled.

Am Jur 2d, Appeal and Error § 125.

Appeal by State of North Carolina ex rel. Employment Security Commission from judgment entered 16 July 1993 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 5 April 1994.

This is a proceeding instituted by the International Alliance of Theatrical Stage Employees Local 574 (hereinafter "IATSE") pursuant to N.C. Gen. Stat. § 96-10(e) for the refund of unemployment taxes. A hearing was conducted by a deputy commissioner of the Employment Security Commission (hereinafter the Commission) on 14 January 1992. On 7 May 1992, the deputy commissioner filed an opinion in which he concluded that IATSE was not an

"employer" as to most of its members and was not liable for unemployment taxes from the second quarter of 1989 forward. The deputy commissioner further concluded that the Commission had no jurisdiction to consider awarding a refund for unemployment taxes paid from 1 January 1984 through the first quarter of 1989. IATSE appealed to the full Commission from that portion of the deputy commissioner's opinion concluding that the Commission had no jurisdiction to consider awarding a refund.

Following a hearing, the full Commission affirmed the deputy commissioner's opinion. IATSE appealed to the Forsyth County Superior Court, and following a hearing held on 21 June 1993, that court entered a judgment ordering that IATSE be refunded all taxes erroneously collected or assessed for the years 1984 through the first quarter of 1989. The trial court further ordered that the action be "remanded to the Employment Security Commission for determination of the amounts of refund to which IATSE is entitled under provisions of N.C.G.S. § 96-10(e) in accordance with this Judgment." The Commission appeals.

Staff Attorney C. Coleman Billingsley, Jr. for appellant Employment Security Commission.

Elliot, Pishko, Gelbin & Morgan, P.A., by Robert M. Elliot, for appellee International Alliance of Theatrical Stage Employees, Local Union 574.

WELLS, Judge.

Although not raised by either of the parties, we must first determine whether this case is presently appealable. *In re Watson*, 70 N.C. App. 120, 318 S.E.2d 544 (1984), *disc. rev. denied*, 313 N.C. 330, 327 S.E.2d 900 (1985). We conclude that the order appealed from is interlocutory and not immediately appealable.

The judgment of the trial court remanded the case for further hearing before the Commission. N.C. Gen. Stat. § 96-4(n) provides that in employment security cases "[e]ither party may appeal to the appellate division from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals." N.C. Gen. Stats. §§ 1-277 and 7A-27, considered together, provide that no appeal lies to an appellate court from an interlocutory judgment unless that ruling deprives the appellant of a substantial right which it would lose if the ruling were not reviewed before

final judgment. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). A ruling is interlocutory if it does not determine the issues but directs some further proceeding preliminary to a final decree. *Id.*

In the present case, the Commission has attempted to appeal from a judgment of the trial court which is not final on its face since the trial court ordered the Commission to determine the refund to which IATSE is entitled. Therefore, the judgment of the trial court is interlocutory. *See Hardin v. Venture Construction Co.*, 107 N.C. App. 758, 421 S.E.2d 601 (1992). The issues which the Commission seeks to raise in this appeal may be raised after a final judgment is entered in this case, and the Commission will not be deprived of a substantial right absent immediate appeal.

For these reasons, the appeal of the Employment Security Commission must be dismissed.

Appeal dismissed.

Judges COZORT and McCRODDEN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 MAY 1994

ANDREW v. HANGING ROCK GOLF & COUNTRY CLUB No. 9324SC643	Avery (92CVS52)	Affirmed
BENTLEY v. B. J. ACQUISITION CORP. No. 9327SC864	Gaston (91CVS4415)	Affirmed
BLUE RIDGE PRODUCTS, INC. v. MUNDY No. 9325DC601	Catawba (93CVD59)	Affirmed
CULP v. BANNER No. 937SC580	Wilson (91CVS1439)	Reversed & Remanded
GARRISON v. WILKINS No. 933DC869	Pitt (85CVD1345)	Reversed
HILTON v. HILTON No. 9317DC818	Rockingham (91CVD1290)	Affirmed
JAMES FARMS, INC. v. CITY OF STATESVILLE No. 9322SC486	Iredell (92CVS612)	Affirmed
JOHNSON v. WALLENSLAGER No. 9315SC728	Chatham (91CVS309)	Affirmed
S & C JOINT VENTURE v. BARBEE No. 9310DC779	Wake (91CVD00114)	Affirmed
SEAGLE v. NATIONWIDE MUTUAL INS. CO. No. 935SC759	New Hanover (92CVS1186)	Affirmed
SMITH v. N.C. FARM BUREAU MUT. INS. CO. No. 9326SC773	Mecklenburg (93CVS3266)	Dismissed
STATE v. COAD No. 9321SC860	Forsyth (93CRS227) (93CRS230)	Affirmed
STATE v. EDWARDS No. 938SC1069	Lenoir (92CRS9854)	No Error

STATE v. FARRAR No. 9319SC1075	Randolph (91CRS00133)	No Error
STATE v. FLOYD No. 9324SC978	Yancey (92CRS146) (92CRS158) Mitchell (92CRS186)	No Error
STATE v. HOPPER No. 9319SC1130	Cabarrus (92CRS11633)	No Error
STATE v. JOHNSON No. 9310SC858	Wake (92CRS46450) (92CRS46451)	New Trial
STATE v. KELLER No. 9328SC865	Buncombe (92CRS54876) (92CRS54878)	Appeal Dismissed
STATE v. PEARSON No. 9310SC873	Wake (92CRS17364)	No Error
STATE v. SHORES No. 9317SC850	Stokes (92CRS2094) (92CRS2095) (92CRS2096)	No Error
STATE v. SULLIVAN No. 9329SC993	Henderson (92CRS6356) (92CRS6357) (92CRS6358) (92CRS6359)	No Error
STATE v. SWINSON No. 933SC797	Craven (93CRS881)	No Error
STATE v. TRIBBLE No. 9325SC814	Catawba (92CRS11025)	No Error
STATE v. TURNER No. 9312SC789	Cumberland (91CRS5463)	No Error
STATE v. WAGNER No. 9321SC936	Forsyth (92CRS20257) (92CRS20258) (92CRS20259)	As to defendant's convictions, the appeal is dismissed. As to the defendant's sentence, the judgment of the trial court is affirmed.

TOSTOE v. STEIGERWALD No. 937SC1010	Edgecombe (92CVS497)	Affirmed
WALTERS v. DIXIE YARNS, INC. No. 9310IC1026	Ind. Comm. (743709)	Affirmed
WESTERN N.C. AIR MUSEUM, INC. v. ZICKGRAF No. 9329SC682	Henderson (91CVS4)	No Error
WHITE v. DAVENPORT No. 9318SC298	Guilford (92CVS08626)	Affirmed
WILLIS v. PARKER No. 9325SC817	Catawba (93CVS168)	Affirmed

ARMANDO LOUIS AMANINI, PETITIONER-APPELLANT v. N.C. DEPARTMENT OF HUMAN RESOURCES, N.C. SPECIAL CARE CENTER, RESPONDENT-APPELLEE

No. 927SC500

(Filed 17 May 1994)

1. **Administrative Law and Procedure § 72 (NCI4th)— administrative agency decisions—appellate review—standard of review**

Although there are statutory provisions establishing judicial review of administrative agency decisions, no section of the Administrative Procedure Act delineates the procedures to be followed upon appellate review. Appellate courts have agreed that characterization of the alleged error on appeal dictates the method or scope of review, with more than one method being used if required by the issues, but the manner of review is not governed merely by the label an appellant places upon an assignment of error and the appellate court need only consider those grounds for reversal or modification argued by the petitioner before the superior court and assigned as error on appeal. Separate panels of the Court of Appeals have reached differing conclusions concerning the proper standard of appellate review; this panel determined that the proper standard was to examine the trial court's order for error of law rather than to apply the same standard as the trial court and to examine the evidence. N.C.G.S. § 150B-52.

Am Jur 2d, Administrative Law §§ 769-774.

2. **Public Officers and Employees § 67 (NCI4th)— firing of state employee—just cause—job performance rather than personal misconduct—no warnings**

The superior court erred by affirming the State Personnel Commission's decision to terminate petitioner where petitioner worked as a charge nurse at the N.C. Special Care Center; petitioner began his thirty-minute meal break around 6:00 p.m.; he went outside the facility to meet his fiancee, who was waiting in her automobile, without signing out or notifying other personnel; an argument ensued and petitioner fell from the vehicle onto the paved driveway; petitioner's fiancee drove away; petitioner, who had suffered vertebral fractures, crawled to a nearby trailer park for assistance; and petitioner was dismissed for vacating his nurses' station without notifying his supervisor or signing out and for departing the grounds. Ac-

cording to Commission regulations, just cause has been divided into two categories, unsatisfactory job performance and personal misconduct, with certain warnings required before a permanent state employee may be terminated on the grounds of unsatisfactory job performance, but none for dismissals based on an employee's personal misconduct. Petitioner's alleged violations properly fall within the contemplation of the job performance category and the Commission erred to the extent that its conclusion of just cause was based upon its characterization of petitioner's actions as personal misconduct. Having proceeded on the theory that the conduct furnishing the grounds for termination fell under the category of personal misconduct, DHR cannot now prevail by arguing that it could have proceeded on unsatisfactory job performance and, assuming that the argument should be considered, there is no evidence to establish the warnings necessary to precede dismissal for unsatisfactory job performance.

Am Jur 2d, Civil Service §§ 52 et seq.

Appeal by petitioner from order entered 7 February 1992 by Judge Herbert O. Phillips, III in Wilson County Superior Court. Heard in the Court of Appeals 16 April 1993.

Eastern Carolina Legal Services, Inc., by Wesley Abney, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General John R. Corne, for respondent-appellee.

JOHN, Judge.

Petitioner Armando Louis Amanini (petitioner) appeals the superior court's order affirming the decision and order of the State Personnel Commission which upheld his termination from employment with respondent N.C. Special Care Center (the Center).

Relevant background information includes the following: In 1984, respondent Department of Human Resources (DHR) hired petitioner to work as a registered nurse at the Center. The Center is a licensed "skilled" and "intermediate" nursing care facility, with beds accommodating 208 patients, each of whom has mental and physical disabilities and requires around-the-clock care. Petitioner was employed at the Center continuously from 28 July 1984 until 23 March 1989.

The events of the evening of 23 March 1989, ultimately resulting in petitioner's dismissal, are essentially uncontroverted. On that date, petitioner held the position of "lead nurse" or "charge nurse" for the facility's fifth floor during the second shift (3:00 p.m. until 11:30 p.m.). In that capacity, he was responsible for the welfare of forty-seven patients and directly supervised the health care technicians (HCTs) assigned to that floor.

Around 6:00 p.m., petitioner began his allocated thirty-minute meal break. Shortly thereafter, without notifying any other personnel or signing out in the lobby of the building on the sheet for his assigned floor, he went outside the facility to meet his fiancee, Edna Crespo, who was waiting there for him in her automobile. An argument ensued between the two, and petitioner got into the passenger seat of her car to continue the discussion. As the couple drove around the grounds, Crespo accelerated suddenly. At that point, petitioner's hand forcefully struck the passenger side door which consequently swung open. Petitioner fell from the vehicle onto the paved driveway, and Crespo drove away from the scene. Petitioner, later discovered to have suffered vertebral fractures from the fall, then crawled toward a nearby trailer park for assistance. His supervisor Ann Boykin was apprised of his predicament by telephone at about 6:40 p.m. In the interim, a family member of one of the fifth floor patients had come to the facility to speak with the charge nurse on duty. An HCT, unable to locate petitioner, had informed Boykin of his absence.

On 10 April 1989, petitioner was notified of his dismissal from employment by the Center in a letter sent him by Director of Nursing Dale Hilburn. The letter indicated petitioner's dismissal was due to "misconduct, which is a personal conduct issue" arising out of the 23 March incident, primarily: 1) vacating his fifth floor nurses' station without notifying his supervisor or signing out, thereby abandoning his patients and violating Center policy; and 2) departing the grounds.

After his dismissal was upheld by DHR in a letter dated 26 July 1989, petitioner sought a contested case hearing with the Office of Administrative Hearings. Following a 23 April 1990 hearing, the administrative law judge assigned to the case issued a decision recommending that petitioner's dismissal be "upheld on the basis of just cause." The full State Personnel Commission adopted *in toto* the recommended decision of the administrative law judge by order entered 11 February 1991.

Pertinent findings of fact adopted by the Commission are as follows:

9. The Respondent enacted a written policy effective February 1984 concerning meal breaks. The policy states, in part, that "[e]mployees have thirty minutes for meals including travel time" and "employees leaving the facility at meal break shall sign-out and sign-in upon return."

10. The Respondent enacted a written policy effective April 1986 concerning sign in—sign out procedures. The policy states, in part, that "[w]hen leaving the facility, for any reason, each individual will be expected to 'sign out', upon return, the individual is to 'sign in' on the same sheet" and "each employee is to sign in or out on the clipboard sheet provided for each area to which assigned."

. . . .

18. The Petitioner did not sign out of the Respondent facility when he left the building during his meal break to enter Crespo's vehicle.

19. The Petitioner did not inform anyone, including the Respondent's evening supervisor Anne Boykin, that he was leaving the fifth floor of the building.

20. A lead nurse has the responsibility to inform Boykin that he or she is leaving the grounds of the Respondent during a meal break. A lead nurse has the responsibility to inform a health care technician that he or she is leaving the assigned floor.

21. As a lead nurse, the Petitioner had the authority to leave the Respondent's building in order to eat on the picnic grounds without informing Boykin.

. . . .

23. The Petitioner was required to sign in and to sign out whenever he left the Respondent's grounds during his work shift.

24. The Petitioner did not intent [sic] to leave the Respondent's grounds when he entered Crespo's vehicle.

. . . .

35. The Respondent's enacted policies pertaining to meal breaks and to sign in—sign out procedures were generally followed, but not strictly enforced.

. . . .

41. The dismissal letter, signed by Hilburn, stated that the Petitioner's employment was terminated due to personal misconduct. The letter stated that the Petitioner's misconduct consisted of leaving his fifth floor nurses' station without notifying his supervisor or signing out . . . and leaving the facility grounds, thereby leaving the fifth floor patients without a licensed nurse for coverage . . . and disobeying the signing out policy.

In addition, the order of the administrative law judge contained the following conclusions of law:

3. The Petitioner violated the Respondent's policy governing absence from a floor unit by failing to inform anyone that he, as lead nurse, was leaving his assigned fifth floor area.

4. The Petitioner violated the Respondent's policy governing absence from the facility during the meal break by failing to sign out from the facility upon his departure from the building with Crespo during his dinner meal break.

5. The Petitioner violated the Respondent's policy governing sign in—sign out procedure by failing to sign out on the clipboard sheet for his assigned area upon his departure from the facility with Crespo.

6. The Petitioner did not violate the Respondent's policy governing departure from the Respondent's grounds. . . . Such an exigent circumstance in leaving the Respondent's grounds does not constitute a violation of the Respondent's policy that a lead nurse must not leave the grounds during a meal break without first informing the supervisor.

. . . .

8. The Petitioner's violations of the Respondent's policies governing absence from a floor unit, absence from the facility and sign in—sign out procedure constitute just cause for the termination of his employment by the Respondent . . . .

Petitioner thereafter sought judicial review pursuant to N.C.G.S. §§ 150B-45 (1991) and 150B-46 (1991) by means of a petition filed

11 March 1991 in Wilson County Superior Court. Included among his listed exceptions to the final agency decision was the following:

> Conclusion of Law No. 8 is also erroneous in that, even if petitioner did violate any policies of respondent, such violations are in the nature of job performance, not personal conduct. Petitioner lacks sufficient prior warnings in his record for one instance of improper job performance to constitute just cause for dismissal, under G.S. 126-35 and the rules and regulations of the Office of State Personnel.

Following a hearing held 12 August 1991 and by order filed 11 February 1992, the superior court affirmed the Commission's decision to terminate petitioner, stating:

> [I]t is found and concluded that the Decision and Order for the Full [State Personnel] Commission is supported by substantial evidence in view of the official record as a whole, and that Petitioner was properly dismissed for personal misconduct as provided by G.S. § 126-35.

I.

[1] The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). Following the statutory provisions establishing judicial review, *see* G.S. § 150B-45 ("person seeking review must file a petition in the . . . superior court . . . ."), and stating review by the superior court shall be conducted without a jury, *see* N.C.G.S. § 150B-50 (1991), the APA sets forth the permissible dispositions upon judicial review of a final agency decision:

> [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b) (1991).

Although the statute lists the grounds upon which the superior court may reverse or modify a final agency decision, the proper manner of review depends upon the particular issues presented on appeal. *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (citation omitted).

> If [petitioner] argues the agency's decision was based on an error of law, then "*de novo*" review is required. If, however, [petitioner] questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.

Id. (citations omitted). "*De novo*" review requires a court to consider a question anew, as if not considered or decided by the agency. *See* Black's Law Dictionary 435 (6th ed. 1990). The "whole record" test requires the reviewing court to examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by "substantial evidence." *Rector v. N.C. Sheriffs' Educ. & Training Standards Comm.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991) (citation omitted).

As to appellate review of a superior court order regarding an agency decision, however, the APA simply specifies "[a] party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court . . . ." N.C.G.S. § 150B-52 (1991). Moreover, unlike G.S. § 150B-51 which immediately follows the statutory provisions establishing judicial review of a final agency decision by the *superior* court, no subsequent section of the APA delineates the procedures to be followed upon *appellate* review.

In consequence of this statutory void, our appellate courts have established certain applicable principles. First, the cases agree

that characterization of the alleged error on appeal "dictates" the method or scope of review, *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 580, 281 S.E.2d 24, 29 (1981) (quoting *State ex rel. Utilities Commission v. Bird Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981)), although more than one method may be utilized "if the nature of the issues raised so requires." *McCrary*, 112 N.C. App. at 165, 435 S.E.2d at 363 (citation omitted). Next, it appears uncontroverted that the foregoing rule should not be interpreted to mean the manner of our review is governed merely by the label an appellant places upon an assignment of error; rather, we first determine the actual nature of the contended error, then proceed with an application of the proper scope of review. *See Bird Oil Co.*, 302 N.C. at 21-22, 273 S.E.2d at 236; *see also Davis v. N.C. Dept. of Human Resources*, 110 N.C. App. 730, 735, 432 S.E.2d 132, 134-35 (1993) (where position of appellant is "not clear," Court in its discretion undertakes *de novo* review of agency's conclusions of law, as well as review of "whole record" to determine whether evidence supports agency's action). Finally, the cases also consistently hold that we need consider only "those grounds for reversal or modification argued by the petitioner before the superior court, and properly assigned as error on appeal to this Court." *Professional Food Services Mgmt. v. N.C. Dept. of Admin.*, 109 N.C. App. 265, 268, 426 S.E.2d 447, 449 (1993) (citation omitted).

Separate panels of this Court, however, appear to have reached differing conclusions concerning the proper standard of appellate review. The *first* line of authority holds our review of a trial court's order under G.S. § 150B-52 "is the same as in any other civil case—consideration of whether the court committed any error of law." *McCrary*, 112 N.C. App. at 165, 435 S.E.2d at 363 (citation omitted); *see also, e.g., Sherrod v. N.C. Dept. of Human Resources*, 105 N.C. App. 526, 530, 414 S.E.2d 50, 53 (1992) (citation omitted); *In re Kozy*, 91 N.C. App. 342, 344, 371 S.E.2d 778, 779-80 (1988) (citation omitted), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989); *American Nat'l Ins. Co. v. Ingram*, 63 N.C. App. 38, 41, 303 S.E.2d 649, 651, *disc. review denied*, 309 N.C. 819, 310 S.E.2d 348 (1983). Under this approach, the appellate court examines the trial court's order for error of law. *Kozy*, 91 N.C. App. at 344, 348, 371 S.E.2d at 780, 782. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. *See, e.g., Walker v. N.C. Dept.*

of Human Resources, 100 N.C. App. 498, 502, 397 S.E.2d 350, 353-54 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991); *see also Bird Oil Co.*, 302 N.C. at 20-21, 273 S.E.2d at 236 (N.C. Supreme Court, reviewing a decision of this Court, must "determine under which criterion for review the Court of Appeals [and the superior court] should have addressed [the] proceeding. Only then can [the Supreme Court] decide whether the Court of Appeals' decision was proper.").

A *second* group of cases asserts "[t]he standard of review for an appellate court in reviewing an order of the superior court affirming or reversing a decision of an administrative agency is the same as that used by the superior court" (referring to G.S. § 150B-51). *Professional Food Services*, 109 N.C. App. at 267, 426 S.E.2d at 449 (citation omitted); *see also Jarrett v. N.C. Dept. of Cultural Resources*, 101 N.C. App. 475, 478, 400 S.E.2d 66, 68 (1991) (applying § 150B-51 standard to "the present case"); *see also Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 464, 276 S.E.2d 404, 409 (1981) (Supreme Court remarked that the Court of Appeals "recogniz[ed] that its review was governed by [then] G.S. 150A-51," but then chided this Court for "fail[ing] to specify under which of the above listed standards it reviewed the decisions of the *superior court* and the Commission." (Emphasis added). The Supreme Court thereafter began its own analysis by deciding whether the *superior court* applied the correct standard in reviewing the agency's actions. Under this second method, the appellate court examines directly the evidence presented to, as well as the decision and order of, the agency, as opposed to the decision of the superior court. *See, e.g., Jarrett*, 101 N.C. App. at 478-80, 400 S.E.2d at 68-69.

Confronted with the foregoing divergent lines of authority, we consider the former approach the proper one. Otherwise, the statutory provisions for judicial review of agency action at the trial court level would appear to lack purpose if that court's determination is to be given no consideration at the appellate level. Legislation by the General Assembly is presumed to have a purpose. *State v. White*, 101 N.C. App. 593, 605, 401 S.E.2d 106, 113 ("The legislature is presumed to have intended a purpose for each sentence and word in a particular statute, and a statute is not to be construed in a way which makes any portion of it ineffective or redundant.") (citation omitted), *disc. review denied, appeal dismissed*, 329 N.C. 275, 407 S.E.2d 852 (1991).

Having determined the appropriate standard of review, we turn now to petitioner's assignments of error herein.

II.

[2] Petitioner's primary assignment of error is directed at Conclusion #8 of the administrative law judge, which provides:

> 8. The Petitioner's violations of the Respondent's policies governing absence from a floor unit, absence from the facility and sign in—sign out procedure constitute *just cause* for the termination of his employment by the Respondent . . . .

(Emphasis added).

Upon reaching the above conclusion, the administrative law judge recommended "that the Respondent's dismissal of the Petitioner from its employ be upheld *on the basis of just cause.*" (Emphasis added). In adopting *in toto* the recommended decision of the administrative law judge, the full Commission ordered that "Respondent's decision to dismiss Petitoner [sic] be upheld as being for just cause." Petitioner maintains this conclusion mischaracterized his actions and is therefore "affected by error of law."

As previously indicated, when a petitioner's assignment of error correctly raises a question of law, the appropriate standard of review for the initial reviewing court to utilize is *de novo* review. *Walker*, 100 N.C. App. at 502, 397 S.E.2d at 354. In addition, where the initial reviewing court should have conducted *de novo* review, this Court will directly review the State Personnel Commission's decision under a *de novo* review standard. *McCrary*, 112 N.C. App. at 165, 435 S.E.2d at 363 (citation omitted).

However, resolving whether an assignment of error correctly asserts an agency decision is "affected by error of law" may not necessarily be a routine matter. As one commentator has suggested:

> The supposed "classical dichotomy" between the fact/law distinction in determining scope of review "is of little use as a working tool" and has been characterized as "often not an illuminating test" that is "never self-executing." One would thus not be surprised that "[w]hat one judge regards as a question of fact another thinks is a question of law."

Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretative Analysis*, 53 N.C.L. Rev. 833, 915 (1975)

(alteration in original) (citations omitted). *See also, e.g., Davis*, 110 N.C. App. at 735, 432 S.E.2d at 134-35.

Nonetheless, we consider petitioner's argument that his termination by the Commission was not for "just cause" based upon personal misconduct to have raised a question of law. *See Employment Security Com. v. Kermon*, 232 N.C. 342, 345, 60 S.E.2d 580, 583 (1950) (" '[T]he legal effect of evidence and the ultimate conclusions drawn by an administrative tribunal from the facts . . . are questions of law . . . .' ") (quoting 42 Am. Jur. § 214). The rules, regulations and policies promulgated by the Commission have the force and effect of law. *See, e.g., N.C. Dept. of Justice v. Eaker*, 90 N.C. App. 30, 37-38, 367 S.E.2d 392, 398 (citations omitted), *disc. review denied*, 322 N.C. 836, 371 S.E.2d 279 (1988), *overruled on other grounds by Batten v. N.C. Dept of Correction*, 326 N.C. 338, 343, 389 S.E.2d 35, 39 (1990). Moreover, "[i]ncorrect statutory interpretation by an agency constitutes an error of law" under G.S. § 150B-51(b)(4). *Brooks, Com'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988) (citation omitted). Thus, when the issue on appeal is whether a state agency erred in interpreting a statutory term, "an appellate court may substitute its own judgment [for that of the agency] and employ *de novo* review." *Chesapeake Microfilm v. N.C. Dept. of E.H.N.R.*, 111 N.C. App. 737, 744, 434 S.E.2d 218, 221 (1993) (citation omitted), *disc. review denied, appeal dismissed*, 335 N.C. 768, 442 S.E.2d 511 (1994). Accordingly, we consider *de novo* whether the Commission erred in reaching its conclusion that "just cause" existed for petitioner's termination.

N.C.G.S. § 126-35 (1993) prohibits the discharge of permanent employees subject to the State Personnel Act except for "just cause." Although "just cause" is not defined in the statute, this Court has held the words are to be given their ordinary meaning. *Wiggins v. N.C. Dept. of Human Resources*, 105 N.C. App. 302, 306, 413 S.E.2d 3, 5 (1992) (citation omitted). In Webster's New International Dictionary, "cause" is defined as a "good or adequate reason," and "just" as "reasonable" or "having a basis in fact." *See* Webster's New International Dictionary 356, 1228 (3d ed. 1968). Definition of the term is further enhanced by reference to certain rules and policies promulgated by the State Personnel Commission concerning discipline and dismissal of employees. Having been promulgated pursuant to statutory authority, *see* N.C.G.S. § 126-4(7a) (1993), these enactments also have "the effect of law." *See, e.g., Harding v. N.C. Dept. of Correction*, 106 N.C. App. 350, 355, 416

S.E.2d 587, 589-90 (citations omitted), *disc. review denied*, 332 N.C. 147, 419 S.E.2d 567 (1992). Significantly, according to the Commission's regulations, "just cause" for dismissal has been divided into two basic categories—unsatisfactory job performance and personal conduct (misconduct) detrimental to State service. *See* State Personnel Manual, Sec. 9, at 2 (the Manual); N.C. Admin. Code tit. 25, O1J .0604 (1984) (amended March 1994) (the Code); *see also Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 343, 342 S.E.2d 914, 918 (citation omitted), *disc. review denied*, 318 N.C. 507, 349 S.E.2d 862 (1986).

The Manual and the Code distinguish between the two categories of "just cause" as follows:

> The JOB PERFORMANCE category is intended to be used in addressing performance-related inadequacies for which a reasonable person would expect to be notified of and allowed an opportunity to improve. PERSONAL CONDUCT discipline is intended to be imposed for those actions for which no reasonable person could, or should, expect to receive prior warnings.

Manual, Sec. 9, at 3; 25 N.C.A.C. O1J .0604(b) (1984) (amended March 1994). Certain warnings are therefore required before a permanent State employee may be terminated on the grounds of unsatisfactory job performance, Manual, Sec. 9, at 3-5; *see also Jones v. Dept. of Human Resources*, 300 N.C. 687, 690-91, 268 S.E.2d 500, 502 (1980), while none are required for dismissals based on an employee's personal (mis)conduct. *See, e.g., Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 923.

Listed in the Manual are several examples of conduct constituting unsatisfactory job performance, including: careless errors, poor quality work, untimeliness, *failure to follow instructions or procedures*, or a pattern of regular absences or tardiness. In contrast, examples of personal (mis)conduct include: abuse of patients or residents, insubordination, reporting to work under the influence of drugs or alcohol, and stealing or misusing State property. Manual, Sec. 9, at 8.1-8.2.

We approve the distinction between the categories of "just cause" as set forth in the Manual and hold it provides an applicable test for determining whether a dismissal is for a "good or adequate reason having a basis in fact" under particular circumstances. However, to the extent the Commission's legal conclusion of "just

cause" was based upon its characterization of petitioner's actions on 23 March 1989 as "personal misconduct," we hold this interpretation to be erroneous. Consequently, the Order of the Commission must be reversed.

Petitioner's alleged violations of Center policy—leaving the facility for his supper break without signing out or informing his supervisor or the HCTs on the fifth floor of his departure—more properly fall within contemplation of the *job performance* category of employee behavior warranting disciplinary action. Concerning infractions of this nature, "a reasonable person would expect to be notified . . . and allowed an opportunity to improve" his work performance before being fired. Manual, Sec. 9, at 3. This is particularly so in light of acknowledgement by all but one of the witnesses testifying at the hearing that neither policy was strictly enforced. Indeed, according to petitioner's supervisor Ann Boykin, if unfortunate circumstances had not befallen him and he had simply returned to work at 6:30 on the evening of 23 March 1989, he might not even have received a reprimand. Moreover, DHR's assertion that petitioner's behavior endangered the welfare of his patients is belied by the action of Boykin (the employee with "overall responsibility to see that the Center's policies were being followed during [petitioner's] shift") in herself going "to supper" after having been informed petitioner, who had immediate responsibility for the patients, could not be located.

We note also the similarity of this case to *Parks v. Dept. of Human Resources*, 79 N.C. App. 125, 338 S.E.2d 826, *disc. review denied*, 316 N.C. 553, 344 S.E.2d 8 (1986). Parks, an HCT at a residential treatment center for the mentally retarded, was fired for negligently failing to report observations of resident abuse, in violation of the facility's written policy. *Id.* at 126-27, 338 S.E.2d at 826-27. The Commission stated his "acts and omissions . . . constituted personal conduct," justifying immediate dismissal. *Id.* at 130, 338 S.E.2d at 828. Although Parks' alleged failure arguably constituted a violation far more egregious than the infractions of petitioner herein, this Court reversed on grounds that the accusations against Parks were in the nature of unsatisfactory job performance and did not constitute "just cause" for his dismissal. *Id.* at 133-34, 338 S.E.2d at 830.

However, DHR argues in its brief to this Court that the Commission's conclusion of "just cause" may also be affirmed as being

grounded upon inadequate job performance. Petitioner responds that such a conclusion is not supported by "substantial evidence . . . in view of the entire record," *see* G.S. § 150B-51(b)(5), because the record fails to demonstrate petitioner received the warnings required by law.

Initially, we observe that "personal (mis)conduct" was the Center's basis for termination of petitioner at all points in the procedural course of this matter, save one. The letter of dismissal petitioner received from the Center's Director of Nursing Dale Hilburn dated 10 April 1989, Director Hilburn's written account of the 23 March incident and 10 April dismissal, Director Hilburn's Pre-dismissal Conference report, as well as a letter dated 3 May 1989 to petitioner from Mr. J. G. Doby, Director of DHR's Division of Mental Health, Mental Retardation and Substance Abuse Services, all stated petitioner was terminated "due to personal misconduct" and cited the same actions later relied upon by the Commission in upholding his dismissal. Only in its written Prehearing Statement before the Commission does DHR's alternative contention of "unsatisfactory job performance" arise. However, at no place in the transcript of the proceedings before the Commission nor at any other place in the record before us is there any indication that DHR otherwise advanced this alternate position before the administrative law judge. Having proceeded through its supervisory personnel on the theory that the conduct furnishing the grounds for petitioner's termination fell under the category of "personal misconduct," DHR cannot now prevail by arguing it "could" have proceeded against him on the basis of unsatisfactory job performance. *See, e.g., Grissom v. Dept. of Revenue*, 34 N.C. App. 381, 383, 238 S.E.2d 311, 312-13 (1977) ("An appeal has to follow the theory of the trial, and where a cause is heard on one theory at trial, [respondent] cannot switch to a different theory on appeal.") (citations omitted), *disc. review denied, appeal dismissed*, 294 N.C. 183, 241 S.E.2d 517 (1978). *See also Cone Mills Corp. v. N.L.R.B.*, 413 F.2d 445, 452 (4th Cir. 1969) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . ."); *United States ex. rel. Coates v. Laird*, 494 F.2d 709, 711 (4th Cir. 1974) ("It was the duty of the [agency] . . . to articulate its reasons for its decision and to articulate them clearly."). Moreover, DHR has not raised its contention by cross-assignment of error. *See* N.C.R. App. P. 10(d). DHR's assertion, therefore, is not properly before us.

Additionally, assuming *arguendo* we need consider respondent's argument, it is unfounded. Briefly focusing upon the superior court's order, we first consider whether the court employed the proper scope or method of review. *See McCrary*, 112 N.C. App. at 168, 435 S.E.2d at 365. In this regard, we note the order recites that the court decided petitioner's appeal in its entirety based upon the court's consideration of "the whole official record." Such consideration constituted in the case *sub judice* appropriate selection by the court of the "whole record test."

We therefore next examine the "whole record" in order to determine whether "substantial evidence" therein supports the conclusion petitioner was dismissed for "just cause" on the alternative grounds of "unsatisfactory job performance," and to consider whether the trial court committed an error of law. *See, e.g., Wiggins*, 105 N.C. App. at 306-07, 413 S.E.2d at 5-6. "Substantial evidence" is that which a reasonable mind would consider sufficient to support a particular conclusion, *Walker*, 100 N.C. App. at 503, 397 S.E.2d at 354 (citation omitted), and must be more than a scintilla or just a permissible inference. *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982) (citation omitted).

In *Jones v. Dept. of Human Resources*, 300 N.C. 687, 268 S.E.2d 500 (1980), our Supreme Court discussed the function and format of the warnings a permanent State employee must receive before being terminated on the grounds of unsatisfactory job performance.

> Prior to dismissal for causes relating to performance of duties, a permanent State employee is entitled to three separate warnings that his performance is unsatisfactory. He must receive: (1) an oral warning explaining how he is not meeting the job's requirements; (2) a second oral warning outlining his unsatisfactory performance with a follow-up letter reviewing the points covered by the oral warning; (3) a final written warning setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary actions, and the employee's appeal rights. Only after receiving these three separate warnings may an employee be dismissed for unsatisfactory performance of duties.

Id. at 690-91, 268 S.E.2d at 502 (emphasis added).

Jones relied upon the following language from the Manual governing State personnel:

> **I. JOB PERFORMANCE DISCIPLINE AND DISMISSAL**
>
> This category covers all types of performance-related inadequacies. . . . Warnings administered under this policy are intended to bring about a permanent improvement in job performance . . . .
>
> Employees who are dismissed for unsatisfactory job performance shall receive at least three warnings: First, one or more oral warnings; second, a written warning to the employee documenting all relevant points covered in the disciplinary discussion; third, a final written warning which notifies the employee that failure to make the required performance improvements may result in dismissal.
>
> In administering this policy, supervisors should be aware that, in part, the intent of this policy is to assist and promote improved employee performance, rather than to punish.

Manual, Sec. 9, at 3; *see also* 25 N.C.A.C. 01J .0605 (1989).

Applying the foregoing rules to our examination of the record, we find indications, undisputed by petitioner, that he had been instructed by his supervisors prior to 23 March 1989 to improve certain aspects of job performance, and that he had also been given certain warnings. However, the Commission's order contains no findings pertaining to warnings received by petitioner or to the nature of his prior unsatisfactory performance. Moreover, we discern no record evidence sufficient to establish that the Center provided petitioner the kind and number of warnings our courts have held necessary to precede dismissal for reasons of job performance.

We further observe that the trial court's conclusion of "personal misconduct" cannot by its own terms be interpreted as a determination that petitioner was properly terminated for "unsatisfactory job performance."

Based on the foregoing, therefore, the trial court's conclusion of "personal misconduct," even if *arguendo* interpreted to mean petitioner was properly terminated for "unsatisfactory job performance," is not supported by substantial evidence in the record as a whole. It thus constitutes an error of law, and DHR's alternative contention is unavailing. *See, e.g., Davis*, 110 N.C. App. at 734-38, 432 S.E.2d at 134-36.

To summarize, because petitioner's argument regarding interpretation of the term "just cause" based upon personal misconduct has raised a question of law, we consider this contention *de novo*. Having done so, we hold as a matter of law that the actions of petitioner on 23 March 1989 did not constitute personal misconduct so as to support his immediate termination for "just cause." In addition, assuming *arguendo* the question is properly before us, no substantial evidence in the record as a whole sustains a conclusion petitioner's dismissal was for "just cause" based upon unsatisfactory job performance.

Accordingly, the judgment of the trial court affirming the decision of the State Personnel Commission to terminate petitioner's employment with the Center is reversed. Further, this matter is remanded to the superior court for subsequent remand to the Commission with direction to order the reinstatement of petitioner and such other relief to which he may be entitled consistent with our opinion herein. Because of this disposition of petitioner's appeal, it is unnecessary to examine his remaining assignments of error.

Reversed and remanded.

Judges EAGLES and MARTIN concur.

CONE MILLS CORPORATION, APPELLEE v. ALLSTATE INSURANCE COMPANY, APPELLANT

No. 9318SC349

(Filed 17 May 1994)

Insurance § 918 (NCI4th)— products liability—legal expenses—coverage—question of law

There was no prejudicial error in an action for a declaratory judgment and breach of an insurance contract where the issue was whether legal expenses were covered by the policy and the court admitted evidence on the intent of the parties and submitted the issue to the jury. The construction and application of the policy was an issue of law for the court rather than an issue of fact for the jury; however, there was no prejudice because the policy provisions are clear and unam-

biguous and specifically include all sums paid for legal expenses, and the jury answered the issue in plaintiff's favor.

Am Jur 2d, Insurance §§ 271, 272, 276-278.

Appeal by defendant from order entered 3 September 1992 by Judge C. Preston Cornelius in Guilford County Superior Court. Heard in the Court of Appeals 1 February 1994.

Plaintiff Cone Mills Corp. ("Cone") filed this action for declaratory judgment and breach of an insurance contract. The facts giving rise to this action are not in dispute. In 1986, Cone was named as a defendant in a product liability action (hereinafter "the *Ostrander* case") brought in the United States District Court in Minnesota on behalf of a minor child who was allegedly severely injured when sleepwear fabric manufactured by Cone caught fire.

At the time of the child's injury, Cone's liability insurance scheme included a self-insured retention ("SIR") in the amount of $250,000.00. Cone also had in effect two additional insurance policies issued by American Re-insurance Company ("Am Re") and by Northbrook Excess and Insurance Company, the predecessor in interest of defendant Allstate ("the Northbrook policy"). The Am Re policy provided general liability coverage for claims above $250,000.00 and up to $500,000.00. The Northbrook policy provides coverage for general liability claims above $500,000.00 and up to $25,000,000.00 per occurrence.

Allstate and Am Re received timely notice of the *Ostrander* case and Allstate acknowledged the potential for the claim to enter Allstate's layer of coverage. Cone retained a Minnesota law firm to defend the *Ostrander* claims. Pursuant to Allstate's request, plaintiff instructed the law firm to keep Allstate and Am Re apprised of the status of the case on an as-needed basis and to provide the two insurers with any information they requested about the case. While settlement negotiations were ongoing, the Minnesota law firm continued to prepare the case for trial. For these services, the law firm submitted itemized bills on a monthly basis.

At a settlement conference convened in the *Ostrander* case in October 1989, Allstate's counsel called upon Cone to tender its $250,000.00 SIR and also received authorization from Am Re to tender its limits of $250,000.00 toward settlement with the *Ostrander* plaintiffs. In January 1990, Allstate reached a settlement of the

case by paying, in addition to the amounts contributed by Cone and Am Re, cash and annuities totalling more than $2,500,000.00. At the time of settlement, Cone had incurred, in addition to the $250,000.00 paid toward the settlement, legal fees in defense of the case which totalled $501,374.34. Cone filed this action when its subsequent requests to Allstate and Am Re for reimbursement of its defense expenses were rejected. Cone and Am Re reached a settlement before trial. The jury returned a verdict for Cone against Allstate in the amount of $501,374.34. After allowing a credit for the amount which Am Re paid Cone in settlement of Cone's claim against it for defense costs, the trial court entered judgment against Allstate. Allstate appealed.

Smith Helms Mulliss & Moore, by James A. Medford and Larissa Jones Erkman, for plaintiff-appellee.

Wilson & Iseman, by G. Gray Wilson and Urs R. Gsteiger, for defendant-appellant.

MARTIN, Judge.

The parties advance several assignments and cross-assignments of error. The dispositive issue, however, is whether the trial court erred when it admitted evidence with respect to the intent of the parties and permitted the jury to determine whether the parties intended that the defense costs incurred in the *Ostrander* case would be included as part of the self-insured retention of $250,000.00 under the Northbrook policy. Both parties argue, and we agree, that the construction and application of the Northbrook policy was an issue of law for the court, rather than one of fact for the jury. Thus, it was error to submit the issue of intent to the jury. Moreover, we agree with Cone that the Northbrook policy requires that Allstate reimburse Cone for legal expenses incurred in defense of the *Ostrander* litigation and, therefore, Cone's motion for a directed verdict should have been granted. Because the jury answered the issue in Cone's favor, however, Cone was not prejudiced by the error and we will not disturb the trial court's judgment.

Under North Carolina law "the construction and application of the policy provisions to the undisputed facts is a question of law for the court." *Walsh v. National Indemnity Co.*, 80 N.C. App. 643, 647, 343 S.E.2d 430, 432 (1986). *See also, Computer Sales Int. v. Forsyth Mem. Hosp.*, 112 N.C. App. 633, 436 S.E.2d 263 (1993), *Tyler v. Nationwide Mut. Ins. Co.*, 101 N.C. App. 713, 401 S.E.2d

80 (1991). Where the policy language is clear and unambiguous, the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written. *Colon v. Bailey*, 76 N.C. App. 491, 333 S.E.2d 505 (1985), *reversed on other grounds*, 316 N.C. 190, 340 S.E.2d 478 (1986). Furthermore, in the absence of an ambiguity, the language used must be given its plain, ordinary, and accepted meaning. *Integon Gen. Ins. v. Universal Underwriters Ins.*, 100 N.C. App. 64, 394 S.E.2d 209 (1990). No ambiguity exists in a contract unless the court finds that the language of the parties is fairly and reasonably susceptible to either of the constructions for which the parties contend. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). If the court determines that the contract is not ambiguous, the court must enforce the contract as it was written and may not remake the contract under the guise of interpreting the ambiguous provisions. *Id.*

There is no question that the Northbrook policy provided coverage for the *Ostrander* claim. The only question is whether the policy provided coverage for Cone's defense costs. To determine that question, we must examine the Limitations of Liability provision and Ultimate Net Loss definition contained in the policy. The relevant portions of these provisions are as follows:

> LIMIT OF LIABILITY. The Company [Allstate] shall only be liable for the Ultimate Net Loss in excess of either [¶] A. The limits of the underlying Insurances as set out in the attached SCHEDULE OF UNDERLYING POLICES in respect of each Occurrence covered by said underlying insurances . . . .
>
> ULTIMATE NET LOSS. "Ultimate Net Loss" shall mean the total sum which the Insured, or the Insured's underlying insurance as scheduled, or both, become obligated to pay by reason of Personal Injuries . . . either through adjudication or compromise, and shall also include expenses consisting of: hospital, medical and funeral charges; all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for docotors [sic], lawyers, nurses, and investigators and other persons; litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any Occurrence covered hereunder.

In our view, the foregoing policy provisions are clear and unambiguous. The term Ultimate Net Loss specifically includes all sums paid for legal expenses. In *Vesta Ins. Co. v. Amoco Production*

Co., 986 F.2d 981 (5th Cir. 1993), *cert. denied*, 126 L.E.2d 48, 114 S.Ct. 80 (1993), the court examined the same definition of Ultimate Net Loss and held that "all litigation costs and expenses are simply built into the determination of [the company's] 'ultimate net loss'." *Id.* at 989. The court found that the policy provision "expressly and unambiguously" included court costs and attorney's fees. *Id.* We likewise hold that defense costs are clearly included in the determination of Ultimate Net Loss.

The Limit of Liability section determines what Allstate will be liable for under the Northbrook policy. This section provides that Allstate is liable only for the Ultimate Net Loss in excess of the limits of the policies set out in the "Schedule of Underlying Policies." The underlying schedule lists Cone's SIR of $250,000.00 and the Am Re policy for $250,000.00. In essence, this provision provides a floor, or level, at which Allstate's excess coverage begins. The floor is determined according to the schedule of underlying policies. Accordingly, Allstate is liable for the Ultimate Net Loss which exceeds Cone's SIR and Am Re's policy. Once Cone tendered the limits of its SIR and Am Re tendered the limits of its coverage toward the settlement, Allstate became liable for the Ultimate Net Loss in excess of the amounts tendered. In other words, Allstate is liable for the Ultimate Net Loss above the $250,000.00 tendered for settlement by Cone and the $250,000.00 tendered for settlement by Am Re. Since we have already determined that Ultimate Net Loss includes all defense related costs, Allstate is clearly liable for the *Ostrander* defense costs under the Northbrook policy.

Allstate, however, posits three arguments to escape liability for the *Ostrander* defense costs. We conclude that none of these arguments are reasonable interpretations of the Northbrook policy. Under the interpretations urged by Allstate, Cone would pay in excess of $750,000.00, over three times the limit of its SIR, on the *Ostrander* claim. Given the fact that the definition of Ultimate Net Loss, as contained in the policy, explicitly includes defense costs, Allstate's position is unreasonable. Moreover, its interpretations of the Northbrook policy are not supported by North Carolina case law.

First, Allstate asserts that, because of its status as an excess carrier, it is under no obligation to pay Cone's defense costs from the *Ostrander* claim. Allstate maintains that the law of primary and excess insurance carriers requires the primary carrier to pre-

sent the defense and pay for all costs associated with such defense without reimbursement from the excess carrier. This argument fails because Allstate's relationship with Cone is not one of excess carrier to primary carrier.

The question of whether a self-insured retention is the equivalent of primary insurance, as argued by Allstate, is addressed in *Wake County Hosp. System v. National Cas. Co.*, 804 F.Supp. 768 (E.D.N.C. 1992), *affirmed*, 996 F.2d 1213 (4th Cir. 1993). In *Wake County Hosp.*, the district court held that the SIR did not constitute "other insurance." *Id.* at 777. The court reasoned that "under a self-insurance scheme, no written insurance policy is issued by another individual or entity nor is a premium paid because obviously a business which is self-insured does not need to pay itself to protect against its own risk of loss." *Id.* at 775. We find the court's reasoning persuasive. Cone did not issue a policy to itself; nor did it pay a premium for the $250,000.00 SIR. Thus, Cone's SIR does not constitute a primary policy.

Additional support for this position exists. "[I]nsurance has been defined as a contract through which one party indemnifies another against loss due to certain specified contingencies, but the term 'self-insurance' has no precise legal meaning." *Self-Insurance against liability as other insurance within the meaning of liability insurance policy*, 46 A.L.R. 4th 707, 710. In general, self-insurance against liability has not been held to be "other insurance" within the meaning of a liability insurance policy, although there is authority to the contrary, particularly when the self-insurance expressly provides that it is primary to other insurance. *Id.* There is no evidence in the record that Cone's SIR stated that it would be primary to the policies of Am Re and Allstate. Consequently, Cone is not the primary carrier in this case and Allstate cannot escape liability based on this argument.

Second, Allstate maintains that its policy did not attach until the time of settlement, when the limits of Cone's SIR and Am Re's coverage were exhausted, and, therefore, it could not be liable for defense costs incurred by Cone up to that point. We disagree. Under the provisions of Allstate's policy, it is liable for the Ultimate Net Loss in excess of the underlying Am Re policy and Cone's SIR. The Allstate policy contains no time limitation within which expenses covered under the definition of Ultimate Net Loss must be incurred. Moreover, the Allstate policy allows Cone one year

within which to make written demand on Allstate for reimbursement of those expenditures covered under Ultimate Net Loss.

The various terms of an insurance policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. All clauses of the policy are to be construed, if possible, so as to bring them into harmony. *Trust Co.*, 276 N.C. at 355, 172 S.E.2d at 522. "Where the language of a contract is plain and unambiguous, construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in light of the undisputed evidence as to the custom, usage and meaning of its terms." *First Citizens Bank & Trust Co. v. McLamb*, 112 N.C. App. 645, 649-50, 439 S.E.2d 166, 169 (1993), *quoting Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975). Thus, Allstate is liable for the defense costs regardless of when the policy attached because a contrary interpretation would ignore those provisions of the contract discussed above.

Allstate mistakenly relies on the case of *Harnischfeger Corp. v. Harbor Ins. Co.*, 927 F.2d 974 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 189 (1991), for the proposition that defense costs incurred prior to attachment are not included in the limits of the underlying policy. *Harnischfeger* is inapposite to the present case. In *Harnischfeger*, the issue was whether the excess insurer became liable on the policy when the self-insured had paid out-of-pocket expenses totalling the underlying limit of liability or when the self-insured had paid out claims in the amount of the underlying limit. The policy in *Harnischfeger* never attached. This means that the excess insurer never became liable on the underlying claim. The court held that since the policy had not attached, the excess carrier could not be held liable for the defense costs.

There is a fundamental difference in the present case. Here, the Northbrook policy did attach, because Allstate became liable on the *Ostrander* claim. This is the fundamental difference. If the Northbrook policy had not attached, Allstate would **not be liable for any costs** associated with the *Ostrander* claim. However, because the policy did attach, Allstate is liable for the Ultimate Net Loss in excess of the underlying insurances. This case would parallel *Harnischfeger* only if the *Ostrander* claim had not exceeded the limits of the Am Re policy. Since that is not the case, *Harnischfeger* does not support Allstate's position.

Finally, Allstate claims that the Assistance & Cooperation Clause shows an intent for defense costs to be excluded from coverage. The Assistance and Cooperation clause states in part:

> The Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured, but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an Occurrence where the claim or suit involves, or appears reasonably likely to involve the Company.

This policy provision concerns whether Allstate will become involved in the actual defense of the claim itself. Allstate's argument that this provision has been interpreted to exclude the excess carrier from the obligation to defend is correct, but irrelevant. Cone did not ask Allstate to provide a defense of the *Ostrander* suit. However, Allstate's further contention that the Assistance & Cooperation Clause also relieves Allstate from the obligation to reimburse Cone for defense costs is incorrect. In *Institute of London Underwriters v. First Horizon*, 972 F.2d 125 (5th Cir. 1992), cited by Allstate, the court decided that since the excess carrier could not be called upon to assume the defense, the excess carrier did not have to indemnify the **primary** carrier for the defense costs incurred on the claim. *Institute of London Underwriters* is distinguishable because it involved a dispute between the primary carrier and the excess carrier. However, as we have previously determined, Cone, as self-insured, is not a primary carrier. Consequently, we do not interpret the Assistance and Cooperation clause as precluding recovery of defense costs from the excess carrier in this case.

Thus, we hold as a matter of law that the defense costs incurred by Cone in the *Ostrander* case are included in the calculation of the self-insured retention and that, as such, Allstate must indemnify Cone for these defense costs which total $501,374.34. All other assignments of error, with the exception of the assignment concerning the setoff, are moot since those assignments concern the issue of intent and the submission of that issue to the jury. Because the policy is unambiguous, the intent of the parties is irrelevant.

The last issue on appeal is whether the trial court erred in ruling that Allstate was entitled to a credit against the judgment

for the $27,500.00 which Cone received from Am Re and by entering judgment for Cone less $27,500.00. Cone contends that the $27,500.00 which it received pursuant to settlement with Am Re should not be credited to reduce the judgment it received from Allstate since it and Am Re are not joint tortfeasors.

In *Duke University v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 384 S.E.2d 36 (1989), this Court held that the excess carrier was entitled to a credit or setoff for the amount of the settlement with the other carrier. In doing so, we recited the general rule applicable to setoffs in contract actions as follows:

> [D]efendant in an action for breach of contract is entitled to show any matters which go to reduce the amount of loss actually suffered by plaintiff, provided such matters have a proximate relation to the contract . . . . Payment of compensation . . . to plaintiff by a third party on the same cause of action, or partial satisfaction from a third person against whom a claim for damages is made with respect to the same subject matter may be shown in reduction of damages for breach of contract.

Id. at 681, 384 S.E.2d at 47, *quoting* 25 C.J.S. Damages Sec. 97, at 1003-05 (1966) (footnotes omitted).

Cone argues that Allstate offered no proof at trial that the Am Re payments were in settlement for Cone's action for declaratory judgment for defense costs. However, Cone's attorneys admitted to the trial judge on the record that the $27,500.00 settlement with Am Re was for attorney's fees. Thus, the trial court correctly reduced the judgment against defendant to prevent Cone from obtaining a double recovery.

In summary, we hold that the trial court erred when it submitted the issue of intent of the parties to the insurance contract to the jury because the contract was unambiguous and should have been interpreted as a matter of law to require Allstate to provide coverage for the legal expenses incurred by Cone in defense of the *Ostrander* suit. However, the error was rendered harmless by the jury's verdict and the entry of judgment thereon. Accordingly, we find no prejudicial error.

Affirmed.

Chief Judge ARNOLD and Judge WYNN concur.

DICKERSON CAROLINA, INC. v. THOMAS J. HARRELSON, IN HIS INDIVIDUAL CAPACITY AND AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND AS CHAIRMAN OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; D. W. BAILEY, IN HIS INDIVIDUAL CAPACITY AND AS CHAIRMAN OF THE MBE GOAL COMPLIANCE COMMITTEE OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; B. G. JENKINS, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE MBE GOAL COMPLIANCE COMMITTEE OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; BOB BROWN, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE MBE GOAL COMPLIANCE COMMITTEE OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; WILLIAM R. BROWN, P.E., IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE MBE GOAL COMPLIANCE COMMITTEE OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; WILLIAM A. PERRY, JR., IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE MBE GOAL COMPLIANCE COMMITTEE OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. O. MURPHY, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE MBE GOAL COMPLIANCE COMMITTEE OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; PHILIP P. GODWIN, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; KEN NEWSOM, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; JEFFERSON B. STRICKLAND, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; ELWOOD GOODSON, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; JACK A. LAUGHERY, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; W. CARY LIVESAY, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; ALBERT McCAULEY, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; CHARLES LOWDERMILK, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; F. HUDNALL CHRISTOPHER, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; JIM NANCE, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; ERNEST BARRY, JR., IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; RICHARD VAUGHN, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; JOHN B. BEALL, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; DEAN PROCTOR, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; J. A. DALPIAZ, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; DAVID BROWN, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION; C. W. HARDIN,

IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE NORTH CAROLINA BOARD OF TRANSPORTATION, AND CROWDER CONSTRUCTION COMPANY, DEFENDANTS

No. 9310SC296

(Filed 17 May 1994)

1. **Appeal and Error § 168 (NCI4th)— highway construction—minority set-asides—constitutionality—mootness**

An assignment of error contending that N.C.G.S. § 136-28.4 and the Project Special Provision Minority Businesses (PSP) (the state policy concerning participation by disadvantaged businesses in highway contracts) violated Equal Protection was dismissed as moot where plaintiff argued that the program was unconstitutional because there was no evidence in the record of prior discrimination in the North Carolina highway construction industry, but NCDOT has modified the PSP in response to a legislative study which found evidence of historical discrimination in the highway construction industry.

Am Jur 2d, Appeal and Error §§ 760 et seq.

2. **Constitutional Law § 85 (NCI4th)— 42 U.S.C. 1983—State Board of Transportation officials—presumptively valid statute—immune**

Summary judgment was properly granted for members of the State Board of Transportation in a suit under 42 U.S.C. § 1983 which arose from a dispute over minority business participation in a highway contract under N.C.G.S. § 136-28.4. The definition of "person" under § 1983 does not include public officials acting in their official capacity and state officials are entitled to immunity from civil liability under the federal constitution for complying with a presumptively valid state statute.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 70; States, Territories, and Dependencies §§ 104-107.

Appeal by plaintiff from summary judgment entered 20 November 1992 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 13 January 1994.

Smith Helms Mulliss & Moore, by Douglas W. Ey, Jr., Paul K. Sun, Jr., and Matthew W. Sawchak, for plaintiff-appellant.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Edwin M. Speas, Jr., Senior Deputy Attorney General Reginald L. Watkins, Special Deputy Attorney General Grayson G. Kelley, and Special Deputy Attorney General Tiare B. Smiley, for defendant-appellee.

WYNN, Judge.

In 1990 the North Carolina Department of Transportation (NCDOT) solicited bids for Project 6.671043, construction of a highway interchange, in Mecklenburg County. All bidders were subject to N.C. Gen. Stat. § 136-28.4, "State Policy Concerning Participation by Disadvantaged Businesses in Highway Contracts." Amended in July 1990, this statute set a 10% goal for contract participation by businesses owned or controlled by minorities (MB's) and a 5% goal for businesses owned or controlled by women (WB's). The statute provides:

> (a) It is the policy of this State to encourage and promote participation by disadvantaged businesses in contracts let by the Department pursuant to this Chapter for the design, construction, alteration, or maintenance of State highways, roads, streets, or bridges and in the procurement of materials for these projects. All State agencies, institutions, and political subdivisions shall cooperate with the Department of Transportation and all other State agencies, institutions, and political subdivisions in efforts to encourage and promote the use of disadvantaged businesses in these contracts.
>
> (b) A ten percent (10%) goal is established for participation by minority businesses and a five percent (5%) goal for participation by women businesses is established in contracts let by the Department of Transportation for the design, construction, alteration, or maintenance of State highways, roads, streets or bridges and for the procurement of materials for these projects. The Department of Transportation shall endeavor to award to minority businesses at least ten percent (10%), by value, of the contracts it lets for these purposes, and shall endeavor to award to women businesses at least five percent (5%), by value, of the contracts it lets for these purposes. The Department shall adopt written procedures specifying the

steps it will take to achieve these goals. The Department shall give equal opportunity for contracts it lets without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition, as defined in G.S. 168A-3, to all contractors and businesses otherwise qualified.

(c) The following definitions apply in this section:

(1) "Disadvantaged business" has the same meaning as in 49 C.F.R. § 23.62.

(2) "Minority" has the same meaning as in 49 C.F.R. § 23.5.

N.C. Gen. Stat. § 136.28-4 (1993).

NCDOT implemented this statute in a document entitled "Project Special Provision Minority Businesses" (PSP) on or about 17 July 1990. The PSP established contract participation goals for MBs and WBs and required that each contractor subject to the PSP take all necessary and reasonable steps to achieve these goals. The PSP further provided that if a low bidder's bid did not meet the designated set-aside percentages, it could submit information documenting its "good faith effort" to meet the goals. The PSP authorized NCDOT to reject a bid if the low bidder failed to demonstrate an adequate good faith effort to meet the contract goals. NCDOT established a Goals Compliance Committee (GCC), composed of senior officials, to implement the set-aside goals and evaluate the bidders' good faith efforts.

On 19 February 1991, NCDOT opened the bids on Project 6.671043 and found plaintiff Dickerson Carolina, Inc. to be the lowest bidder with a bid of $5,322,119.82. The second lowest bid, submitted by Crowder Construction Company (Crowder), was $88,743.58 higher. The GCC determined, however, that Dickerson had not shown an adequate good faith effort to include minority and women businesses' participation in its bid. On 1 March 1991, the North Carolina Board of Transportation, which approves the award of highway construction contracts, followed the GCC's recommendation and unanimously rejected Dickerson's bid. The Board then awarded the contract to Crowder.

Dickerson brought this action against the Secretary of the Department of Transportation and members of the Board of Transportation and of the GCC, seeking injunctive relief and monetary damages against defendants in their official and individual

capacities for violations of Dickerson's federal and state constitutional rights. In its complaint Dickerson alleged that N.C. Gen. Stat. § 136-28.4 is unconstitutional on its face and as applied and that defendants, acting pursuant to the PSP, violated Dickerson's rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, Article I, section 19 of the North Carolina Constitution, and 42 U.S.C. § 1981. Dickerson charged that defendants' actions denied it the right to compete on an equal basis for the construction contract. Dickerson asserted that due to these violations it was entitled to damages under 42 U.S.C. § 1983.

Dickerson moved for summary judgment as to the constitutional claims, and defendants moved for summary judgment as to all of plaintiff's claims under the United States Constitution, the North Carolina Constitution, and 42 U.S.C. §§ 1981 and 1983. The trial court granted defendants' motion and denied plaintiff's motion. The trial court then designated the order a final judgment as to those claims, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), and ruled there was no just reason to delay the final adjudication of these claims. From this order, plaintiff appeals.

I.

[1] Dickerson first argues that N.C. Gen. Stat. § 136-28.4 and the PSP are unconstitutional as violations of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and under Article I, section 19 of the North Carolina Constitution. Dickerson contends the United States Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 102 L. Ed. 2d 854 (1989) requires that a minority set-aside program serve a compelling state interest and that the statute and the regulations fail this test. We conclude, however, that since NCDOT has changed its minority set-aside program in response to a finding by the General Assembly of historical discrimination in the highway construction industry, plaintiff's constitutional challenge in the instant case is now moot.

"Whenever, 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." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert.*

denied, 442 U.S. 929, 61 L. Ed. 2d 297 (1979); *Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Management Comm'n*, 329 N.C. 615, 407 S.E.2d 785, *reh'g denied*, 409 S.E.2d 593 (1991); *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 275 N.C. 675, 170 S.E.2d 473 (1969). An appeal which presents a moot question should be dismissed. *Matthews v. North Carolina Dep't of Transportation*, 35 N.C. App. 768, 242 S.E.2d 653 (1978). Judicial power only extends to concrete, justiciable, and actual controversies properly brought before the court and each decision of law must be based on specific facts established by stipulation or by appropriate legal procedure. *First Nat'l Bank of Catawba County v. Edens*, 55 N.C. App. 697, 286 S.E.2d 818 (1982); *see Boswell v. Boswell*, 241 N.C. 515, 85 S.E.2d 899 (1955).

The record indicates that in response to plaintiff's suit NCDOT temporarily suspended its minority set-aside program pending a review of its factual basis. From September 1991 to April 1993 NCDOT's goals program operated on a voluntary basis. While contractors submitting bids were requested to meet the MB and WB goals, low bids were not rejected if the goals were not met. The defendants' brief indicates that in January 1993 the General Assembly received the results of a comprehensive study of the highway construction industry which concluded that MB and WB contractors had suffered from historical discrimination. The legislature's Highway Oversight Committee requested NCDOT to reimplement a program designed to meet the goals established in N.C. Gen. Stat. § 136-28.4. NCDOT subsequently instituted a minority set-aside program which is similar in scope to the PSP which is the subject of the instant case.

When the necessary determinative facts have not been established in the lower court, the appellate court will not decide the question sought to be presented, since such a decision would amount to an advisory opinion on an abstract question. *See Boswell*, 241 N.C. at 518-9, 85 S.E.2d at 902; *City of Henderson v. Vance County*, 260 N.C. 529, 133 S.E.2d 201 (1963). In addition, a court "will pass upon the constitutionality of a statute *only when* the issue is squarely presented upon an adequate factual record and *only when* resolution of the issue is necessary to determine the rights of the parties before it." *State v. Fayetteville Street Christian School*, 299 N.C. 351, 359, 261 S.E.2d 908, 914, *on reh'g*, 299 N.C. 731, 265 S.E.2d 387, *appeal dismissed*, 449 U.S. 807, 66 L. Ed. 2d 11 (1980); *Nicholson v. State Educ. Assistance Authority*, 275 N.C. 439, 168 S.E.2d 401

(1969); *Union Carbide Corp. v. Davis*, 253 N.C. 324, 116 S.E.2d 792 (1960).

In the instant case, the 1993 legislative study of the highway construction industry and the new minority set-aside program established by NCDOT are necessary evidence in determining the constitutionality of N.C. Gen. Stat. § 136-28.4. "The law is plain that the constitutional sufficiency of a state's proffered reasons necessitating an affirmative action plan should be assessed on whatever evidence is presented, whether prior to or subsequent to the program's enactment." *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2nd Cir. 1992); *see Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 (3rd Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 780 (1992). Plaintiff argues that the former NCDOT minority set-aside program, the PSP, is unconstitutional because there is no evidence in the record of prior discrimination in the North Carolina highway construction industry. Since NCDOT has modified the PSP in response to the 1993 legislative study which found evidence of historical discrimination in the highway construction industry, plaintiff's challenge to the old PSP is now moot. *See Harrison & Burrowes*, 981 F.2d at 59 (challenge to minority set-aside program was moot when an emergency regulation was enacted suspending application of minority enterprise goals on state-funded contracts); *Maryland Highway Contractors Ass'n v. State of Maryland*, 933 F.2d 1246 (4th Cir.), *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 325 (1991) (claims for declaratory and injunctive relief regarding state minority program dismissed as moot where legislature repealed statute and enacted new statute in attempt to comply with *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 102 L. Ed. 2d 854 (1989)). This assignment of error is dismissed.

II.

[2] Dickerson next argues that the trial court erred by granting defendants' motion for summary judgment as to Dickerson's claims for damages for violations of its federal constitutional rights. Dickerson brought this action for damages under 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen

> of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

Dickerson sued the members of the Board and the GCC in their official and individual capacities. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45 (1989), the United States Supreme Court ruled that the definition of a "person" under § 1983 does not include public officials acting in their official capacity. Thus, the only way Dickerson can maintain an action for damages for violations of its federal constitutional rights is to sue the defendants in their individual capacities. *Hafer v. Melo*, ---U.S. ---, 121 L. Ed. 2d 431 (1992).

We conclude, however, that defendants are immune from suit for damages in their individual capacities. To determine the immunity to be accorded as a defense in a suit under § 1983, we must look to federal law. *Wood v. Strickland*, 420 U.S. 308, 43 L. Ed. 2d 992, *reh'd denied*, 421 U.S. 921, 43 L. Ed. 2d 790 (1975). State immunities and defenses are not relevant in § 1983 litigation, even when, as here, the suit is brought in state court. *Martinez v. California*, 444 U.S. 277, 284, 62 L. Ed. 2d 481, 488, n. 8, *reh'g denied*, 445 U.S. 920, 63 L. Ed. 2d 606 (1980). Public officials cannot be liable for damages in a civil rights action based on federal law unless clearly established statutory or constitutional rights of which a reasonable person would have known have been violated. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396 (1982). If an official's acts are not clearly unlawful under existing precedent, the official is not personally liable. *Anderson v. Creighton*, 483 U.S. 635, 97 L. Ed. 2d 523 (1987). "[I]n the light of pre-existing law the unlawfulness must be apparent." *Id.*, 483 U.S. at 640, 97 L. Ed. 2d at 531. *See also Mitchell v. Forsyth*, 472 U.S. 511, 528, 86 L. Ed. 2d 411, 426 (1985) (Public officials are immune unless "the law clearly proscribed the actions [they] took.").

In the instant case, defendants participated in formulating and implementing a program mandated by state law. Legislative classifications are presumed to be constitutional. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 101 L. Ed. 2d 1 (1988). The United States Supreme Court has held that "state officials

and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Lemon v. Kurtzman*, 411 U.S. 192, 209, 36 L. Ed. 2d 151, 166 (1973).

Our Supreme Court has also held that state officials are entitled to immunity from civil liability under the federal constitution for complying with a presumptively valid state statute. *Bailey v. State of North Carolina*, 330 N.C. 227, 244, 412 S.E.2d 295, 305 (1991), *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 777 (1992) ("Rarely will a state official who simply enforces a presumptively valid statute thereby lose her immunity from suit."). Because defendants acted pursuant to a presumptively valid statute, the trial court did not err by granting their motion for summary judgment on plaintiff's claim for damages under § 1983.

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

Affirmed.

Chief Judge ARNOLD and Judge MARTIN concur.

UNITED SERVICES AUTOMOBILE ASSOCIATION, PLAINTIFF v. JACK F. GAMBINO AND WILLIAM F. JOHNSON, DEFENDANTS

No. 9310SC294

(Filed 17 May 1994)

1. Insurance § 528 (NCI4th) — underinsured motorist coverage — stacking — foster child — definition

"Foster child," as used in the portion of plaintiff's underinsured motorist policy defining covered "person," means a person whose upbringing, care and support has been provided by someone not related by blood or legal ties and who has reared the person as his or her own child. Plaintiff's contention that "foster child" includes only persons under the age of majority was rejected because it would result in disparate treatment of the same class of insureds.

Am Jur 2d, Automobile Insurance § 322.

Who is "member" or "resident" of same "family" or "household," within no-fault or uninsured motorist provisions of motor vehicle insurance policy. 96 ALR2d 804.

2. Insurance § 528 (NCI4th)— underinsured motorist coverage—stacking—foster child—evidence insufficient

The trial court erred by granting summary judgment for defendants in an action to determine whether defendant Jack Gambino was included in defendant Johnson's underinsured motorist coverage where Jack left the home of his father and stepmother in 1987 and lived with the Johnsons until 1988, when he moved into a dormitory at Louisburg College; he returned to the Johnsons' on weekends, holidays and summer recess; the Johnsons provided him with school supplies, lunch money, food, and spending money when he resided in their home; he was allowed to use the family vehicle; he had little or no contact with his father and received no financial support from his father; he was seriously injured in a collision in 1989; the Johnsons purchased medical supplies and equipment for Jack's use while he recuperated in their home; and he continued to live with the Johnsons until he moved to his father's home in 1990. However, the Johnsons assumed no parental responsibilities for Jack until he was approximately seventeen and one-half years old; he was raised and supported by his natural parents, or his natural father and stepmother prior to that time; he maintained a part-time job and earned income which he used to purchase clothing after leaving his father's home; his natural mother sent him money whenever she could; the Johnsons listed their natural child as a driver on their automobile insurance policy but did not list Jack; although the Johnsons purchased supplies and equipment for Jack's recuperation, his stepmother sought payment of his medical expenses under a health insurance policy insuring herself and her dependent children; and Jack moved back to his father's home following his recuperation. The evidence, considered in the light most favorable to plaintiff, creates a jury question as to whether Jack falls within the definition of foster child.

Am Jur 2d, Automobile Insurance § 322.

Who is "member" or "resident" of same "family" or "household," within no-fault or uninsured motorist provisions of motor vehicle insurance policy. 96 ALR2d 804.

3. Insurance § 528 (NCI4th)— automobile insurance—underinsured motorist coverage—stacking—policy language

The trial court correctly ruled that defendant Jack Gambino is not entitled to aggregate or stack UIM coverage of each of three vehicles insured under one policy where, at the time this action arose, N.C.G.S. § 20-279.21(b)(4) permitted persons insured of the first class to stack coverages; insureds of the first class were defined as the named insured and, while a resident of the same household, the spouse of any named insured and the relatives of either; there was evidence from which a jury could reasonably find Gambino to be a foster child, but a foster child is not a relative and thus is not a person of the first class; and the policy language prohibited intrapolicy stacking.

Am Jur 2d, Autmobile Insurance §§ 326 et seq.

Combining or "stacking" uninsured motorist coverages provided in single policy applicable to different vehicles of individual insured. 23 ALR4th 12.

4. Insurance § 690 (NCI4th)— automobile insurance—underinsured motorist coverage—prejudgment interest or costs taxed

The trial court did not err in an underinsured motorist stacking case by ruling that the policy's UIM benefits do not cover prejudgment interest or costs taxed where the judgment against the tortfeasor far exceeds the maximum amount of UIM coverage provided by the policy, so that the available limits of UIM coverage would be exhausted in satisfaction of the judgment in the underlying tort action and no UIM coverage would be available for payment of prejudgment interest or costs. Moreover, the Supplementary Payments Provision of the policy applies only to the liability portion of the policy and not the UIM Section.

Am Jur 2d, Automobile Insurance § 428.

Appeal by plaintiff and defendants from judgment entered 11 February 1993 by Judge Jack A. Thompson in Wake County Superior Court. Heard in the Court of Appeals 13 January 1994.

Plaintiff instituted this action seeking a declaration of the rights of the parties with respect to the existence and amount of underinsured motorist coverage (hereinafter "UIM coverage") provided to

defendant Jack F. Gambino by an insurance policy issued by plaintiff to defendant Johnson. The policy at issue insured three vehicles owned by Johnson and provided UIM coverage of $100,000.00 per person.

Defendant Jack Gambino (hereinafter "Jack") was born in 1970 to Jack J. and Janice Gambino. Jack's parents divorced, his father remarried and, in 1983, moved his family to Raleigh, North Carolina. In November, 1987 Jack left the home of his father and step-mother and began living in the home of defendant William Johnson and his wife, Sheila. While living with the Johnsons, Jack held a part-time job at a local restaurant and completed his high school education, graduating in June, 1988. Following graduation, he continued to live in the Johnsons' household until the fall of 1988 when he enrolled in Louisburg College and moved into a campus dormitory. During the school year, Jack returned to the Johnsons' home on weekends and holidays. At the end of the college school year, Jack returned to Raleigh and lived with the Johnsons during the summer recess. During the times that Jack resided in their home, the Johnsons provided him with school supplies, lunch money, food and spending money. The Johnsons allowed Jack to use the family vehicle when he needed it, subject to its availability. During this time, Jack received no financial support from his father with whom he had little or no contact. Mr. Gambino did not know that Jack graduated from high school or that he was attending college.

On 22 August 1989, after returning to Louisburg to begin his second year of college, Jack was seriously injured when the motorcycle he was riding was involved in a collision with an automobile driven by Samuel Black. Following the accident, Jack's stepmother, Marlene Gambino, submitted claims for Jack's medical expenses under an insurance policy provided to her through her employer. The policy provided coverage for children of the employee who were under the age of 26 and primarily dependent on the employee for financial support. When Jack was released from the hospital, the Johnsons purchased medical supplies and equipment for his use while he recuperated in their home. Jack continued living with the Johnsons until the spring of 1990 when he moved back to his father's home.

Jack thereafter instituted an action against Black to recover damages for the injuries he sustained. Black's automobile liability insurance carrier paid its policy limit of $25,000.00, and plaintiff

defended the case on behalf of Black. On 22 January 1993, a judgment was entered in accordance with a jury verdict in favor of Jack for $325,000.00.

Plaintiff thereafter commenced this action to determine whether, and to what extent, the policy it issued to Mr. Johnson provides Jack with UIM coverage. On cross motions for summary judgment, the trial court entered an order concluding that (1) plaintiff's policy provides UIM coverage to Jack by reason of the policy provision which extends such coverage to a "foster child," (2) the coverage provided is $100,000.00, less $25,000.00 paid by Black's liability insurance carrier, or $75,000.00, (3) Jack is not entitled to aggregate or "stack" the coverage for each of the three vehicles insured by the policy, and (4) the policy does not provide UIM coverage for prejudgment interest or costs taxed in the underlying tort action. All parties appealed.

Battle, Winslow, Scott & Wiley, P.A., by Sam S. Woodley and M. Greg Crumpler, for plaintiff-appellant.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for defendant-appellants.

MARTIN, Judge.

PLAINTIFF'S APPEAL

[1] Plaintiff contends that the trial court erred by concluding that Jack is a "covered person" under the terms of plaintiff's policy on the ground that he is the Johnsons' "foster child." For the reasons set forth herein, we hold that summary judgment in favor of defendants was improper.

The policy issued by plaintiff provides in pertinent part that it provides UIM coverage to "covered persons." For purposes of UIM coverage, the policy defines "covered person" as "[y]ou or any family member." "Family member" is defined by the policy as "a person related to you by blood, marriage, or adoption who is a resident of your household. This includes a ward or foster child." The policy does not, however define the term "foster child."

When an insurance policy fails to define a nontechnical term, the term is given its ordinary meaning unless the context in which the term is used in the policy requires that it be given a different meaning. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E.2d 894 (1978).

In addition, an insurance contract is to be construed as a reasonable person in the position of the insured would have understood it. *W & J Rives, Inc. v. Kemper Insurance Group*, 92 N.C. App. 313, 374 S.E.2d 430 (1988), *disc. review denied*, 324 N.C. 342, 378 S.E.2d 809 (1989). If the language of the policy is ambiguous or reasonably susceptible to different constructions, it must be given the interpretation most favorable to the insured. *Id.*; *Maddox v. Insurance Co.*, 303 N.C. 648, 280 S.E.2d 907 (1981). Applying the foregoing principles, we attempt to ascertain the meaning of the term "foster child" as used in plaintiff's policy.

The Random House Dictionary of the English Language 560 (1966) defines the term "foster child" as "a child raised by someone not its own mother or father." *Webster's Third New International Dictionary*, 897 (1976), defines foster (as the first constituent part of the term foster child) as "affording, receiving, or sharing nourishment, upbringing, or parental care though not related by blood or legal ties; as . . . brought up by someone other than one's natural parent . . . ." *Black's Law Dictionary* 656 (6th ed. 1990) defines "foster child" as a "child whose care, comfort, education and upbringing has been left to persons other than his natural parents."

In *Joseph v. Utah Home Fire Ins. Co.*, 313 Or. 323, 329, 835 P.2d 885, 888 (1992), the court defined "foster child" as "a child reared by a person other than its biological or adoptive parent[.]" The court defined a foster parent as "a person who has performed the duties of a parent to the child of another by rearing that child as the foster parent's own." *Id.* The same or similar definitions have been utilized by courts in other jurisdictions. *See, Hayes v. American Standard Ins. Co.*, 847 S.W.2d 150 (Mo. App. S.D. 1993); *Brokenbaugh v. New Jersey Mfrs. Ins. Co.*, 158 N.J.Super. 424, 386 A.2d 433 (1978); *Illinois v. Parris*, 130 Ill. App.2d 933, 267 N.E.2d 39 (1971); *Ellis v. Ellis*, 251 Ark. 431, 472 S.W.2d 703 (1971); *Trotter v. Pollan*, 311 S.W.2d 723 (Tex. Civ. App. 1958); *Cicchino v. Biarsky*, 26 N.J. Misc. 300, 61 A.2d 163 (1948); *In re Norman's Estate*, 209 Minn. 19, 295 N.W. 63 (1940). None of these courts have limited the definition of "foster child" to those situations where a person's "foster child" status was conferred by legal appointment or placement.

Plaintiff argues that the term "foster child" can only apply to a person less than eighteen years of age and that Gambino,

who was nineteen at the time of the accident, therefore would not fall within the policy definition of "foster child." We disagree.

First, we believe that the word "child," when used as part of the term "foster child," refers to a sociological relationship between two persons rather than to a person's biological age. Second, under plaintiff's interpretation, a "foster child" would be covered under the policy's UIM provisions only if he or she was under the age of majority. However, under the terms of the policy, a "foster child" is included within the definition of "family member" which is defined as "a person related to you by blood, marriage or adoption who is a resident of your household." Coverage for family members is not restricted to family members below the age of majority. Rather, a family member living in the insured's household would be included under the policy's UIM coverage regardless of his or her age. *See, Harrington v. Stevens*, 334 N.C. 586, 434 S.E.2d 212 (1993). Thus, limiting coverage for foster children to those foster children below the age of eighteen would result in disparate treatment for members of the same class of insureds. We therefore reject plaintiff's contention that "foster child" includes only persons under the age of majority.

We hold that the term "foster child," as used in plaintiff's policy, means a person whose upbringing, care and support has been provided by someone not related by blood or legal ties and who has reared the person as his or her own child. We must now decide whether the trial court erred by entering summary judgment in favor of defendants.

[2] A party is entitled to summary judgment if the pleadings and forecast of evidence before the court, taken in the light most favorable to the non-moving party, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Speck v. N.C. Dairy Foundation*, 311 N.C. 679, 319 S.E.2d 139 (1984). Plaintiff contends that the evidence before the trial court was sufficient to create a question of fact as to whether Gambino was the Johnsons' "foster child" as herein defined. We agree.

Viewed in the light most favorable to plaintiff, the evidence was insufficient to establish, as a matter of law, that Jack is the Johnsons' foster child. The evidence showed that the Johnsons assumed no parental responsibilities for Jack until he was approximately seventeen and one half years old. Prior to that time, Jack

was reared and supported by his natural parents, or by his natural father and his stepmother. Even after leaving his father's home, Jack maintained a part-time job and earned income which he used to purchase his own clothing. In addition, Jack testified that his natural mother sent him money whenever she could afford to and that during a school year she sent him a total of approximately $500.00.

Other evidence showed that the Johnsons listed their natural child as a driver on their automobile insurance policy, but that Jack was not similarly listed even though he was regularly allowed to drive at least one of the family's vehicles. Although there was evidence that the Johnsons purchased supplies and equipment to facilitate Jack's recuperation, there was also evidence which showed that Jack's stepmother sought payment of his medical expenses under a health insurance policy insuring her and her dependent children. Finally, following his recuperation, in the spring of 1990, Jack moved back to the home of his father.

We believe that this evidence, when considered in the light most favorable to plaintiff, creates a jury question as to whether Jack falls within the definition of a "foster child" as that term is herein defined. Therefore, we hold that the trial court erred by entering summary judgment in favor of defendants.

DEFENDANTS' APPEAL

[3] Defendants first contend that the trial court erred by ruling that Jack is not entitled to aggregate or stack the UIM coverage for each of the three vehicles insured under the policy. We disagree.

"Language in a policy of insurance is the determining factor in resolving coverage questions unless the language is in conflict with applicable statutory provisions governing such coverage." *Lanning v. Allstate Insurance Co.*, 332 N.C. 309, 312, 420 S.E.2d 180, 182 (1992).

> [W]hen a statute is applicable to the terms of a policy of insurance, the provisions of that statute become part of the 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 will prevail.

Sutton v. Aetna Casualty & Surety Co., 325 N.C. 259, 263, 382 S.E.2d 759, 762, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989).

UIM insurance is governed by G.S. § 20-279.21(b)(4). Therefore, we must first look to the statute to determine whether it mandates that Jack, if found to be the Johnsons' foster child, is permitted to stack the UIM coverages for the three vehicles insured by the policy.

At the time this action arose, G.S. § 20-279.21(b)(4) permitted persons insured of the first class to stack UIM coverages, both interpolicy and intrapolicy. *Harrington v. Stevens*, 334 N.C. 586, 434 S.E.2d 212 (1993); *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992); *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (1993). G.S. § 20-279.21(b)(3) defines insureds of the first class as "the named insured and, while a resident of the same household, the spouse of any named insured and relatives of either[.]"

In the present case, Mr. Johnson was the named insured in the policy issued by plaintiff. Jack, the party seeking to stack the UIM coverages provided by the policy, is not the named insured nor the named insured's spouse. Thus, to be entitled to stack the coverages at issue, Jack must be a "relative" of Mr. Johnson or Mrs. Johnson.

As we held above, there is evidence from which a jury could reasonably find that Jack is the named insured's "foster child." However, a foster child is not a "relative" of the foster parent. The word "relative" as ordinarily understood, means "a person connected with another by blood or affinity." *Webster's Ninth New Collegiate Dictionary*, 994 (1983). "Affinity" means "[r]elationship by marriage." *The American Heritage Dictionary of the English Language*, 22 (1981). Clearly, Jack is not connected to the Johnsons by either blood or marriage. Thus, Jack is not a person insured of the first class as defined by G.S. § 20-279.21(b)(3) and may not take advantage of the stacking provisions in G.S. § 20-279.21(b)(4).

Jack's right to aggregate the UIM benefits of plaintiff's policy, where stacking is not mandated by the applicable statutory provision, must therefore be found, if at all, in the language of plaintiff's policy. Plaintiff's policy provides in pertinent part:

> The limit of bodily injury liability shown in the Declarations for "each person" for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident . . . .

> This is the most we will pay for bodily injury and property damage regardless of the number of:
>
> 1. Covered persons;
>
> 2. Claims made;
>
> 3. Vehicles or premiums shown in the Declarations; or
>
> 4. Vehicles involved in the accident.

Plaintiff contends that this policy language prohibits intrapolicy stacking of UIM coverages. We agree.

In *Lanning, supra*, the Supreme Court reviewed policy language virtually identical to the foregoing language from plaintiff's policy and held that it unambiguously prohibited stacking of the uninsured motorists benefits. Thus, we hold that the trial court correctly ruled that the language of the policy prohibits aggregation of the UIM benefits for the Johnsons' three vehicles. Therefore, the UIM benefits available to Jack, in the event he is found to be a foster child, amount to $100,000.00 reduced by the $25,000.00 paid by the tortfeasor's liability insurer.

[4] Next, defendants contend that the trial court erred by ruling that the policy's UIM benefits do not cover prejudgment interest or costs taxed. This issue was recently addressed in *Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993) and *Wiggins v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 26, 434 S.E.2d 642 (1993). The policy in the present case, like the policies at issue in *Baxley* and *Wiggins*, provides that the insurer promises to pay, up to its UIM policy limit,

> damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:
>
> 1. Bodily injury sustained by a covered person and caused by an accident; and
>
> 2. Property damage caused by an accident.

The decisions in *Baxley* and *Wiggins* interpreted this language, as obligating the insurer to pay prejudgment interest and costs *up to* its UIM policy limits. *Baxley* at 9, 430 S.E.2d at 898-899.

In the present case, Jack obtained a judgment against the tortfeasor for $325,000.00. This amount far exceeds $75,000.00, the

maximum amount of UIM coverage provided by the policy. In the event that Jack is determined to be covered by the UIM provisions of the policy, the available limits of the UIM coverage would be exhausted in satisfaction of the judgment in the underlying tort action. Thus, under *Baxley* and *Wiggins*, no UIM coverage would be available for payment of prejudgment interest or costs.

We also reject defendants' contention that plaintiff is obligated to pay prejudgment interest by virtue of the policy's Supplementary Payments Provision. This portion of plaintiff's policy provides that plaintiff will pay "interest accruing after any suit we defend is instituted." However, this provision applies only to the *liability* portion of the policy and we find no similar provision in the UIM section of the policy. Therefore, we affirm the trial court's ruling that plaintiff's policy provides no UIM coverage for prejudgment interest or costs taxed in the underlying tort action.

In summary, we hold that, (1) the issue of Jack's status as a "foster child," as defined herein, is a question of fact for determination by a jury; (2) if Jack is a "covered person" for purposes of UIM coverage, he is not entitled to aggregate the applicable UIM benefits, and (3) plaintiff's policy does not provide UIM coverage for prejudgment interest or costs taxed in the underlying tort action.

Affirmed in part; reversed in part.

Chief Judge ARNOLD and Judge WYNN concur.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA v. ANSCO & ASSOCIATES, INC.

No. 9310SC692

(Filed 17 May 1994)

1. Administrative Law and Procedure § 72 (NCI4th)— final agency decision—appellate review—scope of review

De novo review is required where it is alleged that an agency's decision was based upon an error of law; review is conducted under the whole record test where it is alleged that the agency's decision is not supported by substantial

evidence. An error of law exists as that term is used in N.C.G.S. § 150B-51(b)(4) if a conclusion of law entered by the administrative agency is not supported by the findings of fact entered by the agency or if the conclusion of law does not support the decision of the agency.

Am Jur 2d, Administrative Law §§ 769-774.

2. **Labor and Employment § 34 (NCI4th)— collapsed trench— OSHA regulations—violation not willful**

The findings of the North Carolina Safety and Health Review Board that defendant's actions were willful were not supported by the findings of facts in an action arising from the collapse of an excavation where the findings reveal that defendant knew of the applicable standards and had knowledge, by imputation from its area supervisor, of conditions violative of the standards, but there were no findings that defendant possessed a state of mind that would constitute an intentional disregard or plain indifference to the standards, nor can any such state of mind be implied from the findings. However, the findings do support a conclusion that the violation was serious. N.C.G.S. § 95-127(18).

Am Jur 2d, Plant and Job Safety §§ 94-119.

Judge JOHN concurring in the result.

Appeal by defendant from order filed 22 February 1993 in Wake County Superior Court by Judge Gregory A. Weeks. Heard in the Court of Appeals 11 March 1994.

Michael F. Easley, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, Franklin Scott Templeton, Associate Attorney General, and Linda Kimbell, Associate Attorney General, for the State.

Tuggle, Duggins & Meschan, P.A., by Joseph F. McNulty, Jr., for petitioner-appellant.

GREENE, Judge.

Ansco & Associates, Inc. (Ansco) appeals from a superior court order affirming the decision of the North Carolina Safety and Health Review Board (the Review Board) upholding the classification of citations for violations of the excavation and shoring standards

set forth in 29 C.F.R. 1926.651(c) & (f) as willful and imposing an $8,000 fine.

On 14 November 1989, a three-man crew of Ansco's was preparing a 12 to 13 foot deep, 32 foot long, and 13 to 16 foot wide excavation for the installation of a communications environmental vault under the supervision of job site foreman Scott Marion (Marion). Marion and his men entered the excavation and, with later assistance from additional workers, constructed a shoring system consisting of heavy timbers, cross-braces, and wooden panels around the walls of the excavation. Subsequent to the completion of the shoring system, Marion and two other workers were levelling gravel at the bottom of the excavation, when one of the heavy timbers snapped and one side of the shoring system collapsed, trapping Marion beneath the dirt and broken timbers. Marion suffered a broken leg and a broken pelvis, but subsequently returned to work for Ansco.

Following an investigation into this accident, Ansco received a "Citation and Notification of Penalty" from the North Carolina Department of Labor's Division of Occupational Safety and Health. Ansco was cited for willful violations of two occupational safety and health standards (OSHA standards), specifically, 29 C.F.R. 1926.651(c) (1989) for failing to have a shoring system in place while employees worked in the excavation and 29 C.F.R. 1926.651(f) (1989) for failing to have in place a shoring system which met accepted engineering requirements, and was fined $8,000. Because the violations were similar and involved related hazards, they were grouped together on the citation. Ansco contested the citation, admitting that the violations had occurred, but denying that they were "willful."

Pursuant to N.C. Gen. Stat. § 95-135(i) (1993), a hearing was held before an administrative law judge (ALJ). The ALJ upheld the designation of the violations as "willful," and Ansco, pursuant to N.C. Gen. Stat. § 95-135(i), petitioned the Review Board for review of the ALJ's decision. The Review Board made the following findings of fact:

> 10. [Ansco's] employees had been at this site for two or three days. The employees continually had problems with dirt coming into the trench overnight and each morning they would have to remove the dirt. On the second or third day, the foreman [Scott Marion] called for additional help with the excavation because of the dirt coming into the trench and because he felt it necessary to construct a shoring system in the trench.

. . . .

12. . . . Scott Marion called Bob Landreth, the supervisor, for additional help. Mr. Landreth did not personally come to the trench but did send John Marion, John Brewer and a new employee with the requested materials to construct the trench shoring. . . .

13. . . . The employees took two days in constructing the shoring inside the trench. On at least one occasion, the shored wall bowed inward and had to be dug out once more.

14. On November 14, 1989, between 4:00 and 5:00 P.M., while Fred Taylor, John Brewer and Scott Marion were in the trench, the trench caved in causing serious injury to Scott Marion.

. . . .

16. [Ansco] has a safety training program in place which includes weekly meeting and safety manuals. Some of the weekly safety meetings and written materials were specifically about proper methods of trench shoring and attendance sheets introduced by [Ansco] indicates and the Court finds that these specific employees were in attendance.

17. The Greensboro area supervisor, Bob Landreth, testified and the Court finds that he visited the job site at various times during construction although he could not remember if he was there during actual construction of the shoring inside the trench. . . . Mr. Landreth testified that although he could not recall specific training regarding shoring, the instructions were contained in the safety manual although he had not thoroughly read the manual . . . .

18. . . . [Landreth] acknowledged that the shoring did not meet the OSHA standards as set out in [Ansco's] own safety manual. He further testified that he believed the shoring to be safe and believed at the time that the shoring was in compliance with OSHA standards.

19. [Ansco] has acknowledged that the shoring constructed was not in compliance with the cited OSHA standards [in that] . . . the shoring was constructed inside the trench in violation of the standards.

. . . .

21. The critical elements of these facts are that although [Ansco] has an apparently adequate safety program in place which was designed to be communicated to its employees, these instructions did not get communicated in such a way that the knowledge reached the men who were actually engaged in shoring operations. It was obvious from the evidence and the Court finds that if [Ansco's] employees had followed their own safety manual, there would have been no accident or violation.

22. The Court finds that [Ansco] was aware of the standards. An issue then becomes whether or not the knowledge of the violation of these shoring standards should be imputed to [Ansco] through the job site foreman and the area supervisor. This Court finds that under these circumstances the knowledge of the violative condition by the area supervisor must be imputed to [Ansco].

Based upon these findings, the Review Board concluded that the violations were properly classified as "willful" and affirmed the ALJ's decision.

Ansco appealed the decision of the Review Board to the Superior Court of Wake County. On 19 February 1993, the Superior Court entered an order in which the court, "after reviewing the whole record," found and concluded that "[t]he Review Board's procedures were lawful and not affected by error," and affirmed the order of the Review Board.

The issue presented is whether the Review Board erred by upholding the classification of Ansco's violations as willful.

[1] Initially, we must determine the scope of review to be employed. Under N.C. Gen. Stat. § 150B-51(b), an appellate court, in reviewing the final decision of an agency may

> reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b) (1991). *See Brooks, Comm'r of Labor v. McWhirter Grading Co.*, 303 N.C. 573, 581, 281 S.E.2d 24, 29 (1981) (appellate court reviews findings and conclusions of administrative agency); *Jarrett v. North Carolina Dep't of Cultural Resources*, 101 N.C. App. 475, 478, 400 S.E.2d 66, 68 (1991) (appellate court's scope of review governed by N.C. Gen. Stat. § 150B-51(b)); *O.S. Steel Erectors v. Brooks, Comm'r of Labor*, 84 N.C. App. 630, 634, 353 S.E.2d 869, 872 (1987) (Court of Appeals' scope of review limited to whether the findings and conclusions of the Review Board were supported by competent, material, and substantial evidence); *Walls & Marshall Fuel Co., v. North Carolina Dep't of Revenue*, 95 N.C. App. 151, 153, 381 S.E.2d 815, 817 (1989) (provisions of N.C. Gen. Stat. § 150B-51 govern Court of Appeals' review of administrative agency decision); *but see In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (appellate court's review limited to whether trial court committed any error of law).

The scope of this Court's review depends upon the error which was alleged to have occurred. *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). Where it is alleged that the agency's decision was based upon an error of law, *de novo* review is required. *Brooks, Comm'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). Where it is alleged the agency's decision is not supported by substantial evidence, or is arbitrary and capricious, review is to be conducted under the "whole record" test, *id.*, which requires the reviewing court to examine all competent evidence in the record, including that which detracts from the agency's decision, *Walker*, 100 N.C. App. at 503, 397 S.E.2d at 354, to determine if the agency's decision was supported by substantial evidence. *Rector v. North Carolina Sheriffs' Educ. and Training Standards Comm'n*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991).

Ansco in this case argues that the Review Board's decision was affected by an error of law and was unsupported by substantial evidence. Because we hold that the decision was affected by an

error of law, we do not address whether the decision is supported by substantial evidence.

An error of law, as that term is used in N.C. Gen. Stat. § 150B-51(b)(4), exists if a conclusion of law entered by the administrative agency is not supported by the findings of fact entered by the agency or if the conclusion of law does not support the decision of the agency. In this case, Ansco contends that the findings of the Review Board cannot support a conclusion that Ansco's violation of the OSHA standards was willful. We agree.

[2] This Court has previously held that a violation of an OSHA standard is willful if the employer deliberately violates the standard. *O.S. Steel Erectors*, 84 N.C. App. at 632, 353 S.E.2d at 871. A deliberate violation is one "done voluntarily with either an intentional disregard of or plain indifference" to the requirements of the standard. Mark A. Rothstein, *Occupational Safety and Health Law* § *315*, at 343 (3d ed. 1990) (hereinafter *Rothstein*); *see Intercounty Constr. Co. v. Occupational Safety and Health Review Comm'n*, 522 F.2d 777, 779-80 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072, 47 L. Ed. 2d 82 (1976); Stephen A. Bokat & Horace A. Thompson III, *Occupational Safety and Health Law* 270-73 (1988) (hereinafter *Bokat*). An employer's knowledge of the standard and its violation, although not alone sufficient to establish willfulness, is one of the most effective methods of showing the employer's intentional disregard of or plain indifference to the standards. *Rothstein* § 315, at 341.

The Review Board's findings of fact in this case reveal that Ansco knew of the applicable standards and had knowledge, by imputation from its area supervisor, of conditions violative of the standards. *Bokat*, at 271; *Rothstein* § 106, at 146-47 (knowledge of employer's foreman and supervisor may in some instances be imputed to employer). There are no findings, however, that Ansco possessed a state of mind that would constitute an "intentional disregard of or plain indifference" to the standards, nor can any such state of mind be implied from the findings that were made by the Review Board. *See* N.C.G.S. § 95-135(i) (1993) (requiring the Review Board to enter findings of fact "on all the material issues of fact, law, or discretion presented on the record"); *see also Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (findings must reflect that trial court made "correct application of law"). Accordingly, because the findings of fact do not support

the conclusion that the actions of Ansco were willful, the Review Board's decision is affected by an error of law and must be reversed and remanded. The findings of the Review Board do, however, support a conclusion that the violations were serious, as that term is defined in N.C. Gen. Stat. § 95-127(18), and on remand, the violation must be so classified and a new penalty assessed by the Review Board.

Reversed and remanded.

Judge JOHNSON concurs.

Judge JOHN concurs in the result with separate opinion.

Judge JOHN concurring in the result.

I respectfully disagree with the majority's assertion that the standard of this Court's review is governed by application of N.C.G.S. § 150B-51(b) (1991) to the decision of the *Review Board*. Rather, the standard under N.C.G.S. § 150B-52 (1991) (providing for "appeal to the appellate division from the final judgment of the superior court") is "the same . . . as it is for other civil cases," *In re Kozy*, 91 N.C. App. 342, 344, 371 S.E.2d 778, 779-80 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989); that is, consideration of "whether the *trial court* committed any errors of law." *American Nat'l Ins. Co. v. Ingram*, 63 N.C. App. 38, 41, 303 S.E.2d 649, 651 (emphasis added) (citations omitted), *disc. review denied*, 309 N.C. 819, 310 S.E.2d 348 (1983).

Moreover, *Brooks, Com'r of Labor v. Grading Co.*, 303 N.C. 573, 579-81, 281 S.E.2d 24, 28-29 (1981) cited by the majority, itself relies heavily upon *Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 463-64, 276 S.E.2d 404, 407-09 (1981). In that case, the Supreme Court remarked that the Court of Appeals "recogniz[ed] that its review was governed by [then] G.S. 150A-51," but then chided this Court for "fail[ing] to specify under which of the above listed standards it reviewed the decisions of the *superior court* and the Commission." *Id.* at 464, 276 S.E.2d at 409 (emphasis added). The *Savings and Loan League Court* thereafter began its own analysis by deciding whether the *superior court* applied the correct standard in reviewing the agency's actions. *Id.*

Nonetheless, because in the case *sub judice* appellant's assignment of error properly raises a question of law, *see Employment Security Com. v. Kermon*, 232 N.C. 342, 345, 60 S.E.2d 580, 583 (1950), which requires *de novo* review, *Brooks, Com'r. of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988), and because I believe the majority in conducting such a review has reached the proper conclusion in its opinion, I concur in the result therein.

STEWART B. NEWTON, APPELLANT v. NEW HANOVER COUNTY BOARD OF EDUCATION, APPELLEE

No. 935SC819

(Filed 17 May 1994)

1. **Negligence § 51 (NCI4th)— police officer—response to silent alarm—invitee**

A police officer who went to a high school field house in response to a silent alarm was an invitee rather than a licensee while on the school premises since the officer entered the school property at the school board's implied invitation to perform a service which was of benefit to the board. Therefore, the school board owed the officer the duty to use due care to keep its property reasonably safe and to warn of hidden perils or unsafe conditions that could be ascertained by reasonable inspection.

Am Jur 2d, Premises Liability §§ 87 et seq.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser. 22 ALR4th 294.

2. **Negligence § 42 (NCI4th)— police officer—invitee—fall on stairway—negligence of school board**

Plaintiff police officer's evidence was sufficient to support a jury verdict finding negligence by defendant board of education where it tended to show that plaintiff went to a high school field house owned by defendant in response to a silent alarm; plaintiff fell and was injured while attempting to descend an outside stairway at the field house; the slope of the

stairway exceeded a safe slope, and the stairway was inherently dangerous; and the stairway had remained in the same condition for many years so that defendant had constructive, if not actual, knowledge of the dangerous condition but failed to correct it.

Am Jur 2d, Premises Liability §§ 583 et seq., 815 et seq.

Tort liability of public schools and institutions of higher learning for injuries due to condition of grounds, walks, and playgrounds. 37 ALR3d 738.

3. **Negligence § 109 (NCI4th)— stairway at high school—fall by police officer—former student at school—no contributory negligence**

Plaintiff police officer who went to a high school field house in response to a silent alarm was not contributorily negligent as a matter of law when he fell while descending a dangerous stairway outside the field house because he had frequently been in the field house while he was a student and since he had finished high school some seven years earlier.

Am Jur 2d, Premises Liability §§ 786, 790.

Judge JOHNSON dissenting.

Appeal by plaintiff from judgment entered 5 March 1993 by Judge Judson D. DeRamus, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 18 April 1994.

Plaintiff brought suit to recover for injuries sustained at New Hanover High School, property owned by defendant New Hanover Board of Education. In 1989, plaintiff was working as a uniformed patrol officer for the City of Wilmington Police Department. On the evening of 6 June 1989, plaintiff and his partner, Officer Sheehy, were dispatched to the high school field house in response to a silent alarm. After arriving at the field house, Officer Sheehy investigated the west end of the building while plaintiff investigated the east end. After checking the doors at ground level, plaintiff climbed an outside stairway that led to the second floor of the field house. Plaintiff described the stairway as being 13 to 14 inches from the wall of the building. There was no handrail on the building side of the staircase, but there was a handrail on the side of the stairs away from the building. Another rail ran parallel to the handrail. The handrail had three vertical supports, one each at

the top and bottom of the stairs and the other at the midway point. The rails and the supports were made of angle iron.

As plaintiff began to climb the stairs, he held a flashlight in his left hand and held the handrail with his right hand. When he reached the door at the top, he found that it was locked. He called Officer Sheehy and reported that his side of the building was secure.

Plaintiff then began to descend the stairs. The stairs were too narrow to permit an entire adult foot to be placed on a step, so plaintiff turned his body to the side in order to get more of his foot on each step.

As he went down the stairs he shifted the flashlight to his right hand and placed his left hand on the handrail. He shined the flashlight at the steps. At some point while descending, plaintiff fell back onto his buttocks and began sliding down the steps.

As plaintiff fell, his left hand came off the handrail and landed on the lower horizontal rail. He slid until his left hand became caught in the angle formed by the lower horizontal rail and the vertical support midway down the staircase. His body continued to slide down the stairs until his arm was fully extended. His fall was stopped by the little finger of his left hand wedging into the angle of the horizontal rail and vertical support.

As a result of the fall, plaintiff's left wrist, hand and fifth finger were injured. He received medical treatment for injury to his finger and arm, and continues to suffer a 55 percent permanent physical impairment of his left fifth finger. Plaintiff was 26 years old at the time of the injury.

The parties stipulated that plaintiff suffered injury on the night of 6 June 1989, and incurred medical expenses in the amount of $1,233.41 through 18 October 1989. Because of his injuries, plaintiff lost wages in the amount of $1,856.57, and received $5,086.67 in workers compensation benefits.

At trial, plaintiff introduced the deposition of engineer Daniel M. Aquilino. Aquilino stated that in his opinion, the slope of the staircase exceeded a safe slope. Aquilino testified that the risk of falling on the stairs in question was much greater than the risk of falling on stairs constructed in accordance with good engineering practices and prevailing building codes.

In its charge to the jury, the trial court instructed the jury that plaintiff was an invitee on the premises of the defendant at the time of the injury, and therefore defendant owed plaintiff a duty to exercise reasonable care to keep its premises in a reasonably safe condition.

On 5 March 1990, the jury returned a verdict for plaintiff in the amount of $20,000. Defendant then moved for judgment notwithstanding the verdict. The trial court granted this motion, holding that the evidence showed as a matter of law that plaintiff was a licensee rather than an invitee at the time of the injury, and that no evidence was presented to show that defendant violated the duty owed to a licensee. The court further stated that the evidence demonstrated as a matter of law that plaintiff was contributorily negligent. From this judgment, plaintiff now appeals.

William H. Dowdy and John K. Burns for plaintiff-appellant.

Crossley McIntosh Prior & Collier, by Francis B. Prior and Sharon J. Stovall, for defendant-appellee.

WELLS, Judge.

In allowing defendant's motion for judgment notwithstanding the verdict, the trial court made these findings:

> The Undersigned hereby finds that evidence presented in this case discloses as a matter of law that the plaintiff was a licensee as opposed to an invitee at the time of the injury on the defendant's premises. The Undersigned also finds that there was no evidence presented that defendant violated the duty owed to a licensee;
>
> The Court also finds that if the plaintiff were an invitee on the premises of the defendant at the time of the injury, the Court finds as a matter of law that there was insufficient evidence of negligence on part of the defendant for the issue to be submitted to the jury;
>
> The Court also holds that the evidence presented in this case demonstrates as a matter of law that the plaintiff was contributorily negligent;
>
> . . .

Plaintiff argues that the trial court erred in holding that he was a licensee at the time of the accident and finding that he was contributorily negligent; therefore, the trial court's order grant-

ing defendant's motion for judgment notwithstanding the verdict should be reversed. We agree.

In considering a motion for judgment notwithstanding the verdict, the trial court must consider the evidence in the light most favorable to the nonmovant and may grant the motion only if the evidence is insufficient to justify a verdict for the nonmovant. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974). Any conflicts in the evidence must be resolved in the nonmovant's favor, and the nonmovant must be given the benefit of every inference which can reasonably be drawn in his favor. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E.2d 788 (1978). Upon reviewing a trial court's decision upon a motion for judgment notwithstanding the verdict, an appellate court is presented with "the identical question which was presented to the trial court by defendant's motion . . ., namely, whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury." *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971). In a negligence action, if the evidence, when viewed in the light most favorable to the plaintiff and giving him the benefit of all permissible inferences from it, tends to support all essential elements of actionable negligence, then it is sufficient to survive the motion to nonsuit. *Lake v. Express, Inc.*, 249 N.C. 410, 106 S.E.2d 518 (1959).

[1] We first address plaintiff's contention that the trial court erred by holding that he was a licensee at the time of the accident. The standard of care owed to plaintiff by defendant depends upon whether plaintiff was a licensee or invitee. *Mazzacco v. Purcell*, 303 N.C. 493, 279 S.E.2d 583 (1981). Our Supreme Court has discussed the distinction between the status of licensee and invitee:

> 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 v. Purcell, supra.* (Emphasis added.)

In the case *sub judice*, plaintiff went to defendant's property in response to a silent alarm. Plaintiff entered defendant's premises

at defendant's implied request in order to perform a service beneficial to defendant and not for his own pleasure, interest or benefit.

Defendant argues that plaintiff should be considered a licensee because public policy considerations prohibit a police officer from recovering from a property owner when the officer entered the premises in the course of performing his duty and was injured by the condition which required his presence. We note, however, that plaintiff was injured not as a result of a risk incident to the performance of his duties as a police officer, but from a condition of the premises which plaintiff's evidence tended to show was inherently dangerous. Since plaintiff entered defendant's property at defendant's implied invitation to perform a service which was of benefit to defendant, we conclude that plaintiff entered defendant's premises as an invitee.

A defendant property owner owes an invitee the duty to use ordinary care to keep his property reasonably safe and to warn of hidden perils or unsafe conditions that could be ascertained by reasonable inspection. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992). In order to recover, an invitee must show that the property owner either negligently created the condition that caused the injury or that the owner failed to correct the condition after receiving actual or constructive notice of its existence. *Id.*

[2] When viewed in the light most favorable to plaintiff (nonmovant), the evidence at trial tended to show that the stairs at the field house were inherently dangerous. Plaintiff testified that since he had graduated from New Hanover High School in 1982, until the time of his injury in 1989, he had observed no changes in the stairs. Thus, the stairs had remained in the same condition for many years. The evidence, when viewed in the light most favorable to plaintiff, shows that defendant had constructive, if not actual, knowledge of the dangerous condition of the stairs and negligently failed to correct the situation.

[3] Plaintiff also argues that the trial court erred in granting defendant's motion for judgment notwithstanding the verdict based on its finding that plaintiff was contributorily negligent. The evidence at trial established that plaintiff had attended New Hanover High School and that he had frequently been in the field house while he was a student and since he had finished high school in 1982.

A plaintiff is contributorily negligent when he fails to exercise such care as an ordinary prudent person would exercise under the circumstances in order to avoid injury. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980). Plaintiff entered defendant's premises in response to a silent alarm. He went to the top of the stairs in order to make sure that the building was secure. Once plaintiff was at the top of the stairs, he had no choice but to come down. Plaintiff testified that he made a conscious effort to use care as he descended the stairs. The determination of whether plaintiff exercised the care of an ordinary prudent person under all the attendant circumstances was a determination properly before the jury, and the jury's finding that plaintiff was not contributorily negligent was supported by the evidence at trial. Thus, the trial court erred in holding that plaintiff was contributorily negligent as a matter of law.

For the reasons stated above, we reverse the trial court's order granting defendant's motion for judgment notwithstanding the verdict and remand this case to the trial court for entry of judgment for plaintiff in accordance with the jury's verdict.

Reversed and remanded.

Judge JOHNSON dissents.

Judge JOHN concurs.

Judge JOHNSON dissenting.

I respectfully dissent in this case of first impression. As a police officer entering defendant's property in response to a silent alarm, plaintiff's status fits neither the definition of an invitee or a licensee.

Our Courts have stated:

> 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.

Martin v. City of Asheville, 87 N.C. App. 272, 274-75, 360 S.E.2d 467, 469 (1987) (emphasis retained), *quoting Mazzacco v. Purcell*, 303 N.C. 493, 279 S.E.2d 583 (1981).

The police officer herein does not neatly fit the status of a licensee, "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," because the police officer is not entering the premises solely for his own purposes, rather than the school's benefit. The police officer clearly is not an invitee, "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," because the police officer does not intend to benefit himself by going onto the school's premises; rather, the police officer intends to benefit the landowner and the public. I believe that the predominant "nature of the business bringing [the police officer] to the premises" herein is the officer's duty, as a law enforcement officer, to carry out the responsibilities of his job. A police officer is one who enters the premises of a property owner under the authority of law. On the facts herein, the police officer is entering the school property for the benefit of the public, to maintain civil order and to promote the public welfare.

Therefore, in determining the duty the property owner owes to the police officer, I believe plaintiff's status more closely resembles that of a licensee. As a "quasi-licensee," defendant's duty to plaintiff was to refrain from wilful and wanton conduct, as enumerated in *Wagoner v. R.R.*, 238 N.C. 162, 77 S.E.2d 701 (1953).

I note the following persuasive reasoning in *Burroughs Add. Mach. Co. v. Fryar*, 132 Tenn. 612, 179 S.W. 127 (1915), where a police officer was injured while investigating an open door in an establishment. The Court opined:

> [T]he officer is a mere licensee[.] . . . Under such circumstances, a policeman . . . goes on the premises by permission of the law. In the discharge of his duty to the public he may enter upon the premises in disregard of the owner's wishes. He is not an invitee. He may enter whether the property owner is willing or unwilling, and his right to enter does not depend on the property owner's invitation, express or implied, but his entry is licensed by the public interest[.]

179 S.W. at 128. Several other jurisdictions have similarly held that police officers entering premises in the discharge of their duties have the status of licensees. *See Louisville & N. R. Co. v. Griswold*, 241 Ala. 104, 1 So.2d 393 (1941); *Hall v. Holton*, 330 So.2d 81 (Fla. 1976), *cert. denied*, 348 So.2d 948 (1977); *London Iron & Metal Co., Inc. v. Abney*, 245 Ga. 759, 267 S.E.2d 214 (1980); *Pincock v. McCoy*, 48 Idaho 227, 281 P. 371 (1929); *Sherman v. Suburban Trust Co.*, 282 Md. 238, 384 A.2d 76 (1978); *Nared v. School Dist. of Omaha in Douglas County*, 191 Neb. 376, 215 N.W.2d 115 (1974); *Davy v. Greenlaw*, 101 N.H. 134, 135 A.2d 900 (1957); *Scheurer v. Trustees of Open Bible Church*, 175 Ohio St. 163, 192 N.E.2d 38 (1963); *Kithcart v. Feldman*, 89 Okla. 276, 215 P. 419 (1923); *Cook v. Demetrakas*, 108 R.I. 397, 275 A.2d 919 (1971); *Walters v. Southern S.S. Co.*, 113 S.W.2d 320 (Tex. 1938).

I would affirm the decision of the trial court.

LINDA L. SMITH, PLAINTIFF v. ALLEGHANY COUNTY DEPARTMENT OF SOCIAL SERVICES, DENNIS C. JOHNSON AND ANNETTA L. JOHNSON, DEFENDANTS

No. 9323DC451

(Filed 17 May 1994)

1. **Parent and Child § 101 (NCI4th)— termination of parental rights—neglected juveniles—mother's improved psychological and living conditions—sufficient consideration by court**

The trial court sufficiently considered all of the evidence, including evidence of the mother's improved psychological condition and improved living conditions at the time of the hearing, in terminating the mother's parental rights on the ground that her children were "neglected juveniles" as defined in N.C.G.S. § 7A-517(21).

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 24, 29.

2. **Divorce and Separation § 357 (NCI4th)— custody of neglected children—grandmother's petition—mother's problems—effect on grandmother's mental condition—improper consideration**

The trial court erred by dismissing plaintiff grandmother's petition for custody of her daughter's neglected children on

the basis of the court's "serious concerns" about the daughter's parenting skills because of "problems experienced by" the daughter and the trial court's "share[d] concerns" expressed by a Virginia DSS regarding plaintiff's "history of depression and how the responsibility of the two children might affect that condition" since plaintiff cannot be held solely responsible for her daughter's behavior as an adult, the record was devoid of any evidence that custody would adversely impact upon plaintiff's mental condition or upon the welfare of the grandchildren, and the evidence tended to show that plaintiff was a fit and proper person to have custody of her grandchildren.

Am Jur 2d, Divorce and Separation §§ 963 et seq.

Award of custody of child where contest is between child's parents and grandparents. 31 ALR3d 1187.

Appeal by defendant Annetta L. Johnson and plaintiff Linda L. Smith from order entered 18 January 1993 by Judge Edgar B. Gregory in Alleghany County District Court. Heard in the Court of Appeals 8 February 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Jane Rankin Thompson, for petitioner-appellee Alleghany Department of Social Services.

Van Winkle, Buck, Wall, Starnes and Davis P. A., by Michelle Rippon, for plaintiff-appellant Linda L. Smith.

Arnold L. Young for defendant-appellant Annetta L. Johnson.

JOHNSON, Judge.

This is an appeal from an order terminating the parental rights of Dennis C. Johnson and Annetta L. Johnson on the basis of child abuse and neglect and denying grandmother Linda L. Smith custody of the minor children. The minor children involved in this action are a daughter born 24 October 1986 and a son born 14 July 1988. The minor children have been in the custody of Alleghany County Social Services (ACSS) since January 1991 and were adjudicated neglected juveniles in April 1991. Additionally, the minor daughter was adjudicated a sexually abused juvenile in November 1991. In July of 1992, the children's maternal grandmother, Linda Smith, filed a complaint seeking custody of the minor children.

The termination proceeding and custody action were consolidated for hearing, and evidence presented for petitioner ACSS tended to show the following: The minor children previously lived with their parents, the Johnsons, in Galax, Virginia, and the Galax Department of Social Services (GDSS) had been involved with the minor children from March 1988 until July 1990; the Johnsons' home was cluttered and dirty when GDSS visited on twelve occasions; on two occasions when the home was not cluttered and dirty, Annetta Johnson said her mother, Linda Smith, had cleaned the home for her; during GDSS's visit in July 1990, the house was filthy and the children were covered with dirt, and at that time the GDSS worker told Annetta Johnson that she would be back to check on the children the next day; however, the GDSS social worker was unable to locate Annetta Johnson and the children the next day and later learned they had moved to Alleghany County in North Carolina.

ACSS became involved with the minor children in September of 1990; the trailer the children lived in was dirty and dangerous for the minor children; and from September through December of 1990, ACSS counseled the Johnsons so that they could improve care for their minor children. In January 1991, ACSS received a report that Dennis Johnson had sexually abused his minor daughter. On 22 January 1991, ACSS went to the home with the sheriff and found the minor children filthy and partially dressed; they observed food crumbs and wood chips on the floor and a heavy infestation of cockroaches in the home; and they noted there was no door on the woodstove, and that toilets and bed sheets were stained, soiled and unclean. On 22 January 1991, the minor children were placed in foster care, and have been in foster care since that date.

On 24 January 1991, Linda Smith and her mother met with ACSS, stating that Annetta Johnson was a slow learner and that they had always done everything for her; Linda Smith requested placement of the minor children (her grandchildren) with her but ACSS declined at that time because of information ACSS had received concerning Linda Smith's history of mental health involvement, and because no home study had been completed on her home in Virginia.

After being placed in foster care, the minor daughter was diagnosed with cerebral palsy with delayed speech and language

development; she also required hospitalization and extensive dental work to repair her teeth. The Johnsons were psychologically tested in March 1991; Dennis Johnson had an IQ score of 90 and Annetta Johnson had an IQ score of 78. In April of 1991, Dennis Johnson confessed to and was eventually convicted of two felonious counts of taking indecent liberties with the minor daughter; Dennis Johnson entered prison in March 1992. Annetta Johnson did not believe that her husband had sexually abused their minor daughter, and she stayed with him (except for one two-week period) until his actual prison sentence began in March 1992. After the minor children were removed from the Johnsons' home and while Annetta Johnson was still in North Carolina, ACSS had twenty-seven office visits and twenty-two phone contacts with Annetta Johnson discussing problems that needed to be remedied for the minor children to be returned home, which included the need for a stable and clean home, stable income, and counseling. Annetta Johnson moved many times between March of 1991 and October of 1992. At the time of the hearing, Annetta Johnson had a job and was living in a trailer in Galax, Virginia.

Evidence presented for Annetta Johnson showed that at the time of the hearing, she was living in Galax, Virginia in a trailer she bought with her lump sum SSI disability payment; that she was working at Mount Rogers Industrial Development Center sewing t-shirts; that she did not have a driver's license and went to and from work in a van provided by the center; and that she was now more independent and could take care of herself and the minor children since her husband went to prison. Results submitted from a November 1992 test indicated that Annetta Johnson's IQ score had increased to 91. On cross-examination, Annetta Johnson testified that she never let the minor children get dirty; that ACSS was making up allegations against her; that her disability payments are related to leg and "nerve" problems; that until ACSS "showed up," she did not have "nerve" problems; that she did not believe her husband had harmed their minor daughter; and that she did not know why the minor daughter had also accused her of sexual abuse unless Linda Smith "put it in her head."

Richard Chafin, a counselor at the Mount Rogers Mental Health Center in Independence, Virginia, testified that he met with Annetta Johnson in March 1992, and that she was upset, with no direction, and was depressed about the situation with her husband and her minor children; that since that time, he felt her self-confidence

had improved, but he had never addressed parenting issues with her and had no opinion on her ability to care for her minor children; and that he did not feel the minor children could return to her without assistance, especially because the minor daughter was diagnosed with cerebral palsy.

Linda Smith testified that she had spent a great deal of time with the minor children prior to their placement in foster care; that she loved them very much and wanted to raise them; that she did not have a driver's license and received SSI disability for depression; that she and her former husband divorced for the second time in 1982 and she had a nervous breakdown in 1984; that she stopped working in 1986 because of her depression; that she has been receiving counseling since 1986; that she had not had emotional problems or hallucinations in the recent past although she had described a number of them to her counselor; and that she felt she had begun improving in 1990.

Daniel Aycock, Linda Smith's counselor, tendered as an expert in the field of psychology and social work, testified that he had counseled regularly since 1986 with Linda Smith at the Mount Rogers Mental Health Center; that he diagnosed her as suffering from depression in remission and felt if the minor children were placed with her, it would be beneficial to her and give her more focus in her life; that he had never met the minor children and could only speculate on what the effect on the minor children would be if they were placed with Linda Smith, but he felt placement in their biological home was better for them; and he stated that what he called "hallucinations" in his notes of his sessions with Linda Smith were more like "daydreams" and what he termed "obsessions" about the minor children was more like "worrying too much."

The order issued by the district court terminated the parental rights of the Johnsons and dismissed Linda Smith's custody action. The court found as fact that the minor children were both adapting well to their foster homes and concluded as law that the best interests of the minor children would be promoted and served by continuing their legal and physical custody with ACSS. Annetta Johnson and Linda Smith have both appealed to our Court.

[1] Annetta Johnson argues that the trial court erred in terminating her parental rights. Specifically, Annetta Johnson asserts that the

trial court did not adequately consider her improved psychological condition and her improved living conditions as of the time of the hearing.

The trial judge concluded as law that the juveniles were "neglected juveniles" as defined by North Carolina General Statutes § 7A-517(21) (1993), those "who do[ ] not receive proper care, supervision, or discipline from [their] parent, guardian, custodian, or caretaker; . . . or who [are] not provided necessary medical care; or who [are] not provided necessary remedial care; or who live[ ] in an environment injurious to [their] welfare[.]" In a termination proceeding, neglect must be proven by clear, cogent and convincing evidence. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984). "[T]he trial court may not base a finding of neglect justifying termination of parental rights solely on a prior adjudication of abuse or neglect." *In re Beck*, 109 N.C. App. 539, 545, 428 S.E.2d 232, 236 (1993).

While making its conclusions of law, the trial court considered *In re Ballard*, 311 N.C. 708, 319 S.E.2d 227 (1984). The Court in *In re Ballard* stated that "[w]e agree that the parents' fitness to care for their children should be determined as of the time of the hearing. The trial court must consider evidence of changed conditions. However, this evidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect." *Id.* at 714, 319 S.E.2d at 231. We have examined the record and find that the trial court's conclusions of law properly considered Annetta Johnson's improved psychological condition and her improved living conditions as of the time of the hearing. And, bearing in mind that "[t]he determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*," *Id.* at 715, 319 S.E.2d at 232, we note the trial court's statement that "[o]nly recently has the mother obtained her own residence, a job and shown any independence. The mother has shown improvement recently in her ability to care for her own needs, but this must be viewed in the light that she no longer has a small son and a handicapped daughter to care for. The 'probability of a repetition of neglect,' . . . is great in the opinion of the Court if the mother, Annetta L. Johnson, had the stress of dealing with her two children thrust back on her." We find the trial court properly considered all of the evidence in concluding as law that the minor children were "neglected juveniles" and

then properly terminated the parental rights of the Johnsons pursuant to North Carolina General Statutes § 7A-289.32 (1993).

[2] Linda Smith argues that the trial court erred in concluding as a matter of law that the best interests of the children would be served by continuing their custody with ACSS, thereby rejecting Linda Smith's request for custody.

We note that "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]" North Carolina General Statutes § 50-13.1 (1993). "An order for custody of a minor child . . . shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. . . ." North Carolina General Statutes § 50-13.2 (1987).

The trial court made conclusions of law that

> this Court has serious concerns about Linda Smith's parenting skills because of the many problems experienced by Annetta Johnson and the extreme dependance of Annetta Johnson on others. This Court also shares the same concerns expressed by the Galax DSS regarding Linda Smith's history of depression and how the responsibility of two children might affect that condition.

We take issue with the trial court's concerns about Linda Smith's parenting skills which are based on the problems experienced by Annetta Johnson. A parent can guide a child during the child's formative years, but cannot be held solely responsible for the child's behavior as an adult. We also note testimony presented at trial that Linda Smith's son, Michael, is now grown and is married, has children, and a job. As such, we find the trial court erred in finding "serious concerns" about Linda Smith's parenting skills because of "problems experienced by Annetta Johnson."

The trial court also, in part, apparently based its decision on not awarding custody of the children to Linda Smith upon its shared concerns with GDSS regarding Linda Smith's history of depression and how having custody might affect her condition. It is clear from the record that this concern was purely speculative. The record is devoid of any evidence to even indicate that custody

would adversely impact upon Linda Smith's mental condition or upon the welfare of the children. The "shared" concerns were merely speculative thoughts without foundation. To the contrary, the evidence shows through the testimony of Daniel Aycock, who was received as an expert, that Linda Smith was found not to be psychotic, that her condition was stable, and that her depression was and had been in remission for some time.

Further, the evidence shows and the trial court so found that Linda Smith was the one who made the calls to ACSS concerning the alleged sexual abuse of the minor daughter by her father; that Linda Smith visited the minor children on every occasion made available to her by ACSS; that Linda Smith is forty-six years old and has lived in the same house in Galax, Virginia for twelve years; that Linda Smith has never been convicted of any criminal offense, has an eleventh grade education and does not consume alcoholic beverages; that Linda Smith's residence, a two story frame house with a large back yard, was in a state of good repair, had three bedrooms and a bath and was described as "immaculate"; that GDSS noted that Linda Smith displayed excellent housekeeping standards; that Linda Smith does not maintain contact with her daughter, Annetta Johnson, because she feels her daughter should have made more of an effort to protect her minor children; that Linda Smith babysits frequently for her grandchildren, nieces and nephews; and that Linda Smith is aware of the minor daughter's diagnosis of cerebral palsy and realizes that she would require special care and that Linda Smith has investigated this with the health department and Mount Rogers Mental Health Center.

We hold, *under the facts of this case*, that the trial court erred in denying and dismissing Linda Smith's petition for custody on the basis of its "serious concerns" about Linda Smith's parenting skills because of "problems experienced by Annetta Johnson," and the trial court's "share[d] . . . concerns expressed by the Galax DSS regarding Linda Smith's history of depression and how the responsibility of two children might affect that condition."

In summary, we affirm the decision of the trial court terminating the parental rights of Dennis Johnson and Annetta Johnson; and we reverse the trial court's decision in dismissing Linda Smith's petition for custody and remand the case for a hearing *de novo* on Linda Smith's petition for custody.

Affirmed in part, reversed in part and remanded.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. TERRY LEE SCALES

No. 9118SC412

(Filed 17 May 1994)

Jury § 203 (NCI4th)— prospective juror—member of district attorney's staff—challenge for cause denied

The trial court in a burglary prosecution did not err by denying defendant's challenge for cause of a prospective juror who was a member of the district attorney's staff and who stated that it might be difficult for him to give defendant a fair and impartial trial because of his position but that he thought he could follow the law. Unlike the juror in *State v. Hightower*, 331 N.C. 348, 426 S.E.2d 712, the juror in this case never stated that he would be unable to give defendant a fair and impartial trial, that he was afraid that he would hinder defendant from receiving a fair and impartial trial, or that he would have any thoughts "sticking in the back of his mind" that would prevent him from giving defendant a fair and impartial trial.

Am Jur 2d, Jury §§ 279 et seq., 294 et seq.

Appeal by defendant from judgment entered 12 December 1990 by Judge Marvin K. Gray in Guilford County Superior Court. Heard in the Court of Appeals 16 January 1992 and upon reconsideration pursuant to an order from the Supreme Court issued 11 February 1993 and transmitted to this panel on 12 April 1994.

Defendant was charged with second degree burglary in violation of N.C. Gen. Stat. § 14-51. The State's evidence tended to show the following: Michelle Marie Daniels and Jennifer Alver King shared an apartment at 4812 Brompton Drive in Greensboro. Both Daniels and King testified that on 8 June 1990 they left their apartment around 3:00 a.m. with two acquaintances. When they left the apartment the front and back doors were locked.

When the women returned approximately an hour to an hour and a half later, Daniels noticed that her VCR was gone. Daniels called the police, and a detective came to investigate. He discovered that the lock on the back door was loose and broken. After the detective left, the women discovered other items were missing from the apartment. These items included $45.00 in cash, three rings, a camera and a watch.

Dale Maynard, president of Kernersville Pawnbrokers, testified that the three rings were brought to his shop on 11 June 1990 as collateral for a loan. Maynard asked for personal identification and was shown a North Carolina driver's license bearing defendant's name. Maynard also testified that he had an independent recollection of defendant as the person who brought the rings to his shop.

The State also introduced into evidence defendant's written confession in which he admitted breaking into the apartment and taking a VCR, a camera and jewelry. In the statement, defendant admitted pawning the jewelry and selling the VCR to a third party. The statement also reflected defendant's recollection that he saw people leave the apartment between 8:00 and 9:00 p.m.

The defendant presented no evidence. Defendant was convicted and sentenced to 16 years in prison. From this judgment, defendant appealed, and in an unpublished opinion, this Court found no error. *State v. Scales*, 106 N.C. App. 707, 418 S.E.2d 716 (1992) (unpublished). However, our Supreme Court remanded the case with the following specific instruction: "the case is remanded to the Court of Appeals for reconsideration in light of *State v. Hightower*, 331 N.C. 636 (1992)." *State v. Scales*, 333 N.C. 348, 426 S.E.2d 712 (1993).

Attorney General Lacy H. Thornburg, by Assistant Attorney General Donald W. Laton, for the State.

Assistant Public Defender Frederick G. Lind for defendant-appellant.

ORR, Judge.

In his first assignment of error, defendant contends that the trial court erred in denying his challenge for cause to three jurors. In this Court's original opinion in this action, we found that de-

fendant had preserved his right to bring forward this assignment of error by following the procedures of N.C. Gen. Stat. § 15A-1214(h) and (i) which states:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.
>
> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
>
> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.
>
> The judge may reconsider his denial of the challenge for cause, reconsidering facts and arguments previously adduced or taking cognizance of additional facts and arguments presented. If upon reconsideration the judge determines that the juror should have been excused for cause, he must allow the party an additional peremptory challenge.

We also found, however, that defendant had failed to show why these jurors were unable to be fair and impartial. Thus, based on *State v. Sanders*, 317 N.C. 602, 346 S.E.2d 451 (1986), we overruled defendant's assignment of error and found no error with the judgment of the trial court.

We now reconsider our decision in light of *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992). The facts in *Hightower* show that defendant assigned as error the denial of his challenge for cause as to one juror, Juror Browning. During the selection of the jury, counsel for defendant informed Juror Browning that the defendant might not present any evidence. Then counsel for defendant stated: "Now, do you feel like if [defendant] didn't take the witness stand, do you feel like that might affect your ability to

give him a completely fair and impartial trial . . . ?" *Id.* at 637, 417 S.E.2d at 238. Juror Browning answered, "Yes[.]" *Id.* After the trial court explained to Juror Browning that "our law and the Constitution gives [defendant] the right not to testify if he so elects, and [that] the law also says that that decision . . . not to testify, is not to be held against him, and that [he], as a juror, [was] not to consider [defendant's] silence in anyway [sic] in [his] deliberations," the trial court asked Juror Browning whether he could follow that law. *Id.* at 638, 417 S.E.2d at 238. Juror Browning stated, "I'm just trying to think and give you a fair answer." *Id.*

Subsequently, the trial court again asked Juror Browning whether he could follow the law, and Juror Browning stated, "Yeah, I could follow it, if it's the law." *Id.* at 638, 417 S.E.2d at 239. The trial court then asked Juror Browning if the "law says that you're not to use, or consider in anyway, the defendant's silence against him in your deliberations, you could do that, is that what you're saying?" *Id.* Juror Browning responded, "I still feel like it might stick in the back of my mind, even though I—you know, I'll try to discount it, but I—." *Id.* Thereafter, the trial court asked Juror Browning if he would make every effort to follow the law, and he stated that he would but indicated again that the fact that defendant did not take the stand would stick in the back of his mind. The trial court asked Juror Browning, "If you know something, you can't erace [sic] it completely, but could you—even being aware of that, could you just not let it affect your decision in anyway [sic]?" *Id.* at 639, 417 S.E.2d at 239. Juror Browning answered:

> I can't tell you for sure, because if the, you know, first degree murder charge is pretty serious, and I don't want—I want to give an impartial decision, and I don't want anything to hinder it, and I'm afraid that might hinder it.

Id.

At the outset, our Supreme Court set out the applicable provisions of N.C. Gen. Stat. § 15A-1212 that:

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> . . .

> (8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
>
> (9) For any other cause is unable to render a fair and impartial verdict.

Id. at 640, 417 S.E.2d at 240.

Thereafter, our Supreme Court concluded that "defendant's challenge for cause should have been allowed under both section (8) and (9) of N.C.G.S. § 15A-212 [sic]." *Id.* at 641, 417 S.E.2d at 240. In reaching this conclusion, our Supreme Court stated:

> [w]hen the defendant's attorney first asked if the defendant's failure to testify would affect the juror's ability to give him a fair and impartial trial, the juror said "[y]es." When the court questioned the juror, he said on one occasion that he could follow the law as given to him by the court but he repeatedly said the defendant's failure to testify would "stick in the back of my mind" while he was deliberating. On one occasion he told the court, "I want to give an impartial decision, and I don't want anything to hinder it, and I'm afraid that might hinder it." In [counsel for defendant's] last question to the juror, he asked if the juror had serious concerns that the defendant's failure to testify "might affect your ability to give him a fair trial[.]" The juror said "[r]ight." We can only conclude from the questioning of this juror that he would try to be fair to the defendant but might have trouble doing so if the defendant did not testify. In this case the defendant did not testify.
>
> We have said that the granting of a challenge for cause of a juror is within the discretion of the judge. *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991); *State v. Watson*, 281 N.C. 221, 227, 188 S.E.2d 289, 293, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972). Nevertheless, in a case such as this one, in which a juror's answers show that he could not follow the law as given to him by the judge in his instructions to the jury, it is error not to excuse such a juror. It was error for the court not to allow the challenge for cause to Juror Browning in this case.

Id. at 641, 417 S.E.2d at 240.

After concluding that the denial of the challenge for cause to Juror Browning constituted error, the trial court addressed the question of whether this error was prejudicial error. The Court stated:

> The question we next face is whether the failure to allow this challenge for cause was prejudicial error. After the challenged juror was excused and the defendant had exhausted his peremptory challenges, he renewed his challenge for cause to Juror Browning and told the court he would peremptorily challenge the juror then being questioned if he had not exhausted his peremptory challenges. Although this juror might not have been subject to a challenge for cause, it was the prerogative of the defendant as to whether to exercise a peremptory challenge. He was deprived of this right and for this reason there must be a new trial.

Id.

In the present case, defendant contends in part that the trial court erred in denying his challenge for cause as to juror number 10, a member of the district attorney's staff for Guilford County. The following dialogue is reflected in the transcript of the *voir dire*:

> MR. LIND: [Juror number 10], do you feel because of your position, it might be difficult for you to give [defendant] a completely fair and impartial trial?
>
> JUROR NO. 10: I think it might be difficult, but I think I can follow the law.
>
> . . .
>
> MR. LIND: Well, wouldn't you tend to—wouldn't you say you're prosecution oriented?
>
> JUROR NO. 10: I'm a prosecutor by profession.
>
> MR. LIND: Right, and you've been doing it how many years now?
>
> JUROR NO. 10: I've been in this office for about six years.
>
> . . .

MR. LIND: And wouldn't you agree that it would be difficult for you to really be totally fair and impartial and give [defendant] a fair trial?

JUROR NO. 10: I think I indicated . . . that there's a certain amount of difficulty, but I think I could follow the law.

MR. LIND: Well, you'd attempt to follow the law, but it would be a rather difficult and awkward position for you?

[STATE:] We OBJECT. Now he's arguing with the juror.

THE COURT: Objection is SUSTAINED. Mr. Lind, he's told you that it would be difficult, but that he could do—he could perform the duties of a juror. That's not a ground for challenge.

Our review of the answers given by Juror Browning in *Hightower* shows that these answers are distinguishable from the answers given by juror number 10 in the case *sub judice*. Unlike Juror Browning, juror number 10 never stated that he would be unable to give defendant a fair and impartial trial or that he was afraid that he would hinder defendant from receiving a fair and impartial trial. Instead, juror number 10 stated that although it might be difficult, he thought he could follow the law. Also unlike Juror Browning, juror number 10 gave no indication that he would have any thoughts "sticking in the back of his mind" that would prevent him from giving defendant a fair and impartial trial. Accordingly, we conclude that as a matter of law, the answers given by juror number 10 did not fall within the rule set out in *Hightower* and that the trial court did not abuse its discretion in denying defendant's challenge to juror number 10 for cause.

Additionally, we find that the holding in *Hightower* is not controlling as to defendant's challenges to juror number 6 and juror number 12 for cause and again find that the trial court did not abuse its discretion in denying defendant's challenge for cause as to these jurors.

As to defendant's other assignments of error, the Supreme Court has not required us to reconsider these assignments of error, as *Hightower* does not address the issues involved. Accordingly, for the reasons stated in our original opinion, we find no error as to the remaining assignments of error. *See State v. Scales*, (No. 9118SC412, filed 7 July 1992), 106 N.C. App. 707, 418 S.E.2d 716.

No error.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. COLBY SCOTT HUGHES

No. 9330SC659

(Filed 17 May 1994)

1. **Criminal Law § 1179 (NCI4th)— aggravating factor—position of trust or confidence—improper for incest—proper for indecent liberties**

Since it was necessary for the State to prove the parent-child relationship as an element of the crime of felonious incest, the trial court could not use the evidence of this relationship to find the aggravating factor that defendant took advantage of a position of trust or confidence to commit incest. However, a parental or familial relationship is not an element of the crime of taking indecent liberties with a child, and the trial court properly found the position of trust or confidence aggravating factor for such crime.

Am Jur 2d, Criminal Law §§ 598, 599.

2. **Rape and Allied Sexual Offenses § 132 (NCI4th)— indecent liberties—sexual offense—use of disjunctive in instructions**

The trial court did not err in the use of the disjunctive in its instructions that an indecent liberty "is an immoral, improper and indecent touching by the defendant of the child *or* inducement by the defendant of an immoral or indecent touching by the child" and that a sexual act means "fellatio . . . *and/or* any penetration, however slight, by any object into the genital opening of a person's body."

Am Jur 2d, Rape §§ 108 et seq.

3. **Rape and Allied Sexual Offenses § 166 (NCI4th)— sexual offense—instructions—alternative acts—one act not supported by evidence**

The trial court erred by instructing the jury that it could base a conviction of sexual offense on either fellatio or penetra-

tion by an object since there was no evidence of penetration by an object where the victim testified only that defendant put his finger "on [her] private," and it was clear from other testimony by the victim that she did not confuse the words "on" and "in."

Am Jur 2d, Rape §§ 108 et seq.

4. **Evidence and Witnesses § 2342 (NCI4th)— victim suffering from PTSD—relevancy—failure to give limiting instruction**

A sexual abuse therapist's testimony that a rape, sexual offense and indecent liberties victim suffered from post traumatic stress disorder was relevant to explain the victim's delay in reporting the offenses. However, the trial court erred by failing to limit the jury's consideration of this testimony to corroborative purposes, but this error was not prejudicial since there is no reasonable possibility that, had a limiting instruction been given, a different result would have been reached at trial.

Am Jur 2d, Expert and Opinion Evidence § 244.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 ALR4th 879.

5. **Evidence and Witnesses § 2332 (NCI4th)— expert testimony—characteristics of sexually abused children—victim's similar characteristics**

A pediatrician was properly permitted to testify about the characteristics of sexually abused children and to state that her findings with regard to the alleged victim "were strongly suggestive of possible sexual abuse."

Am Jur 2d, Expert and Opinion Evidence § 244.

6. **Evidence and Witnesses § 961 (NCI4th)— victim's statement to pediatrician—hearsay—medical diagnosis and treatment exception**

A pediatrician's testimony that she asked an alleged rape, sexual offense and indecent liberties victim if anyone had touched her in a way that she did not like and that the victim replied that her father had was admissible under the medical diagnosis and treatment exception to the hearsay rule where the pediatrician examined the victim for possible sexual abuse.

Am Jur 2d, Federal Rules of Evidence § 232.

Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of the Federal Rules of Evidence. 55 ALR Fed 689.

Appeal by defendant from judgments and commitments entered 29 January 1993 by Judge Robert W. Kirby in Macon County Superior Court. Heard in the Court of Appeals 8 March 1994.

Michael F. Easley, Attorney General, by Hal F. Askins, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

LEWIS, Judge.

Defendant was convicted after a jury trial of first-degree rape, first-degree sexual offense, felonious incest, and indecent liberties with a child. Defendant was sentenced to the maximum term for each conviction. From the judgments and commitments, defendant appeals, assigning error to both his trial and sentencing.

The State's evidence tended to show the following: On one afternoon in 1991, after defendant and his wife had separated, defendant's daughter, C., and her brother and sister were visiting defendant at his residence. While her brother and sister were outside playing, C., age nine at trial, was taking a nap on her father's bed. Defendant came into the bedroom from the bathroom wearing only his underwear. Defendant then engaged in various sexual acts with C. against her will, including putting his finger "on [her] private," putting his penis in her mouth, and putting his penis "on [her] private." C. testified that defendant had engaged in these acts, as well as engaging in sexual intercourse, with her at other times over the past several years. In addition, C. had engaged in sexual acts with her brother on many occasions. C.'s mother testified that on one occasion she observed such behavior between C. and her brother. Thereafter, in August of 1991, both C. and her brother began seeing Maggie Seehof, a sexual abuse therapist. In February of 1992, C. first told Ms. Seehof of the abuse by her father. Ms. Seehof then reported the suspected abuse to the Department of Social Services. Both Ms. Seehof and social worker Lisa Davis testified for the State. In addition, the State presented the testimony of Dr. Jennifer Brown, a pediatrician, who examined C. in September

of 1991 for possible sexual abuse. Dr. Brown examined C. a second time in February of 1992.

We first address defendant's arguments regarding sentencing. The trial court found, as the sole factor in aggravation of the incest and indecent liberties convictions, that defendant took advantage of a position of trust or confidence in order to commit the offenses. *See* N.C.G.S. § 15A-1340.4(a)(1)(n) (1988). Defendant contends that these findings were error. As to the incest conviction, we agree.

[1] Evidence necessary to prove an element of an offense may not be used to prove a factor in aggravation. § 15A-1340.4(a). The crime of felonious incest has as an element that the defendant and the other participant be related in one of three enumerated familial ways, including parent-child. *See* N.C.G.S. § 14-178 (1993). Thus, to prove one element of the offense in the case at hand, it was necessary to establish the parent-child relationship. The trial court then used the evidence of this relationship to find that defendant took advantage of a position of trust or confidence. This was error, and the conviction for incest must therefore be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983).

Defendant also argues that abuse of a position of trust is inherent in the crime of taking indecent liberties, and that, therefore, the trial court erred in finding the position of trust factor in aggravation. This Court rejected the same argument in *State v. Caldwell*, 85 N.C. App. 713, 355 S.E.2d 813 (1987). Accordingly, we find no merit to defendant's contention.

[2] Defendant next argues that the trial court erred in instructing the jury on the offenses of indecent liberties and sexual offense. As to indecent liberties, the court instructed: "An indecent liberty is an immoral, improper and indecent touching by the defendant upon the child *or* inducement by the defendant of an immoral or indecent touching by the child." (Emphasis added). As to the sexual act element of sexual offense, the court instructed: "A sexual act means fellatio . . . and/*or* any penetration, however slight, by any object into the genital opening of a person's body." (Emphasis added). For each offense, the jury returned a general verdict of guilty, without specifying upon which theory or theories it relied.

Defendant argues that the use of the disjunctive in each instruction permitted the possibility of a divided jury on the issue of which indecent liberty and which sexual act defendant in fact committed, thereby denying him the right to a unanimous verdict. As defendant concedes in his brief, this argument was specifically rejected by our Supreme Court in *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). However, defendant argues, and we agree, that the instruction on sexual offense in the instant case was improper for another reason.

[3] The trial court instructed that the jury could find the defendant guilty of first-degree sexual offense upon finding, *inter alia*, that defendant committed a sexual act. As noted above, sexual act was defined as "fellatio . . . and/or any penetration, however slight, by any object into the genital opening of a person's body." A careful examination of the record reveals that there was no evidence of penetration by an object. C. testified that defendant put his finger "on [her] private." The prosecutor then asked, "Put it where?", and C. again stated, "On [her] private." C.'s subsequent testimony showed that she did not confuse the words "on" and "in," as she stated that defendant put his penis "on [her] private and sometimes he put it . . . in [her] private." We note that the penetration by the penis satisfied the penetration element of first-degree rape, but not the penetration element of first-degree sexual offense. On cross-examination, C. was asked, "So, he never did put his finger in your private?", and C. responded, "No." Thus, there was no evidence of any penetration which would support the sexual offense instruction on penetration by an object. Because there was no evidence of penetration by an object, the trial court erred in instructing that the jury could base a conviction of sexual offense on either fellatio or penetration by an object. Where the trial court instructs on alternative theories, one of which is not supported by the evidence and the other which is, and it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990). We are required, we believe, to order a new trial on the charge of first-degree sexual offense.

[4] Defendant's remaining contentions on appeal relate to the admissibility of certain testimony of the State's expert witnesses. First, defendant contends that the trial court erred in allowing Ms. Seehof, the therapist who treated C. and her brother, to testify

that C. suffered from post-traumatic stress disorder (hereinafter "PTSD"), and in not limiting the admissibility of such testimony.

In arguing that the testimony was inadmissible, defendant contends that the expert's opinion was not helpful to the jury, as required by Rule 702 of the Rules of Evidence. We disagree. One way in which expert testimony regarding PTSD can be helpful to the jury is when it tends to explain the victim's delays in reporting the offenses. *State v. Hall*, 330 N.C. 808, 822, 412 S.E.2d 883, 891 (1992). In the present case, the victim delayed reporting the offenses for several years. Thus, the expert testimony tended to help explain to the jury the cause of this delay. Accordingly, defendant's contention that the evidence was inadmissible is without merit.

Defendant is correct, however, in his assertion that such testimony may only be admitted for purposes of corroboration. It may not be admitted as substantive evidence to prove that a rape or sexual abuse has in fact occurred. *Id.* Further, the trial court "should take pains to explain to the jurors the limited uses for which the evidence is admitted." *Id.* In the present case, the trial court did not give a limiting instruction. This was error. However, we conclude that it was not prejudicial error. Defendant has not shown that there is a reasonable possibility that, had the limiting instruction been given, a different result would have been reached at trial. *See* N.C.G.S. § 15A-1443 (1988); *State v. Davis*, 106 N.C. App. 596, 418 S.E.2d 263 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). Therefore, we hold that the admission of Ms. Seehof's testimony was not prejudicial error.

[5] Defendant next argues that the trial court erred in allowing Dr. Brown, the pediatrician who examined C., to testify that C. had been sexually abused. Specifically, Dr. Brown testified that her "clinical impression first was that the findings were strongly suggestive of possible sexual abuse." In *State v. Hammond*, 112 N.C. App. 454, 435 S.E.2d 798 (1993), *disc. review denied*, 335 N.C. 562, 441 S.E.2d 126 (1994), this Court recently held that an expert witness' opinion that the victim's symptoms suggested a "very high probability that [she] had been sexually abused" was properly admitted. The Court held that it was proper for the expert to discuss the symptoms and characteristics of sexually abused children and to express, in her expert opinion, whether the victim showed similar characteristics. *Id.* at 461, 435 S.E.2d at 802. Likewise, we conclude that in the present case, Dr. Brown's testimony regarding

the characteristics of sexually abused children and her opinion that C. showed similar characteristics was admissible expert testimony, and we overrule this assignment of error.

[6] Defendant's next contention is that the trial court erred in allowing Dr. Brown to testify to statements made to her by C., without limiting the admissibility of such testimony to corroboration. Defendant contends that the statements made by C. were hearsay and did not fall within the hearsay exception for statements made for the purpose of medical diagnosis or treatment, Rule 803(4). This contention is without merit.

Defendant has only assigned error to one such statement, and our review is therefore limited to that statement. Dr. Brown testified that she asked C. if anyone had touched her in a way that she did not like and that C. replied that her father had. This Court, in *State v. Rogers*, 109 N.C. App. 491, 501-02, 428 S.E.2d 220, 226, *disc. review denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 62 U.S.L.W. 3640 (U.S. Mar. 28, 1994) (No. 93-7753), held that "[w]here children are examined by physicians for diagnosis and treatment of alleged sexual abuse, details of the offense, including the identity of the offender, provided by the child during such examination are generally admissible at trial." Defendant argues, however, that C.'s statement was not made for purposes of diagnosis and treatment. We disagree. The record clearly shows that C. was seen by Dr. Brown for suspected sexual abuse. C.'s answer to Dr. Brown's question, therefore, was for the purpose of and was pertinent to a proper diagnosis and course of treatment. *See State v. Aguallo*, 318 N.C. 590, 597, 350 S.E.2d 76, 81 (1986). Accordingly, Dr. Brown's testimony was properly admitted.

In conclusion, because the jury instruction on first-degree sexual offense was prejudicial error, defendant must have a new trial in case number 92 CrS 483, first-degree sexual offense. In addition, the error in sentencing in case number 92 CrS 481, felonious incest, requires that defendant be resentenced on that offense. As to defendants remaining convictions, we find no prejudicial error in the trial or sentencing.

File number 92 CrS 483: New trial.

File number 92 CrS 481: Reversed and remanded for new sentencing hearing.

File number 92 CrS 482: No error.

File number 92 CrS 484: No error.

Chief Judge ARNOLD and Judge COZORT concur.

NEW SOUTH INSURANCE COMPANY, PLAINTIFF v. DEBORAH A. KIDD, BOBBY LEWIS MATHIS, AND OSSIE LEE MAMIE MELVIN, DEFENDANTS

No. 9321SC874

(Filed 17 May 1994)

1. **Insurance § 487 (NCI4th)— automobile insurance—punitive damages—not excluded by intentional conduct clause**

The trial court did not err by granting summary judgment for defendant Kidd in a declaratory judgment action to determine whether the automobile insurance policy issued by plaintiff New South covered punitive damages where New South contended that, even though the policy did not specifically exclude coverage for punitive damages, it expressly denied coverage for intentional conduct and the jury found intentional conduct as the basis for punitive damages. This cause of action arose from allegations that the driver operated a vehicle carelessly and heedlessly and under the influence of an impairing substance; there were no allegations of deliberate or intentional conduct. Based on the facts of the case and the Pattern Jury Instructions on willful and wanton conduct which were read to the jury, the finding of willful and wanton conduct does not support a finding that the conduct in question was intentional.

Am Jur 2d, Automobile Insurance §§ 197, 427.

2. **Insurance § 487 (NCI4th)— automobile insurance—punitive damages—insurance coverage**

A trial court finding in a declaratory judgment action that an automobile insurance policy included coverage for punitive damages was affirmed where the exclusionary language in the policy stated only that it did not provide coverage "for any person who intentionally causes bodily injury or property damage." Punitive damages are not necessarily awarded based solely on intentional conduct and, in the absence of a

provision specifically excluding punitive damages, punitive damage coverage is available and defendant was bound to pay that portion of the judgment.

Am Jur 2d, Automobile Insurance §§ 197, 427.

Liability insurance: intoxication or other mental incapacity avoiding application of clause in liability policy specifically exempting coverage of injury or damage caused intentionally by or at direction of insured. 33 ALR4th 983.

Appeal by plaintiff from order entered 26 July 1993 by Judge W. Steven Allen, Sr. in Forsyth County Superior Court. Heard in the Court of Appeals 20 April 1994.

Greeson and Grace, P. A., by Michael R. Greeson, Jr., for plaintiff-appellant.

Yow, Culbreth & Fox, by Stephen E. Culbreth and Jerry A. Mannen, Jr., for defendant-appellee Deborah A. Kidd.

JOHNSON, Judge.

The facts of this appeal arise from a prior cause of action wherein: Deborah A. Kidd (Kidd), defendant herein, brought an action against Bobby Lewis Mathis (Mathis) and Ossie Lee Mamie Melvin (Melvin), co-defendants herein, in New Hanover County, for personal injuries she sustained as a result of a collision between her motor vehicle and a motor vehicle owned by Melvin and operated by Mathis on 24 June 1990. The complaint alleged negligence on the part of Melvin and Mathis and sought damages for personal injuries sustained by Kidd and her minor children as a result of the collision. Specifically, the complaint alleged that defendant Mathis was negligent at the time of the collision in that: (1) he was under the influence of an impairing substance to such an extent that his physical and mental faculties had become appreciably impaired; (2) that he operated a motor vehicle carelessly and heedlessly in a willful and wanton disregard for the rights and safety of others; (3) that he operated a motor vehicle without due caution and circumspection and at a rate of speed and in a manner to endanger persons. At the time of the accident, the vehicle Mathis was operating was insured by New South Insurance Company (New South), plaintiff herein.

The matter was subsequently transferred to superior court and a dismissal was taken as to Melvin. Kidd, through counsel and leave of court, filed an amendment to her complaint charging defendant Mathis with willful and wanton conduct in relation to the collision, and seeking punitive damages.

The case was heard at the 22 March 1993 session of superior court in New Hanover County before a jury and Judge James D. Llewellyn. At the conclusion of the evidence, three issues were submitted to the jury and, upon deliberation, the jury awarded Kidd $5,000.00 in compensatory damages and $45,000.00 in punitive damages.

New South then filed the declaratory judgment action which is the subject of this appeal, to ascertain New South's liability for the punitive damages awarded to Kidd. New South maintained that the insurance policy covering the vehicle involved in the accident did not provide coverage for punitive damages. New South then moved for summary judgment on 29 June 1993. Kidd cross-motioned for summary judgment on 15 July 1993.

On 26 July 1993, the motions were heard before Judge W. Steven Allen, Sr.; Judge Allen concluded that Kidd was entitled to judgment as a matter of law. From this judgment, New South appealed to our Court.

[1] By New South's first assignment of error, New South contends that the trial court erred in granting Kidd's motion for summary judgment based on the legal conclusion that the subject policy provided coverage for punitive damages when, New South contends, said policy expressly denied coverage for intentional conduct and the jury found intentional conduct as the basis for its punitive damage award.

Summary judgment is a device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. North Carolina General Statutes § 1A-1, Rule 56 (1990). This showing must be viewed in the light most favorable to the non-moving party and such non-moving party should be accorded all favorable inferences that may be deduced from the showing. *Moye v. Thrifty Gas Co., Inc.*, 40 N.C. App. 310, 252 S.E.2d 837, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979).

New South's policy provides:

> We will pay damages for **bodily injury** or **property damage** for which any insured becomes legally responsible because of an auto accident. . . .

The policy also provides, under a section titled "**EXCLUSIONS**," the following:

> A. We do not provide Liability Coverage for any person:
>
> 1. Who intentionally causes **bodily injury** or **property damage**. . . .

New South contends that even though the policy in question does not specifically exclude coverage for punitive damages, the policy as drafted excludes the category of conduct which formed the basis for the jury's decision to award punitive damages. New South argues that because the policy contains an exclusion for intentional acts and because the jury found that Mathis acted willfully and wantonly, it is not responsible for the punitive damages awarded.

The North Carolina Pattern Jury Instructions, read by Judge Llewellyn to the jury, defines willful and wanton conduct as follows:

> An act is done willfully when it is done purposefully and deliberately in violation of the law, or when it is done knowingly and of set purpose, or when the person acts with a reckless and total indifference to the rights and safety of others. An act is wanton when it is done of wicked purpose, or when done needlessly, showing a reckless indifference to the rights and safety of others. N.C.P.I. 102.85 (Replacement April 1989).

This cause of action arises from allegations that Mathis operated a vehicle under the influence of an impairing substance and carelessly and heedlessly. There were no allegations that Mathis' conduct was deliberate or intentional in nature. Therefore, based on the above instructions and the facts of this case, we find that the jury's finding of willful and wanton conduct does not support a finding that the conduct in question was intentional.

[2] By New South's second assignment of error, New South contends that the trial court's finding of insurance coverage for the punitive damage award is not supported by current case law.

The North Carolina Supreme Court first addressed the issue of insurance coverage for punitive damages in *Mazza v. Medical*

Mut. Ins. Co., 311 N.C. 621, 319 S.E.2d 217 (1984). In *Mazza*, the Court held that public policy does not preclude providing liability insurance coverage for punitive damages and that the insuring language in a medical malpractice policy was broad enough to encompass punitive damages in the absence of a specific punitive damages exclusion. Specifically, the Court held:

> We place great emphasis on the fact that there is no specific exclusion in the insurance contract for punitive damages. If the insurance carrier to this insurance contract intended to eliminate coverage for punitive damages it could and should have inserted a single provision stating "this policy does not include recovery for punitive damages."

Id. at 630, 319 S.E.2d at 223.

In *Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*, 106 N.C. App. 357, 416 S.E.2d 591 (1992), this Court adopted the reasoning of *Mazza* when it addressed the issue of whether standard commercial insurance policies provide coverage for punitive damages. The Court held that an umbrella liability policy provided coverage for punitive damages in the absence of a specific exclusion. Rejecting the insurance company's argument that a policy provision operated to exclude punitive damages from the coverage of the policy, the Court stated:

> It is well established that if an exclusionary clause in an insurance policy is not expressed plainly and without ambiguity, then the exclusion will be construed in favor of the insured. . . . "The reason for this rule is that the insurance company selected the phrase to be construed and should have specifically excluded the risk if there was any doubt."

Collins at 364, 416 S.E.2d at 595. (Citations omitted.)

More recently, our Court, in *Boyd v. Nationwide Mutual Ins. Co.*, 108 N.C. App. 536, 424 S.E.2d 168 (1993), held that a Nationwide business auto policy provided coverage for punitive damages. Relying on *Mazza* and *Collins*, we rejected the insurance company's argument that the term damages does not include punitive damages, and held that absent an express exclusion of punitive damages such coverage was provided by the policy. Specifically, the Court stated:

> The holding and instruction of *Mazza* combined with the time honored proposition that insurance policies are construed against the insurer who selected the language of the contract, sufficiently forewarned Nationwide that if it chose not to be explicit in its policies it might be subject to punitive damages in fields other than medical malpractice.

Boyd at 543, 424 S.E.2d at 172.

New South argues that the holdings of *Mazza*, *Collins* and *Boyd* are inapplicable to the case *sub judice*. Specifically, New South argues that the holdings are inapplicable because the policy at bar contains relatively specific coverage language and is a personal automobile policy. We disagree.

With respect to the specific coverage language of the policy, this Court in *Collins* examined a provision which the defendant claimed excluded punitive damages and found that the provision did not exclude punitive damages, because the policy did not specifically exclude punitive damages. It is our opinion that the alleged exclusionary language in *Collins* was more specific than the alleged exclusionary language in New South's policy. The policy provision in *Collins* reads as follows: " '[d]amages' do not include fines or penalties or damages for which insurance is prohibited by the law applicable to the construction of this policy." *Collins* at 363, 416 S.E.2d at 595. The language in New South's policy provides only that it does not provide coverage "for any person who intentionally causes bodily injury or property damage." As we have previously noted, punitive damages are not necessarily awarded based solely on intentional conduct. Therefore, we cannot find that the exclusionary language in New South's policy excludes punitive damages.

With respect to the allegation that *Mazza*, *Collins* and *Boyd* are inapplicable because the policy in the case *sub judice* is a personal automobile policy, we note that none of the aforementioned cases has specifically stated that its holding is limited to its specific area. Additionally, we note that *Mazza*, *Collins* and *Boyd* all concerned three distinct areas. *Mazza* dealt with medical malpractice, *Collins* dealt with commercial insurance policies and *Boyd* dealt with business auto policies. All reached the same conclusion: an insurance policy must explicitly state that it does not provide coverage for punitive damages. Moreover, our Court in *Boyd* definitively stated that those who "chose not to be explicit in its

policies . . . might be subject to punitive damages in fields other than medical malpractice." *Boyd* at 543, 424 S.E.2d at 172.

We find that the holdings in *Mazza, Collins* and *Boyd* are applicable to the case *sub judice*. Consequently, in the absence of a provision specifically excluding punitive damages, punitive damage coverage is available and New South is bound to pay the punitive damages portion of the judgment.

The decision of the trial court is affirmed.

Chief Judge ARNOLD and Judge JOHN concur.

HARRY M. LEETE, ALBERT SEARS BUGG, THOMAS HOLT, CLAUDE F. BURROWS, II, CECIL CRAIG ALLEN, CHARLES A. BENNETT, WILLIAM S. BUGG, JAMES E. CRENSHAW, JR., AND THE OTHER TAXPAYERS OF WARREN COUNTY, PLAINTIFFS v. THE COUNTY OF WARREN, A BODY POLITIC AND CORPORATE; LUCIOUS HAWKINS, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF WARREN COUNTY; O. L. MEEK, WILLIAM T. SKINNER, III, JAMES BYRD, AND GEORGE E. SHEARIN, MEMBERS OF THE BOARD OF COMMISSIONERS OF WARREN COUNTY; AND SUSAN W. BROWN, FINANCE OFFICER OF WARREN COUNTY, DEFENDANTS

No. 939SC529

(Filed 17 May 1994)

Constitutional Law § 131 (NCI4th)— county manager—severance pay—not an exclusive emolument

An amount equal to six weeks pay granted by the county commissioners to a county manager who resigned was not a prohibited exclusive emolument under the North Carolina Constitution, Article I, section 32, where the minutes of the board referred to the payment as "severance pay," but it is clear from the brief discussion preceding the motion that the motivation for the payment was consideration of past service as county manager. North Carolina case law demonstrates that it is permissible to compensate public service previously rendered without violating the constitutional ban on private emoluments, even though the recipient may have no legal and enforceable right to the benefit.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 128, 258.

Appeal by defendants from order entered 25 March 1993 by Judge B. Craig Ellis in Granville County Superior Court. Heard in the Court of Appeals 8 February 1994.

Plaintiffs instituted this action to enjoin the Warren County Board of Commissioners from making certain payments to Charles J. Worth, the county manager, upon his voluntary resignation. The record shows that on 1 February 1993, at the regular meeting of the Warren County Board of Commissioners, Mr. Worth announced to the Board during executive session that he was resigning from his position effective 1 March 1993 to accept employment in the office of the newly elected representative from the first Congressional District. The Board voted to pay Mr. Worth an amount equal to six weeks salary as "severance pay."

Plaintiffs, contending that the payment was an unlawful gratuity, thereafter sought and obtained a temporary restraining order preventing the Board from making the payment to Mr. Worth. When the case came on for hearing upon plaintiffs' motion for a preliminary injunction, the hearing was transformed into a hearing on the merits by agreement of the parties. The trial court entered an order enjoining the Warren County Board of Commissioners from making the payment to Mr. Worth. Defendants appealed.

Banzet, Banzet & Thompson, by Julius Banzet, III, and Lewis A. Thompson, III, for plaintiff-appellees.

Charles T. Johnson, Jr., and Michael B. Brough & Associates, by Michael B. Brough, for defendant-appellants.

MARTIN, Judge.

The sole issue presented by this appeal is whether defendants' proposed payment of "severance pay" to Mr. Worth violates Article I, Section 32 of the North Carolina Constitution. For the reasons set forth herein, we hold that it does not. Accordingly, we reverse the order of the trial court.

Article I, Section 32 provide as follows:

Exclusive emoluments.

> No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.

By its definition, this Constitutional provision does not proscribe all exclusive emoluments absolutely, but prohibits them except in consideration of public service. *5 N.C. Index 4th, Sec. 130.* Defendants argue that the proposed payment to Mr. Worth is, in the words of the Constitution, a payment made "in consideration of public services." Plaintiffs contend that the payment constitutes a prohibited exclusive emolument, since it is no more than a gratuity which the Warren County Board of Commissioners is under no obligation to pay.

The legislature has vested county boards of commissioners with broad discretion to direct fiscal policy of the county, G.S. § 153A-101, and with specific authority to fix compensation for all county officers, G.S. § 153A-92. Courts may not interfere with the exercise of discretionary powers of local boards for the public welfare unless the action taken is so unreasonable that it amounts to an oppressive and manifest abuse of discretion. *Jones v. Hospital,* 1 N.C. App. 33, 34-5, 159 S.E.2d 252, 253 (1968).

> Courts have no right to pass on the wisdom with which [county officials] act. Courts cannot substitute their judgment for that of the county officials honestly and fairly exercised. For a court to enjoin the proposed expenditure, there must be allegation and proof that the county officials acted in wanton disregard of public good.

Barbour v. Carteret County, 255 N.C. 177, 181, 120 S.E.2d 448, 451 (1961) (citations omitted). Absent contrary evidence, it is presumed "[t]hat public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *Painter v. Board of Education,* 288 N.C. 165, 178, 217 S.E.2d 650, 658 (1975) (citations omitted). Furthermore, the burden is on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence. *Id.*

In its order enjoining the payment to Mr. Worth, the trial court concluded:

> 1. The proposed payment of $5,073.12 to Charles J. Worth in addition to his regular compensation would constitute a separate emolument not in consideration of public service and in violation of Article I, Section 32 of the Constitution of North Carolina.

2. In keeping with the ruling of *Brown v. Board of Commissioners of Richmond County*, 223 NC 744 (1943), the County Commissioners of Warren County cannot lawfully make an appropriation of public moneys except to meet a legal and enforceable claim, and the requested payment of $5,073.12 to Charles J. Worth does not constitute a legal or enforceable claim.

In *Brown v. Comrs. of Richmond County*, 223 N.C. 744, 28 S.E.2d 104 (1943), relied upon by the trial court, the plaintiff was elected as presiding judge of the county recorder's court. The following year, the recorder's court was abolished by the General Assembly, and the plaintiff's office, along with its duties and emoluments, was terminated. Subsequently, the General Assembly passed an act requiring the Richmond County Board of Commissioners to pay the plaintiff the salary he would have been paid during his term of office had the office not been abolished. Thereafter, the plaintiff sought a writ of mandamus to compel the board of commissioners to pay him the salary as provided by the legislative act. The *Brown* court held that payment by the county of the salary which would have accrued had the recorder's court not been abolished would constitute a gift or gratuity, violative of Article I, Section 7 (now Article I, Section 32).

Brown is distinguishable from the facts before us. *Brown* held that payment to a public employee for services which had not been, and would never be, rendered constituted a private gift of public funds and, as such, violated Article I, Section 32 of the Constitution. The *Brown* court based its ruling on the principle that the General Assembly could not compel or authorize a municipality to pay a gratuity to an individual to adjust a claim which the municipality is under no obligation to pay.

In contrast, Mr. Worth had served the Warren County as county manager for nine years prior to his resignation. North Carolina case law demonstrates that it is permissible to compensate public service previously rendered without violating the constitutional ban on private emoluments, even though the recipient may have no legal and enforceable right to the benefit. Defendants correctly cite to *Hinton v. State Treasurer*, 193 N.C. 496, 137 S.E. 669 (1927) and *Brumley v. Baxter*, 225 N.C. 691, 36 S.E.2d 281 (1945) as support for this proposition. The issue in *Hinton* was whether the General Assembly could constitutionally enact legislation whereby veterans of the First World War could obtain loans on favorable terms

for the purchase of homes. The legislation recited that its purposes were to recognize the veterans' military service, to encourage patriotism, to promote the ownership of homes, and to provide a means by which the veterans could acquire homes on favorable terms. In addressing the validity of this enactment under Article I, Section 7 (now Article I, Section 32) the Court found that it did not constitute an exclusive emolument since the enactment was in recognition of the veterans' past service to this State. The Court stated that "[p]ast services may also be compensated, and pensions may also be granted to those who were wounded, disabled, or otherwise rendered invalids while in the public service, even in cases where no prior promise was made or antecedent inducement held out." (Emphasis supplied.) *Hinton*, at 508, 137 S.E. at 676. In *Hinton*, the veterans had no legal or enforceable claim for the enactment of legislation providing loans to veterans on favorable terms. However, because the Act was in consideration of the veterans' past public service, this was not an exclusive emolument.

In *Brumley v. Baxter*, the court upheld the validity of an act authorizing donation of land by the City of Charlotte for the building of a veterans' center. The veterans had no legal or enforceable claim for the donation of land for a veterans' center, but the donation of land was held not to be an impermissive emolument since it was in consideration of public service. *Brumley*, at 698, 36 S.E.2d at 286.

Hence, our Supreme Court has held, on more than one occasion, that the constitutional ban on exclusive emoluments is not violated by a governmental grant of certain benefits, paid out of public resources, to one class of citizens, but not to be enjoyed by all, if the grant is in consideration of public service. From these cases, we discern that the primary inquiry under Article I, Chapter 32 is not whether the recipient has a legal or enforceable claim against the governmental entity granting the benefit, but rather, whether the governmental entity took such action in consideration of the recipient's public service.

"The court is exercising a very delicate function when it is sitting in judgment upon the validity of an act of legislation. . . . We may assume a fact to exist which will sustain an act, but not one which may impeach its validity, and everything must clearly appear upon which the court can declare it to be void, for a pre-

sumption exists in favor of its validity . . . ." *Faison v. Commissioners*, 171 N.C. 411, 415, 88 S.E. 761, 763 (1916). Applying these principles to the case before us, we are constrained to uphold the validity of the action of the board of commissioners in this case. Although the minutes of the meeting of the board of commissioners refer to the payment to Mr. Worth as "severance pay," it is clear from the brief discussion preceding the motion that the motivation for the payment was in consideration of Mr. Worth's past service as county manager. Plaintiffs may question the wisdom of the board's action, but they have not carried their burden of showing by substantial evidence that the board was not acting in good faith and in accordance with its constitutional and statutory authority. Thus, we hold that payment of $5,073.12 to Charles Worth by the Warren County Commissioners does not constitute a prohibited exclusive emolument under the North Carolina Constitution, Article I, Section 32, since such payment was in consideration of public service. The trial court's order enjoining Warren County's payment of said amount is reversed.

Reversed.

Chief Judge ARNOLD and Judge WYNN concur.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, PLAINTIFF-APPELLEE v. MARTIN L. BANKS, JR. AND CAROLYN S. BANKS, DEFENDANTS-APPELLANTS

No. 9310SC605

(Filed 17 May 1994)

1. **Insurance § 823 (NCI4th)— homeowner's insurance—exclusionary clause—intended damage—construction debris as fill**

An exclusion in a homeowner's insurance policy for personal liability coverage for property damage intended or expected by the insured did not apply where defendants acquired a permit from the City of Raleigh allowing them to fill the back of their lot with construction debris in an effort to level the lot; defendants had truckloads of debris dumped on their property for over two years; city employees periodically inspected the property; and Wake County informed defendants

that the fill violated a county landfill ordinance as well as a statute which prevents the obstruction of a stream or actions impeding the natural drainage of the land into a stream and would have to be removed. Both the resulting injury and the volitional act must be intended for the exclusion to defendants' homeowner's insurance to apply, and defendants here contemplated nothing but a lawful build-up of their property and clearly did not intend to cause harm to the stream.

Am Jur 2d, Insurance §§ 1504 et seq.

Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured. 31 ALR4th 957.

2. **Insurance § 819 (NCI4th)— homeowner's insurance—personal liability coverage—exclusionary clause—property owned by insured—construction debris as fill**

An exclusion in personal liability coverage under a homeowner's policy for property owned by the insured did not apply where defendants obtained city permits and inspections, used construction debris to fill and level the back of their property, the county informed defendants that the fill violated a landfill ordinance and a statute concerning obstruction of streams or impeding drainage into streams, and the county required defendants to remove the fill. There was no actual damage or harm to defendants' property, only to the adjacent stream, which is not owned by defendants.

Am Jur 2d, Insurance §§ 1504 et seq.

Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured. 31 ALR4th 957.

Appeal by defendants from order entered 2 April 1993 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 8 March 1994.

Bailey & Dixon, by David S. Coats, for plaintiff-appellee.

R. Bradley Miller for defendants-appellants.

LEWIS, Judge.

In October 1992, plaintiff Nationwide Mutual Fire Insurance Company (hereinafter "Nationwide") brought this declaratory judg-

ment action in order to define the rights of the parties under a provision of a homeowners insurance policy issued to defendants. Nationwide argues the policy does not extend coverage to or obligate them to defend an order from Wake County requiring defendants to remove several thousand truckloads of construction debris from their property. Defendants filed a counterclaim, contending that the policy applies and requires Nationwide to defend them and cover the cost of any corrective measures they may be required to take. Both parties moved for a judgment on the pleadings, and on 2 April 1993 the court allowed Nationwide's motion and denied defendants'. Defendants now appeal.

In 1985 defendants acquired a permit from the City of Raleigh allowing them to fill the back of their lot with construction debris in an effort to level their lot. For over two years defendants had truckloads of debris dumped on their property. City employees periodically inspected their property to ensure compliance with the terms of the permit. However, in November 1987 Wake County informed defendants that the fill violated a county landfill ordinance as well as N.C.G.S. § 77-14 (1993), which prevents the obstruction of a stream or actions impeding the natural drainage of the land into a stream. The County demanded that they remove the fill, stating that the City of Raleigh had no jurisdiction to issue the permit and that the permit was invalid. Estimates of the cost to remove the fill ranged from $35,000 to $100,000.

The City of Raleigh, Wake County, and defendants became involved in litigation over whether the fill was lawful or unlawful, whether defendants must remove the fill, whether the City was negligent in issuing the permit, and whether sovereign immunity would bar a negligence action against the City. Defendants notified Nationwide of the County's demand that they remove the fill, claiming liability coverage under their homeowner's policy. Nationwide then filed the present declaratory judgment action.

A judgment on the pleadings is appropriate when "the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). There is no factual dispute in the case at hand. After considering the legal questions involved, we conclude that the trial court erred in entering a judgment on the pleadings in favor of Nationwide.

Both parties agree that the relevant portion of the homeowner's policy is the personal liability coverage, which provides coverage in the amount of $100,000 per occurrence. At issue in this case are two exclusions to that coverage. The policy provides that personal liability coverage (1) does not extend to property damage "which is expected or intended by the insured," and (2) does not apply to "property damage to property owned by the insured."

I.

[1] Defendants first contend that their claim for coverage cannot be excluded because of property damage "intended by the insured." This exclusion applies only if the resulting injury as well as the act were intentional. *See N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 706, 412 S.E.2d 318, 324 (1992). According to defendants, although they intended to place the fill on their property, they did not intend to cause the harm cited by Wake County: the violation of a county landfill ordinance and the violation of section 77-14. *See* § 77-14 (stating that it is a misdemeanor to put any refuse or substances into a stream or to impede the natural and normal drainage of land into a stream). It follows that coverage should not be excluded on the basis of damage "intended by the insured."

Nationwide concedes that both the resulting injury and the volitional act must be intended for the exclusion to apply. According to Nationwide, however, the resulting injury in this case was the accumulation of debris on defendants' property. Nationwide argues that defendants clearly intended to fill their property with construction debris, and that coverage is excluded even though they did not intend to violate either a state statute or a county ordinance.

We find that this exclusion does not apply to the case at hand. The intended result, the accumulation of debris, is separate and distinct from the resulting injury, the damage to the stream. Defendants clearly did not intend to cause harm to the stream. They intended to acquire the necessary permits at the outset, and contemplated nothing but a lawful building-up of their property.

II.

[2] Defendants' second argument is that coverage cannot be excluded on the basis that the damage occurred to property owned by the insured. The actual damage is not to defendants' property, but to the stream bordering their property. Defendants distinguish

the case mentioned by Nationwide, *New Jersey Department of Environmental Protection v. Signo Trading International, Inc.*, 612 A.2d 932 (N.J. 1992). In that case the owned property exclusion applied, because the damage occurred exclusively on the owned insured's property, not on adjacent property or surface water.

According to Nationwide, the damage occurred to defendants' property because defendants must remove the debris from their property. Other jurisdictions have decided that this exclusion applies to preclude coverage for the costs of cleaning up an insured's own property. For example, in *Signo and Western World Insurance Co. v. Dana*, 765 F. Supp. 1011 (E.D. Cal. 1991), the exclusion precluded coverage for government-ordered cleanups of the insured's property. The *Signo* court held that under the clear terms of the policy, it did not cover "the costs of cleanup performed by or on behalf of an insured on its own property when those costs are incurred to alleviate damage to the insured's own property and not to the property of a third party." 612 A.2d at 938.

While these cases are similar to the case at hand in that they involve government-mandated cleanup of the insured's property, they are distinguishable because they involve actual damage to the insured's property. In *Signo*, state environmental authorities ordered the insured to clean up toxic wastes spilled on the insured's property. 612 A. 2d at 934. Toxic waste and other forms of environmental contamination are clearly harmful to the property itself as well as potentially harmful to adjacent property. *See C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, 326 N.C. 133, 146, 388 S.E.2d 557, 565 (1990) (stating that environmental contamination of State's natural resources, such as groundwater and soil, constitutes property damage). *See also Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021, 1036 (Md. 1993) (Maryland Court of Appeals held that expenses for removal of hazardous waste materials from an insured's property are not covered under a comprehensive general liability policy because no indication of any injury to a third party's property); *Shell Oil Co. v. Winterhur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 844 (Cal. Ct. App. 1993) (coverage could be precluded for response costs related to remedying contamination of soil and ground water within insured's "care, custody and control"), *review denied* (13 May 1993); *Western World*, 765 F. Supp. at 1011-12 (involving soil contamination).

The case at hand is distinguishable from the cases cited by Nationwide, because there is no actual damage or physical harm to defendants' property. There is no accumulation of hazardous or toxic wastes or any sort of environmental contamination on defendants' land, but only an accumulation of debris. There is no indication that the debris in any way harms the land itself. The only damage cited is the damage to the adjacent stream, which is not owned by defendants. We conclude that coverage cannot be excluded under the "owned property" provision.

Thus, Nationwide may not deny coverage to defendants on the basis of either exclusion. Defendants did not intentionally harm their land, and they did not intentionally violate state or county law regarding streams or landfills. Nor was there any damage to defendants' property. The only actual harm here occurred to the adjacent stream. From the beginning of their venture, defendants intended to act lawfully in improving their property, and they believed that they had acquired all the necessary permits.

The judgment on the pleadings in favor of Nationwide is hereby reversed and this case is remanded for entry of judgment on the pleadings in favor of defendants.

Reversed and remanded.

Chief Judge ARNOLD and Judge COZORT concur.

ROSCOE BLEVINS AND WIFE, ETHEL BLEVINS; JAMES FARRINGTON AND WIFE, RUBY FARRINGTON; LLOYD GRAHAM AND WIFE, LINDA GRAHAM; EURA HART, WIDOW; JEAN B. KEY, SINGLE; ROBERT L. LEWIS AND WIFE, SHIRLEY LEWIS; HETTIE SAPP, WIDOW; VAUGHN WELCH AND WIFE, MINNIE WELCH; AND WAYNE WILLIAMS, SINGLE, PLAINTIFFS-APPELLEES v. ALVIN "JUNIOR" DENNY; REGGIE TESTERMAN; DANA BROWN; SHARON COWAN; AND LINDA GRAHAM, MEMBERS OF THE BOARD OF ALDERMEN OF THE TOWN OF LANSING, AND THE TOWN OF LANSING, DEFENDANTS-APPELLANTS

No. 9323DC629

(Filed 17 May 1994)

1. **Appeal and Error § 118 (NCI4th)— water and sewer system—required connection—action against Town—summary judgment for Town denied—immediately appealable**

The denial of summary judgment for defendant Town of Lansing was immediately appealable in an action against the Town arising from an ordinance requiring water and sewer connections.

Am Jur 2d, Appeal and Error § 14.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

2. **Municipal Corporations § 413 (NCI4th)— water and sewer system—required connection—governmental function—Town's tort liability—immunity**

The Town of Lansing was performing a governmental function when it passed an ordinance mandating connection to a water and sewer system and is immune from tort liability for depriving plaintiffs of their wells and septic systems and for unjust enrichment.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 87 et seq.

Comment Note.—Municipal immunity from liability for torts. 6 ALR2d 1198.

Municipal operation of sewage disposal plant as governmental or proprietary function, for purposes of tort liability. 57 ALR2d 1336.

3. Estoppel § 3 (NCI4th)— action to enjoin ordinance requiring water and sewer connection—valid exercise of police power—no estoppel

The Town of Lansing could not be estopped from requiring connection to a water and sewer system where the Town Clerk/Finance officer had sent town residents a letter before the referendum stating that the Town had no intention of requiring hook-ups and informed residents after the construction of the system that mandatory hook-ups were the Town's only option. The ordinance mandating connection to the water and sewer system was a valid exercise of the Town's police power.

Am Jur 2d, Estoppel and Waiver §§ 114-133.

Comment Note.—Applicability of doctrine of estoppel against government and its govermental agencies. 1 ALR2d 338.

4. Eminent Domain § 295 (NCI4th)— required water and sewer connection—taking—limitation

Actions asserting a "taking" are to be initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall come later. N.C.G.S. § 40A-51(a).

Am Jur 2d, Eminent Domain §§ 498, 499.

Appeal by defendants from order entered 18 May 1993 by Judge Michael E. Helms in Ashe County District Court. Heard in the Court of Appeals 9 March 1994.

Kilby, Hodges & Hurley, by John T. Kilby, and Vannoy & Reeves, by Jimmy D. Reeves, for plaintiffs-appellees.

Johnston and Johnston, by John C. Johnston, for defendants-appellants.

JOHNSON, Judge.

The Town of Lansing in Ashe County, North Carolina (hereafter, Town) conducted a bond referendum on 17 June 1986 in order to construct a water and sewer system. A week prior to the vote on the bond referendum, by letter dated 9 June 1986 to the town's residents, the Town Clerk/Finance Officer urged support of the bond referendum, stating that the Town had no intention of requir-

ing mandatory water hook-ups to the proposed water and sewer system. The bond referendum passed by an overwhelming majority.

Following the construction of the Town's water and sewer system, the Town Clerk/Finance Officer informed the citizens of the Town that because of the few resident taxpayers located within the Town and the large amount of money necessary to complete the project, mandatory hook-ups were the Town's only option, unless taxes were raised to a prohibitive amount.

On 17 August 1989, the Town passed an ordinance requiring every person owning improved property within the corporate limits to connect to the Town's water and sewer system. An amendment to the ordinance followed, pursuant to North Carolina General Statutes § 160A-175 (Cum. Supp. 1993), establishing fines and penalties for violation of the ordinance.

In a separate action to which they counterclaimed, Roscoe and Ethel Blevins were named defendants in an action brought by the Town, requiring that they connect to the Town's water and sewer system or be subject to fines and penalties. The Blevins then joined with other residents who have refused to comply with the Town's ordinance in the lawsuit *sub judice* against the Town and Town officials. Plaintiff residents in this case asked the court to grant a writ of mandamus requiring defendants to operate the water and sewer system without requiring plaintiff residents to connect to said system; for a permanent injunction preventing defendants from requiring said hook-up; for compensation for plaintiff residents' private wells and septic systems of which they claim they will be deprived; for a survey of the corporate limit; and for damages on the theory of unjust enrichment. Defendants answered, claiming defenses of laches and the statute of limitations among others, and counterclaiming against plaintiff residents for their noncompliance with the Town's ordinance. Plaintiff residents filed a reply to defendants' counterclaim. With plaintiff residents' consent, defendants amended their reply to include the defense of sovereign immunity. Defendant Town made a motion for summary judgment which was denied on 18 May 1993, and defendant Town gave notice of appeal to this Court.

The issue in both this case and a companion case filed simultaneously, *Town of Lansing v. Key*, No. 9323DC640 (N.C. App. filed 17 May 1994), is the same: did the trial court properly deny defendant Town's motion for summary judgment as a matter of law?

[1] We note that at the trial level, the Town argued their right to appeal this interlocutory order pursuant to *Corum v. University of North Carolina*, 97 N.C. App. 527, 389 S.E.2d 596, *stay allowed*, 326 N.C. 595, 394 S.E.2d 453, *disc. review and writ allowed and dismissal denied*, 327 N.C. 137, 394 S.E.2d 170 (1990), *aff'd in part; rev'd in part on other grounds*, 330 N.C. 761, 413 S.E.2d 276 (1992). The motion for summary judgment in *Corum* was based on immunity defenses to a section 1983 claim. In *Corum*, we stated:

> Generally, the denial of summary judgment does not affect a substantial right and is not appealable. (Citations omitted.) In the instant case, however, we hold that the denial of summary judgment affected a substantial right and is subject to review. We reach this conclusion in light of the holding of the United States Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411 (1985), a case in which the defendant federal official's summary judgment motions, on the grounds of absolute and qualified immunity, had been denied in District Court. In *Mitchell*, the Supreme Court held that "denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." 472 U.S. at 525, 86 L.Ed.2d at 424 (citations omitted). Similarly, the Court concluded that denial of a public official's claim of qualified immunity from suit, to the extent that it turns on the legal questions of whether the conduct complained of violated "clearly established law" . . . is also appealable as a "final decision" within the meaning of 28 U.S.C. sec. 1291.

Corum, 97 N.C. App. at 531, 389 S.E.2d at 598. In *Mitchell*, the United States Supreme Court went on to explain that

> entitlement [to qualified immunity] is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.
>
> . . .
>
> An appealable interlocutory decision must satisfy two additional criteria: it must "conclusively determine the disputed question," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 57 LEd2d 351, 98 S.Ct 2454 (1978), and that question must

> involve a "clai[m] of right separable from, and collateral to, rights asserted in the action," [*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 93 L.Ed. 1528, 69 S.Ct. 1221 (1949).] The denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets these requirements.

Corum, 97 N.C. App. at 531-32, 389 S.E.2d at 598, *quoting Mitchell*, 472 U.S. at 526-27, 86 L.Ed.2d at 425-26. (Emphasis retained.) We find the denial of the Town's summary judgment motion in the instant case immediately appealable.

[2] Upon examination of the evidence in this case, we find that defendant Town was performing a governmental function when it passed the ordinance mandating connection to the water and sewer system, and that therefore, the Town is immune from tort liability. (*See Rhyne v. Mount Holly*, 251 N.C. 521, 112 S.E.2d 40 (1960) for a list of situations in which municipalities have been held immune by reason of being engaged in governmental functions.) In support of our holding, we cite *McNeill v. Harnett County*, 327 N.C. 552, 572, 398 S.E.2d 475, 486 (1990), where the North Carolina Environmental Management Commission found unsanitary conditions and gave the Buies Creek-Coats Water and Sewer District permission to proceed to construct a sewer system to serve the district, and our Supreme Court held that "the ordinances mandating connection to the county-operated sewer system, and the payment of connection charges and monthly user fees for the sewer service are valid exercises of the police power[.]" *See* North Carolina General Statutes § 160A-317 (1993), entitled "Power to require connections to water or sewer service and the use of solid waste collection services," which authorizes municipalities to require citizens to either connect to a water or sewer line, or, to avoid hardship, to pay a periodic availability charge. *(See also McCombs v. City of Asheboro*, 6 N.C. App. 234, 240, 170 S.E.2d 169, 173 (1969), where our Court said "construction of a sewerage system is a governmental function[.]")

[3] A reading of the letter sent by the Town Clerk/Finance Officer to the citizens of Lansing indicates that "50% of the homes or businesses surveyed [by the Ashe County Health Department in 1985] had illegal discharge of sewage, [and that] 10% of existing septic tanks were not functioning[.]" The letter continues:

> The study clearly indicates that the sewage disposal problems in Lansing are widespread and serious and are posing a definite threat to our health and well-being. . . .
>
> The officials of the Ashe County Health Department are coming under increased pressure from Raleigh and elsewhere to do something about Lansing's violators of State health laws.

The letter further indicates the efforts made by the Lansing town officials to secure grant monies and a FmHA loan to go toward the costs of the new water and sewer system. Although there was no evidence to indicate that the purchase of the new water and sewer system at the time of the bond referendum was mandatory, it appears it was inevitable. Therefore, we find the ordinance mandating connection to the water and sewer system a valid exercise of the Town's police power and find that the Town cannot be estopped from requiring said connection.

[4] Additionally, we note that actions asserting a "taking" are to be "initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later." North Carolina General Statutes § 40A-51(a)(1984).

Reversed and remanded for judgment to be entered in favor of defendant Town.

Judges GREENE and JOHN concur.

BELL ATLANTIC TRICON LEASING CORPORATION, PLAINTIFF v. DRR, INC. D/B/A CAROLINA FLEET SERVICE AND MAYLON H. FOWLER, INC., DEFENDANTS

No. 9310DC495

(Filed 17 May 1994)

1. **Appeal and Error § 443 (NCI4th)— no assignment of error in record—not addressed on appeal**

An assignment of error in a brief which was not set out in the record on appeal was not addressed. N.C.R. App. P. 10(a).

Am Jur 2d, Appeal and Error §§ 723 et seq.

2. Corporations §§ 111, 118 (NCI4th)— leasing of equipment—president and secretary of corporation—apparent authority

The trial court properly granted plaintiff's motion for summary judgment in an action on a guaranty of an equipment lease where defendant Maylon H. Fowler, Inc. contended that Ricky and Dennis Fowler had not had the apparent authority to bind MHF in the guaranty and had acted outside the scope of MHF's ordinary business transactions and without express authorization from the Board of Directors, but Ricky Fowler was the president of MHF and was allowed to represent that he was responsible for the management and control of MHF; Dennis Fowler, by signing the secretary's certificate of the guaranty, represented that the MHF board of directors met and authorized the signing of the guaranty; and guarantying an affiliates's lease agreement does not put a party on notice that the officers of the corporation were acting outside the scope of their authority.

Am Jur 2d, Corporations §§ 1534-1630.

Authority of officer or agent to bind corporation as guarantor or surety. 34 ALR2d 290.

3. Corporations §§ 102, 121 (NCI4th)— lease of equipment—estoppel and ratification by corporation

The trial court did not err in an action to enforce a corporate guaranty of an equipment lease by granting plaintiff's motion for summary judgment despite defendant MHF's contention that it could not be bound by the guaranty on the basis of estoppel or ratification. MHF held out Ricky Fowler, who signed the guaranty, as president and thereby authorized him to bind the corporation and allowed other persons to rely on Ricky Fowler as having the authority to bind MHF, and should therefore be estopped from denying Ricky Fowler's authority to execute the guaranty. The leased equipment was in the possession of MHF and MHF made several payments on the lease, supporting plaintiff's position that MHF ratified the acts of its president and secretary.

Am Jur 2d, Corporations §§ 1534-1630.

Authority of officer or agent to bind corporation as guarantor or surety. 34 ALR2d 290.

Appeal by defendant Maylon H. Fowler, Inc. from order entered 12 February 1993 by Judge Joyce A. Hamilton in Wake County District Court. Heard in the Court of Appeals 10 February 1994.

Smith Debnam Hibbert & Pahl, by Bettie Kelley Sousa and Byron L. Saintsing, for plaintiff-appellee.

Manning, Fulton & Skinner, P. A., by Howard E. Manning, Michael T. Medford and Alison R. Cayton, for defendant-appellant Maylon H. Fowler, Inc.

JOHNSON, Judge.

Defendant corporation Maylon H. Fowler, Inc., (hereinafter, MHF), is a closely held corporation involved in the business of hauling sand, stone, and other similar materials. Christine M. Fowler is the primary stockholder and owns 236 of the 248 shares. Additionally, Mrs. Fowler is Chairperson of MHF's Board of Directors and was president of MHF until February 1990. The remainder of corporate ownership and control is vested in Mrs. Fowler's sons, Dennis, Ricky and Ronald Fowler. Ricky Fowler has been president of MHF since February 1990; Ronald Fowler has been the secretary of MHF since May 1991; and Dennis Fowler was the secretary of MHF from February 1990 to May 1991.

In July of 1990, soon after Dennis, Ricky and Ronald Fowler became officers of MHF, Dennis, Ricky and Ronald formed defendant corporation DRR, Inc., d/b/a Carolina Fleet Service (hereinafter, DRR). Soon after its incorporation, DRR, by its president, Dennis Fowler, executed an equipment lease in favor of plaintiff Bell Atlantic Tricon Leasing Corporation (hereinafter, Bell Atlantic) for computer hardware, software and printers. In order for DRR to obtain the equipment, Bell Atlantic required DRR to obtain a corporate guaranty. To comply with this requirement, Ricky Fowler, in his capacity as president of MHF, signed the guaranty. Additionally, Dennis Fowler, in his capacity as secretary of MHF, executed a secretary's certificate on the second page of the guaranty which stated that on 10 July 1990, MHF's Board of Directors entered into a corporate resolution authorizing the guaranty.

The computer equipment was delivered and DRR made the monthly rental payments on the equipment from November 1990 until April 1991. In May of 1991, DRR ceased operations. In August of 1991, MHF made two payments to plaintiff for the equipment, the total of which approximated five months of lease payments.

In January of 1992, after DRR defaulted on the lease agreement, plaintiff gave notice of default and notice of the acceleration of the lease payments to both DRR and MHF. Plaintiff then filed this action against DRR and MHF on 31 March 1992, alleging DRR defaulted in payments under the equipment lease and MHF defaulted on the corporate guaranty agreement.

Plaintiff filed a motion for summary judgment on 21 January 1993. The motion was heard before Judge Joyce A. Hamilton at the 12 February 1993 Civil Session of Wake County District Court, and Judge Hamilton granted summary judgment for plaintiff against both DRR and MHF. Defendant MHF gave notice of appeal to this Court.

[1] The first assignment of error in MHF's brief was not set out in the record on appeal. As Rule 10(a) of the North Carolina Rules of Appellate Procedure provides that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . ." we do not address the merits of MHF's first assignment of error.

[2] By MHF's next assignment of error, MHF argues that the trial court erred in granting plaintiff's motion for summary judgment because Ricky and Dennis Fowler did not have the apparent authority to bind MHF.

North Carolina General Statutes § 1A-1, Rule 56(c) (1990) provides that summary judgment should 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 of material fact and that any party is entitled to a judgment as a matter of law."

A principal is liable upon a contract made by its agent with a third party in three instances: when the agent acts within the scope of his or her actual authority; when a contract, although unauthorized, has been ratified; or when the agent acts within the scope of his or her apparent authority. *Foote & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 595, 324 S.E.2d 889, 892 (1985).

Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974). "[T]he determination of a prin-

cipal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances conferred upon his agent." *Id.* at 31, 209 S.E.2d at 799.

At the time the lease guaranty was executed, Ricky Fowler was the president of MHF and allowed to represent he was responsible for the management and control of MHF. The law of this state is clear as to the apparent authority of the president of a closely held corporation to enter into contracts for the corporation. The president of the corporation is the head and general agent of the corporation and may act for it in matters that are within the corporation's ordinary course of business or incidental to it. *Zimmerman*, 286 N.C. at 32, 209 S.E.2d at 800. Generally, when the president acts for the corporation with respect to matters outside the corporation's ordinary course of business, in the absence of express authorization for such acts by the board of directors, the corporation is not bound. *Id.* In order for a contract executed by the president to be binding on the corporation, "it must appear that (1) it was incidental to the business of the corporation; or (2) it was expressly authorized; and (3) it was properly executed." *Id.*

In the case *sub judice*, MHF argues that MHF should not be bound by the corporate guaranty because Ricky and Dennis Fowler acted outside the scope of MHF's ordinary business transactions and without express authorization from the Board of Directors. We disagree.

In the present case, the business of MHF was transporting goods for hire. As part of that business, MHF owned and operated a fleet of trucks. DRR was established as an affiliate of MHF to solely service MHF vehicles. We do not find that guarantying an affiliate's lease agreement should put a party on notice that the officers of the corporation were acting outside the scope of their authority. We believe that the actions of Ricky and Dennis Fowler could very well be viewed as "incidental" to the ordinary course of MHF's business. Additionally, we note that Dennis Fowler, by signing the secretary's certificate of the guaranty, represented that the MHF Board of Directors met on 10 July 1990 and authorized the signing of the guaranty. We find nothing which put plaintiff on notice that Ricky Fowler, as president of MHF, was exceeding the scope of his authority. Moreover, the general rule

> that a person dealing with an agent must know the extent of his authority does not apply when dealing with one who is a general agent, as the president of a corporation. In such a case the burden is upon the principal to show that the other party had notice of a restriction upon the power of the general agent.

Zimmerman, 286 N.C. at 33, 209 S.E.2d at 800 (citations omitted). MHF has not carried this burden. Therefore, we find that plaintiff's reliance on the apparent authority of Ricky Fowler and Dennis Fowler as president and secretary of MHF was justified.

[3] By MHF's final argument, MHF contends that the trial court erred in granting plaintiff's motion for summary judgment because MHF cannot be bound by the terms of the guaranty on the basis of estoppel or ratification.

Our Supreme Court has held that:

> [a] corporation which, by its voluntary act, places an officer or agent in such a position or situation that persons of ordinary prudence, conversant with business usages and the nature of the particular business, are justified in assuming that he has authority to perform the act in question and deal with him upon that assumption is estopped as against such persons from denying the officer's or agent's authority.

Moore v. W O O W, Inc., 253 N.C. 1, 6, 116 S.E.2d 186, 189 (1960). By holding Ricky Fowler out as its president, MHF authorized Ricky Fowler to contractually bind the corporation, and control the management of the corporation. Additionally, MHF allowed other persons to rely on Ricky Fowler as having the authority to bind MHF. Therefore, MHF should be estopped from denying Ricky Fowler's authority to execute the guaranty.

"Ratification is defined as 'the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.' " *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982). "Ratification requires intent to ratify plus full knowledge of all material facts." *Id.* (Citation omitted.) Ratification "may be express or implied, and intent may be inferred from failure to repudiate an unauthorized act . . . or from conduct on the part of the principal

which is inconsistent with any other position than intent to adopt the act." *Id.*

In the case *sub judice*, the facts indicate that the leased equipment was in the possession of MHF, and that MHF made several payments on the lease. These acts support plaintiff's position that MHF ratified the acts of its president and secretary. The acts are consistent with an intent to affirm and appear inconsistent with any other position.

We find that MHF is bound by the lease guaranty based upon apparent authority, estoppel and ratification. As such, we find that the trial court correctly granted plaintiff's motion for summary judgment. The decision of the trial court is affirmed.

Affirmed.

Judges EAGLES and LEWIS concur.

CHERI EVANS, PLAINTIFF v. FULL CIRCLE PRODUCTIONS, INC., D/B/A TOGETHER, DEFENDANT

No. 9321DC207

(Filed 17 May 1994)

1. Notice § 2 (NCI4th)— motions hearing—actual notice

The trial court did not err by overruling plaintiff's objection to a hearing on motions where plaintiff made her motion under N.C.G.S. § 1A-1, Rule 6(d) and contended that she did not have notice of the hearing and was inadequately prepared, but it is clear that plaintiff had actual notice since the hearing was scheduled originally by plaintiff, plaintiff's notice of the hearing was evidenced by the telephone conversation between counsel for the parties during which plaintiff's counsel objected to her motion being heard, and, despite her acceptance of an offer of judgment, plaintiff was aware that the case remained pending for motions hearing. Moreover, plaintiff cannot show prejudice since her counsel subsequently appeared and his arguments were heard.

Am Jur 2d, Notice §§ 32-40, 45-48.

2. Unfair Competition § 52 (NCI4th); Judgments § 115 (NCI4th)—attorney fees—offer of judgment—no prevailing party

The trial court did not err by determining that plaintiff was not entitled to attorney fees pursuant to N.C.G.S. § 75-16.1 where plaintiff had accepted an offer of judgment. The first requirement for an award of attorney fees under that statute is that plaintiff be the prevailing party; however, where an offer of judgment is accepted by the plaintiff, there is no prevailing party or losing party and no admission or judgment of liability. Although plaintiff's attorney fees exceeded her recovery in the settlement, nothing prevented her from bargaining for attorney fees as part of the Rule 68 offer of judgment.

Am Jur 2d, Judgments § 184; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

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

Appeal by plaintiff from judgment and order entered 22 December 1992 by Judge Chester Davis in Forsyth County District Court. Heard in the Court of Appeals 7 December 1993.

Robert E. Winfrey for plaintiff appellant.

Underwood Kinsey Warren & Tucker, P.A., by Richard L. Farley, for defendant appellee.

COZORT, Judge.

Plaintiff Cheri Evans brought this action in small claims court on 30 June 1992 to recover $744.90 from defendant Full Circle Productions, Inc., d/b/a Together, a dating referral service. Plaintiff and Together entered into a contract on 5 September 1991 under which Together would provide plaintiff with twelve dating referrals over a two-year period in exchange for plaintiff's payment of a membership fee. Plaintiff alleges she was induced into entering the contract based on false representations made by an agent of Together. Plaintiff contends the agent told her that Together's clients included a large number of suitably aged professional African-American men in the Winston-Salem area. Plaintiff stated she would not have entered into the contract but for the agent's statements. When plaintiff did not receive the introduction referrals she had anticipated, she contacted Together personnel. Following an unsuc-

cessful attempt by the parties to arrive at a resolution, plaintiff filed her action, the matter was heard, and judgment for $854.90 was entered in plaintiff's favor on 25 August 1992.

Plaintiff appealed the magistrate's decision to district court. On 12 November 1992, defendant filed an offer of judgment of $1,934.70, pursuant to N.C. Gen. Stat. § 1A-1, Rule 68(a). On 13 November, plaintiff filed a motion to amend her complaint, changing the damages sought from $744.90 to $1,595.00. The defendant filed an amended offer of judgment on 17 November; a similar amended offer of judgment was served on 25 November. The amended offers corrected technical mistakes in the initial offer. On 17 November, plaintiff filed an objection to the defendant's Rule 68(a) offer of judgment. The district court subsequently published its calendar and scheduled for hearing on 7 December the plaintiff's motion to amend and the objection to the offer of judgment.

On 3 December, plaintiff filed a motion to compel discovery, and defendant served a motion for a prosecution bond and a motion for a protective order which included a request for costs. By stipulation of the parties, the defendant's motions were also to be heard on 7 December. Plaintiff filed an acceptance to the second amended offer of judgment on 4 December and filed a motion for attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1 on that same date, and notified the district court of her acceptance. Plaintiff communicated her acceptance to defendant and informed defendant's counsel that she now opposed the hearing on her motion for attorney's fees on 7 December. Defendant's attorney expressed his intention of proceeding with the motions which remained on the calendar for 7 December and explained that defendant would also respond to the plaintiff's motion for attorney's fees at that time.

On 7 December, defendant's counsel appeared in court; plaintiff's counsel did not appear. Defendant's counsel related the case history to the trial court, and a futile attempt was made to locate plaintiff's counsel. The trial court nonetheless heard defendant's arguments on its motion for sanctions and its argument in opposition to plaintiff's motion for attorney's fees. Later, the court directed plaintiff's counsel to appear on 9 December and on that date heard argument on plaintiff's motion for attorney's fees; plaintiff's counsel objected pursuant to N.C.R. Civ. P. 6(d). The trial court determined that plaintiff was not a prevailing party under N.C. Gen. Stat. § 75-16.1 and therefore not entitled to attorney's fees. On 21

December 1992, the court issued an order and judgment reflecting its rulings.

[1] Plaintiff first assigns as error on appeal the trial court's decision to overrule her objection pursuant to Rule 6(d) of the North Carolina Rules of Civil Procedure. Rule 6(d) provides, "[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court." N.C. Gen. Stat. § 1A-1, Rule 6(d) (1990). Plaintiff claims she did not have notice of the hearing and was inadequately prepared for argument on the motion for attorney's fees.

To establish an error by the trial court for failing to sustain plaintiff's objection, plaintiff must show an actual violation of Rule 6(d) and must demonstrate prejudicial harm as a result. *Jenkins v. Jenkins*, 27 N.C. App. 205, 206, 218 S.E.2d 519, 519 (1975). Here, plaintiff neither can prove an actual violation of Rule 6(d), nor can she point to any prejudice. Plaintiff's argument is nonsensical; she assumes she was entitled to receive notice of a hearing on her own motion. It is clear plaintiff had actual notice of the 7 December hearing, since the hearing was scheduled originally by plaintiff. Furthermore, plaintiff's notice of the hearing was evidenced by the telephone conversation between counsel for the parties during which plaintiff's counsel objected to her motion being heard. And, despite plaintiff's acceptance of the offer of judgment, plaintiff was aware the case remained pending for motions hearing.

In addition to having ample notice of the hearing, plaintiff cannot show she was prejudiced. Plaintiff's counsel appeared on 9 December, and the trial court heard his arguments at that time. Plaintiff's assignment of error is overruled.

[2] Plaintiff's remaining contentions attack the trial court's determination that plaintiff was not entitled to attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1. N.C. Gen. Stat. § 75-16.1 (1988) states:

> In any suit instituted by a person who alleges that the defendant violated § 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

> (1) The 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. . . .

To award attorney's fees under the statute, the trial court must find: (1) plaintiff is the prevailing party; (2) defendant willfully engaged in the act at issue; and (3) defendant made an unwarranted refusal to fully resolve the matter. Even if the requirements are met, an award of attorney's fees under N.C. Gen. Stat. § 75-16.1 is in the trial court's discretion.

In the case at bar, the trial court correctly denied the motion for attorney's fees because plaintiff fails the first requirement of being the prevailing party. To be a "prevailing party" within the meaning of N.C. Gen. Stat. § 75-16.1, the plaintiff must prove both an actual violation of N.C. Gen. Stat. § 75-1.1 and actual injury to plaintiff as a result of the violation. *Mayton v. Hiatt's Used Cars, Inc.*, 45 N.C. App. 206, 212, 262 S.E.2d 860, 863, *cert. denied*, 300 N.C. 198, 269 S.E.2d 624 (1980). Where an offer of judgment is accepted by the plaintiff, there is not a "prevailing party" or a "losing party." A purpose of N.C.R. Civ. P. 68 is to encourage compromise and avoid lengthy litigation. *Scallon v. Hooper*, 58 N.C. App. 551, 554, 293 S.E.2d 843, 844, *disc. review denied*, 306 N.C. 744, 295 S.E.2d 480 (1982). Because the rationale behind N.C.R. Civ. P. 68 is to encourage a voluntary, mutual settlement, both parties may consider themselves prevailing parties. Furthermore, when a case is settled, there is no admission or judgment of liability by defendant; we cannot say that an actual violation under N.C. Gen. Stat. § 75-1.1 has occurred.

We acknowledge that the statute, as it now stands, potentially poses a dilemma for plaintiffs who have to choose either to accept the offer of judgment and lose the opportunity to recover attorney's fees, or in the alternative, reject the offer of judgment and have to pay her attorney and possibly costs of defendant's counsel. On the other hand, we also recognize that the statute apparently has been designed to award attorney's fees in extreme cases, since even when the statutory requirements are met, an award of attorney's fees is within the trial court's discretion. Unfortunately, in this case the attorney's fees incurred by plaintiff exceeded her recovery in the settlement. However, nothing prevented plaintiff from bargaining for attorney's fees as part of the Rule 68 offer

of judgment. So long as costs and attorney's fees, if separately designated, are specifically provided for in the offer of judgment, such judgment will be upheld. *See Aikens v. Ludlum*, 113 N.C. App. 823, 440 S.E.2d 319 (1994). Consequently, plaintiff does not meet the initial requirement of being a "prevailing party" under the statute to justify an award of attorney's fees. The trial court's judgment is

Affirmed.

Judges GREENE and WYNN concur.

IN THE MATTER OF THE WILL OF LUGENIA M. JONES, DECEASED

No. 9311SC344

(Filed 17 May 1994)

1. **Trial § 266 (NCI4th)— directed verdict—caveat to will—statement of grounds for motion**

The trial court did not err by granting a directed verdict for the propounders in a will caveat case where the caveators contended that the motion failed to state specific grounds in favor of the motion. The issues of undue influence and testamentary capacity were clearly identified, the grounds for the motion were apparent, and it is obvious that the motion challenged the sufficiency of the evidence as to these issues. The parties and the court were sufficiently apprised of the grounds for the motion. N.C.G.S. § 1A-1, Rule 50(a).

Am Jur 2d, Trial §§ 939, 940, 981 et seq.

2. **Wills § 65 (NCI4th)— undue influence—motion for directed verdict—sufficiency of evidence**

The trial court did not err by granting a directed verdict for the propounders in a will caveat action based on undue influence where the caveators did not present sufficient evidence to establish a prima facie case of undue influence.

Am Jur 2d, Wills §§ 1083-1089.

3. Evidence and Witnesses § 87 (NCI4th)— caveat—undue influence—behavior of primary beneficiary after execution—excluded

The trial court did not err in a caveat proceeding by excluding evidence regarding the behavior of the primary beneficiary after the execution of the will.

Am Jur 2d, Evidence § 253.

Appeal by caveators from judgment entered 17 September 1992 by Judge Knox V. Jenkins in Johnston County Superior Court. Heard in the Court of Appeals 1 February 1994.

This case involves a dispute over the Last Will and Testament of the decedent, Lugenia M. Jones. On 1 May 1991, the ninety-two-year-old decedent was admitted to Johnston Memorial Hospital in Smithfield, North Carolina. The decedent underwent major abdominal surgery upon admission to the hospital and was placed in intensive care for several days following the surgery. Thereafter, she was moved to a private room.

Vicky Lee, a hospital nurse, testified that the decedent asked her numerous times to contact Carolyn Ennis, a longtime friend and fellow schoolteacher, because the decedent had some "business" to discuss with her. Ennis went to the decedent's hospital room on 6 May 1991 and discussed with her the drawing of her will. She took notes based on her conversation with the decedent regarding her will and took them to an attorney at the decedent's request. The attorney prepared the will per the decedent's instructions as dictated by Ennis. The next day, Ennis took the will back to the decedent's hospital room where, after stating that she had read and understood the will, she signed it in the presence of a notary and two witnesses.

The pertinent parts of the will distributed the decedent's property as follows: First Missionary Baptist Church ($500); Robert Mangum (step-son—$1200); Columbus Mitchener ($1200); Bertha Mae Sutton (niece—$500); Earldine Reid (aunt—$15,000, automobile and personal and household furnishings); Cora Jane Dickerson (niece—$1500); Kenneth Reid (great grand-nephew, whom the decedent referred to as her "son"—life insurance policies, retirement benefits, and house); Carolyn Ennis (friend and fellow schoolteacher—residuary beneficiary and executrix).

On 29 July 1991, Herbert C. Mitchener, Sr., a nephew of the decedent, and Alice Quiller, Mitchener's niece, filed a caveat to the Will of Jones. Eric Mitchell, Krisandra Mitchell and Gloria (Bertha Mae) Sutton also participated as caveators. The Estate of Lugenia M. Jones through the executrix, Carolyn Ennis, together with Kenneth Reid, Earldine Reid, Robert Mangum, and Cora Jane Dickerson, participated as propounders. The caveat challenged the capacity of the decedent to make a will and further alleged that she had been unduly influenced by the primary beneficiaries of the will, Kenneth Reid and Earldine Reid. At trial the trial court granted propounders' motion for directed verdict. Caveators appeal.

John F. Oates, Jr. for caveator appellants.

Susan S. Haas for propounder appellees.

ARNOLD, Chief Judge.

[1] Caveators' first assignment of error is that the trial court erred in granting a directed verdict for propounders. Based on the then recent case of *In re Will of Jarvis*, 107 N.C. App. 34, 418 S.E.2d 520 (1992), *aff'd in part, rev'd in part*, 334 N.C. 140, 430 S.E.2d 922 (1993), which allowed a Rule 50 directed verdict motion in caveat cases, the trial court granted a directed verdict in favor of propounders on the issues of undue influence and testamentary capacity. Rule 50(a), which governs a motion for directed verdict states that "[a] motion for directed verdict shall state the specific grounds therefor." N.C. Gen. Stat. § 1A-1, Rule 50(a) (1990). Caveators contend that the trial court erred by granting a motion which failed to state specific grounds in support of the motion, and further by granting the directed verdict motion where caveators established a prima facie case of undue influence exercised by Kenneth Reid.

First, while Rule 50(a) requires that a motion for directed verdict state specific grounds for the motion, failure to state such grounds is not a basis for an automatic reversal of the directed verdict on appeal. "[T]he courts need not inflexibly enforce the rule [as to stating specific grounds] when the grounds for the motion are apparent to the court and the parties." *Anderson v. Butler*, 284 N.C. 723, 729, 202 S.E.2d 585, 588 (1974). In the case at bar, the issues of undue influence and testamentary capacity were clearly identified, and the grounds for the motion were apparent. It is obvious that propounders' motion challenged the sufficiency of

the evidence as to these issues. The parties, as well as the court, were sufficiently apprised of the grounds for the motion, thus meeting the purpose of a Rule 50(a) motion.

[2] Moreover, caveators did not present sufficient evidence to establish a prima facie case of undue influence. Undue influence is defined as "the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made." *In re Andrews*, 299 N.C. 52, 54, 261 S.E.2d 198, 199 (1980) (quoting *In re Will of Kemp*, 234 N.C. 495, 498, 67 S.E.2d 672, 674 (1951)). Although caveators contend certain factors relevant to the issue of undue influence, *see In re Andrews*, 299 N.C. 52, 261 S.E.2d 198, such as the decedent's age and infirmity, were supported by the evidence, we find the record devoid of any evidence sufficient to withstand a motion for directed verdict.

[3] Caveators' second assignment of error is that the trial court erred in excluding evidence of Kenneth Reid's behavior after the execution of the will. Caveators contend that evidence that Kenneth Reid attempted to exclude the decedent's relatives from financial conversations with the decedent, and to eject them from her house, raised an inference that Reid had knowledge of the contents of the will, which he did not want to share with other family members; this evidence, therefore, was relevant to the issue of undue influence, and thus, admissible. We disagree.

During the direct examination of Herbert C. Mitchener, Sr., caveator, counsel attempted to elicit testimony regarding conversations Mitchener had with Kenneth Reid and Earldine Reid immediately following the funeral of the decedent. Propounders' objection to the testimony was sustained. The court conducted a voir dire out of the presence of the jury:

> THE COURT: . . . Now, what's the purpose of the conversations that occurred after the will was executed.
>
> . . . .
>
> What does [the conduct of the propounders during the funeral] have to do with whether or not these people exerted undue influence on the testator? I mean what possible probative value could that have? You haven't laid any foundation for it. I've let you go along as much as I can.

MR. OATES: Your Honor, it shows the presence of it by showing their attitude in that they wanted as little input and communication from Mr. Mitchener and his daughters once they had produced and created this will that benefitted Mr. Reid—Ms. Earldine and Mr. Kenneth Reid. All of a sudden it was Mr. Mitchener and his side of the family that were completely cut out.

THE COURT: All right, I don't see that has any probative value. You've laid no foundation about any undue influence exerted by anybody prior to the execution of the will.

At the close of all the evidence, counsel for caveators presented offers of proof through the testimony of Herbert C. Mitchener and his son, Herbert Mitchener, Jr. The essence of the offers of proof was a conversation between Kenneth Reid, Earldine Reid and Herbert Mitchener in which Mitchener discovered that a will had been procured, yet no details were discussed. Also, Mitchener's testimony indicated that on one occasion Kenneth Reid asked him to step out of the decedent's hospital room while Reid spoke to her about bills that had to be paid. Finally, Mitchener's son testified to a fight that broke out between the Mitcheners and the Reids in which the police were called to remove the Mitcheners from the property.

Evidence is relevant if it has a tendency to make a fact of consequence more probable than it would be without such evidence. N.C. Gen. Stat. § 8C-1, Rule 401 (1990). The trial court is entitled to great deference in ruling on questions of relevancy. *State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, --- U.S. ---, 121 L. Ed. 2d 241 (1992). We find nothing in the record with regards to the excluded testimony to suggest that the trial court erred. We defer to the trial court's ruling and find no error on this issue.

This matter shall be remanded to Johnston County Superior Court for administration of the Estate of Lugenia M. Jones.

Affirmed.

Judges WYNN and MARTIN concur.

LOIS NEWSOM AND GEORGE NEWSOM, PLAINTIFFS-APPELLANTS v. DALE M. BYRNES, DEFENDANT-APPELLEE

No. 9319SC337

(Filed 17 May 1994)

Negligence § 58 (NCI4th)— fall by invitee on muddy incline— obvious danger—summary judgment for landowner

Summary judgment was properly entered for defendant in plaintiff invitee's action to recover for injuries she received when she slipped and fell on a graveled incline covered with wet leaves and mud at a construction site to which she went in response to an advertisement for the sale of a camper owned by defendant since (1) defendant's unrebutted evidence showed that the area in which plaintiff fell was in a reasonably safe condition for its contemplated use by trucks hauling construction materials for the house being built on defendant's property, and (2) even if the condition of the area had been rendered unsafe, it should have been obvious to plaintiff that the wet and muddy incline partially covered with leaves would be slippery and potentially dangerous, and defendant was under no duty to warn plaintiff of this obvious danger.

Am Jur 2d, Premises Liability §§ 137 et seq.

Appeal by plaintiffs from order entered 15 January 1993 by Judge Judson D. DeRamus, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 1 February 1994.

On 22 September 1990, plaintiff Lois Newsom sustained a broken leg when she slipped and fell at a construction site owned by defendant. Plaintiffs, husband and wife, were responding to an advertisement in a High Point newspaper for the sale of a camper owned by defendant. Defendant, a contractor, was living in the camper while building his own house. Plaintiffs called defendant and made an appointment with him to look at the camper.

When plaintiffs arrived at defendant's construction site around 3:00 p.m., they walked down an incline to see the camper. Defendant greeted them outside and proceeded to show them the camper. Mr. Newsom was in front of Mrs. Newsom as they walked down the incline towards the camper. The incline had been cut through with a bulldozer, and leaves had fallen on the ground. The incline

had been graveled in June 1990. It had been raining earlier that day, and a thin layer of mud covered the incline. As her husband and defendant were walking up to the trailer, Mrs. Newsom slipped on some "gray clay" on the incline, and her leg "popped." Defendant called an ambulance, and plaintiff was taken to the hospital where her leg was put in a cast.

Plaintiffs filed a claim against defendant on 8 January 1992 seeking to recover damages for personal injuries incurred by Mrs. Newsom. Mr. Newsom sought compensation for loss of consortium. Defendant filed a motion for summary judgment, and the trial court granted defendant's motion. Plaintiffs appeal.

Gabriel, Berry & Weston, by M. Douglas Berry, for plaintiff appellants.

Frazier, Frazier & Mahler, by Torin L. Fury, for defendant appellee.

ARNOLD, Chief Judge.

Plaintiffs' only assignment of error is that the trial court erred in granting summary judgment in favor of defendant. Plaintiffs maintain that there was sufficient evidence of defendant's negligence and sufficient evidence on the lack of plaintiff's contributory negligence to submit to the jury. We disagree.

Plaintiffs were invitees in the case at bar because their purpose for entering defendant's property was to purchase the camper. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E.2d 245 (1979). Under North Carolina law, as owner of the premises, defendant owed to plaintiffs as invitees the duty to exercise ordinary care to keep the property in a reasonably safe condition, and to warn them of hidden or concealed dangers of which he had knowledge, express or implied. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E.2d 559 (1981) (citing *Long v. Methodist Home for Aged, Inc.*, 281 N.C. 137, 187 S.E.2d 718 (1972); *Wrenn v. Hillcrest Convalescent Home, Inc.*, 270 N.C. 447, 154 S.E.2d 483 (1967)). However, it is also the law in this State that there is "no duty to warn an invitee of a hazard obvious to any ordinarily intelligent person using [her] eyes in an ordinary manner, or one of which the plaintiff had equal or superior knowledge." *Branks v. Kern*, 320 N.C. 621, 624, 359 S.E.2d 780, 782 (1987). Defendant's burden, therefore, is to show that one of the following essential elements of plaintiffs' claim

is nonexistent: (1) the area in which plaintiff was injured was not in a reasonably safe condition for its contemplated use, or (2) defendant knew or should have known of the unsafe condition. *Pulley v. Rex Hospital*, 326 N.C. 701, 392 S.E.2d 380 (1990). "Further, [plaintiff] may not recover if she knew of the unsafe condition or if it should have been obvious to any ordinary person under the circumstances existing at the time she was injured." *Id.* at 705, 392 S.E.2d at 383.

Both plaintiffs and defendant cite to several factually similar slip and fall cases. *Evans v. Batten*, 262 N.C. 601, 138 S.E.2d 213 (1964) (per curiam) (indenture in walkway); *Spell v. Contractors*, 261 N.C. 589, 135 S.E.2d 544 (1964) (dirt-filled ditch); *Falatovitch v. Clinton*, 259 N.C. 58, 129 S.E.2d 598 (1963) (per curiam) (hole in sidewalk filled with dirt and trash); *Smith v. Hickory*, 252 N.C. 316, 113 S.E.2d 557 (1960) (hole in sidewalk); *Fanelty v. Jewlers*, 230 N.C. 694, 55 S.E.2d 493 (1949) (terrazzo entryway); *cf. Lamm v. Bissette Realty*, 327 N.C. 412, 395 S.E.2d 112 (1990) (uneven risers and no handrails); *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E.2d 245 (1979) (concrete step-up from parking lot); *Rone v. Byrd Food Stores*, 109 N.C. App. 666, 428 S.E.2d 284 (1993) (wet floor); *Barnes v. Wilson Hardware Co.*, 77 N.C. App. 773, 336 S.E.2d 457 (1985) (lack of handrail); *Green v. Wellons, Inc.*, 52 N.C. App. 529, 279 S.E.2d 37 (1981) (cracks on sidewalk). In light of these cases and under the principles stated above, summary judgment in favor of defendant was appropriate.

Plaintiffs allege that defendant had knowledge that there was little or no gravel present at the point of the incline where Mrs. Newsom fell, and that as a result defendant knew that the incline would be slippery when wet, yet he failed to warn plaintiffs of this danger. Plaintiffs base their allegations on the following facts: defendant knew that there was no gravel on the sloped portion of the drive; that it had rained three hours before plaintiff arrived; that the drive would be slippery without gravel; that the drive was steeper than other drives he had excavated; that the drive was the only path from the street to the camper; that the upper graveled portion of the drive created a false sense of security; that leaves covered the drive; that no irregularities existed to heighten one's state of awareness; that he failed to warn plaintiffs of the danger presented by the unexpected ending of the layer of gravel.

Although plaintiffs' evidence shows that Mrs. Newsom's ankle twisted as a result of stepping in gray clay, "the mere existence of a condition which causes an injury is not negligence *per se*, and the occurrence of the injury does not raise a presumption of negligence." *Spell v. Contractors*, 261 N.C. at 592, 135 S.E.2d at 547. A landowner is not an absolute insurer as to the safety of his invitees. *Graves v. Order of Elks*, 268 N.C. 356, 150 S.E.2d 522 (1966) (per curiam). Defendant's evidence shows that the area in which Mrs. Newsom fell was in a reasonably safe condition for its contemplated use. The contemplated use of the graveled driveway was for trucks, primarily hauling construction materials, to access the house being built on defendant's property without getting stuck. Plaintiffs offer no evidence to rebut that the area in which Mrs. Newsom fell was in a reasonably safe condition for this purpose. Furthermore, even if the condition of the driveway had been rendered unsafe under the circumstances, plaintiffs knew of the unsafe condition, or it should have been obvious to any ordinary person under the circumstances at the time of the injury that the wet and muddy incline partially covered with leaves would be slippery and potentially dangerous. Mrs. Newsom and her husband were aware that the driveway was unfinished and had been cut through with a bulldozer. The site was partially covered with leaves, but no obstructions such as rocks or branches existed. Defendant testified in his deposition that the moisture on the ground from the rain was obvious. Also, Mrs. Newsom admitted in her deposition that she did not want to get her tennis shoes muddy, thereby showing that she knew the ground was wet. Certainly, if a slight depression or uneven and irregular walkways, sidewalks and streets have been held to be conditions so obvious as to negate a landowner's duty to warn, *see generally, Evans v. Batten*, 262 N.C. 601, 138 S.E.2d 213, an incline covered with wet leaves and mud would be obvious to an ordinary and prudent invitee. Thus, defendant was not bound to warn plaintiff of an obvious danger. *See Spell v. Contractors*, 261 N.C. 589, 135 S.E.2d 544.

Although summary judgment in a negligence action is appropriate only in exceptional cases, the facts warrant summary judgment in the case at bar. *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E.2d 827 (1978), *disc. review denied*, 296 N.C. 736, 254 S.E.2d 178 (1979). The order of the trial court is

Affirmed.

Judges WYNN and MARTIN concur.

NORMAN D. BULLARD AND TINA R. STANCILL v. USAIR, INC. AND TOM TOTH

No. 935DC938

(Filed 17 May 1994)

Courts § 15.3 (NCI4th)— defamatory statements made in Florida— insufficient contacts for personal jurisdiction

Defendant Florida resident had insufficient minimum contacts with North Carolina for the courts of this state to exercise personal jurisdiction over him in an action to recover for defamatory statements allegedly made by defendant about plaintiffs in a Tampa, Florida airport where defendant is a gate agent employed by USAir at the airport; he has never lived in North Carolina and owns no property in this state; he has been in North Carolina only occasionally during the past ten years; and he does not expect to be in this state at any time in the foreseeable future. Jurisdiction may not be established by showing that defendant knew or should have known that he was dealing with residents of the forum state and purposefully directed his conduct toward residents of that state, since defendant must have sufficient contacts with the forum state itself.

Am Jur 2d, Courts §§ 118, 119; Process §§ 190, 191.

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.

Propriety, under due process clause of Fourteenth Amendment, of forum state's assertion or exercise of jurisdiction over nonresident defendant in defamation action. 79 L. Ed. 2d 992.

Appeal by defendant Tom Toth from order entered 21 July 1993 by Judge W. Allen Cobb, Jr. in New Hanover County District Court. Heard in the Court of Appeals 10 May 1994.

Plaintiff-appellee Norman D. Bullard, pro se, and Bruce A. Mason for plaintiff-appellee Tina R. Stancill.

Bell, Davis & Pitt, by Stephen M. Russell and Alan M. Ruley, for defendant-appellant Tom Toth.

WYNN, Judge.

Plaintiffs-appellees Norman D. Bullard and Tina R. Stancill are citizens and residents of North Carolina who were scheduled to fly from Wilmington, North Carolina to Key West, Florida, via USAir on 9 July 1992, with connecting flights in Charlotte, North Carolina and Tampa, Florida. Plaintiffs filed suit against USAir, Inc. and its employee, gate agent Tom Toth, on 1 April 1993, alleging that Toth made untrue and defamatory statements about them in the presence of others in the Tampa, Florida airport.

On 23 June 1993, Toth filed an affidavit and motion to dismiss the action against him pursuant to N.C. R. Civ. P. Rule 12(b)(2) and N.C. Gen. Stat. § 1-75.4 on the ground that the court lacks personal jurisdiction over him. On 21 July 1993, Judge W. Allen Cobb, Jr. of the New Hanover District Court entered a written order denying the motion. Defendant-appellant Toth appeals from this order.

The question before us is whether the district court had personal jurisdiction over Tom Toth.

Although Judge Cobb's order was not final as to the merits of the case, this appeal is properly before us pursuant to N. C. Gen. Stat. § 1-277(b) (1983), which provides, "Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant."

Tom Toth is a citizen and resident of the state of Florida. He is employed as a gate agent for USAir at Tampa International Airport in Tampa, Florida. He has never lived in the state of North Carolina, nor does he own any property in North Carolina. In the past ten years he has been in the state of North Carolina only occasionally: He attended a two-day USAir training program in Charlotte in July of 1989 and has traveled through the state while on trips. He does not expect to be in the state at any time in the foreseeable future.

In order for a court of North Carolina to exercise personal jurisdiction over an out-of-state defendant, there must be a statutory basis for personal jurisdiction, and an exercise of jurisdiction must not violate the defendant's due process rights. *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 348 S.E.2d 782 (1986); *Tutterrow v. Leach*, 107 N.C. App. 703, 421 S.E.2d 816 (1992), *appeal dismissed*, 333 N.C. 466, 428 S.E.2d 185 (1993).

When personal jurisdiction is challenged, the burden of proof is on the plaintiff to show by a preponderance of the evidence that these jurisdictional requirements have been satisfied. *J. M. Thompson Co. v. Doral Mfg. Co., Inc.*, 72 N.C. App. 419, 324 S.E.2d 909, *disc. rev. denied*, 313 N.C. 602, 330 S.E.2d 611 (1985).

Plaintiffs allege a statutory basis for personal jurisdiction in the state's long-arm statute, N.C. Gen. Stat. § 1-75.4 (1983), which provides:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person . . . under any of the following circumstances:
>
> (1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party . . .
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

Our courts have held that this provision extends personal jurisdiction over nonresident defendants to the full extent allowed by due process. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977); *Parris v. Garner Commercial Disposal, Inc.*, 40 N.C. App. 282, 253 S.E.2d 29, *disc. rev. denied*, 297 N.C. 455, 256 S.E.2d 808 (1979).

To satisfy due process, there must exist "certain minimum contacts [between the nonresident defendant and the forum] 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, 316, 90 L. Ed. 95, 102 (1945), *quoting Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940), *reh'g denied*, 312 U.S. 712, 85 L. Ed. 1143 (1941). The plaintiff

should be able to show some act by which the defendant invoked the benefits and protection of the laws of the forum state. *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963). The relationship between the defendant and the forum must be "such that [the defendant] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980).

Although defendant Toth had no personal dealings with the forum state, plaintiffs argue that jurisdiction can be established under *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 85 L. Ed. 2d 528 (1985). Plaintiffs rely on the following passage from *Burger King*:

> So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

471 U.S. 462, 476, 85 L. Ed. 2d 528, 543.

Plaintiffs read this passage to mean that jurisdiction can be established where defendant directed his conduct toward individuals who were residents of the forum state, even where those individuals had no connection to the forum at the time of the conduct. Because defendant knew or should have known that he was dealing and conversing with North Carolina residents, plaintiffs argue, his efforts were "purposefully directed toward residents of another state." However, the constitutional requirement is not that defendants have contact with residents of the forum state; it is that they have contact with the forum state itself. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L. Ed. 2d 490 (1980); *Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp.*, 70 N.C. App. 737, 321 S.E.2d 28 (1984). Contact with a state's residents is important only insofar as it shows contact with the forum state. In *Burger King*, the Supreme Court found personal jurisdiction where plaintiff franchisor sued its Michigan franchisee in Florida, plaintiff's corporate headquarters. Jurisdiction arose not because plaintiff was a Florida citizen but because defendant had had contact with Florida through his dealings with plaintiff, which was located in Florida. *See also Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985) (North Carolina had jurisdiction when a North Carolina-based company sued its out-of-state employee in North Carolina). In contrast, Toth interacted with North Carolina

residents while they were not in North Carolina. This encounter did not establish any contacts with the state of North Carolina.

Because the record lacks evidence that defendant had the minimum contacts necessary to constitute substantial activity in North Carolina and satisfy due process, we find no basis for personal jurisdiction over defendant in North Carolina.

We reverse the trial court's order and remand for dismissal as to defendant Tom Toth.

Reversed and remanded.

Judges EAGLES and LEWIS concur.

WALTER DANIEL MELTON, PETITIONER v. ROBERT F. HODGES, COMMISSIONER, DIVISION OF MOTOR VEHICLES OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. 9310SC926

(Filed 17 May 1994)

Evidence and Witnesses § 867 (NCI4th)— statements to officer—probable cause for arrest—not hearsay

An officer's testimony reciting the statements of two eyewitnesses that a vehicle almost ran their car off the road, that they observed the vehicle leave the road and strike a stop sign, and that they followed the vehicle to a residence and saw a man in a white shirt and blue pants exit the vehicle, fall to the ground, and then enter the residence did not constitute hearsay since the testimony was not offered to prove the truth of the matters asserted by the eyewitnesses but was offered to show the basis for the officer's reasonable belief at the time he arrested petitioner that petitioner had been driving while impaired.

Am Jur 2d, Evidence §§ 497 et seq.

Appeal by petitioner from judgment entered 7 May 1993 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 18 April 1994.

John F. Oates, Jr., for petitioner appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Bryan E. Beatty, for respondent appellee.

COZORT, Judge.

Petitioner appeals from a judgment affirming the revocation of his driving privileges for one year based on his willful refusal to submit to an intoxilyzer test. Petitioner's sole argument on appeal is that the superior court abused its discretion by basing its decision on unreliable and incompetent hearsay evidence. We find this argument unpersuasive and affirm the judgment entered.

The parties stipulated that the sole issue to be decided by the superior court was whether the charging officer at the time of the arrest had reasonable grounds to believe that petitioner had committed an implied consent offense. In resolving this issue, the court found as follows:

> 2. On April 3, 1992 at approximately 9:10 pm, Officer George Daniels of the Cary Police Dept. responded to a radio call to investigate a report of suspected impaired driver. Officer Daniels arrived at the residence where two female witnesses were waiting outside.
>
> 3. [Officer] Daniels spoke with the two witnesses who identified themselves as Ms. Jewell and Ms. Bottger [*sic*]. The witnesses stated that they observed a motor vehicle travelling at a high rate of speed [that] almost ran the witness's vehicle off of the road on the Cary Parkway. The witnesses followed the vehicle and observed it weaving and run off the road and strike a stop sign. The witnesses followed the vehicle to the residence and observed a man in a white shirt and blue pants exit the vehicle and fall to the ground. The man went into the residence. One of the witnesses contacted the Cary Police Department while the other waited at the residence. The witnesses told Officer Daniels that only three to five minutes passed from the time the police department was contacted to the time Officer Daniels arrived at the residence.
>
> 4. Officer Daniels felt the hood and exhaust pipe of the vehicle that the witnesses said they followed to the residence. The hood and exhaust pipe were hot. Officer Daniels also observed a liquor bottle in the passenger compartment of the vehicle.

5. Officer Daniels went to the door of the residence and was allowed to enter the residence by petitioner's wife. Officer Daniels observed petitioner in the residence. Petitioner had a strong odor of alcohol on his person and was unable to stand without staggering. Petitioner told Officer Daniels that he had not driven a vehicle since he arrived home from work some hours earlier. Petitioner stated that his wife had just arrived home. She had driven a vehicle other than the one the witnesses followed.

6. Officer Daniels notice[d] that petitioner was wearing a white shirt and blue pants. His clothing was disorderly and the shirt had a grass stain on it.

7. Officer Daniels inspected the motor vehicle the witnesses said they followed to the residence and noticed a small scratch on the front bumper.

8. Based on the information he received from the two witnesses regarding their observations of the operation of the motor vehicle and also upon his own observations of petitioner and the vehicle, the witnesses said they followed, Officer Daniels formed the opinion that petitioner had been driving while impaired. Officer Daniels arrested petitioner for driving while impaired.

Based on these findings, the court concluded that when Officer Daniels arrested petitioner, he had reasonable grounds to believe that petitioner had committed an implied consent offense.

Officer Daniels was the sole witness at the hearing in the court below. He was permitted to testify, over petitioner's objection, as to the information provided him by the two eyewitnesses, Ms. Jewell and Ms. Boeddeker. Petitioner contends that Daniels' testimony concerning what Ms. Jewell and Ms. Boeddeker told him was inadmissible hearsay and erroneously admitted; that the court's Finding of Fact No. 3, which is based on the information provided Daniels by these two eyewitnesses, is therefore not based on competent evidence and should be disregarded; and that the remaining findings are insufficient to support the conclusion that Daniels had reasonable grounds to believe that petitioner had committed an implied consent offense.

Respondent contends that the testimony in question was not hearsay because it was not offered to prove the truth of the matters

asserted by Ms. Jewell and Ms. Boeddeker but instead was offered to show the basis for Daniels' belief that petitioner had been driving while impaired. We agree with respondent.

N.C. Gen. Stat. § 8C-1, Rule 801(c) (1992), defines "[h]earsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

> 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. White*, 298 N.C. 430, 437, 259 S.E.2d 281, 286 (1979) . . . .

State v. Coffey, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990). In determining under N.C. Gen. Stat. § 20-16.2(d)(2) (1993) whether the charging officer had reasonable grounds to believe that the petitioner had committed an implied consent offense, the reasonable grounds for belief may be based upon information given to the officer by another, the source of the information being reasonably reliable, and it is immaterial that the hearsay information itself may not be competent in evidence at the trial of the person arrested. *See State v. Roberts*, 276 N.C. 98, 171 S.E.2d 440 (1970); *In re Gardner*, 39 N.C. App. 567, 251 S.E.2d 723 (1979). We conclude that Daniels' testimony regarding the information provided him by Ms. Jewell and Ms. Boeddeker was properly admitted for the purpose of showing the basis for Daniels' belief that petitioner had committed an implied consent offense. We reject defendant's argument that the decision of the superior court is improperly based on hearsay evidence.

Affirmed.

Judges WELLS and McCRODDEN concur.

SALLY JENKINS, PLAINTIFF v. HAROLD MIDDLETON, DEFENDANT

No. 9212DC1346

(Filed 17 May 1994)

Judgments § 474 (NCI4th)— paternity—judgment erroneously set aside

The trial judge erred by setting aside pursuant to Rule 60(b)(6) another judge's previous judgment adjudicating defendant to be the father of plaintiff's three minor children where the first judge's finding that defendant's answer and motion for a jury trial was not timely filed was supported by competent substantial evidence, the first judge's determination of paternity was supported by the evidence, and there was thus no showing that the judgment should be set aside because of extraordinary circumstances or because justice requires that it be set aside. N.C.G.S. § 1A-1, Rule 60(b)(6).

Am Jur 2d, Judgments §§ 708 et seq.

Judge GREENE concurring.

Appeal by plaintiff from order entered 24 September 1992 by Judge Sol G. Cherry in Cumberland County District Court. Heard in the Court of Appeals 9 December 1993.

Attorney General Michael F. Easley, by Assistant Attorney General T. Byron Smith, for plaintiff appellant.

No brief for defendant appellee.

COZORT, Judge.

Plaintiff appeals from the trial court's order setting aside a previous order adjudicating defendant to be the father of plaintiff's three minor children. We find the second trial court judge lacked authority to set aside the order or judgment of another trial court judge, and we reverse the second order. The facts follow.

On 11 July 1990, plaintiff filed in South Carolina a petition under the Uniform Reciprocal Enforcement of Support Act, seeking to establish defendant's paternity and child support obligations. On 22 August 1991, a summons and order to show cause for child support was filed in Cumberland County and was served on defend-

ant on 30 August 1991. On 24 October 1991, Judge Elizabeth Keever entered an order requiring the parties and the children to submit to blood testing for proof of paternity. On 21 May 1992, Judge Keever granted defendant's request for a continuance until 25 June 1992. On 18 June 1992, defendant filed an answer denying paternity, requesting blood tests, and requesting a jury trial. On 30 June 1992, defendant filed an amended answer. On 30 July 1992, Judge James F. Ammons, Jr., sitting without a jury, entered an order finding that defendant's answer and motion for jury trial were not timely filed. Judge Ammons adjudicated defendant to be the father of plaintiff's three minor children and ordered him to pay monthly child support. Defendant gave oral notice of appeal in open court.

On 2 September 1992, defendant filed a motion to set aside the 30 July 1992 order, alleging that he was denied the opportunity to face his accuser and denied a jury trial. On 24 September 1992, Judge Sol Cherry entered an order setting aside the 30 July 1992 judgment on the grounds that defendant was entitled to a jury trial. Plaintiff timely filed written notice of appeal.

On appeal, plaintiff argues that Judge Cherry erred in setting aside Judge Ammons' judgment adjudicating defendant's paternity. We agree.

> [E]rroneous judgments may be corrected only by appeal, and . . . a motion under G.S. 1A-1, Rule 60(b) of the Rules of Civil Procedure cannot be used as a substitute for appellate review. A judge of the District Court cannot modify a judgment or order of another judge of the District Court, absent mistake, fraud, newly discovered evidence, satisfaction and release, or a showing based on competent evidence that justice requires it.

Town of Sylva v. Gibson, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117, *appeal dismissed and cert. denied*, 303 N.C. 319, 281 S.E.2d 659 (1981) (citations omitted).

Judge Cherry's order makes no specific findings to justify setting aside the previous order. We must proceed under the premise that the order was set aside on the basis of N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (1990), which provides that an order may be set aside for "any other reason justifying relief from the operation of the judgment." Relief from an order is appropriate under Rule

60(b)(6) only if there are (1) extraordinary circumstances and (2) there is a showing that justice demands it. *Oxford Plastics v. Goodson*, 74 N.C. App. 256, 259, 328 S.E.2d 7, 9 (1985).

Having reviewed the record, we find no extraordinary circumstances and no showing that justice demands setting aside the order. Judge Ammons' finding of fact that defendant's answer and motion for jury trial were not timely filed is supported by competent substantial evidence. Defendant did not answer and request a jury trial until ten months after he was served with summons and the show cause order. We also note there was substantial competent evidence to support Judge Ammons' determination of paternity. Judge Cherry erred in setting aside Judge Ammons' order of 30 July 1992. The 24 September 1992 order is

Reversed.

Judge WYNN concurs.

Judge GREENE concurs with separate opinion.

Judge GREENE concurring.

Although I agree with the result reached by the majority, I do not believe that analysis under Rule 60 is appropriate.

The sole basis relied upon by Chief Judge Sol G. Cherry in granting the defendant's motion to set aside the order of Judge James F. Ammons, Jr. was that the defendant was entitled to a jury trial in plaintiff's paternity action. Judge Ammons had concluded that defendant was not entitled to a jury trial. Whether Judge Ammons erred in denying the defendant a jury trial in this paternity action presents a question of law and can be addressed only by an appeal of Judge Ammons' order or a timely motion in the trial court pursuant to Rule 59(a)(8). *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988). Rule 60 "provides no specific relief for 'errors of law' and our courts have long held that even the broad general language of Rule 60(b)(6) does not include relief for 'errors of law.' " *Id.* In this case, the defendant did not appeal Judge Ammons' order and because his motion before Judge Cherry was filed more than 10 days after entry of Judge Ammons' order it was not filed pursuant to Rule 59(b). N.C.G.S. § 1A-1, Rule 59(b) (1990) (motion must be "served

not later than 10 days after entry of judgment"). For these reasons I join the majority in holding that Judge Cherry erred in setting aside Judge Ammons' order.

JOANNE COFFIN, PLAINTIFF v. ISS OXFORD SERVICES, INC., DEFENDANT

No. 9314SC720

(Filed 17 May 1994)

Corporations § 208 (NCI4th)— corporation sold after accident—purchasing corporation named as defendant—failure to show "mere continuation" of selling corporation

Summary judgment was properly entered for defendant ISS Oxford Services, Inc. (ISS Oxford) in plaintiff's slip and fall action on the ground that plaintiff failed to name and serve the proper party within the statute of limitations where it was undisputed that ADT Maintenance Services, Inc. (ADT) waxed the floor on which plaintiff fell; ADT was purchased by ISS Oxford after plaintiff's accident; and plaintiff's evidence was insufficient to substantiate her theory that ISS Oxford is a "mere continuation" of ADT in that she failed to present evidence of the consideration paid by ISS Oxford for ADT, failed to support her assertion of a "continuity of key personnel," and produced no evidence that ISS Oxford has some of the same shareholders, directors, and officers as ADT.

Am Jur 2d, Corporations §§ 2862-2870.

Appeal by plaintiff from order entered 25 March 1993 by Judge Robert P. Farmer in Durham County Superior Court. Heard in the Court of Appeals 23 March 1994.

Robert T. Perry for plaintiff-appellant.

Cranfill, Sumner & Hartzog, by Susan K. Burkhart, for defendant-appellee.

JOHNSON, Judge.

Facts pertinent to this appeal are as follows: On 15 December 1988, plaintiff Joanne Coffin, an employee of Northrup Services,

Inc., was on her business premises at 2 Triangle Drive in Research Triangle Park, North Carolina. Although plaintiff typically left work at 4:30 p.m., on this date she stayed late in the building performing job-related duties. Around 6:00 p.m., plaintiff walked through a door; on the other side of the door, a cleaning service was waxing the floor. As plaintiff walked through the door, she slipped and fell to the ground, sustaining injuries.

The cleaning service was on the premises pursuant to a cleaning contract between plaintiff's employer, Northrup Services, Inc., and "Oxford Building Service." Plaintiff's fall occurred after the cleaning service had begun its cleaning process.

Some time later, plaintiff instituted an action against defendant ISS Oxford Services, Inc. (hereafter, ISS Oxford) for damages incurred as a result of the accident. A summons was issued on 11 December 1991 and service was made on defendant's registered agent on 17 December 1991. On 15 January 1992, defendant filed a motion and answer and on 6 February 1992 defendant filed an amended answer and motions to include denial of negligence and to move the court for dismissal of plaintiff's complaint on the grounds that plaintiff failed to name and serve the proper party within the three-year statute of limitations set forth in North Carolina General Statutes § 1-52 (Cum. Supp. 1993). Defendant responded to plaintiff's first set of interrogatories and request for production of documents on 1 June 1992. On 28 July 1992, defendant filed a motion for summary judgment, which the trial judge granted on 25 March 1993. Plaintiff filed timely notice of appeal to our Court.

Plaintiff argues that the trial court erred by granting defendant's motion for summary judgment on the grounds of lack of personal jurisdiction, insufficiency of process and service of process, and the statute of limitations, where evidence adduced at the summary judgment hearing demonstrated a genuine dispute regarding whether defendant, ISS Oxford, is a "continuation" of ADT Maintenance Services, Inc. (hereafter, ADT). Defendant argues that ISS Oxford was not in existence on the date of the accident and that there is no evidence in the record that anyone connected with ADT received notice of the suit.

Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment

as a matter of law. North Carolina General Statutes § 1A-1, Rule 56 (1990). 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).

Following are dates relevant to this appeal:

12/1/87: Oxford Services, Inc. filed a Certificate of Assumed Name as "Oxford Building Services"

6/30/88: Oxford Services, Inc. merged into Pritchard Services, Inc.

8/2/88: Pritchard Services, Inc. changed its name to ADT Maintenance Services, Inc.

12/15/88: date of plaintiff's fall

12/30/88: ADT Maintenance Services, Inc. assets sold to ISS International Service Systems, Inc.

It is undisputed that although plaintiff served defendant ISS Oxford, ADT is the proper party defendant in this action. Plaintiff contends, however, that there is a genuine dispute regarding whether the purchasing corporation, defendant ISS Oxford, is a "mere continuation" of the selling corporation, ADT.

"A corporation which purchases all, or substantially all, of the assets of another corporation is generally not liable for the old corporation's debts or liabilities." *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 687, 370 S.E.2d 267, 269 (1988) (citations omitted). "Exceptions exist where: (1) there is an express or implied agreement by the purchasing corporation to assume the debt or liability; (2) the transfer amounts to a de facto merger of the two corporations; (3) the transfer of assets was done for the purpose of defrauding the corporation's creditors; or (4) the purchasing corporation is a 'mere continuation' of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers." *Id.* (citations omitted).

In the case *sub judice*, plaintiff has failed to put on evidence to substantiate this "mere continuation" theory. For example, although plaintiff evidences the "Bill of Sale Regarding Certain Assets" between ADT and ISS Oxford, which indicates consideration in the sum of one dollar "and other good and valuable consideration," plaintiff has failed to attempt to ascertain the extent

of this "other good and valuable consideration." Plaintiff asserts the "continuity of key personnel" in her brief, but there is no substantiation to this in the record; plaintiff produces no evidence that the purchasing corporation "has some of the same shareholders, directors, and officers." In addition, plaintiff notes that defendant continued to do business under names similar to those used when the business was owned by ADT, but the relationship of these various parties was available in public records. Therefore, we find plaintiff's assertion that ISS Oxford, the purchasing corporation, is a "mere continuation" of ADT, the selling corporation, without merit.

Therefore, for the foregoing reasons, we find the trial court properly granted defendant's motion for summary judgment.

The decision of the trial court is affirmed.

Judges GREENE and JOHN concur.

FIRST SOUTHERN SAVINGS BANK, PLAINTIFF v. GARLAND W. TUTON AND SUE C. TUTON, DEFENDANTS

No. 9319SC1007

(Filed 17 May 1994)

1. **Appeal and Error § 126 (NCI4th)— change of venue— immediately appealable**

A trial court order granting defendant's motion for a change of venue was immediately appealable. The disposition of a motion asserting a statutory right to venue affects a substantial right and is therefore immediately appealable.

Am Jur 2d, Appeal and Error §§ 89 et seq.

2. **Venue § 17 (NCI4th)— personal property—foreclosure—deficiencies**

Venue of an action for a deficiency after foreclosure on a note was properly transferred to Carteret County from Randolph County where the deed of trust for the note was upon property leased by defendants, defendants reside in Onslow County, and the loan was negotiated in Carteret County. A

leasehold interest in real property is a chattel real and as such is subject to rules of law applicable to personal property. N.C.G.S. § 1-76.1.

Am Jur 2d, Venue § 24.

Appeal by plaintiff from order entered 26 July 1993 by Judge Catherine C. Eagles in Randolph County Superior Court. Heard in the Court of Appeals 18 April 1994.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jeffrey E. Oleynik and James R. Saintsing, for plaintiff appellant.

McMillan, Kimzey & Smith, by James M. Kimzey and Katherine E. Jean, for defendant appellees.

COZORT, Judge.

Plaintiff instituted this cause of action against defendants seeking to recover deficiencies allegedly remaining after foreclosure of the deeds of trust securing six promissory notes. Plaintiff alleges that the promissory note identified in the pleadings as the "Island Resort Note" was secured by a deed of trust conveying a certain parcel of land.

The parties entered into the deed of trust securing the "Island Resort Note" on 22 July 1987 in Carteret County. Defendants and two other individuals leased the property described in that deed of trust from the estate of George F. Spell (Lessor) on 22 January 1986. Plaintiff, defendants, and the Lessor entered into an estoppel and non-disturbance agreement on 15 July 1987, in which the Lessor agreed

> that the Lessee [defendants and the other two individuals] is the owner of the Collateral and/or Improvements placed in or on said premises by lessee, whether attached to said premises or not, and that either Lessee or Mortgagee [plaintiff], their successors and assigns, have and shall have the right to remove said property from said premises at any time without interference or hindrance on the part of the Lessor, the Lessor hereby waiving any rights it may now or hereafter have in the Collateral and/or Improvements.

Defendants assigned their lease on the property to plaintiff on 22 July 1987. In return for this assignment and other conditions, plaintiff loaned defendants $67,500.00 for the permanent financing of an office building on the property. Defendants defaulted on that promissory note, and plaintiff foreclosed on the property pursuant to the power of sale contained in the deed of trust. When the property failed to bring the amount due on the note, plaintiff sought to recover the deficiency from defendants.

Following the appearance of a third-party plaintiff, a debtor in a pending bankruptcy case, this action was removed to the United States Bankruptcy Court for the Eastern District of North Carolina. The Bankruptcy Court granted plaintiff's motion for summary judgment against the third-party plaintiff and remanded the remaining case to Randolph County Superior Court. Defendants in their answer included a motion for change of venue under N.C. Gen. Stat. §§ 1-76.1 and 1-83(1) (1983). They asserted that plaintiff's claim for relief must be brought either in the county where the loan was negotiated (Carteret) or in the county in which they reside (Onslow), and requested that venue be changed to Carteret County. Judge Catherine Eagles heard defendants' motion and entered an order on 26 July 1993 transferring venue to Carteret County Superior Court. Plaintiff appeals. We affirm.

[1] The sole issue presented in this appeal is whether the trial court erred in granting defendant's motion for change of venue to Carteret County pursuant to N.C. Gen. Stat. §§ 1-83 and 1-76.1. As a threshold matter we note that the trial court's order, while interlocutory in nature, is immediately appealable. When an action is not brought in the proper county, upon timely motion of defendants the trial court must, pursuant to N.C. Gen. Stat. § 1-83, change the place of trial. *Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 743, 71 S.E.2d 54, 55-56 (1952). The disposition of a motion asserting a statutory right to venue affects a substantial right and is therefore immediately appealable. *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980).

[2] Plaintiff argues the trial court erred in granting defendants' motion for change of venue under N.C. Gen. Stat. § 1-76.1 because this action is for deficiencies resulting from foreclosure sales of real, not personal, property. We disagree.

Plaintiff's deed of trust for the "Island Resort Note" was upon property leased by defendants. A leasehold interest in real proper-

ty is a chattel real and as such is subject to rules of law applicable to personal property. *See Real Estate Trust v. Debnam*, 299 N.C. 510, 512, 263 S.E.2d 595, 597 (1980). Since the Lessor agreed in the estoppel and non-disturbance agreement that defendants owned the collateral or improvements which they placed on the premises, whether attached or not, the modular office building on the premises would also be considered personal property. *See Oil Co. v. Cleary*, 295 N.C. 417, 420, 245 S.E.2d 720, 722 (1978).

The property foreclosed upon was personal, rather than real property, and under N.C. Gen. Stat. § 1-76.1,

> [s]ubject to the power of the court to change the place of trial as provided by law, actions to recover a deficiency, which remains owing on a debt after secured personal property has been sold to partially satisfy the debt, must be brought in the county in which the debtor or debtor's agent resides or in the county where the loan was negotiated.

Defendants reside in Onslow County and the loan was negotiated in Carteret County. The trial court in its order determined that Carteret County and Onslow County were the proper counties in which to maintain this action and transferred it to Carteret County. The trial court did not err in allowing defendants' motion to change venue to Carteret County. The order of the trial court is

Affirmed.

Judges WELLS and McCRODDEN concur.

DEBORAH C. PITTMAN (NOW PHELPS), PLAINTIFF v. JAMES C. PITTMAN, DEFENDANT

No. 9322DC599

(Filed 17 May 1994)

Divorce and Separation § 445 (NCI4th)— child support—loss of job—changed circumstance

The trial court erred by holding that a substantial and involuntary decrease in the income of a non-custodial parent cannot, as a matter of law, constitute a substantial change of

circumstances authorizing the court to modify a prior order by reducing child support payments. There was no evidence that the needs of the children had changed; however, there was evidence that defendant's ability to pay his support payments had decreased and the matter was remanded for a determination of whether defendant had suffered a substantial and involuntary decrease in income sufficient to warrant a reduction in child support payments.

Am Jur 2d, Divorce and Separation §§ 1085, 1086.

Changes in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR2d 7.

Appeal by defendant from order entered 23 February 1993 by Judge George T. Fuller in Iredell County District Court. Heard in the Court of Appeals 22 March 1994.

No brief filed by plaintiff-appellee.

Pope McMillan Gourley Kutteh & Simon, P. A., by Pamela H. Simon, for defendant-appellant.

JOHNSON, Judge.

Defendant, James C. Pittman, appeals from an order denying his motion for reduction in child support. The record tends to show the following: On 15 April 1991, plaintiff, Deborah C. Pittman, and defendant entered into a consent agreement which provided that defendant pay the sum of $253.04 every two weeks for the support of the parties minor children. The order further directed that defendant provide medical insurance coverage and pay one-half of all uninsured medical, dental, hospital, and drug bills for the minor children.

On 5 January 1993, defendant filed a motion for reduction in child support, alleging his financial circumstances had changed because he had lost his job. On 23 February 1993, following a hearing in Iredell District Court, Judge George T. Fuller denied defendant's motion, finding that defendant had offered no evidence of any reduction or decrease in the reasonable needs of the minor children. From this order, defendant appealed to our Court.

Defendant contends that the trial court erred in holding that a substantial and involuntary decrease in the income of a non-custodial parent cannot, as a matter of law, constitute a substantial change of circumstances authorizing the court to modify a prior order by reducing child-support payments. We agree.

North Carolina General Statutes § 50-13.7 (1987) provides that a court order awarding child support "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances. . . ." Generally, the trial court modifies child support provisions of an order only when the moving party has presented evidence that there has been a substantial change in circumstances affecting the welfare of the child. *O'Neal v. Wynn*, 64 N.C. App. 149, 306 S.E.2d 822 (1983), *aff'd*, 310 N.C. 621, 313 S.E.2d 159 (1984). (*See Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E.2d 116 (1979); *see also Davis v. Risley*, 104 N.C. App. 798, 411 S.E.2d 171 (1991).) However, it is also important to note that the ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the father [mother] to meet the needs. *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E.2d 522 (1975).

In the instant case, the trial court relied on *Davis v. Risley*, 104 N.C. App. 798, 411 S.E.2d 171 in denying defendant's motion for a reduction in child support. Specifically, the court relied on the following language: "[c]hild support orders may be modified upon a showing of changed circumstances. N.C.G.S. § 50-13.7 (1987). The changed circumstances must relate to 'child-oriented expenses.' " *Id.* at 800, 411 S.E.2d at 172-73. (Citations omitted.)

However, the facts of *Davis* and the case *sub judice* are substantially different. In *Davis*, the defendant father filed for a motion to reduce his child support obligations; however, the defendant father's income had actually increased, and there was no evidence that there had been a change in circumstances to support the reduction. Therefore, as the defendant was unable to show changed circumstances, the trial court dismissed the action.

In the case *sub judice*, defendant filed a motion for reduction in child support based on a change of circumstance; defendant had lost his job. The facts are very similar to *O'Neal v. Wynn*, wherein the defendant father sought a reduction in his child support payments because his financial circumstances had changed, but the needs of his children remained unchanged. The trial court found that

although the needs of the children remained unchanged, defendant had suffered a substantial change of circumstances, and was entitled to have his child support payments reduced. In affirming the decision of the trial court, this Court found that the circumstances of the case warranted decreasing the defendant's child support payments.

In the present case, as in *O'Neal*, there was no evidence that the needs of defendant's minor children had changed; however, there was evidence that defendant's ability to pay his support payments had decreased. As such, we find that the facts of this case warrant the application of our holding in *O'Neal*. We reverse the decision of the trial court, and remand this matter to the district court for a determination of whether defendant suffered a substantial and involuntary decrease in income sufficient to warrant a reduction in child support payments.

Reversed and remanded.

Judges GREENE and JOHN concur.

KRAFT FOODSERVICE, INC. v. CHARLIE L. HARDEE

No. 937SC297

(Filed 17 May 1994)

Guaranty § 14 (NCI4th)— special guaranty—not enforceable by assignee—summary judgment

The trial court erred in an action on a guaranty by granting summary judgment for plaintiff, and the matter was remanded for entry of summary judgment for defendant, where Quick Fill submitted an application to Seaboard Foods to purchase merchandise on an open account for its convenience stores; defendant signed a personal guaranty for the account; Seaboard sold and assigned most of its assets, including defendant's personal guaranty, to Kraft; and plaintiff sought to enforce the personal guaranty after Quick Fill filed a Chapter 11 Bankruptcy proceeding. The guaranty was specifically addressed to Seaboard Foods, makes reference to "you" and "yours" repeatedly, referring to Seaboard Foods, and specifically

states that it is assignable by defendant but makes no mention of assignability by Seaboard Foods. The guaranty was a special guaranty extended only to Seaboard Foods and was not enforceable by plaintiff as Seaboard's assignee or successor.

Am Jur 2d, Guaranty §§ 34-36.

Appeal by defendant from judgment entered 7 December 1992 by Judge Thomas S. Watts in Nash County Superior Court. Heard in the Court of Appeals 11 April 1994.

In 1984, Quick Fill, Inc. (Quick Fill) operated convenience stores in Pitt County, under the trade name of Kash & Karry. Seaboard Foods, Inc. (Seaboard) of Rocky Mount sold restaurant supplies and other merchandise to restaurants and other food service establishments. On 11 June 1984, Quick Fill submitted an application to Seaboard to purchase merchandise on an open account for the Kash & Karry stores. This credit application was signed by defendant as President of Quick Fill. Defendant also signed a personal guaranty for the account. After Seaboard received the credit application and defendant's personal guaranty, it sold merchandise to Quick Fill on an open account.

On 30 December 1985, Seaboard Foods sold and assigned most of its assets, including defendant's personal guaranty, to Kraft, Inc. In January of 1986, Quick Fill entered into a partnership with Mallard Oil Company to operate Kash & Karry convenience stores. On 26 January 1990, this partnership was dissolved and written notice was sent to Kraft.

After receiving this written notice from defendant, plaintiff continued to sell goods to Quick Fill on open account. Meanwhile, Kraft had merged with General Foods in 1989 to become Kraft General Foods. On 29 December 1990, Kraft General Foods underwent two internal corporate reorganizations so that certain corporate assets, including defendant's personal guaranty, were vested in Kraft Foodservice, Inc.

After Quick Fill filed a Chapter 11 Bankruptcy petition in 1991, plaintiff filed this action seeking to enforce the personal guaranty contract dated 11 June 1984 between defendant and Seaboard Foods for goods sold to Quick Fill on and after 26 September 1991. Plaintiff moved for summary judgment pursuant to N.C. Gen.

Stat. § 1A-1, Rule 56. After a hearing, the trial court granted plaintiff's motion. From this order, defendant appeals.

Fields & Cooper, by John S. Williford, Jr., for plaintiff-appellee.

Hardee & Hardee, by G. Wayne Hardee and Charles R. Hardee, for defendant-appellant.

WELLS, Judge.

Defendant argues that the trial court erred by granting defendant's motion for summary judgment. After carefully examining the record before us, we must agree.

Summary judgment is a device whereby judgment is rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Dickens v. Thorne*, 110 N.C. App. 39, 429 S.E.2d 176 (1993), N.C.R. Civ. P. 56(c).

The pertinent facts surrounding the execution of the personal guaranty are undisputed. The guaranty agreement signed by defendant appears, in part, as follows:

PERSONAL GUARANTY CONTRACT

TO: SEABOARD FOODS, INC.

In consideration of *your* granting credit to the person(s), firm(s), corporation(s) (herein called customer) shown on the foregoing credit application for purchasing restaurant supplies and related items from time to time from *you* on an open account, I (we) the undersigned do thereby personally and unconditionally guarantee without notice the payment of all sums that shall become due from the customer *to you* for goods sold and delivered at all locations of the customer, regardless of trade style. (Emphasis added.)

The agreement also states: "This guaranty shall bind the heirs, executors, legal representatives, successors and assigns of the undersigned."

Plaintiff contends that the guaranty addressed to Seaboard is a general guaranty, and therefore assignable under general contract principles. Defendant argues, however, that the guaranty is

a special guaranty, enforceable only by the person to whom it is addressed, and therefore not assignable by Seaboard. We are persuaded by defendant's argument.

Generally, a guaranty is assignable where the language of the guaranty contract shows that the parties intended it to be assignable. *Gillespie v. De Witt*, 53 N.C. App. 252, 280 S.E.2d 736, *cert. denied*, 304 N.C. 390, 285 S.E.2d 832 (1981). This Court discussed the distinctions between a general guaranty and a special guaranty in *Palm Beach, Inc. v. Allen*, 91 N.C. App. 115, 370 S.E.2d 440 (1988). "A general guaranty which is addressed to *no specific person*, authorizes anyone to whom it is presented to extend credit upon its strength, and is enforceable by anyone who acts upon it, whereas a special guaranty . . . may only be enforced by the person to whom the guaranty is extended, that is, the person to whom it is addressed." *Id.*

The guaranty in the case *sub judice* was specifically addressed to Seaboard Foods, Inc. The agreement makes reference to "you" and "your" repeatedly, obviously referring to Seaboard Foods. Additionally, the agreement specifically states that it is assignable by defendant, but makes no mention of assignability by Seaboard Foods.

We are convinced that the guaranty agreement in the case at bar was a special guaranty extended only to Seaboard Foods, Inc., and was not enforceable by plaintiff as Seaboard's assignee or successor. Therefore, we reverse the order of the trial court and remand for entry of summary judgment in favor of defendant.

Reversed and remanded.

Judges JOHNSON and JOHN concur.

CITY OF RALEIGH v. HUDSON BELK COMPANY, AND CVM ASSOCIATES

No. 9210SC1331

(Filed 17 May 1994)

Zoning § 120 (NCI4th)— review of board of adjustment decision— board as necessary party

Where a city board of adjustment reversed the city zoning inspector's decision that the maximum size of signage on respondent's entire store was 300 square feet rather than a maximum of 300 square feet of signage per public street frontage, and the city petitioned the superior court for a review of the board of adjustment's decision, the trial court properly allowed respondent's motion to dismiss the case for failure of the city to join the board of adjustment as a necessary party to the lawsuit.

Am Jur 2d, Zoning and Planning § 1042.

Appeal by petitioner City of Raleigh from order entered 19 October 1992 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 16 November 1993.

City Attorney Thomas A. McCormick, by Associate City Attorney Elizabeth C. Murphy, for petitioner appellant.

Manning, Fulton & Skinner, P.A., by John B. McMillan and Alison R. Cayton, for respondent appellee.

COZORT, Judge.

Petitioner appeals the trial court's order dismissing its case for failure to join the local Board of Adjustment as a party in the superior court review of the Board's determination on a zoning issue. We affirm.

The facts pertinent to our review of the case are as follows: In the fall of 1991, CVM Associates (CVM), owners of the building leased by respondent Hudson Belk Company (Belk), at Crabtree Valley Mall in Raleigh, North Carolina, received a notice from the City Zoning Inspector alleging that on-premise signs were not in compliance with Raleigh City Code Section 10-2065.1(4). The code provision, which had been enacted on 1 July 1987, allows a maximum of 300 square feet of signage for certain businesses. Belk

displays three signs at the Crabtree Valley location on the outside of the building. One sign, on Blue Ridge Road, is 288 square feet, while the signs on the east and west sides of the store are 248 and 288 square feet, respectively.

The City Zoning Inspector explained to CVM that the signs were not in compliance because the maximum size of signing permitted on the entire store was 300 square feet, rather than a maximum of 300 square feet for each sign. On 23 September 1991, Belk appealed to the Raleigh Board of Adjustment (Board). The Board unanimously decided to reverse the Zoning Inspector's decision, finding that the city code allows up to 300 square feet of signing per public street frontage.

The City petitioned for a writ of certiorari to the superior court for a review to determine whether the Board's decision was supported by the evidence presented at the hearing. Belk moved to dismiss the case pursuant to N.C.R. Civ. P. 12(b)(7) for failure of the City to join the Board as a necessary party. On 25 September 1992, the trial court granted the motion to dismiss. The City appeals.

The City's primary contention on appeal is that the trial court erred in dismissing the action based on petitioner's failure to join the Board of Adjustment as a necessary party to the lawsuit. In essence, the City is asking us to ignore or overrule our decision in *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986). In *Mize*, the petitioners challenged the decision of the Zoning Board of Adjustment pursuant to N.C. Gen. Stat. § 153A-345(e) by filing a petition for writ of certiorari in the superior court. The petitioners named only the county as a necessary party to the action, and the superior court granted a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(7) for failure to join the Zoning Board of Adjustment as a necessary party. In upholding the trial court's dismissal of the action in *Mize*, this Court explained:

> The Zoning Board of Adjustment is a necessary party because the Board is the agency having custody of the record that is being reviewed. Common sense and logic dictates such a result.
>
> [I]nstances may arise where the position of the Board of Adjustment and the County of Mecklenburg may be adverse. The focus of the review under G.S. 153A-345(e) is on the decision of the Zoning Board of Adjustment. While the County delegates to the Board the authority to hear appeals of zoning

> cases, once the delegation has occurred the County has no power to influence the decisions of the Board. Thus, we hold that the Zoning Board of Adjustment is a necessary party respondent to a petition filed pursuant to G.S. 153A-345(e).

Id. at 282-83, 341 S.E.2d at 769.

We find no distinguishing features in the present case which would justify our failing to follow *Mize*. We are thus bound by our decision in *Mize*. *See In re Matter of Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). Accordingly, we hold the trial court did not err in granting defendants' motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(7).

Petitioner submits that, in the event we decide not to revisit *Mize*, we should conclude nevertheless that the trial court erred in dismissing the case because the trial court could have joined the Board as a necessary party on its own motion. Petitioner claims the trial court should have added the Board as a party on its own motion, since five months elapsed between the time when the petition was filed and the hearing on the motion to dismiss. We decline to impose the responsibility of including the Board as a necessary party onto the trial court, when the petitioner has made no effort whatsoever to join the Board on its own and has made no request of the judge to add the party. The trial court's order dismissing the City's petition is therefore

Affirmed.

Judges EAGLES and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 MAY 1994

BRITT LIMITED PARTNERSHIP v. KARATE INTL. MARTIAL ARTS ACADEMY No. 9314DC760	Durham (90CVD4625)	Affirmed
CAROLINA SURGICAL CENTER v. PRINCE HALL GRAND LODGE No. 9310SC690 No. 9310SC716	Wake (91CVS9500) (92CVS12440)	As to No. 91CVS9500, the trial court's order affirming arbitration is Affirmed. As to No. 92CVS12440, the trial court's order of summary judgment is Affirmed.
CITY OF RALEIGH v. HUDSON BELK CO. No. 9210SC1332	Wake (92CVS00639)	Affirmed
DEAVER v. RUGGIRELLO No. 9310SC872	Wake (93CVS5478)	Affirmed
FASSELL v. FASSELL No. 9310DC6	Wake (89CVD07116) (90CVD07654)	Reversed & Remanded
GROSE v. FERGUSON No. 9323SC695	Wikes (92CVS560)	Affirmed
GUILFORD COUNTY PLANNING & DEV. DEPT. v. QUICK No. 9318SC754	Guilford (90CVS10301)	Vacated
HAMPTON v. CBP RESOURCES/ASHEVILLE BY-PRODUCTS No. 9310IC134	Ind. Comm. (815454)	Affirmed
JACOBS v. ADAMS FARM REALTY No. 9318SC586	Guilford (90CVS10940)	Affirmed
KEEN v. HARRISON No. 927SC1263	Nash (90CVS690)	Reversed & Remanded

KELLY v. BRADLEY No. 9315SC76	Orange (91CVS886)	Reversed in part & remanded for trial on damages only
MADDOX v. HOWELL No. 938SC619	Wake (91CVS2388)	Affirmed
N.C. RAILROAD CO. v. FERGUSON BUILDERS SUPPLY No. 933SC573	Carteret (89CVS1063)	Affirmed
OLVERA v. CHARLES Z. FLACK AGENCY No. 9329SC197	Rutherford (88CVS816)	No Error
PITTMAN v. PITTMAN No. 933DC826	Carteret (86CVD703)	Affirmed
STATE v. ANTHONY No. 932SC866	Martin (92CRS4137)	No Error
STATE v. DIXON No. 9318SC1024	Guilford (92CRS22306)	No Error
STATE v. FAIRCLOTH No. 9320SC1079	Richmond (92CRS8177)	No Error
STATE v. HUFFMAN No. 9329SC1083	McDowell (91CRS3162) (91CRS3163) (91CRS3164) (91CRS3166) (91CRS3170) (91CRS3171) (91CRS3173) (92CRS1015)	Judgment arrested; matters remanded
STATE v. JONES No. 9327SC342	Cleveland (91CRS8597)	No Error
STATE v. JONES No. 931SC650	Dare (92CRS5994) (92CRS5995) (92CRS6020) (92CRS6021)	No Error
STATE v. KENNEDY No. 9326SC980	Mecklenburg (92CRS045800)	No Error
STATE v. LYNCH No. 9310SC1001	Wake (92CRS73508) (92CRS73509)	No Error

STATE v. MOSES No. 9310SC1031	Wake (93CRS11697)	No Error
STATE v. QUILLEN No. 933SC181	Carteret (90CRS7771) (90CRS7772) (90CRS7773) (90CRS7774)	No error at trial; remanded for resentencing
STATE v. RICK No. 9327SC632	Gaston (92CRS10709) (92CRS22410) (92CRS22411)	In summary, vacate as to the charge of second degree murder (92CRS10709); reversed as to second degreee burglary (92CRS22411); & reversed as to attempted second degree rape (92CRS22410)
STRICKLAND v. TOWN OF PEMBROKE No. 9316SC598	Robeson (92CVS1287) (92CVS1290)	Affirmed
THOMPSON v. EDWARDS No. 9315SC453	Orange (91CVS1290)	No Error
TOWN OF LANSING v. KEY No. 9323DC640	Ashe (92CVD39)	Reversed & remanded for judgment to be entered in favor of plaintiff Town
TRANSAMERICA INS. CO. v. WOODY'S RESTAURANT & TAVERN No. 9326SC402	Mecklenburg (92CVS1130)	Affirmed
WRIGHT v. WRIGHT No. 9330DC930	Haywood (89CVD410)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW AND PROCEDURE

§ 65 (NCI4th). Scope and effect of review generally

Review of an agency decision under G.S. 150B-51(a) allows the court to determine whether the agency's decision states the specific reasons why the agency did not adopt the administrative law judge's recommended decision but does not entitle petitioner to review of whether those stated reasons were correct. **Oates v. N.C. Dept. of Correction**, 597.

§ 72 (NCI4th). Appeal from judgment on review

Although there are statutory provisions establishing judicial review of administrative agency decisions, no section of the Administrative Procedure Act delineates the procedures to be followed upon appellate review; this panel of the Court of Appeals determined that the proper standard was to examine the trial court's order for error of law rather than to apply the same standard as the trial court and to examine the evidence. **Amanini v. N.C. Dept. of Human Resources**, 668.

De novo review is required where it is alleged that an agency's decision was based upon an error of law; review is conducted under the whole record test where it is alleged that the agency's decision is not supported by substantial evidence. **Brooks v. Ansco & Associates**, 711.

APPEAL AND ERROR

§ 118 (NCI4th). Appealability of particular orders; summary judgment denied

The denial of summary judgment for defendant Town of Lansing was immediately appealable in an action against the Town arising from an ordinance requiring water and sewer connections. **Blevins v. Denny**, 766.

§ 119 (NCI4th). Appealability of particular orders; summary judgment granted

An appeal was treated as a petition for certiorari in order to promote judicial economy where the judgment was interlocutory because it failed to dispose of the entire case. **Adams v. Jones**, 256.

§ 126 (NCI4th). Appealability of particular orders; change of venue; order of transfer

A trial court order granting defendant's motion for a change of venue was immediately appealable. **First Southern Savings Bank v. Tuton**, 805.

§ 137 (NCI4th). Appealability of particular orders; orders relating to remand

An order remanding the action to the Employment Security Commission for a determination of the amount of refund to which appellee is entitled was interlocutory and not immediately appealable. **State ex rel. Employment Security Comm. v. IATSE Local 574**, 662.

§ 168 (NCI4th). Mootness of particular questions; questions involving statutes or ordinances

An assignment of error contending that G.S. 136-28.4 and the Project Special Provision Minority Businesses (the state policy concerning participation by disadvantaged businesses in highway contracts) violated Equal Protection was dismissed as moot. **Dickerson Carolina, Inc. v. Harrelson**, 693.

§ 176 (NCI4th). Effect of appeal on power of trial court generally

Defendant's motion to dismiss the appeal and for sanctions which was filed over five months before the appeal was docketed in the Court of Appeals was

APPEAL AND ERROR — Continued

properly directed to the trial court, and neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions. **Dodd v. Steele**, 632.

§ 209 (NCI4th). Appeal in civil actions; content of notice

Defendant's notice of appeal was insufficient to vest the Court of Appeals with jurisdiction to review the trial court's 3 June 1992 order granting judgment on the pleadings for plaintiffs as to certain defenses and counterclaims where defendant completely omitted in its notice of appeal any reference to the 3 June 1992 judgment. **Guilford Co. Dept. of Emer. Serv. v. Seaboard Chemical Corp.**, 1.

§ 249 (NCI4th). Security for costs on appeal; appeal for trial de novo

The trial court properly denied defendant's motion to reinstate its appeal from the magistrate to district court where defendant's appeal was dismissed for failure to pay costs of court to appeal within 20 days after entry of judgment. An appeal is not perfected under G.S. 7A-228(b) unless the costs of court to appeal have been paid within 20 days after the entry of judgment. **Principal Mut. Life Ins. Co. v. Burnup & Sims, Inc.**, 494.

§ 341 (NCI4th). Failure to properly assign error

Defendant in an equitable distribution action abandoned any argument that the valuation of the marital home was improper where defendant alluded to an error in the valuation of the marital home in his assignment of error, made an oblique reference to the valuation in his argument, and did not assign error to the court's finding concerning the sale price of the home and the parties' stipulation as to its value. **Fox v. Fox**, 125.

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

Defendant's argument that the trial court erroneously applied preFair Sentencing Act sentencing law was not before the Court where no assignment of error encompassed this assertion. **State v. Burton**, 610.

§ 443 (NCI4th). Review on assignments of error and record

An assignment of error in a brief which was not set out in the record on appeal was not addressed. **Bell Atlantic Tricon Leasing Corp. v. DRR, Inc.**, 771.

ATTORNEYS AT LAW

§ 45 (NCI4th). Proof of malpractice; applicable standard of care

In a malpractice action against defendant attorneys for improperly stating the date of plaintiff's slip and fall in a complaint against a hospital and thereby causing the case to be dismissed on the ground it was barred by the statute of limitations, the trial court erred in directing a verdict for defendant attorneys because plaintiff failed to present expert testimony establishing a breach of the standard of care. **Little v. Mattewson**, 562.

§ 48 (NCI4th). Professional malpractice; miscellaneous acts and omissions

The trial court erred in directing a verdict for defendant attorneys in a malpractice action on the grounds that plaintiff failed to establish that the underlying claim was valid, would have resulted in a judgment in her favor, and would have been collected. **Little v. Mattewson**, 562.

AUTOMOBILES AND OTHER VEHICLES

§ 305 (NCI4th). Duty of pedestrians; duty of highway workers

The trial court erred in its instructions on contributory negligence in an action which arose from plaintiff-highway worker being struck while his back was turned to traffic and in which the jury found contributory negligence. **Bosley v. Alexander**, 470.

§ 416 (NCI4th). Concurring negligence generally

The trial court erred in an action arising from an automobile accident by failing to instruct on joint and concurring negligence. **Browning v. Carolina Power & Light Co.**, 229.

§ 466 (NCI4th). Sudden emergency doctrine; where party invoking doctrine contributed to emergency; particular circumstances

The trial court erred by instructing on sudden emergency in an automobile accident case where defendant ran through an intersection in fog and crashed through an embankment into a tree; plaintiff, who was riding with defendant, was injured; and it was apparent that there was fog in the area the entire time that defendant was driving that morning. The fact that patchy fog continued to create a problem and obscured defendant's clear view of the intersection was neither sudden nor an emergency. **Weston v. Daniels**, 418.

§ 528 (NCI4th). Wet pavement

The evidence did not show negligence per se by defendant but presented an issue of negligence for the jury where it tended to show that defendant crossed the center line and struck plaintiffs in their lane of travel, but there was also evidence that defendant was driving under the speed limit, was driving a car in good repair with good tire tread, and crossed the center line because of roads made slippery by rain. **Tate v. Christy**, 45.

§ 571 (NCI4th). Last clear chance; persons standing or walking along road

The trial court properly instructed the jury and submitted the issue of last clear chance to the jury where plaintiff was struck from the rear by defendant's car while pushing a disabled vehicle along a road. **Griffith v. McCall**, 190.

§ 813 (NCI4th). Driving under influence of impairing substance; requirement of alcohol test

The contention of a defendant in a driving while impaired prosecution that he was denied his statutory rights to a pre-arrest test was without merit; although a person stopped for investigation of an implied consent offense may request a chemical analysis before any arrest or charge is made, defendant did not make such a request. **State v. McGill**, 479.

§ 818.1 (NCI4th). Penalty for subsequent or additional offense of impaired driving

The trial court properly denied defendant's motion to suppress evidence of his prior DWI convictions in a prosecution for habitual impaired driving although defendant alleged that court records failed to show that defendant was represented by counsel when he entered guilty pleas in those prior cases. **State v. Stafford**, 101.

§ 845 (NCI4th). Proof of impaired condition of driver

The evidence was sufficient to support a conviction for driving while impaired and the trial court did not err by denying defendant's motion to dismiss. **State v. O'Rourke**, 435.

CORPORATIONS — Continued

§ 121 (NCI4th). What constitutes ratification; acceptance of benefits of contract generally

The trial court did not err in an action to enforce a corporate guaranty of an equipment lease by granting plaintiff's motion for summary judgment despite defendant MHF's contention that it could not be bound by the guaranty on the basis of ratification. The leased equipment was in the possession of MHF and MHF made several payments on the lease, supporting plaintiff's position that MHF ratified the acts of its president and secretary. **Bell Atlantic Tricon Leasing Corp. v. DRR, Inc.**, 771.

§ 208 (NCI4th). Claims as consequence of entire asset purchase

Summary judgment was properly entered for defendant corporation in plaintiff's slip and fall action on the ground that plaintiff failed to name and serve the proper party within the statute of limitations where another corporation waxed the floor on which plaintiff fell, the other corporation was purchased by defendant, and plaintiff's evidence was insufficient to show that defendant is a mere continuation of the other corporation. **Coffin v. ISS Oxford Services**, 802.

COSTS

§ 26 (NCI4th). Effect of contractual provision for attorney's fees

The trial court erred in awarding the actual amount of attorney's fees incurred instead of awarding 15% of the outstanding balance owed on a lease where the lease did not stipulate a specific percentage, and G.S 6-21.2(2) thus applied so that the amount of attorney's fees is 15% of the outstanding balance. **Devereux Properties, Inc. v. BBM&W, Inc.**, 621.

§ 37 (NCI4th). Attorney's fees in other particular actions or proceedings

Respondent was not prejudiced by petitioner's failure to serve its supporting affidavit with its petition for attorney's fees. **Crowell Constructors, Inc. v. State ex rel. Cobey**, 75.

The trial court was not required to deny a petition for attorney's fees under G.S. 6-19.1 on grounds that respondent had substantial justification for its claim against petitioner and there were special circumstances which made the award of attorney's fees unjust where the sole support for respondent's contentions was a Court of Appeals opinion which was vacated by the Supreme Court. **Ibid.**

The trial court erred in the amount of attorney's fees it awarded when it inadvertently included certain fees which were incurred before a civil penalty assessment and the court had stated that it was disallowing all such fees. **Ibid.**

COURTS

§ 15.3 (NCI4th). Grounds for personal jurisdiction; substantial activity within state; other actions or occurrences

Defendant Florida resident had insufficient minimum contacts with North Carolina for the courts of this state to exercise personal jurisdiction over him in an action to recover for defamatory statements allegedly made by defendant about plaintiffs in a Tampa, Florida airport. **Bullard v. USAir, Inc.**, 791.

DISCOVERY AND DEPOSITIONS

§ 65 (NCI4th). Sanctions for failure to identify expert witness

The trial court did not abuse its discretion by excluding a physician's testimony because of plaintiff's failure in discovery to designate the physician as an expert witness regarding the standard of care. **Clark v. Perry**, 297.

DIVORCE AND SEPARATION

§ 13 (NCI4th). Separation agreements; unfairness or unconscionability

The trial court did not err by granting defendant's motion for summary judgment where plaintiff and defendant had entered into a separation agreement; defendant was represented by counsel and plaintiff was not; and the agreement vested plaintiff with property valued at $11,000 and debts valued at $24,000 while defendant received property valued at $54,600 and debts valued at $6,000. **King v. King**, 454.

§ 132 (NCI4th). Classification of property; shares of stock in closely held corporation

The trial court erred in an equitable distribution action in distributing property consisting of shares in a mobile home company owned by defendant and shares owned through a profit sharing plan where the trial court properly recited that post-separation appreciation is a distributional factor; plaintiff was awarded one-half of the appreciation through an adjustive credit applied in calculating plaintiff's share of the marital property; and, despite the conclusion that an equal division would be equitable, plaintiff received 66% of the marital estate. **Fox v. Fox**, 125.

§ 121 (NCI4th). Classification of property; inheritances and gifts

The trial court in an equitable distribution action properly classified a savings account in the wife's name as marital property where most of the money in the account came from the wife's father, but the only evidence of donative intent was the wife's statement that "my daddy wants me to have this and I'm going to keep it separate." **Johnson v. Johnson**, 589.

§ 123 (NCI4th). Increase in value of separate property

The trial court in an equitable distribution action did not err in its methodology and determination as to what portion of the increase in the value of plaintiff husband's separate property, the parties' home, was marital property. **Johnson v. Johnson**, 589.

§ 136 (NCI4th). Valuation of property; measure of value

The trial court in an equitable distribution action did not err in its valuation of a piece of property based on the testimony of an expert witness as to appraisals of real estate. **Johnson v. Johnson**, 589.

§ 142 (NCI4th). Distribution of marital property; valuation of pension and retirement benefits

In calculating the value of defendant's pension plan, the trial court did not err in using the date of separation as defendant's retirement date instead of the date at which defendant would become eligible for retirement. **Surrette v. Surrette**, 368.

The trial court did not improperly double discount the present value of defendant's pension where the court did discount the value of the pension at defendant's age 65 to arrive at its present value as of the date of separation, but the court's

order did not require plaintiff to wait to receive her discounted benefits until defendant retired. **Ibid.**

The trial court erred in calculating the present value of defendant's pension on the date of separation by averaging the benefits at age 50, defendant's earliest retirement age, and at age 65, since the court should have chosen the valuation of defendant's pension which assumed defendant would begin drawing benefits at his earliest retirement age, but plaintiff was not prejudiced because the court's valuation was greater than the valuation the court should have used. **Ibid.**

§ 144 (NCI4th). Distribution factors; generally

When evidence of a particular distributional factor is introduced, the trial court must consider the fact and make an appropriate finding of fact. **Fox v. Fox**, 125.

§ 144 (NCI4th). Equitable division of property generally

The trial court did not abuse its discretion in determining that an unequal division of the marital assets was equitable. **Surrette v. Surrette**, 368.

§ 147 (NCI4th). Distribution factors; liabilities

The trial court did not err in an equitable distribution action by finding that the only marital debt was the mortgage on the former marital home and that defendant had no debts or liabilities other than those owing plaintiff and the minor child where defendant contended that the court failed to take into consideration defendant's personal guaranty of certain business debts incurred prior to the separation. **Fox v. Fox**, 125.

§ 172 (NCI4th). Filing of action; effect of decree of absolute divorce

An order of equitable distribution was reversed where plaintiff's complaint in an action for divorce from bed and board asserted a claim for child support, temporary alimony, permanent alimony, the possession and use of certain property, and that defendant be ordered to maintain all marital assets in their present condition, but clearly made no application for equitable distribution, and defendant's pleadings likewise failed to assert a claim for equitable distribution. **Stirewalt v. Stirewalt**, 107.

§ 284 (NCI4th). Recoupment of alimony; judgment that supporting spouse not liable for alimony

When a jury or the trial judge finds that none of the grounds on which a spouse alleges entitlement to permanent alimony exist, the trial court may order recoupment of any alimony pendente lite paid by the supporting spouse. **Wyatt v. Hollifield**, 352.

§ 303 (NCI4th). Termination of alimony; remarriage by dependent spouse

Where the trial court ordered a lump sum alimony award of $54,420, and ordered plaintiff to make semi-monthly payments of $452 until the entire lump sum was paid, the entire $54,420 did not vest at the time of the court's order, and plaintiff's obligation to pay alimony was terminated by defendant's remarriage. **Potts v. Tutterow**, 360.

§ 337 (NCI4th). Child custody; basis of determination

The trial court did not abuse its discretion by awarding custody of a minor child to the biological father where the mother, now deceased, had indicated that she wanted custody to be with plaintiffs, her relatives. **Black v. Glawson**, 442.

EMINENT DOMAIN — Continued

§ 295 (NCI4th). Limitations of actions

Actions asserting a "taking" are to be initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever comes later. **Blevins v. Denny**, 766.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 124 (NCI4th). Regulation of sedimentation; violations of law; enforcement; remedies

An apartment development project was not funded in whole or in part by state or federal funds so as to deprive plaintiff city of the authority to regulate land disturbing activities on the project because HUD insured the loan on the project and later purchased the note and deed of trust, or because a grant was received from the Appalachian Regional Commission to install water and sewer lines, and the city had jurisdiction to impose a civil penalty for violations of the city's soil erosion and sedimentation control ordinance. **City of Asheville v. Woodberry Associates**, 377.

ESTOPPEL

§ 3 (NCI4th). Estoppel against governmental unit

The Town of Lansing could not be estopped from requiring connection to a water and sewer system where the Town Clerk/Finance Officer had sent town residents a letter before the referendum stating that the Town had no intention of requiring hookups and informed residents after the construction of the system that mandatory hookups were the Town's only option. **Blevins v. Denny**, 766.

§ 19 (NCI4th). Lack of knowledge or access thereto; duty of reasonable care to ascertain facts

Defendants were not estopped from pleading the statutes of repose and limitation in plaintiff's medical malpractice action on the ground that defendants delayed furnishing her medical records to her attorney where plaintiff had knowledge of the facts she claimed were concealed from her. **Sidney v. Allen**, 138.

§ 20 (NCI4th). Conduct of party asserting estoppel; reliance

The Industrial Commission properly declined to apply the doctrine of apparent agency, or agency by estoppel, in this action by a student at NCSU to recover for injuries he sustained after being administered a measles vaccine by a temporary nurse at a clinic set up on campus by the Wake County Health Department since plaintiff did not rely on the nurse who administered the shot being the agent of NCSU. **Deal v. N.C. State University**, 643.

EVIDENCE AND WITNESSES

§ 87 (NCI4th). Lack of probative value, generally

The trial court did not err in a caveat proceeding by excluding evidence regarding the behavior of the primary beneficiary after the execution of the will. **In re Will of Jones**, 782.

§ 90 (NCI4th). Grounds for exclusion of relevant evidence; prejudice as outweighing probative value

The trial court erred in an automobile accident case by denying plaintiffs' motion in limine and in allowing defendants to introduce evidence of mini bottles

EVIDENCE AND WITNESSES — Continued

§ 2148 (NCI4th). Opinion testimony by experts, generally; when allowed; requirement of relevancy

The Utilities Commission erred in a hearing on whether to transfer customers from Haywood Electric Membership Corporation to Duke Power by excluding expert testimony on the impact of the transfer on Haywood. **In re Dennis v. Duke Power Co.** 272.

§ 2332 (NCI4th). Experts in child sexual abuse; characteristics and symptoms of abuse, generally

A pediatrician was properly permitted to testify about the characteristics of sexually abused children and to state that her findings with regard to the alleged victim "were strongly suggestive of possible sexual abuse." **State v. Hughes**, 742.

§ 2342 (NCI4th). Rape and sexual abuse of children; post traumatic stress disorder

A sexual abuse therapist's testimony that a rape and sexual offense victim suffered from post traumatic stress disorder was relevant to explain the victim's delay in reporting the offenses, and the trial court's erroneous failure to limit the jury's consideration of this testimony to corroborative purposes was not prejudicial. **State v. Hughes**, 742.

§ 2366 (NCI4th). Accident reconstruction; conditions at scene

The trial court in an automobile accident case properly admitted testimony from an accident reconstruction analyst. **Griffith v. McCall**, 190.

§ 3068 (NCI4th). Credibility of witness; basis for impeachment; extent of cross-examination

The trial court abused its discretion in an automobile accident case by allowing plaintiff to be questioned regarding a lawsuit in which plaintiff participated in 1979 regarding an incident at a fishing tournament in 1977. **Weston v. Daniels**, 418.

EXECUTORS AND ADMINISTRATORS

§ 1 (NCI4th). Jurisdiction of clerk of superior court

The clerk of court had no jurisdiction to hear an appeal of a claim against an estate which had been rejected by the personal representative since the only way to preserve such a claim is by commencing an action within three months of the notice of rejection of the claim. **In re Estate of Neisen**, 82.

§ 130 (NCI4th). Referral of disputed claims

A personal representative's letter to claimant suggesting that she file a notice of hearing with the clerk of court of her claim against decedent's estate did not amount to a referral agreement as permitted by G.S. 28A-19-15. **In re Estate of Neisen**, 82.

FRAUD, DECEIT, AND MISREPRESENTATION

§ 38 (NCI4th). Summary judgment; jury questions

The evidence was sufficient for the jury on the issue of fraudulent concealment by plaintiffs in the sale of their business to defendants. **Pridgen v. Shoreline Distributors, Inc.**, 94.

GUARANTY

§ 13 (NCI4th). Construction of guaranty agreements, generally

Defendants were estopped from denying liability on their obligations as guarantors of a lease agreement because of modifications of the original lease. **Devereux Properties, Inc. v. BBM&W, Inc.**, 621.

Defendants as guarantors of a lease agreement were responsible for attorney's fees where the guaranty agreement covered "each and every obligation of Tenant under this Lease Contract," and the lease required the tenant to pay reasonable attorney's fees in the event of a default. **Ibid.**

§ 14 (NCI4th). Assignment

The trial court erred in an action on a guaranty by granting summary judgment for plaintiff and not granting summary judgment for defendant where the guaranty was a special guaranty extended only to Seaboard Foods and was not enforceable by plaintiff as Seaboard's assignee or successor. **Kraft Foodservice v. Hardee**, 811.

HOMICIDE

§ 299 (NCI4th). Second-degree murder; sufficiency of evidence; physical evidence connecting defendant to crime or crime scene; circumstantial evidence

The evidence was insufficient to support defendant's conviction of second-degree murder where it tended to show only that defendant and the victim had an argument shortly before her death and that defendant had a motive to kill her because she wanted to break up with defendant. **State v. Cannada**, 552.

§ 417 (NCI4th). Instructions; degrees of homicide offenses

Defendant's contention that the Pattern Jury Instruction given to the jury in a second-degree murder prosecution arising from child abuse impermissibly shifted the burden of proof to defendant was overruled. **State v. Baynes**, 165.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 62 (NCI4th). Tort liability generally

The trial court properly directed a verdict for defendant hospital in plaintiff's action based on the alleged negligence of hospital employees in administering a blood transfusion to plaintiff's husband, a Jehovah's Witness AIDS patient who had requested that he receive no blood products, where plaintiff offered no expert testimony as to the standard of care for employees of defendant hospital in maintaining patient records and in administering blood transfusions pursuant to a physician's order. **Clark v. Perry**, 297.

§ 63 (NCI4th). Tort liability; physicians as agents or employees

Defendant hospital was not vicariously liable for a radiologist's alleged negligence in the performance of an angioplasty procedure under the doctrine of respondeat superior because the radiologist was not an employee of the hospital. **Hoffman v. Moore Regional Hospital**, 248.

Defendant hospital was not vicariously liable for a radiologist's alleged negligence based on the doctrine of apparent authority even if the hospital represented in some manner to the patient that the radiologist was its employee where there was no evidence of reliance. **Ibid.**

reared the person as his or her own child. **United Services Automobile Assn. v. Gambino**, 701.

The trial court erred by granting summary judgment for defendants in an action to determine whether defendant Jack Gambino was included in defendant Johnson's underinsured motorist coverage where the evidence, considered in the light most favorable to plaintiff, creates a jury question as to whether Jack falls within the definition of foster child. **Ibid.**

The trial court correctly ruled that defendant Jack Gambino is not entitled to aggregate or stack UIM coverage of each of three vehicles insured under one policy where, at the time this action arose, G.S. 20-279.21(b)(4) permitted persons insured of the first class to stack coverages and a foster child is not a relative and thus is not a person of the first class. **Ibid.**

§ 530 (NCI4th). Underinsured coverage; reduction of insurer's liability

The primary provider of UIM coverage was entitled to credit for the $25,000 paid by the tortfeasor's liability insurer even though it failed to protect its subrogation rights by matching the amount of the tentative settlement. **Falls v. N.C. Farm Bureau Mut. Ins. Co.**, 203.

§ 571 (NCI4th). What constitutes other or nonowned automobile; regular use by insured

An automobile was furnished to defendant driver for his regular use at the time of an accident and was excluded from coverage under the driver's personal automobile liability policy by the "furnished for your regular use" exclusion for noncovered vehicles where possession of the automobile was given to the driver so that he could test drive it and the driver continued to possess and use the vehicle for twenty-nine days until the accident occurred. **State Farm Mut. Automobile Ins. Co. v. Branch**, 234.

The trial court properly granted summary judgment for defendant insurance company where plaintiff was injured while driving a dump truck used in his family's farming operation and titled in the name of one of his parents and defendant denied payment and moved for summary judgment based on a policy provision which excluded coverage for injury sustained while occupying or when struck by any vehicle other than the covered auto which was owned by the insured or furnished for the insured's regular use. **Betts v. Great American Insurance Companies**, 260.

§ 690 (NCI4th). Propriety of award of prejudgment interest

The trial court did not err in an underinsured motorist stacking case by ruling that the policy's UIM benefits do not cover prejudgment interest or costs taxed where the judgment against the tortfeasor far exceeds the maximum amount of UIM coverage provided by the policy, so that the available limits of UIM coverage would be exhausted in satisfaction of the judgment in the underlying tort action and no UIM coverage would be available for payment of prejudgment interest or costs. **United Services Automobile Assn. v. Gambino**, 701.

§ 724 (NCI4th). Homeowner's policies; coverage of property damage

The business exclusion provision in defendants' homeowners insurance policy prevented them from recovering for liability incurred for a patron's injury suffered when she was bitten by a dog while attending a wedding reception on the insured premises. **Nationwide Mutual Fire Ins. Co. v. Nunn**, 604.

INSURANCE — Continued

§ 819 (NCI4th). Fire and homeowner's insurance; provisions excluding liability generally

An exclusion in personal liability coverage under a homeowner's policy for property owned by the insured did not apply where defendants obtained city permits and inspections, filled and leveled the back of their property, and the county informed defendants that the fill violated a landfill ordinance and a stream drainage statute and would have to be removed. There was no actual damage or harm to defendants' property, only to the adjacent stream, which is not owned by defendants. **Nationwide Mut. Fire Ins. Co. v. Banks**, 760.

§ 823 (NCI4th). Fire and homeowner's insurance; provisions excluding liability; loss arising from bodily injury or property damage either expected or intended from insured's standpoint

An exclusion in a homeowner's insurance policy for personal liability coverage for property damage intended or expected by the insured did not apply where defendants acquired a permit from the City of Raleigh allowing them to fill the back of their lot with construction debris in an effort to level the lot and they were subsequently informed by the county that they had violated a landfill ordinance and a stream drainage statute and that the fill would have to be removed. Both the resulting injury and the volitional act must be intended for the exclusion to defendants' homeowner's insurance to apply, and defendants here contemplated nothing but a lawful buildup of their property and clearly did not intend to cause harm to the stream. **Nationwide Mut. Fire Ins. Co. v. Banks**, 760.

§ 918 (NCI4th). What legal fees are recoverable

There was no prejudicial error in an action for a declaratory judgment and breach of an insurance contract where the issue was whether legal expenses were covered by the policy and the court admitted evidence on the intent of the parties and submitted the issue to the jury. **Cone Mills Corp. v. Allstate Ins. Co.**, 684.

§ 1155 (NCI4th). Sufficiency of evidence to show injury from use of vehicle

Plaintiff was "using" his father's automobile at the time of an accident and was thus a "person insured" under his father's automobile policy for UIM purposes when he was struck by an automobile while walking on the shoulder of the road in search of mechanical assistance after the automobile he was driving broke down. **Falls v. N.C. Farm Bureau Mut. Ins. Co.**, 203.

JOINT VENTURES

§ 1 (NCI4th). Definitions and distinctions

The trial court did not err by determining that a joint venture was illegal and dismissing a counterclaim to enforce the venture where the parties entered an agreement to purchase Virginia lottery tickets and purchased such tickets over a period of time. **Cole v. Hughes**, 297.

JUDGMENTS

§ 25 (NCI4th). Entry of judgment; determining time for appeal purposes

Where the trial court announced its decision to dismiss defendant's contempt motion on 13 October and filed a written order on 13 November, and there was no indication in the record that the trial court directed the clerk to make a notation of the judgment in the minutes, entry of judgment occurred when the written

order was filed and defendant's notice of appeal filed on 11 December was timely. **Potts v. Tutterow**, 360.

§ 38 (NCI4th). Propriety and effect of order signed and entered out of session where decision made during session

The parties impliedly consented to the entry of judgment outside the session where the judge indicated that it might be "a week or so" before he decided the case, there was no objection, and the judge signed the judgment a month later. **City of Asheville v. Woodberry Associates**, 377.

§ 115 (NCI4th). Tender or offer of judgment generally

Defendant's offer of judgment "in the lump sum of $7,001.00 for all damages, attorneys' fees taxable as costs, and the remaining costs accrued at the time this offer is filed" evinces an unmistakable intent that the $7,001.00 lump sum be payment not only for plaintiff's damages but also for her attorney's fees and the costs accrued at the time the offer was filed. **Harward v. Smith**, 263.

The trial court did not err by determining that plaintiff was not entitled to attorney fees pursuant to G.S. 75-16.1 where plaintiff had accepted an offer of judgment; where an offer of judgment is accepted by the plaintiff, there is no prevailing party or losing party and no admission or judgment of liability. **Evans v. Full Circle Productions**, 777.

§ 139 (NCI4th). Consent judgment as basis for contempt

A consent judgment in actions for clear title and for trespass was not an order enforceable through the contempt powers of the court where the judgment was merely a recital of the parties' agreement and not an adjudication of rights. **Crane v. Green**, 105.

§ 166 (NCI4th). Time for granting default judgment in action against more than one defendant

In an action to establish an easement by prescription over the property of several defendants, the trial court cannot, by entry of a default judgment, grant the easement across the property of a non-answering defendant and by grant of summary judgment deny the easement across the property of an answering defendant. **Vandervott v. Gateway Mountain Ppty. Owners Assn.**, 655.

§ 237 (NCI4th). Conclusiveness of judgments; res judicata and collateral estoppel; persons regarded as privies; units of government

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion in limine to exclude evidence relating to defendant's refusal to submit to a chemical analysis where DMV had concluded that defendant did not willfully refuse and defendant argued that the doctrine of collateral estoppel barred the State from introducing the refusal in his trial. **State v. O'Rourke**, 435.

§ 302 (NCI4th). Res judicata and collateral estoppel; rent and damages under lease

Plaintiff's prior action in district court for back rent after defendants had been ejected operated as a bar to this action for subsequent rent payments under the doctrine of res judicata. **Holly Farm Foods v. Kuykendall**, 412.

§ 474 (NCI4th). Unusual or extraordinary circumstances; justice demands setting aside judgment

The trial judge erred by setting aside pursuant to Rule 60(b)(6) another judge's previous judgment adjudicating defendant to be the father of plaintiff's three minor

accusation which, as a matter of law, per se holds that individual up to disgrace, ridicule, contempt. **Donovan v. Fiumara**, 524.

§ 14 (NCI4th). Statements imputing crime

A false claim that plaintiffs were gay or bisexual was not tantamount to charging defendants with the commission of a crime and did not constitute slander per se. **Donovan v. Fiumara**, 524.

§ 35 (NCI4th). Pleadings; defamation per quod

Plaintiffs failed to state a claim for slander per quod where the complaint contained no assertion of special damages. **Donovan v. Fiumara**, 524.

LIENS

§ 32 (NCI4th). Liens of mechanics, laborers, and materialmen; grant of lien; subrogation and perfection

Plaintiff second tier subcontractor failed to perfect its lien against motel property where plaintiff filed a claim of lien against the owner and the general contractor but did not also file a notice of a claim of lien. **Universal Mechanical, Inc. v. Hunt**, 484.

§ 35 (NCI4th). Sufficiency of notice of claim of lien

The notice of a claim of lien must be a single document substantially in the form prescribed by G.S. 44A-19, and plaintiff's claim of lien, complaint and motion to amend the complaint did not together amount to a notice of a claim of lien. **Universal Mechanical, Inc. v. Hunt**, 484.

LIMITATIONS, REPOSE, AND LACHES

§ 9 (NCI4th). Estoppel, generally; agreement not to plead statute

The two-year limitations period provided in a public performance bond for construction of a community center was not equitably tolled because the contractor made cosmetic repairs which concealed structural defects where there was no evidence that the surety ever made any misrepresentations to plaintiff town. **Town of Pineville v. Atkinson/Dyer/Watson Architects**, 497.

§ 22 (NCI4th). Medical malpractice

The trial court properly granted defendant's motion for summary judgment based on the statute of limitations where plaintiff husband fell from a gurney in defendant hospital's emergency room on 14 June 1986; plaintiff wife was told in the emergency room that her husband's condition was caused by swelling in the brain resulting from striking his head; they were subsequently told that there was no brain damage; tests in a psychiatric ward in April of 1990 disclosed permanent and residual brain impairment; and plaintiffs first instituted this action on 12 June 1990, voluntarily dismissed it, and refiled on 7 October 1992. The head injury was not latent; it was apparent that there had been wrongdoing most likely attributable to defendant hospital on the date of the fall. **Hussey v. Montgomery Mem. Hosp.**, 223.

§ 24 (NCI4th). Medical malpractice; continued course of treatment

Plaintiff's forecast of evidence was insufficient to show that defendant doctor treated her during her 25 November 1988 hospital stay for the condition created by the doctor's failure to administer radiation therapy to plaintiff in 1982, and

NEGLIGENCE — Continued

NOTICE

PLEADINGS — Continued

federal preemption in a railroad crossing negligence case, discovery indicated that defendants were relying only on contributory negligence, and defendants raised federal preemption in a motion in limine to exclude evidence that defendant railroad had a duty to signalize the crossing five days before trial. **Collins v. CSX Transportation**, 14.

§ 63 (NCI4th). Imposition of sanctions in particular cases

The trial court did not err in imposing Rule 11 sanctions because plaintiff appealed after filing a voluntary dismissal since a voluntary dismissal terminates a case and precludes the possibility of an appeal. **Dodd v. Steele**, 632.

§ 64 (NCI4th). Attorneys' fees as sanction; amount of award

The trial court did not err in awarding defendant attorney's fees as a sanction where the court found that defendant incurred the fees as a consequence of plaintiff's notice of appeal filed after plaintiff had taken a voluntary dismissal. **Dodd v. Steele**, 632.

§ 367 (NCI4th). Delay as waiver of right to move to amend

The trial court did not err in denying plaintiffs' motion to amend their complaint to allege that defendant board of education had purchased liability insurance where plaintiffs failed to move to amend their complaint to allege the purchase of this insurance for two and one-half years although they had notice that such insurance had been purchased. **Gunter v. Anders**, 61.

PRINCIPAL AND AGENT

§ 50 (NCI4th). Sufficiency of evidence to show apparent authority

The Industrial Commission properly declined to apply the doctrine of apparent agency in this action by a student at NCSU to recover for injuries he sustained after being administered a measles vaccine by a temporary nurse at a clinic set up on campus by the Wake County Health Department. **Deal v. N.C. State University**, 643.

PRINCIPAL AND SURETY

§ 48 (NCI4th). Action on public construction contract bonds generally

The two-year limitations period provided in a performance bond for construction of a town community center was valid. ***Town of Pineville* v. Atkinson/Dyer/Watson Architects**, 497.

PROCESS AND SERVICE

§ 19 (NCI4th). Defects or omissions; cure and amendment; matters relating to name and representative capacity; individuals

Even if defendant in a claim against an estate was not estopped from asserting the defenses of insufficient process and service, and the resulting lack of personal jurisdiction, plaintiff's action should not have been subject to dismissal where the process was sufficient because the caption in the summons amounted to a misnomer and defendant had adequate notice that the action was against the estate rather than against defendant individually, and the instructions in the summons were adequate to satisfy the spirit and the letter of G.S. 1A-1, Rule 4(b). **Storey v. Hailey**, 173.

PROCESS AND SERVICE — Continued

§ 41 (NCI4th). Waiver of defects

The trial court erred in a claim against an estate by dismissing the claim for insufficiency of process, insufficiency of service of process, and lack of personal jurisdiction where the defendant's conduct in securing extensions of time, through opposing counsel's professional courtesy, to 54 days past the date when plaintiff could have procured endorsement of the original summons or issuance of an alias and pluries summons, acts to estop defendant from asserting these defenses. **Storey v. Hailey**, 173.

§ 111 (NCI4th). Sufficiency of service of process on estate of deceased person

The trial court erred in a claim against an estate by dismissing the case for insufficiency of service of process where the executor of the estate, a nonresident, had appointed an N.C. attorney as process agent and the summons was served by leaving a copy with the process agent's law partner at their law office. **Storey v. Hailey**, 173.

PUBLIC OFFICERS AND EMPLOYEES

§ 63 (NCI4th). State personnel system; employee grievances and disciplinary actions generally

The State Personnel Commission did not act arbitrarily in disregarding the administrative law judge's credibility determinations. **Oates v. N.C. Dept. of Correction**, 597.

§ 67 (NCI4th). Disciplinary actions involving career state employees; what constitutes "just cause"

The State Personnel Commission properly dismissed a correctional sergeant for stealing food from the kitchen at Central Prison. **Oates v. N.C. Dept. of Correction**, 597.

The superior court erred by affirming the State Personnel Commission's decision to terminate petitioner where petitioner's alleged violations properly fall within job performance and the Commission erred to the extent that its conclusion of just cause was based upon its characterization of petitioner's actions as personal misconduct. **Amanini v. N.C. Dept. of Human Resources**, 668.

RAILROADS

§ 2 (NCI4th). Safety

The trial court erred in an action arising from a collision between a train and an automobile at a crossing by granting defendant's motion in limine to exclude all evidence relating to defendant railroad's duty to signalize the crossing on the basis of federal preemption. **Collins v. CSX Transportation**, 14.

§ 31 (NCI4th). Establishment of safeguards; automatic signals, lights, gates, and gongs

The trial court did not err in a railroad crossing case in which contributory negligence was an issue by withholding a gross negligence instruction, and there was no prejudice from the exclusion of evidence of defendant's duty to install signals at the crossing, where, assuming that the conditions at the crossing rendered it extrahazardous, the failure to implement more extensive signalization in this case did not rise to the level of gross negligence. **Collins v. CSX Transportation**, 14.

RAILROADS — Continued

§ 32 (NCI4th). Crossing accidents; excessive speed of train

The trial court did not err in a negligence action by a railroad arising from a crossing accident by failing to submit to the jury as grounds for plaintiff-railroad's contributory negligence the failure of the engineer to abide by plaintiff's operating rule regarding track speed limits. **Southern Railway Co. v. Biscoe Supply Co.**, 474.

§ 43 (NCI4th). Crossing accidents; sufficiency of evidence and nonsuit

The trial court did not err in a negligence action by a railroad against the owner of a truck involved in a crossing accident by directing a verdict that the accident was proximately caused by the negligence of defendant's employee, the truck driver. **Southern Railway Co. v. Biscoe Supply Co.**, 474.

RAPE AND ALLIED OFFENSES

§ 19 (NCI4th). Prior law: carnal knowledge of female between ages of twelve and sixteen generally

A first-degree statutory rape charge against defendant was not subject to dismissal because the statute under which he was charged had been repealed. **State v. Burton**, 610.

§ 73 (NCI4th). Variance between indictment and proof; time of events

There was no fatal variance between indictments and proof with regard to time in a prosecution for incest, taking indecent liberties, and first-degree statutory rape where the offenses allegedly occurred between certain dates years before the time of trial. **State v. Burton**, 610.

§ 132 (NCI4th). Jury instructions; effect of disjunctive charge

The trial court did not err in the use of the disjunctive in its instructions that an indecent liberty is an immoral and indecent touching by the defendant of the child or inducement by the defendant of an immoral or indecent touching by the child and that a sexual act means fellatio and-or any penetration by any object into the genital opening of a person's body. **State v. Hughes**, 742.

§ 166 (NCI4th). First-degree sexual offense; manner of submitting issues regarding alternative unlawful acts as affecting right to unanimous verdict

The trial court erred by instructing the jury that it could base a conviction of sexual offense on either fellatio or penetration by an object where there was no evidence of penetration by an object. **State v. Hughes**, 742.

§ 200 (NCI4th). Lesser offenses of second-degree rape; attempt

Defendant's testimony in a second-degree rape trial amounted to an unequivocal denial of penetration which entitled him to an instruction on the lesser included offense of attempted rape. **State v. Nelson**, 341.

REGISTRATION AND PROBATE

§ 88 (NCI4th). Registration as only notice recognized

Where defendants' easement which traversed both Orange and Person Counties was properly recorded only in Orange County before plaintiffs recorded their deed in both counties, plaintiffs had notice only in Orange County and the easement did not encumber their Person County property. **Rowe v. Walker**, 36.

SALES

§ 4 (NCI4th). Sales contract; statute of frauds

A check written by plaintiff to defendant as partial payment for bulk tobacco barns was an insufficient writing to satisfy the requirements of G.S. 25-2-201(1) where it was not endorsed by defendant. **Buffaloe v. Hart**, 52.

§ 54 (NCI4th). Acceptance of goods by buyer generally

The evidence was sufficient to support the jury's conclusion that there was a contract between the parties for the sale of tobacco barns, that plaintiff accepted the barns under the terms and conditions of the contract, and that defendants accepted a payment for the barns under the terms and conditions of the contract. **Buffaloe v. Hart**, 52.

SCHOOLS

§ 113 (NCI4th). Special education programs; diagnosis and evaluation; individualized education program

The trial court erred in determining that respondent school system was under no legal obligation to fully develop an Individualized Educational Program (IEP) for petitioner's daughter, to present an IEP to petitioner upon request, and to present respondent's proposals in writing to petitioner, regardless of petitioner's request. **Beaufort County Schools v. Roach**, 330.

§ 172 (NCI4th). Liability insurance; waiver of tort immunity

Plaintiffs' complaint failed to state a claim for personal injuries against defendant board of education where it failed to allege that defendant waived its immunity by the procurement of liability insurance. **Gunter v. Anders**, 61.

§ 200 (NCI4th). Sufficiency of complaint

Plaintiffs' complaint was insufficient to state a claim for personal injuries against a district superintendent and a school principal where it failed to allege that defendants' acts or failure to act were corrupt, malicious, or outside the scope of defendants' authority. **Gunter v. Anders**, 61.

§ 227 (NCI4th). Services for handicapped students

Respondent school system did not fail in its statutory duty to provide a free appropriate education for petitioner's child who had been determined to be a child with special needs where the cause of respondent's failure to follow statutory procedures and federal regulations was petitioner's act of placing the child in another school system. **Beaufort County Schools v. Roach**, 330.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

§ 19 (NCI4th). Arrest or excessive force in making arrest

Summary judgment was properly entered for defendant highway patrol officers individually and in their official capacities on plaintiff's trespass claim where defendants were authorized by statute to enter plaintiff's residence to arrest her for delaying and obstructing the arrest of her husband. **Lee v. Greene**, 580.

§ 22 (NCI4th). Civil liability; death or injury caused by other individual

Plaintiff's claim against a city, its police chief and a police officer for the death of his daughter who was raped and murdered by a taxicab driver was barred by the public duty doctrine where plaintiff alleged that the driver had

TAXATION

§ 143 (NCI4th). Collection of sales taxes; remedies

A State tax lien for unpaid sales taxes does not have priority over local ad valorem tax liens which arise from a property owner's failure to pay real estate taxes in the years subsequent to the year in which the State tax lien was docketed. **County of Lenoir v. Moore**, 110.

§ 205 (NCI4th). Tax liens generally

A State tax lien for unpaid sales taxes does not have priority over local ad valorem tax liens which arise from a property owner's failure to pay real estate taxes in the years subsequent to the year in which the State tax lien was docketed. **County of Lenoir v. Moore**, 110.

TRIAL

§ 140 (NCI4th). Particular stipulations as binding; matters concluded by stipulations

Defendant could not argue in an equitable distribution action that a CPA's valuation of assets was based upon incompetent evidence where defendant's stipulation at trial, made with full knowledge of the facts, removed the pertinent valuations, including their evidentiary bases, from the field of evidence. **Fox v. Fox**, 125.

Stipulations in an equitable distribution action that the parties would be bound by the valuations of assets by a particular CPA were binding where there was a written pretrial equitable distribution order which recited the agreement but which was not signed or otherwise acknowledged by the parties, and there was a second set of stipulations on the day of trial at which time the court examined the parties concerning the terms of the agreement. **Ibid.**

§ 266 (NCI4th). Statement of grounds for directed verdict; effect of failure to state specific grounds

The trial court did not err by granting a directed verdict for the propounders in a will caveat case where the caveators contended that the motion failed to state specific grounds in favor of the motion. **In re Will of Jones**, 782.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices in general

The trial court properly granted partial summary judgment for plaintiffs on a claim for unfair or deceptive acts under G.S. 75-1.1 where plaintiffs entered into a contract and executed a note and deed of trust in consideration of defendant's abstaining from criminal or civil remedies for embezzlement. **Adams v. Jones**, 256.

§ 52 (NCI4th). Attorney's fees to prevailing plaintiff or defendant; who is prevailing party

The trial court did not err by determining that plaintiff was not entitled to attorney fees pursuant to G.S. 75-16.1 where plaintiff had accepted an offer of judgment. **Evans v. Full Circle Productions**, 777.

UTILITIES COMMISSION

§ 5 (NCI3d). Jurisdiction and authority of Commission in general

The Utilities Commission exceeded its authority under G.S. 62-110.2(d)(2) where a number of customers of Haywood Electric Membership Corporation requested

WILLS

§ 13.1 (NCI3d). Jurisdiction over caveat proceedings

The superior court did not have jurisdiction, and its judgment was vacated, where the executrix of an estate sought more than the construction of a will in that the third document attached to the complaint seeking a declaratory judgment, if given effect, would revoke the validly probated will. **Rogel v. Johnson**, 239.

§ 34 (NCI3d). Devise of estate in fee

The trial court did not err by declaring plaintiff widow the fee simple owner of property where Item 2 of the decedent's will states, "I have 7 acres in Albright Township goes [sic] to my wife Notie J. Coble," but defendants argued that decedent's paramount intent as gathered from the entire will was to make plaintiff the lifetime beneficiary of a testamentary trust. **Coble v. Patterson**, 447.

§ 41 (NCI3d). Rule against perpetuities

There was no violation of the Rule Against Perpetuities where a decedent stated in his will that, if his wife (plaintiff in this action) should predecease him, or at her death, money and certificates remaining after certain other items were paid would be kept in certificates with the interest to keep the taxes paid on the land and any remainder to be divided as stated. **Coble v. Patterson**, 447.

§ 45 (NCI4th). Jurisdiction and power of court generally

The clerk of superior court lacked jurisdiction to resolve respondent's claim that an antenuptial agreement was invalid and that she was therefore entitled to participate in the administration and distribution of her deceased husband's estate. **In re Estate of Wright**, 659.

§ 65 (NCI4th). Undue influence

The trial court did not err by granting a directed verdict for the propounders in a will caveat action based on undue influence where the caveators did not present sufficient evidence to establish a prima facie case of undue influence. **In re Will of Jones**, 782.

WORKERS' COMPENSATION

§ 62 (NCI4th). Employer's misconduct tantamount to intentional tort; "substantial certainty" test

In an action to recover for the wrongful death of plaintiff's intestate who was crushed by a straddle crane while he worked for defendant, plaintiff's forecast of evidence was insufficient to show that defendant employer intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death. **Powell v. S & G Prestress Co.**, 319.

Defendant employer did not engage in intentional misconduct knowing such conduct was substantially certain to cause death or serious injury to plaintiff employee where plaintiff was injured while attempting to repair a tobacco blending silo while the machine was running. **Vaughan v. J. P. Taylor Co.**, 651.

§ 114 (NCI4th). Tests as to whether injury "arises out of" employment; particular applications

Though the immediate cause of decedent's death was pneumonia, there was sufficient evidence to support the Commission's finding that decedent died as a result of injuries received in an automobile accident. **Murray v. Associated Insurers, Inc.**, 506.

WORKERS' COMPENSATION — Continued

§ 115 (NCI4th). Tests as to whether injury "arises out of" employment; where cause of injury or death is unknown

Although medical experts testified that it was impossible to tell whether a stroke suffered by decedent occurred before his automobile accident or whether the stroke occurred as a result of the accident, decedent's accident arose out of his employment if the Industrial Commission finds that decedent was in the course of his employment at the time of the accident. **Murray v. Associated Insurers, Inc.**, 506.

§ 152 (NCI4th). Dual purpose rule

The Industrial Commission erred by denying death benefits for a decedent who was killed in an accident on his way from his primary residence in Raleigh to his home in Hound Ears for a weekend during which he planned to go to a dinner party and to call on customers since, under the dual purpose rule, decedent was in the course of his employment during the trip to Hound Ears even though he had additional personal motivations for making the trip as long as he was on the direct route he would have had to take to accomplish the business purpose of the trip. **Murray v. Associated Insurers, Inc.**, 506.

§ 363 (NCI4th). Who may bring claims; dependents or other death beneficiaries of deceased employee

Even if decedent's widow did not technically file a claim for decedent's death benefits, the Industrial Commission had jurisdiction to determine her right to receive death benefits since the Commission acquired jurisdiction when the executor of decedent's estate filed a claim for decedent's injuries which ultimately resulted in death within two years of the accident. **Murray v. Associated Insurers, Inc.**, 506.

§ 387 (NCI4th). Admissibility of evidence; hearsay

Decedent's statements to his wife, daughter, and a customer tending to show his intent or motive in traveling to Hound Ears was admissible under the state of mind exception to the hearsay rule. **Murray v. Associated Insurers, Inc.**, 506.

ZONING

§ 120 (NCI4th). Judicial review of zoning matters; necessary parties

A city's petition in the superior court for a review of the city board of adjustment's decision was properly dismissed for failure of the city to join the board of adjustment as a necessary party to the lawsuit. **City of Raleigh v. Hudson Belk Co.**, 875.

WORD AND PHRASE INDEX

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