NORTH CAROLINA COURT OF APPEALS REPORTS

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CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. PATRICK S. FIGURED

No. 9315SC539

(Filed 16 August 1994)

1. Rape and Allied Offenses § 105 (NCI4th)— first-degree sex offense—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for first-degree sex offense against three children where it tended to show that defendant had access to the children and opportunity to commit the crimes; the State presented overwhelming medical evidence which was uncontroverted by defendant; and the three victims identified defendant as the perpetrator in direct testimony and in consistent statements made independently to doctors and psychologists, as well as to their parents.

Am Jur 2d, Rape §§ 88 et seq.

2. Evidence and Witnesses § 2334 (NCI4th)— first-degree sex offense—opinion that children abused admissible—opinion that defendant was abuser inadmissible—admission harmless error

In a prosecution for first-degree sex offense against three children, the opinion of an expert in psychology and child sex abuse that the children were sexually abused was clearly admissible, but the expert's opinion that the children were sexually abused by defendant was not admissible, since the latter opinion did not relate to a diagnosis derived from the expert's examina-

tion of the prosecuting witnesses in the course of treatment; however, there was no reasonable possibility that the witness's inadmissible testimony affected the jury's verdict because of the State's evidence of opportunity, the children's testimony identifying defendant as the perpetrator, and the corroborating testimony of other witnesses.

Am Jur 2d, Expert and Opinion Evidence §§ 47 et seq.

3. Constitutional Law § 327 (NCI4th)— no denial of speedy trial

Defendant was not denied his Sixth Amendment right to a speedy trial by the delay between his arrest in November 1988 and his trial in September 1992, and the trial judge's findings setting forth in significant detail the procedural history of the case were adequate to support its conclusion that defendant was not prejudiced by the delay.

Am Jur 2d, Criminal Law §§ 652 et seq., 849 et seq.

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

4. Evidence and Witnesses § 961 (NCI4th)— victim's statements to psychologists and social worker—statements made for diagnosis or treatment—admissibility

The trial court in a first-degree sex offense case did not err in admitting testimony of a social worker and two psychologists concerning statements made by the victims since those statements were made for the purposes of medical diagnosis or treatment and hence were admissible under N.C.G.S. § 8C-1, Rule 803(4).

Am Jur 2d, Evidence §§ 867, 868.

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.

5. Evidence and Witnesses § 1209 (NCI4th)— admission—instruction proper

The trial court's instruction in a prosecution for first-degree sex offenses against three children that there was some evidence "which tends to show that the defendant may have admitted a fact

relating to the crime charged in this case" was supported by evidence that defendant said "Who, Brooks?" when informed that he was being arrested for statutory rape. Furthermore, the instruction did not constitute an expression of opinion on the evidence.

Am Jur 2d, Trial §§ 1204 et seq.

Appeal by defendant from judgment entered 13 October 1992 by Judge Darius B. Herring, Jr., in Chatham County Superior Court. Heard in the Court of Appeals on 1 March 1994.

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.

COZORT, Judge.

The most significant issue presented by this appeal is whether the trial court erred by admitting testimony from a State's witness that two children "were sexually abused by Pat Figured," the defendant. We hold the admission of that statement was error; however, we find the error was not prejudicial, given the other evidence against the defendant. The procedural history and summary of the evidence follow.

The defendant was arrested on 15 November 1988 and indicted by the Grand Jury of Johnston County on 9 January 1989 for three counts of first degree sex offense involving three children. The indictment alleged that the events occurred sometime in July of 1988. On 28 March 1989, the defendant entered an Alford plea of guilty to all three charges. The State agreed to dismiss the charges against a codefendant, Sonja Hill, who was defendant's girlfriend. Defendant was sentenced to life imprisonment, and the State dismissed the charges against Sonja Hill.

In July of 1990 the outgoing District Attorney of Johnston County re-indicted Sonja Hill on the same charges. On 15 April 1991 defendant filed a motion for appropriate relief asking that his plea of guilty be set aside on the ground that the district attorney had violated the terms of its plea agreement by re-indicting Sonja Hill. The motion was granted on 26 August 1991. Since the newly elected District Attorney of Johnston County had been counsel to Sonja Hill prior to assuming

office, the case was assigned to two assistant district attorneys from another prosecutorial district, and the venue was changed from Johnston County to Chatham County.

On 9 March 1992 the Grand Jury of Chatham County re-indicted defendant for three counts of first degree sex offense involving Child A, aged 2½, Child B, aged 5½, and Child C, aged 2½, occurring between June and October 1988. On 24 March 1992, defendant filed a motion to dismiss for denial of his right to a speedy trial and due process of law. Judge Herring conducted a hearing on this motion on 28 September 1992, the day of trial, and entered an order, with findings of fact and conclusions of law, holding that defendant's constitutional rights were not violated. All three cases were consolidated for trial.

At trial, the State presented evidence that the defendant frequently visited at Miss Polly Byrd's unlicensed home day care, where the three children stayed. The defendant frequently visited Ms. Byrd's home in order to visit Ms. Byrd's daughter, Sonja Hill, who was living there. Defendant stayed at the day-care home frequently until he got a job and thereafter was able to return to the home during the daytime while travelling on company business. Witnesses testified that defendant's car, a distinctive white Corvette, was frequently seen at Ms. Byrd's house during the daytime.

Each child testified that defendant inserted a screwdriver in his or her anus. Two of the children testified that the defendant made a dog urinate and forced the children to drink it.

Dr. Karen Sue St. Claire testified that Child A was referred to her for medical evaluation concerning possible sex abuse. Dr. St. Claire examined Child A on 2 November 1988. She examined Child A's anus and discovered hyperpigmentation and redness around the anus and noted that both sets of anal muscles opened rapidly to a width of 1.7 centimeters. She testified that the hyperpigmentation could be caused by trauma or by infection or by irritation. She further testified that the rapid opening of the anus indicated that something had been repeatedly inserted into the anus from the outside. She indicated that this could have been a screwdriver or a penis. Dr. St. Claire also examined Child B. She testified to having found similar abnormalities in her examination of Child B's rectal area.

Marci Herman-Giddens, a physician's assistant and professor of pediatrics at Duke University, examined Child C on 3 November 1988. Ms. Herman-Giddens testified that Child C's anal muscle would open

and close intermittently and that there was an area of skin that was a different color from normal, and smooth, indicating an area that had been hurt and was in the process of healing. In her opinion this was some type of trauma caused by an object with sufficient force to disrupt the skin. The object could have been a screwdriver.

Nancy Berson, a social worker and coordinator of the Duke Child Protection Team, separately interviewed Child A, Child B and Child C. She testified that in her initial interview with Child A, Child A identified the defendant as the man who hurt her. She further testified that she interviewed Child A on several subsequent occasions to determine if the child's story was consistent and to determine whether Child A's father could have been the perpetrator. She testified that Child B also said that defendant had hurt him, Child A, and Child C with a screwdriver and pointed to his anal area. She further testified that Child B told her about various other acts of sexual abuse of the three children by defendant. Ms. Berson testified that Child C told her in her interview with him in November 1988 that he was not hurt and did not want to talk to her. When she interviewed Child C again the next day he did not say anything about defendant but began stuttering. In a subsequent 6 November interview, Child C began to talk about a "mean man" who hurt him with a screwdriver and who also hurt Child A and Child B. Ms. Berson referred all three children to Dr. Boat and Dr. Everson for treatment.

Dr. Barbara Boat, a child psychologist, treated Child C to help him learn to deal with the trauma he had experienced. Dr. Boat testified that Child C drew a picture and stated during therapy that "Pat hurt my hiney with a screwdriver." She also testified that Child C told her that Pat tore his pants with the screwdriver and that Granny Polly sewed them up.

Dr. Mark Everson, a clinical associate professor of psychology in the Department of Psychiatry at the University of North Carolina, saw Child A and Child B for treatment beginning in November 1988. He treated them in therapy up until trial to reduce their fears and feelings of guilt surrounding the abuse. Dr. Everson testified that in November 1988 Child B told him that defendant inserted the sharp end of a screwdriver into his bottom and into Child C's bottom, inserted his penis into the bottoms of all three children, made Child B and Child C lick white powder off defendant's penis, threatened them to keep them from telling, and made them drink dog urine. Dr. Everson further testified that Child A told him that she saw white stuff come out

of defendant's penis when he stuck it in Child C's bottom and that Child A and Child B told him that defendant threatened to kill their parents if they told on him. Over defense counsel's objection, Dr. Everson testified that, in his opinion, Child A and Child B were sexually abused by defendant.

Defendant made a motion to dismiss for insufficiency of the evidence, which the trial court denied. The jury found defendant guilty on all three counts. From sentences imposing three consecutive life terms, defendant appeals.

Defendant raises five issues on appeal: (1) whether the trial court erred in denying defendant's motion to dismiss for insufficiency of the evidence, (2) whether the trial court erred in allowing Dr. Everson to testify that defendant molested the prosecuting witnesses, (3) whether the trial court properly denied defendant's speedy trial motion, (4) whether the trial court properly admitted testimony of medical and mental health experts containing hearsay statements of the child victims, and (5) whether the trial court erred in instructing the jury on an admission by defendant.

[1] Defendant contends the three convictions in this case rest on evidence which is not substantial. He argues that even though there is some evidence of each element, this evidence cannot be deemed substantial because the children had been subjected to repeated, suggestive interviewing for over four years, the physical evidence was equivocal, and most of the State's case was based on hearsay from adults who were in no better position than the jury to determine the truth.

In reviewing a trial court's denial of a motion to dismiss this Court must consider the evidence in the light most favorable to the State, giving the State the benefit of all permissible favorable inferences. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). To survive a motion to dismiss for insufficiency of the evidence, the State must present substantial evidence of each element of the offenses. *State v. Allred*, 279 N.C. 398, 404, 183 S.E.2d 553, 557 (1971). To be guilty of a first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1), the State must show that defendant engaged in a sexual act "[w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; . . ." N.C. Gen. Stat. § 14-27.4(a)(1) (1993).

Reviewing the evidence in the light most favorable to the State, we find there was substantial evidence as to each element of the three

offenses. The State's evidence showed that defendant had access to the children and opportunity to commit the crimes. The State presented overwhelming medical evidence which was uncontroverted by defendant. Moreover, the State's case was not based completely on hearsay. The three victims identified defendant as the perpetrator in direct testimony and in consistent statements made independently to doctors and psychologists, as well as to their parents.

[2] Defendant next argues that it was reversible error for the trial court to allow Dr. Everson, who was accepted as an expert in psychology and child sex abuse and who treated Child A and Child B, to testify that in his opinion "[Child A and Child B] were sexually abused by Pat Figured."

Defendant first argues that it is error to allow an expert witness to testify to his or her conclusion that the child has been abused. We disagree. This Court has upheld the admission of expert testimony that, in his or her opinion, the prosecuting witness was sexually abused. *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 132 (1994); *State v. Reeder*, 105 N.C. App. 343, 350, 413 S.E.2d 580, 584 (1992); *State v. Speller*, 102 N.C. App. 697, 702, 404 S.E.2d 15, 18, *disc. review denied*, 329 N.C. 503, 407 S.E.2d 548 (1991); *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 656 (1988).

Defendant further argues that such testimony is inadmissible because it merely attests to the truthfulness of the child witness. "Our appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *Bailey*, 89 N.C. App. at 219, 365 S.E.2d at 655 (citations omitted). In *Bailey*, this Court upheld testimony by a social worker and a pediatrician that in their opinion the child had been sexually abused, reasoning that such testimony was not improper testimony as to the credibility of the victim's testimony or to the defendant's guilt or innocence, but constituted proper expert testimony based on each witness's examination of the victim and expert knowledge concerning the abuse of children in general. *Bailey*, 89 N.C. App. at 219, 365 S.E.2d at 656 (1988). *See also Reeder*, 105 N.C. App. 343, 349-50, 413 S.E.2d 580, 583; *Richardson*, 112 N.C. App. 58, 434 S.E.2d 657. In distinguishing such testimony from those cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant, the *Bailey* court noted that the opinion "relates to a diagnosis based on the expert's examination of

the witness." *Bailey*, 89 N.C. App. at 219, 365 S.E.2d at 655 (1988) (citations omitted). Dr. Everson's testimony that the children had been sexually abused related to a diagnosis derived from his expert examination of Child A and Child B in the course of treatment and thus did not constitute improper testimony as to the credibility of the child's testimony. Defendant's reliance on *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), and *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993), to support his argument is misplaced. Those cases did not hold that an expert's opinion that a child had been sexually abused was inadmissible because it merely attests to the truthfulness of the child witness. Rather, in those cases the Court found the opinions inadmissible because the State failed to lay sufficient foundation for the opinions.

Defendant further argues that Dr. Everson's testimony that in his opinion the children were sexually abused *by this defendant* was not helpful to the jury and that the testimony was essentially expert testimony on the guilt of the defendant. We agree.

Dr. Everson's opinion was an expression of opinion as to defendant's guilt and thus violated Rule 702 of the North Carolina Rules of Evidence. In *State v. Faircloth*, 99 N.C. App. 685, 692, 394 S.E.2d 198, 203 (1990), we held that an expert's opinion testimony that " 'it would be improbable that these hairs would have originated from another individual' " "addressed the credibility of other witnesses and was an expression of opinion as to defendant's guilt and thus violated Rules 405(a), 608(a) and 702 of the North Carolina Rules of Evidence." Rule 702 of the North Carolina Rules of Evidence allows a witness qualified as an expert to testify in the form of an opinion where he has "scientific, technical or other specialized knowledge [which] will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." N.C. Gen. Stat. § 8C-1, Rule 702 (1992). The State argues that Dr. Everson's opinion was helpful to the jury because Dr. Everson was in a better position than the jury to evaluate whether the defendant was the perpetrator. The State points out that Dr. Everson was professionally obligated to determine the identity of the abuser in order to prevent further abuse and had brought the children's father in for testing and observation and determined that the father was not the abuser. We nonetheless find that Dr. Everson was in no better position than the jury to determine whether defendant was the perpetrator and hence the admission of his testimony violated Rule 702. Dr. Everson's opinion was based on the same information that had been conveyed to the jury through the testimony of the social

worker and mental health professionals who treated the children and the testimony of the children themselves.

While Dr. Everson's opinion that the children were sexually abused was clearly admissible under prior decisions of this Court, his opinion that the children were sexually abused *by defendant* was not. Dr. Everson's opinion that the children were sexually abused *by defendant* did not relate to a diagnosis derived from his expert examination of the prosecuting witnesses in the course of treatment. It thus constituted improper opinion testimony as to the credibility of the victims' testimony. *Bailey*, 89 N.C. App. at 219, 365 S.E.2d at 655; *Reeder*, 105 N.C. App. at 349-50, 413 S.E.2d at 583; *Richardson*, 112 N.C. App. 58, 434 S.E.2d 657. This testimony was in violation of Rules 405(a) and 608(a) of the North Carolina Rules of Evidence. *State v. Faircloth*, 99 N.C. App. 685, 692, 394 S.E.2d 198, 203 (1990).

We next consider whether the admission of Dr. Everson's opinion constitutes reversible error. Defendant contends that had Dr. Everson's opinion that the children were sexually abused by defendant been excluded, there is a reasonable possibility that the jury would have found him not guilty. We disagree. Having considered the remaining evidence which was properly before the jury, we find there was no reasonable possibility that the admission of the improper testimony affected the jury's decision.

The State presented strong evidence that defendant was the perpetrator. Each child testified defendant inserted a screwdriver into his or her anus. Two of the children testified that the defendant made a dog urinate and forced them to drink it. The children's testimony was corroborated by Ms. Berson, Dr. Boat, and Dr. Everson. They testified to statements the children made to them in the course of diagnosis and treatment which described sexual abuse by the defendant. Dr. Everson testified that, in his opinion, the children had been sexually abused.

In addition, the State presented evidence that defendant had an opportunity to sexually abuse the children. Brooks Hill, Sonja Hill's daughter, testified that during June through October 1988 she and her mother lived with Polly Byrd. Brooks further testified that during this period defendant would occasionally eat lunch at Polly's. Jewel Blackmon, the mother of two of the children, testified that she saw defendant at Polly's six or seven times when she went to pick her children up in the afternoon. Defendant testified that he was the only person who drove his white Corvette. The State presented various witnesses who saw defendant's Corvette parked in Polly's driveway

during daytime hours. The State also presented evidence that Polly had a large yard that she mowed herself. The yard took three hours to mow. Child B testified that Polly "mowed the grass when we got hurt."

Defendant tried to establish that he had no access to the children through his own testimony and the testimony of various other witnesses. Defendant presented witnesses who testified that they did not see defendant at Polly Byrd's. Ann Lee, Polly Byrd's daughter, testified that she would drop in at Polly's and that she never saw defendant there when the children were there. Two of Sonja Hill's sisters testified that they often dropped in on Polly unannounced. Neither remembered having seen defendant there during the week. Linwood and Betsy Byrd testified that they never saw defendant at Polly's. Polly Byrd testified that defendant never had occasion to be alone with the children at the house. Brooks Hill testified that she had seen defendant with the other children on occasion, but never alone with them.

Defendant testified that he was out of work from January 1988 to 18 July 1988, when he was hired by Teletek in Raleigh. He testified that he lived at his mother's house in Concord while searching for a job. He began work on 24 July 1988 at Teletek in Raleigh. He testified that he worked regular hours during July through October, 1988 and that the only times during that period that he went to Smithfield were two or three times in the evenings. It took thirty-five minutes to an hour to drive from Teletek to Polly's residence. Defendant further testified that he and Sonja were not seeing each other at all during the first half of September. Tom Smart testified that defendant worked with him at Teletek, Inc., in Raleigh and that defendant worked from about eight to five, five days a week. Mr. Smart acknowledged that no one kept up with defendant's whereabouts during that time and that everybody in the company frequently had business out of the office. Defendant testified that on two business trips he stopped by Polly's during the daytime hours when the children were there. Defendant's secretary, Deborah Beasley, testified that defendant usually came in early and worked late. She also testified that defendant was rarely away during the day, although he sometimes went out for lunch.

We find that the State established that defendant had sufficient opportunity to sexually abuse the children. Defendant did not present an airtight alibi for his whereabouts between June and October, 1988. Because of the State's evidence of opportunity, the children's testi-

mony identifying defendant as perpetrator, and the corroborating testimony of Ms. Berson, Dr. Boat, and Dr. Everson, we find that there is no reasonable possibility that Dr. Everson's inadmissible testimony affected the jury's verdict.

[3] We next consider whether the trial court properly denied defendant's speedy trial motion. The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. "To determine whether a defendant's right to a speedy trial has been denied, four factors must be examined: the length of the delay, reasons for the delay, defendant's assertion of the right, and prejudice suffered by the defendant." *State v. Joyce*, 104 N.C. App. 558, 568, 410 S.E.2d 516, 522 (1991) (citing *Barker v. Wingo*, 407 U.S. 514, 530, 33 L.Ed.2d 101, 117 (1972)), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992). The factors are considered together in determining whether defendant's Sixth Amendment rights have been violated. *State v. McClain*, 112 N.C. App. 208, 213, 435 S.E.2d 371, 373 (1993) (citing *State v. Joyce*, 104 N.C. App. 558, 568, 410 S.E.2d 516, 522 (1991)).

Defendant contends that the trial court did not apply the test set out by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530, 33 L.Ed.2d 101, 117 (1972), and therefore abused its discretion. The judge's order sets forth in significant detail the procedural history of the case. While it would have been better for the trial court to specifically address the four factors from *Joyce*, we find no error in the judge's findings of fact and conclusion of law that defendant was not prejudiced by the delay.

[4] Defendant next argues that portions of the testimony of witnesses Dr. Everson, Ms. Berson and Dr. Boat containing statements of the children should have been stricken as inadmissible hearsay.

Ms. Berson, a social worker and coordinator of the Duke Child Protection Team, was asked to interview Child A after a doctor at Duke gave Child A a physical examination and found Child A's anal area abnormal. Ms. Berson interviewed Child A to determine what had happened to her and conducted subsequent interviews to determine whether her story was consistent and whether Child A's father could have been the perpetrator. Child A told Ms. Berson that a man hurt her "lulu" a lot of times with a screwdriver and later named the defendant as the perpetrator. Ms. Berson asked that Child B be brought in for an evaluation. During this evaluation, Child B made

statements describing defendant's sexual abuse of Child A, Child B, and Child C. Ms. Berson later interviewed Child C, who made statements about a "mean man" who hurt him on his knee and on his genitals with a screwdriver.

Dr. Everson treated Child A and Child B in therapy between November, 1988 until the time of trial to reduce their fears and feelings of guilt surrounding the abuse. In the course of therapy, Child A and Child B made statements to Dr. Everson describing defendant's sexual abuse of them.

Dr. Boat, a child psychologist, treated Child C to help him learn to deal with the trauma he experienced. Dr. Boat testified to the course of her sessions with Child C from February 1989 through November 1991. Dr. Boat testified that Child C drew a picture and stated that "Pat hurt my hiney with a screwdriver" and that Pat tore his pants with the screwdriver.

Rule 803(4) provides an exception to the hearsay rule for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." N.C. Gen. Stat. § 8C-1, Rule 803(4) (1992). This Court and the Supreme Court have allowed this type of evidence to come in as substantive evidence under Rule 803(4). In *State v. Bullock*, 320 N.C. 780, 783, 360 S.E.2d 689, 690 (1987), the Supreme Court allowed testimony of a mental health professional "as to the statements and demonstrations by the children indicating that they had been sexually abused and that the perpetrator was . . . the defendant, . . ." finding them admissible under Rule 803(4). In *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657, we held statements to a social worker assisting a pediatrician were admissible as substantive evidence under Rule 803(4). In *State v. Jones*, 89 N.C. App. 584, 593, 367 S.E.2d 139, 145 (1988), the testimony of Nancy Berson, a social worker and coordinator and child evaluator for the Duke Child Protection Team, was properly admitted as substantive evidence under Rule 803(4). We find that the children's statements to Ms. Berson, Dr. Everson, and Dr. Boat, like those in *Bullock*, *Richardson* and *Jones*, were made for the purposes of medical diagnosis or treatment and hence were admissible under Rule 803(4).

Defendant also argues that the testimony of Ms. Berson, Dr. Everson, and Dr. Boat should have been excluded or at least re-

stricted by the trial court to show some psychological characteristic of the complaining witnesses placed at issue by the defense. Defendant cites *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), to support his argument. In *Hall*, the Supreme Court held that evidence of post-traumatic stress syndrome suffered by victims of sexual abuse may be admitted for certain corroborative purposes. *Hall*, 330 N.C. at 821, 412 S.E.2d at 890. The Court noted that "[a]lthough we find that evidence of post-traumatic stress syndrome does not alone prove that sexual abuse has in fact occurred, we believe that this should not preclude its admission at trial where the relevance to certain disputed issues has been shown by the prosecution." *Id.* Since there was no evidence of post-traumatic syndrome in this case, the *Hall* decision is clearly inapplicable. We thus overrule this assignment of error.

[5] Finally, defendant argues that the trial court erred in instructing the jury on an admission. During trial, the prosecutor asked defendant on cross-examination what he said to Detective Eatman as he was being arrested for statutory rape. In response to the prosecutor's question whether he said "Who, Brooks?" defendant answered, "No, that was before the arrest, sir." Brooks was Sonja Hill's daughter. On rebuttal the State called Detective Eatman, who testified that, when the defendant was arrested and informed that he had been accused of sexual conduct with a minor, he responded, "Who, Brooks?" Defense counsel objected to the admission of this testimony. After the judge overruled his objection, defense counsel stated that the defendant had already testified to this. The judge asked counsel to approach the bench and then repeated that the objection was overruled.

The trial court stated at the charge conference that he would give the instruction on admissions, and defendant made no objection. The trial court instructed the jury as follows:

> There is some evidence which tends to show that the defendant may have admitted a fact relating to the crime charged in this case. If you find that the defendant made any admission, then you should consider all of the circumstances under which it was made in determining whether or not it was truthful and in determining what meaning and what weight you will give to it.

At the conclusion of the charge defendant stated an objection "for the record" to the instruction on admission, without giving any reason or making any argument.

Defendant argues that the detective's testimony was improper impeachment on a collateral matter through extrinsic evidence. Since defendant failed to specify the grounds for his objection to the detective's testimony, and it is not apparent from the context what specific grounds defendant sought to have the court exclude the detective's testimony, other than the fact that defendant had already testified to the issue, defendant has not preserved this error for review. N.C.R. App. P. 10(b).

Defendant further argues that the admission instruction was not supported by the evidence. We disagree. Defendant's statement "Who, Brooks?" in response to being informed that he was being arrested for statutory rape could be considered an admission. "A response which is not the equivalent of a denial may indicate acquiescence and be considered by the jury for what it is worth." *State v. Thompson*, 332 N.C. 204, 219, 420 S.E.2d 395, 403 (1992). Finally, defendant argues that the judge's instructions set out only the State's contentions and thus constituted an improper expression of judicial opinion in violation of N.C. Gen. Stat. § 15A-1232. We disagree. N.C. Gen. Stat. § 15A-1232 (1988) reads as follows: "In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." This statute does not prohibit the judge from setting out the parties' contentions. However, when the judge does so, he must give equal stress to the contentions of the State and the defendant. N.C. Gen. Stat. § 15A-1232 Official Commentary.

In *State v. McKoy*, 331 N.C. 731, 417 S.E.2d 244 (1992), the Supreme Court held that a substantially similar instruction on an admission was not an impermissible expression of opinion on the evidence. In *McKoy*, the trial court's instructions were as follows:

> There is evidence which tends to show that the defendant has admitted the facts relating to the crime charged in this case. If you find that the defendant made that admission, then you should consider all the circumstances under which it was made in determining whether it was a truthful admission and the weight you will give to it.

McKoy, 331 N.C. at 733, 417 S.E.2d at 246. The Court concluded that the trial court did not err in stating that there was evidence "tending to show" that the defendant had "admitted the facts relating to the crime charged in this case." The Court relied on prior decisions which

held that "[a] trial court's use of the words 'tends to show' in reviewing the evidence does not constitute an expression of opinion on the evidence." *Id.* (citations omitted). The Court also reasoned that the instruction was proper because there was evidence from which the jury could find that the defendant had admitted a fact relating to the crime charged. *Id.* In the case before us, defendant was charged with first degree statutory sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1) (1993). If the jury believed Detective Eatman's testimony, it could reasonably infer that defendant had admitted to having sexual conduct with a minor. We thus hold that the judge's instructions did not constitute an improper expression of judicial opinion on the evidence.

No error.

Chief Judge ARNOLD and Judge LEWIS concur.

CREMORE ALEXANDER, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT

No. 934SC490

(Filed 16 August 1994)

Social Services and Public Welfare § 20 (NCI4th)— food stamp eligibility—encumbered vehicle—no exclusion from eligibility determination

Under the Exclusions from Resource Section of the Resource Eligibility Standards Provision of the Food Stamp Act, a vehicle cannot be excluded from an applicant's eligibility determination as an "inaccessible resource" even if the sale of the vehicle would not provide any significant return to the applicant.

Am Jur 2d, Welfare Laws §§ 26 et seq.

Eligibility for food stamps under Food Stamp Act of 1964 (7 USCS §§ 2011 et seq.). 118 ALR Fed. 473.

Appeal by petitioner from order entered 8 March 1993 by Judge James D. Llewellyn in Onslow County Superior Court. Heard in the Court of Appeals 8 February 1994.

Petitioner, Cremore Alexander, filed an application for Food Stamps with the Onslow County Department of Social Services in July 1992. At the time of the application, petitioner and his wife owned a 1991 GMC Jimmy ("the vehicle"), which was financed, with a balance of $11,236.22 owed. The vehicle's tax value was $10,370.00. The Department of Social Services denied petitioner's application because petitioner's reserve assets exceeded the allowable limit. Petitioner made a timely request for a State Appeal Hearing, which was held on 2 October 1992. The evidence at the hearing showed that the value of petitioner's vehicle was the only impediment to petitioner's food stamp eligibility. Ms. Terri Alexander, petitioner's wife, testified that the vehicle had been purchased in February 1992, when petitioner had been working. The amount originally borrowed was approximately $12,431.00, with payments beginning in March 1992. Petitioner was laid off in June of 1992. He used the vehicle to look for work and his wife used the vehicle to attend school.

The Hearing Officer calculated the reserve value of petitioner's vehicle as being $5,870.00 by subtracting the statutory vehicle allowance amount, $4,500.00, from the tax value of petitioner's vehicle, $10,370.00. In addition, the officer found that petitioner's household was subject to a $2,000.00 reserve limit. Thus, the hearing officer concluded that the reserve value of the vehicle exceeded the household's reserve limit and that the excess reserve in the vehicle rendered petitioner ineligible for benefits. The hearing officer affirmed the decision of the Onslow County Department of Social Services denying petitioner's food stamp application. This denial became respondent's Final Agency Decision on 5 November 1992.

Petitioner timely filed a Petition for Judicial Review. The superior court entered an order affirming the decision of respondent. Petitioner appealed.

Legal Services of the Lower Cape Fear, by Mason Hogan, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Claud R. Whitener, III, for respondent-appellee.

Assistant U.S. Attorney R.A. Renfer, Jr., and Patricia Arzuaga, amicus curiae.

MARTIN, Judge.

Because the hearing officer determined that petitioner's vehicle was the only impediment to petitioner's food stamp eligibility, the single issue presented by this appeal is whether, under the Exclusions from Resource Section of the Resource Eligibility Standards Provision of the Food Stamp Act, a vehicle can be excluded from an applicant's eligibility determination as an "inaccessible resource" if the sale of the vehicle would not provide any significant return to the applicant. Petitioner contends that his vehicle can be excluded from his resource eligibility calculation as an inaccessible resource. The recently amended inaccessible resource provision of the Food Stamp Act effects an exclusion for certain resources which would not provide an applicant with food if sold. Petitioner asserts that the inaccessible resource provision, which is found in the resource eligibility section of the Act, requires respondent to exclude petitioner's vehicle from petitioner's eligibility determination as an inaccessible resource.

Respondent counters that both the plain language of the Food Stamp Act and the legislative history of the Act clearly demonstrate Congressional intent to count vehicles as resources, regardless of a food stamp applicant's equity in the vehicle, and to not exclude a vehicle as an inaccessible resource. Additionally, respondent contends that the Secretary of Agriculture, who is charged with administering the Food Stamp Act, has interpreted the "inaccessible resource" provision of the Act as providing that a vehicle cannot be an inaccessible resource under the Act, and that, according to Federal law, the Secretary's decision is entitled to deference by the courts.

Our review of this case is limited to the question of whether the trial court committed any errors of law. *Tay v. Flaherty*, 90 N.C. App. 346, 348, 368 S.E.2d 403, 404 (1988). In *Tay*, this Court stated:

> [w]hen an appellate court is reviewing the decision of another court—as opposed to the decision of an administrative agency—the scope of review to be applied by the appellate court under G.S. § 150A-52 is the same as it is for other civil cases. That is, we must determine whether the trial court committed any errors of law. See N.C. Gen. Stat. 7A-27(b) (1981) and Rule 10(a) of the North Carolina Rules of Appellate Procedure.

See Amanini v. N.C. Dept. of Human Resources, 114 N.C. App. 668, 443 S.E.2d 114 (1994). In reviewing the actions of the respondent, the trial court held as a matter of law that the decision of the hearing offi-

cer to deny petitioner's food stamp benefits was supported by substantial competent evidence of record and the appropriate State and Federal statutes and regulations. Therefore, our review is limited to the question of whether the trial court's finding that the inaccessible resource provision does not require respondent to exclude petitioner's vehicle from petitioner's resource eligibility determination is correct under Federal law.

Only two provisions of the Act are at issue: 7 U.S.C. § 2014(g)(2), governing the treatment of licensed vehicles, and 7 U.S.C. § 2014(g)(5), governing the treatment of inaccessible resources. Both provisions are part of the "exclusions from resources" section of the Act. 7 U.S.C. § 2014(g)(2) states:

> The Secretary shall, in prescribing inclusions in, and exclusions from, financial resources, . . . include in financial resources . . . any licensed vehicle (other than one used to produce income or that is necessary for transportation of a physically disabled household member . . .) used for household transportation or used to obtain or continue employment to the extent that the fair market value of any such vehicle exceeds $4,500 . . . .

In essence, this provision exempts up to $4,500 of the value of a licensed vehicle, other than those vehicles necessary to produce income or necessary to transport a disabled household member, from the computation of an applicant's financial resources to determine eligibility under the Act. The regulation governing the licensed vehicles provision summarizes the treatment of each licensed vehicle under the Act as follows:

> First, it will be evaluated to determine if it is exempt as an income producer or as a home. If not exempt, it will be evaluated to determine if its fair market value exceeds $4,500. If worth more than $4,500, the portion in excess of $4,500 for each vehicle will be counted as a resource. The vehicle will also be evaluated to see if it is equity exempt as the household's only vehicle or necessary for employment reasons. If not equity exempt, the equity value will be counted as a resource. If the vehicle has a countable market value of more than $4,500 and also a countable equity value, only the greater of the two amounts shall be counted as a resource.

7 C.F.R. 273.8(h)(6). The regulation explicitly provides that any amount of value in a vehicle in excess of $4,500 is included in an

applicant's resource level when determining eligibility under the Food Stamp Act. Furthermore, an applicant's equity in a vehicle is only considered when evaluating a second vehicle.

The "Inaccessible Resource" provision, as amended by Congress in 1990 and 1991, sets out an exemption for resources which a household would not be able to sell for any significant return. The 1990 amendments to 7 U.S.C. § 2014(g)(5) state that:

> The Secretary shall promulgate rules by which State agencies shall develop standards for identifying kinds of resources that, as a practical matter, the household is unlikely to be able to sell for any significant return because the household's interest is relatively slight or because the cost of selling the household's interest would be relatively great. Resources so identified shall be excluded as inaccessible resources.

The 1991 amendments to this provision added the following:

> A resource shall be so identified if its sale or other disposition is unlikely to produce any significant amount of funds for the support of the household. The Secretary shall not require the State agency to require verification of the value of a resource to be excluded under this paragraph unless the State agency determines that the information provided by the household is questionable.

These two amendments became effective 1 February 1992. The Secretary has not yet issued final regulations to guide the state agencies in determining what types of resources may be excluded from an eligibility determination. The former regulation governing inaccessible resources, which is still in force, lists several types of resources that may be excluded as inaccessible. The regulation states:

> Resources having a cash value which is not accessible to the household, **such as but not limited to**, irrevocable trusts, security deposits on rental property or utilities, property in probate, and real property which the household is making a good faith effort to sell at a reasonable price and which has not been sold . . . .

7 C.F.R. § 273.8(e)(8). (Emphasis added.)

Based on the statutory provision and regulations governing licensed vehicles, the hearing officer found that the reserve value of

petitioner's vehicle was $5,870.00, since the vehicle's $10,370.00 tax value exceeded the $4,500.00 exemption amount by that amount. Petitioner does not quarrel with the calculations, rather, he maintains that, because he has no equity in his vehicle, his vehicle qualifies as an inaccessible resource since the sale or disposition of the vehicle would not provide any significant amount of funds for support of the household. Therefore, petitioner argues that his vehicle should be excluded from his eligibility determination.

7 U.S.C. § 2014(g)(2) mandates that petitioner's vehicle be valued at fair market value; however, 7 U.S.C. § 2014(g)(5) mandates that any resource which is unlikely to provide any significant return upon its sale or disposition shall not be counted as a resource. Nowhere does the Act state that the inaccessible resource provision shall not apply to licensed vehicles; nor does the Act provide for the converse situation, that a vehicle can be excluded from an eligibility determination under the inaccessible resource provision. Thus, we must determine how these separate provisions interact. In so doing, we must look to the legislative history of the Act for guidance as to the scope Congress intended for the inaccessible resource provision.

Respondent contends that the legislative history clearly demonstrates that Congress did not intend to exclude heavily encumbered vehicles from the determination of a household's resources under the inaccessible resource provision. As evidence of this intent, respondent traces changes in the Act concerning the valuation of licensed vehicles. Prior to the passage of the Food Stamp Act of 1977, the Secretary, by regulation, had been exempting entirely from such determination one licensed vehicle used for household transportation as well as all vehicles necessary for employment. *H.R. Rep. 464, 95th Congress., 1st Sess.* 78-80, 88; 1977 U.S.C.A.A.N. 2056-58, 2066. However, in 1977 Congress changed the treatment of vehicles under the Act to require the valuation of vehicles at their fair market value and to exclude only a select group of vehicles such as vehicles used to produce income. During this same period, the regulations changed to explicitly state that encumbrances are not to be considered when determining whether a vehicle exceeds the $4,500 exemption. 43 Fed. Reg. 18884-85 (5/2/75); 43 Fed. Reg. 47862-64, 47902 (10/17/78); see also current 7 C.F.R. 273.8(h)(3), (4), and (5). In our view, the legislative history concerning licensed vehicles clearly indicates that a licensed vehicle is valued at its fair market value for a resource determination under the Food Stamp Act.

Moreover, on 20 December 1993, the United States Department of Agriculture announced its intention to conduct a demonstration project under the authority of § 17(h) of the Food Stamp Act as mandated by Congress. The purpose of this demonstration project, titled The Food Stamp Program's Vehicle Exclusion Limit Demonstration (VELD), is to:

> evaluate the effects, in both rural and urban areas, of including in financial resources under section 5(g) of the Act the fair market value of licensed vehicles to the extent the value of each vehicle exceeds the statutory base figure ($4,500 until August 31, 1994), but excluding value of (1) any licensed vehicle that is used to produce earned income, necessary for transportation of an elderly or physically disabled household member, or used as the household's home; and (2) any licensed vehicle used to obtain, continue, or seek employment (including travel to and from work); used to pursue employment-related education or training; or used to secure food or the benefits of the food stamp program.

Administrative Notice Vol. 58-242 (Monday, Dec. 20, 1993). In essence, this provision's purpose is to determine the effect of adding to the category of exempted vehicles any licensed vehicle which a household uses to find work, to travel to and from work, to pursue education or training for employment purposes or to secure food or the benefits of the food stamp program. In the Administrative Notice creating this demonstration program, the Department of Agriculture stated:

> Concern is escalating that many otherwise eligible households with low-incomes are being denied food stamp benefits because they own vehicles with too high a fair market value or equity value notwithstanding the fact that such vehicles are used for essential transportation between home, work, shopping and medical services. Unemployed households may also face a difficult decision between having a vehicle to look for work or selling the vehicle in order to qualify for food stamps. Congress has mandated these demonstration projects to enable a careful examination of the impact of liberalizing application of the resource test to vehicles.

Id. This Congressionally mandated project demonstrates Congressional understanding of the dilemma facing someone like petitioner who is forced to maintain a vehicle in order to look for work or to sell the vehicle to qualify for food stamp benefits. However, until Con-

gress sees fit to change the statutory and regulatory provisions covering licensed vehicles, the treatment of licensed vehicles will still require counting towards an applicant's financial resources the value of applicant's vehicle which exceeds the statutory vehicle exemption level. Thus, the entire legislative history of the licensed vehicle provision unquestionably demonstrates that the value of a licensed vehicle above $4,500 is counted in an applicant's resource determination.

Acknowledging the legislative history of the licensed vehicle provisions reflect the intent of Congress to exclude encumbrances when determining eligibility under the Act, petitioner argues that the legislative history of the inaccessible resource provision effectuates a new exemption for a licensed vehicle if the sale or disposition of such vehicle is unlikely to provide funds for the support of the household. Petitioner's argument is not without merit.

Support for petitioner's position is found in congressional hearings which concerned the amendments to the inaccessible resource provision. In the hearings, Sen. Patrick Leahy, Chairman of the Senate Agriculture Committee stated:

> The program's resource rules are intended to deny eligibility to persons with other, readily available means of obtaining food. It serves no purpose to deny a household food stamps because of an asset whose disposition would be costly relative to its value and therefore would not yield the household any significant cash.

137 Cong.Rec. S16673. The House Report, while illustrating this provision with the example of heir property, expounded on the purpose behind the resource provision by stating:

> The purpose of the program's resource rules is to limit food stamps to those who really need them. They insure that the Federal Government does not provide assistance to households with substantial resources. This purpose is obviously not served when the resources cannot be sold.

H.Rep. No. 569 (Part 1), 101st Cong., 2d Sess., 429-430 (July 3, 1990). Because petitioner has no equity in his vehicle, selling the vehicle would not provide resources which petitioner's family could use to buy food. Consequently, petitioner asserts that excluding petitioner's vehicle as an inaccessible resource does not offend the purpose of the Act's resource rules.

Respondent contends, however, that the legislative history of the inaccessible resources provision demonstrates that Congress intended to limit application of the provision to resources, like heir property, which are not readily liquidated. According to its argument, the 1990 and 1991 amendments to the inaccessible resource provision were simply paperwork saving devices.

In *Jackson v. Jackson*, 857 F.2d 951 (4th Cir. 1988), the Fourth Circuit classified three types of resources that qualify as inaccessible resources. The classifications include resources which have a substantial or legal impediment preventing sale, resources which cannot be sold as a practical matter, and resources which should not be sold because of policy considerations. Respondent argues that petitioner's vehicle does not meet any of these classifications. However, it would certainly be impractical for petitioner to sell his vehicle since he owes more money than it is worth. Furthermore, the outstanding loan on the car, in effect, works to prevent a sale since petitioner cannot afford to pay the amount of the loan above the current value of the vehicle. Moreover, *Jackson* was decided prior to the 1990 and 1991 amendments to the inaccessible resource provision. Consequently, we find nothing in the legislative history of the inaccessible resource provision to keep petitioner's vehicle from being excluded from petitioner's resource determination as an inaccessible resource.

Since the legislative histories of the two provisions do not provide an answer as to the scope of the inaccessible resource provision, we must turn to the Secretary of Agriculture's interpretation. Administrative Notice A-24-92, dated 3 February 1992, states, in pertinent part: "**We have received inquiries asking if the general provisions of Section (g)(5) of the Food Stamp Act (FSA) are applicable to vehicles. The answer is no.**" Thus, the Secretary's interpretation supports respondent's contention that a licensed vehicle may not be excluded from an applicant's resource eligibility calculation as an accessible resource.

Petitioner challenges the validity of Administrative Notice A-24-92, and therefore our consideration of it, on the grounds that it has not been promulgated in accordance with the notice and comment procedures of the Administrative Procedure Act, ("APA"). However, the notice and comment procedures are only applicable to legislative rules; not interpretative rules. 5 U.S.C. § 553(b)(A) (Unless a statute provides otherwise, the notice and comment requirements do not apply to interpretative rules.) An agency statement is an inter-

pretative rule if it "effectuates no change in policy or merely explains or clarifies law or regulations." *Allen v. Bergland*, 661 F.2d 1001, 1007 (4th Cir. 1981), *quoting Gosman v. United States*, 573 F.2d 31, 39 (U.S. Court of Claims 1978). Administrative Notice A-24-92 relies on the explicit provision of 7 U.S.C. § 2014(g)(2) concerning licensed vehicles in its ruling that licensed vehicles are not to be excluded an eligibility determination as inaccessible resources. Therefore, Administrative Notice A-24-92 is simply an interpretive rule, not subject to APA's notice and comment procedures, because it clarifies the law and regulations concerning licensed vehicles and because it effectuates no change in the treatment of licensed vehicles.

The Food Stamp Act expressly charges the United States Secretary of Agriculture with implementation and administration of the Food Stamp program. 7 U.S.C. § 2014(b). The United States Supreme Court has recognized:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-43, 81 L.E.2d 694, 702-03 (1984). Since, we have already determined that Congress has not spoken to the precise issue of whether or not a licensed vehicle can ever qualify as an inaccessible resource under the Act, this Court must determine whether the agency's interpretation is based on a permissible construction of the statute.

In *Chevron*, the court enunciated the principle that an agency's interpretation concerning the statute it is charged with administering is entitled to deference by reviewing courts. The court stated:

> considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to

> administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

Id. at 844, 81 L.E.2d at 704. (Citations omitted.) Thus, the Secretary's interpretation of the Food Stamp Act and the accompanying regulations must be accorded great deference as long as the Secretary's interpretation is based on a permissible construction of the statute.

To sustain the Secretary's interpretation, we do not have to find that the Secretary's construction is the only reasonable construction, nor do we have to find that it is the construction which this Court would have reached had the question arisen first in judicial proceedings. *Udall v. Tallman*, 380 U.S. 1, 16, 13 L.Ed.2d 616, 625 (1965). Instead, this Court need only find that the agency's interpretation is a reasonable interpretation of the statute. *See Com. of Mass. v. Lyng*, 893 F.2d 424 (1st Cir. 1990); *State of N.Y. v. Lyng*, 829 F.2d 346 (2nd. Cir. 1987); *Biggs v. Lyng*, 823 F.2d 15 (2nd. Cir. 1987) (upholding Secretary's interpretation of income as reasonable).

The Secretary's interpretation that a licensed vehicle cannot be excluded as an inaccessible resource is a reasonable and permissible interpretation of the statute, and is grounded upon Congress' explicit treatment of licensed vehicles under the Act. Therefore, we accord it the deference to which it is entitled and affirm the trial court's order which found that the Hearing Officer's decision to deny petitioner food stamps based on petitioner's excess resources is supported by the appropriate State and Federal statutes and regulations and that the inaccessible resource provision does not require respondent to exclude petitioner's vehicle from petitioner's resource eligibility determination is correct under Federal law.

Affirmed.

Chief Judge ARNOLD and Judge WYNN concur.

CREEKSIDE APARTMENTS, PLAINTIFF-APPELLEE v. MYRTLE POTEAT, CAREY SILER, RODNEY CURRIE, ROVENA DAWKINS, DEFENDANTS-APPELLANTS

No. 9315DC894

(Filed 16 August 1994)

1. **Landlord and Tenant § 60 (NCI4th)— breach of implied warranty of habitability—trial court's denial in contradiction of own finding**

The trial court erred in denying defendants' counterclaims for breach of implied warranty of habitability and for damages for violation of N.C.G.S. § 42-42, a part of the Residential Rental Agreements Act, since the court's denial was in contradiction of the court's findings of fact and conclusion that the premises leased to defendants were "unfit and uninhabitable as a matter of law because of cockroach infestation and the presence of safety hazards and unauthorized persons in vacant apartments," and since the court's conclusion mandated a further conclusion that plaintiff violated N.C.G.S. § 42-42 and hence breached the implied warranty of habitability; furthermore, the trial court erred in failing to determine the exact period for which the premises were not in compliance with Chapter 42.

Am Jur 2d, Landlord and Tenant §§ 597 et seq., 767 et seq.

Modern status of rules as to existence of implied warranty of habitability or fitness for use of leased premises. 40 ALR3d 646.

2. **Landlord and Tenant § 60 (NCI4th)— abatement of rent—failure to determine period of uninhabitability—effect of difficulty in operating complex and repair efforts**

Where the trial court did not determine the exact period for which the premises in question were unfit and uninhabitable, the court on appeal could not determine the period for which defendants would have been entitled to abatement damages; however, plaintiff's difficulty in operating the apartment complex would not excuse a breach of N.C.G.S. § 42-42, nor would plaintiff's reasonable efforts to repair allow the trial court to deny rent abatements.

Am Jur 2d, Landlord and Tenant § 612.

Measure of damages for landlord's breach of implied warranty of habitability. 1 ALR4th 1182.

3. Unfair Competition or Trade Practices § 12 (NCI4th)—premises unfit for habitation—threatening notices from landlord to tenants—unfair trade practices claim improperly dismissed

The trial court erred in dismissing defendants' counterclaims for unfair practices in violation of N.C.G.S. § 75-1.1 where plaintiff maintained an apartment building which was infested with cockroaches, contained safety hazards, and had vacant apartments with unauthorized persons using them; plaintiff had due notice of problem conditions and Code violations at the premises and did not make reasonable efforts to alleviate these conditions; after the premises were declared unfit and uninhabitable by the City Inspector, plaintiff continued to collect rent on the premises; plaintiff warned tenants that anyone calling the City of Burlington prior to making a repair request to plaintiff would be evicted; plaintiff distributed a notice which stated that, if a resident had any unauthorized person residing with them, "this will be your thirty day notice"; and plaintiff's conduct was immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers.

Am Jur 2d, Consumer and Borrower Protection § 291.

Coverage of leases under state consumer protection statutes. 89 ALR4th 854.

4. Landlord and Tenant § 60 (NCI4th); Equity § 3 (NCI4th)—defendants ordered to vacate premises—premises unfit for habitation—clean hands doctrine inapplicable—counterclaims moot

The trial court did not err in ordering defendants to vacate premises and in holding that defendants' counterclaims for possession were moot, since the trial court found the premises to be unfit for human habitation; the city code provided that any building found by the inspector to be unfit for habitation could not be occupied; the application of this section was not limited to premises which had been condemned; the trial court was not granting equitable relief sought by plaintiff when it ordered the premises vacated so that the doctrine of clean hands was inapplicable; and because the trial court did not order defendants to

vacate due to nonpayment of rent, the trial court properly denied defendants' motions to dismiss and correctly concluded that defendants' counterclaims were moot.

Am Jur 2d, Landlord and Tenant § 609.

Appeal by defendants from order entered 2 February 1993 by Judge Spencer B. Ennis in Alamance County District Court. Heard in the Court of Appeals 22 April 1994.

Joe A. Barringer, Pro Se, for plaintiff appellee.

North State Legal Services, Inc., by Terry C.J. Reilly, for defendant appellants.

COZORT, Judge.

In this case, plaintiff initiated proceedings to evict defendants from plaintiff's apartments because defendants had not paid their rent. Defendants alleged the premises were unfit and counterclaimed for rent abatement, breach of the implied warranty of habitability, and damages under the unfair practices statutes. The trial court found the premises unfit and ordered partial abatement of rent owed by defendants. The trial court denied defendants' counterclaims for breach of the implied warranty of habitability and for unfair trade practices. We find the trial court erred in not ordering additional abatement and in denying these two counterclaims of defendants. We remand for further proceedings on these issues. The facts and procedural history follow.

Plaintiff, the owner of Creekside Apartments, initiated summary ejectment actions in small claims court against defendants on 23 September 1992 for nonpayment of rent. In the actions against defendants Poteat and Siler, the magistrate granted judgments for possession and back rent owed to plaintiff and awarded a rent abatement to defendant Siler. The magistrate dismissed the actions against defendants Currie and Dawkins. Defendants Poteat and Siler and plaintiff landlord appealed to Alamance County District Court, where the four cases were consolidated.

Defendants Poteat, Siler, Currie, and Dawkins each moved to allow amended answer and counterclaim, which motions were allowed. In their amended answer and counterclaim, defendants Dawkins and Poteat asserted as a defense plaintiff's waiver of their failure to pay rent. Each defendant further asserted as defenses,

among other things, plaintiff's unlawful eviction attempts in violation of N.C. Gen. Stat. §§ 42-25.6 and 42-25.9 (1984) and breach of implied warranty of fitness. With respect to plaintiff's breach of implied warranty of fitness, defendants alleged that plaintiff knowingly leased the premises with serious defects which include, among other things: cockroach infestation, unreliable heat and air conditioning, unreliable appliances, leaking and stopped up plumbing, apartments are not weathertight, entire apartment building in unsafe disrepair, no lights in hallway and common areas, dumpsters not emptied regularly, mice in Dawkins' apartment, no smoke detector in Poteat's apartment, faulty smoke detector wiring in Currie's apartment, holes in ceiling of Currie's building, exposed electrical wires in Poteat's apartment, faulty wiring in apartments of Currie, Dawkins, and Siler, and no locks in the doors of Siler's apartment. Each defendant sought retrospective and prospective rent abatement, plus special or consequential damages for breach of implied warranty of fitness.

Each defendant made counterclaims for, among other things, rent abatements and compensatory damages for breach of implied warranty of habitability and treble damages for unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 (1988).

The case was heard before the Honorable Spencer B. Ennis in Alamance County District Court. On 2 February 1993 Judge Ennis entered a judgment containing, among others, these conclusions:

> 97. Prior to initiation of its Small Claims actions in Summary Ejectment against defendants, and prior to July, 1992, plaintiff had had difficulty operating the complex due to unreliable managerial and maintenance staff, and poor co-operation from some residents.
>
> 98. Plaintiff has since made, and continues to make reasonable efforts to alleviate this difficulty. . . .
>
> 99. Prior to that time, plaintiff did not make reasonable efforts to alleviate problem conditions and/or Code violations at the premises; in some instances, plaintiff did not have reasonable notice concerning problem conditions.
>
> * * * *
>
> 104. Plaintiff has had due notice of problem conditions and Code violations at the premises. . . .

105. [T]hat plaintiff unreasonably delayed in making repairs to the air conditioning and the balcony rail at this [1925-C] apartment.

106. The Court finds no evidence that problems with the heating and air conditioning systems in the other defendants' apartments caused those apartments to be unreasonably cold or hot. . . .

* * * *

108. Plaintiff has had notice . . . of the infestation at . . . the Curries' apartment [and] had due notice of the roof leaks, the defective plumbing and carpet in that apartment, . . . [and] did not timely repair the roof leaks nor the carpet, although the carpet problem is a minor defect. The Court further finds that . . . the plumbing was timely repaired.

109. Plaintiff has had due notice of the plumbing and heating/air conditioning problems in . . . defendant Poteat's apartment [and] . . . plaintiff made reasonable efforts to make, and did timely make repairs to that system and to the plumbing. . . .

110. Plaintiff has had due notice of the infestation, the plumbing and air conditioning problems, and the rodents in . . . defendant Dawkins's apartment [and] . . . of the defective stairway and absent hall lighting in [defendant's] building . . . . [P]laintiff timely made repairs to the plumbing and air conditioning, and . . . repairs to the stair and the hall light were made within a reasonable time.

* * * *

112. Since at least August of 1991, there has been a serious, ongoing cockroach problem at the premises. Plaintiff cannot completely exterminate the cockroaches by fumigation or other means, while the premises are occupied by defendants. Within the last two (2) months, and particularly since December 8th, 1992, plaintiff has made reasonable efforts to alleviate the cockroach infestation, without success.

113. Since at least October of 1991, there have been vacant apartment units in the four (4) buildings in which defendants' apartments are located. Plaintiff has had written notice of this . . . . Unauthorized persons have gained entry to various apartment units, and pose continuing risks to the health and safe-

ty of the defendants. Plaintiff has been unable to prevent unauthorized persons from gaining entry to vacant apartment units in the four (4) buildings in which defendants' apartments are located.

114. Plaintiff is in the process of installing deadbolt locks at the vacant apartment units at the complex and is now taking reasonable steps to secure the vacant units. Since December 8th, 1992, plaintiff has made reasonable efforts to make these and other necessary repairs. Despite its reasonable efforts plaintiff has not alleviated the cockroach infestation, nor has plaintiff prevented unauthorized persons from gaining access to vacant apartment units in the four (4) buildings in which defendants live.

The court further concluded that each defendant failed to pay rent or to timely pay rent and thus breached the rental contract with plaintiff. The court also concluded:

125. Since at least December 8, 1992, plaintiff has failed to maintain the premises leased to defendants in compliance with the requirements of N.C.G.S. Chapter 42 or the minimum housing Code of the City of Burlington, and the health and safety of defendants cannot be assured.

126. On December 8th, 1992 and on January 26th, 1993, the premises leased to defendants were unfit and uninhabitable as a matter of law, pursuant to N.C.G.S. Chapter 42 and the minimum housing Code of the City of Burlington, due to the health and safety hazards posed, *inter alia*, by the ongoing cockroach infestation and by the presence of safety hazards and unauthorized persons in vacant apartments. For these and the foregoing reasons, defendants are entitled to particular abatements of rent, limited to a retrospective period of three (3) years.

The court denied defendants' claims of unlawful eviction attempts. The court concluded that notices delivered in January 1992 violated the provisions of N.C. Gen. Stat. § 75-50 *et seq.* The court held there was no evidence that defendants were damaged thereby and found insufficient evidence to base any award for special or consequential damages, including moving expenses, to defendants.

The court then ordered and decreed:

131. Despite reasonable efforts made in the last two (2) months, plaintiff has failed to maintain the premises in compli-

ance with law and the health and safety of defendants cannot be assured. Pursuant to the Code, § 14-103(b) and in exercise of this Court's equitable discretion to protect defendants, by reason of the uninhabitability of the premises, defendants shall vacate the premises by no later than the lst day of March, 1993. . . . Counterclaims of waiver asserted by defendants Poteat, Dawkins, and Currie are moot.

* * * *

134. Defendants have failed to show that they have been damaged by the notices delivered by plaintiff in January, 1992, as plaintiff made no effort to collect any sums demanded in the notice and defendants demonstrate no harm suffered through their receipt of these notices. As the terms of both of these notices are violative of the provisions of G.S. §75-50 *et sequa*, defendants are awarded nominal damages . . . of $1.00 each.

135. By reason of plaintiff's reasonable efforts to make repairs in the past two (2) months, there shall be no rent abatement pertinent to the premises leased to defendants for the months of December, 1992 or January, 1993.

136. Defendants' Motions for Injunctive Relief are granted in part. By reason of the provisions of the Code, § 14-103(b), plaintiff shall not charge defendants any rent for the month of February, 1993, for the premises.

The court determined the amount of rent owed by each defendant and abated it for the months of July, 1992 through November, 1992 "in compensation for plaintiff's violations of the minimum housing Code of the City of Burlington, pursuant to N.C.G.S. § 42-42." The court denied defendants' counterclaims for attempted illegal eviction, violation of N.C. Gen. Stat. § 42-42, including breach of the implied warranty of habitability, and Unfair Trade Practices, as well as defendants' motions for moving expenses, special damages, and/or consequential damages. Defendants appeal.

Defendants assign the following errors on appeal: (1) the trial court's denial of defendants' counterclaims for breach of implied warranty of habitability and damages for violation of N.C. Gen. Stat. § 42-42, (2) the trial court's denial of defendants' counterclaims for unfair practices in violation of N.C. Gen. Stat. § 75-1.1, (3) the trial court's denial of defendant's motions to dismiss, and (4) the trial court's conclusion that defendants were entitled to only nominal

damages for plaintiff's violation of N.C. Gen. Stat. § 75-50. For the reasons discussed below, we reverse the trial court's denial of defendants' counterclaims for breach of implied warranty of habitability and for unfair practices. We also reverse the order granting partial abatement. The judgment is otherwise affirmed.

[1] We first consider whether the trial court erred in denying defendants' counterclaims for breach of implied warranty of habitability and for damages for violation of N.C. Gen. Stat. § 42-42, a part of the Residential Rental Agreements Act. Defendants argue that the trial court erred in denying its claims for breach of implied warranty of habitability and damages for violation of that statute because the trial court's denial is in contradiction of the court's findings of fact and conclusions of law. We agree.

"By the enactment in 1977 of the Residential Rental Agreements Act, N.C. Gen. Stat. Secs. 42-38 *et seq.*, our legislature implicitly adopted the rule, now followed in most jurisdictions, that a landlord impliedly warrants to the tenant that rented or leased residential premises are fit for human habitation." *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 366, 355 S.E.2d 189, 192 (1987). "The implied warranty of habitability is co-extensive with the provisions of the Act." *Id.* (citation omitted). N.C. Gen. Stat. § 42-42(a) (1984), which requires landlords to provide fit premises, provides in pertinent part:

> (a) The landlord shall:
>
> (1) Comply with the current applicable building and housing codes . . . to the extent required by the operation of such codes; . . .
>
> (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;
>
> (3) Keep all common areas of the premises in safe condition; and
>
> (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating . . . air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations.

These statutory requirements create an implied warranty of habitability, such that a landlord "warrants to the tenant that . . . [the]

premises are fit for human habitation." *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. at 366, 355 S.E.2d at 192. "Tenants may bring an action for breach of the implied warranty of habitability, seeking rent abatement, based on their landlord's noncompliance with N.C.G.S. Sec. 42-42(a)." *Cotton v. Stanley*, 86 N.C. App. 534, 537, 358 S.E.2d 692, 694 (1987). "The rent abatement is calculated as the difference between the fair rental value of the premises if as warranted (*i.e.*, in full compliance with N.C.G.S. 42-42(a)) and the fair rental value of the premises in their unfit condition ('as is') plus any special and consequential damages alleged and proved." *Id.* A tenant who has withheld rent may also recover damages for breach of the covenant of habitability, but damages of rent abatement can include only those amounts actually paid by defendant for substandard housing. *Allen v. Simmons*, 99 N.C. App. 636, 642, 394 S.E.2d 478, 482 (1990).

The trial court's denial of defendants' claims for violation of § 42-42 and for breach of implied warranty of habitability was inconsistent with its conclusion that:

> On December 8th, 1992 and on January 26th, 1993, the premises leased to defendants were unfit and uninhabitable as a matter of law, pursuant to N.C.G.S. Chapter 42 and the minimum housing Code of the City of Burlington, due to the health and safety hazards posed, *inter alia*, by the ongoing cockroach infestation and by the presence of safety hazards and unauthorized persons in vacant apartments. For these and the foregoing reasons, defendants are entitled to particular abatements of rent, limited to a retrospective period of three (3) years.

The court determined the amount of rent owed by each defendant and abated it for the months of July, 1992 through November, 1992 "in compensation for plaintiff's violations of the minimum housing Code of the City of Burlington, pursuant to N.C.G.S. § 42-42." The trial court further concluded that there is insufficient evidence to base any award for special or consequential damages, including moving expenses, to defendants.

The conclusion quoted above mandates a further conclusion that plaintiff violated § 42-42(a)(1), (2), and (3) and hence breached the implied warranty of habitability. Since the court should have found that plaintiff breached the implied warranty of habitability it was error to not award abatement damages to defendants for that breach. Defendants were entitled to rent abatement for the period during which the premises were unfit. *See Cotton v. Stanley*, 86 N.C. App.

534, 358 S.E.2d 692. With respect to the months which defendants did not pay rent, damages of rent abatement can only include the amounts they actually paid for substandard housing. *Allen v. Simmons*, 99 N.C. App. 636, 642, 394 S.E.2d 478, 482 (1990). Since the trial court abated rent for July 1992 through November, 1992 due to plaintiff's violation of § 42-42, the trial court found the premises unfit during that period. Thus, we deem the award of abatement for that period as an award for breach of the implied warranty of habitability. However, the trial court failed to determine the exact period for which the premises were not in compliance with Chapter 42. The trial court concluded that "[s]ince at least December 8, 1992 plaintiff has failed to maintain the premises leased to defendants in compliance with the requirements of N.C.G.S. Chapter 42" and that the premises were unfit and uninhabitable at least as of 8 December 1992 and 26 January 1993. We must remand to the trial court for (1) a determination of the exact period during which the defendants' apartments were unfit and (2) entry of an order for rent abatement damages covering this entire period. We note that defendants argue in their brief that they are entitled to special and consequential damages under this claim. Defendants fail to point out, however, what those damages are and what evidence supports them. That argument is thus deemed abandoned.

[2] Defendants also assign as error the trial court's decision to deny rent abatements to defendants Dawkins and Poteat prior to July 1992 and to deny any rent abatements for December 1992 and January 1993. The trial court concluded that prior to July 1992, plaintiff had difficulty operating the complex due to unreliable managerial and maintenance staff, poor cooperation from some residents, and that plaintiff did not make reasonable efforts to alleviate problem conditions and code violations at the premises. The trial court also noted that plaintiff has discharged some members of its maintenance staff and hired a new resident manager and maintenance supervisor in July 1992. Defendants contend that the court denied rent abatements prior to July 1992 solely because plaintiff retained new staff at that time. Since the trial court did not determine the exact period for which the premises were unfit and uninhabitable, we cannot determine whether the defendants would have been entitled to abatement damages for the period preceding July 1992. Thus, we are unable to determine whether the trial court erred by failing to award abatement damages prior to July 1992. However, we do note that plaintiff's difficulty in operating the complex does not excuse a breach of § 42-42. Thus, on

remand, if the trial court finds the premises unfit and uninhabitable prior to July 1992, it may not deny rent abatement because of plaintiff's difficulty in operating the complex.

Defendants further contend that given the trial court's conclusion that the premises were unfit and uninhabitable during December 1992 and January 1993, it was error for the court to conclude that plaintiff's repair efforts during December 1992 and January 1993 were reasonable and to deny rent abatements for those months because of plaintiff's reasonable efforts to make repairs. We agree. The trial court concluded that despite reasonable efforts in the last two months plaintiff failed to maintain the premises leased in compliance with the requirements of Chapter 42 or the City Code. Since the trial court in essence concluded that plaintiff violated § 42-42, the trial court could not deny rent abatements for December and January because of plaintiff's reasonable efforts to repair during those months.

[3] We next consider whether the trial court erred in denying defendants' counterclaims for unfair practices in violation of N.C. Gen. Stat. § 75-1.1. Defendants argue that plaintiff's failure to maintain the dwellings in a safe, fit, and habitable condition and subsequent demands for payment of rent constitute an unfair and deceptive trade practice. We agree, and we reverse the trial court's denial of defendants' counterclaims.

Chapter 75 was created to "provide means of maintaining 'ethical standards of dealings . . . between persons engaged in business and the consuming public' and to promote 'good faith and fair dealings between buyers and sellers. . . .' " *Allen v. Simmons*, 99 N.C. App. 636, 643, 394 S.E.2d 478, 483 (1990). In order to prevail under Chapter 75, a litigant must prove that the other party committed an unfair or deceptive act or practice, that the action in question was in or affecting commerce, and that said act proximately caused actual injury to the litigant. *Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992). Conduct is unfair or deceptive if it has the capacity or tendency to deceive the average consumer. *Id.* Proof of actual deception is not required. *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 461, 400 S.E.2d 476, 482 (1991). A trade practice is unfair within the meaning of § 75-1.1 "when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980) (citation omitted). "While an act or practice which is unfair may also

be deceptive, or vice versa, it need not be so for there to be a violation of the Act." *Id.* Chapter 75 applies to residential rentals because the rental of residential housing is commerce pursuant to § 75-1.1. *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E.2d 574, 583 (1977).

The facts in the instant case are similar to the facts in *Allen v. Simmons*. In *Allen v. Simmons*, 99 N.C. App. 636, 394 S.E.2d 478 (1990), this Court held that a jury could find that plaintiff committed an unfair trade practice where defendant's evidence was that plaintiff leased to defendant a house which contained numerous defects which existed throughout defendant's tenancy and rendered the house unfit and uninhabitable. Plaintiff failed to respond to numerous notices about the unfit and uninhabitable state of the house. Despite the unfit conditions of the house, plaintiff attempted to collect rent after defendant discontinued payments. We held that plaintiff's behavior can be considered "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Allen*, 99 N.C. App. at 645, 394 S.E.2d at 484.

In the instant case, the trial court concluded that plaintiff had due notice of problem conditions and Code violations at the premises and did not make reasonable efforts to alleviate these conditions and violations until July 1992. Since at least August 1991, there was a serious, ongoing cockroach problem. While plaintiff was aware of this problem, he did not make reasonable efforts to alleviate the infestation until the last two months preceding the trial. The trial court concluded that at least since October 1991 there have been vacant apartment units which pose continuing risks to the health and safety of defendants. Although plaintiff had written notice of this problem, plaintiff did not make reasonable efforts to solve this problem until 8 December 1992, when the premises were declared unfit and uninhabitable. The trial court concluded that the premises were unfit and uninhabitable on 8 December 1992 and 26 January 1993 "due to the health and safety hazards posed, *inter alia*, by the ongoing cockroach infestation and by the presence of safety hazards and unauthorized persons in vacant apartments." The trial court further stated that "plaintiff has failed to maintain the premises in compliance with the law and the health and safety of defendants cannot be assured." The court ordered defendants to vacate because of the uninhabitability of the premises. After the premises were declared unfit and uninhabitable by the City Inspector, plaintiff continued to collect rent on the premises. The trial court also found that on or about 3 January 1992 plaintiff delivered a written statement to all residents, which all four

defendants received, entitled "Notice to All Tenents [*sic*]," which warned tenants that if a tenant called the City of Burlington prior to making a repair request to plaintiff, the tenant would be evicted. On 3 January 1992 plaintiff also distributed a notice received by defendants Currie and Dawkins, which stated that if a resident had any unauthorized person residing with them, "this will be your thirty day notice." The trial court concluded that the terms of these notices violated the provisions of N.C. Gen. Stat. §§ 75-50, *et seq.*

We find plaintiff's conduct, like that in *Allen v. Simmons*, "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers," and thus hold that the trial court's dismissal of defendant's unfair practices counterclaim was in error. On remand, the trial court must enter judgment for defendants on this counterclaim, in accordance with Chapter 75.

[4] Defendants Poteat, Currie, and Dawkins made motions to dismiss all claims seeking possession on grounds that plaintiff waived that remedy by the following: accepting rent from Poteat and Dawkins prior to judgment, execution of a new HUD lease with Currie prior to judgment, and accepting rent and a late fee from Currie. These defendants also counterclaimed that plaintiff waived the right to possession. The trial court denied these motions and held that "[p]ursuant to the Code, § 14-103(b) and in exercise of this Court's equitable discretion to protect defendants, by reason of the uninhabitability of the premises, defendants shall vacate the premises by no later than the 1st day of March, 1993." The trial court further held that defendants' counterclaims were moot. Defendants assign as error the trial court's denial of these motions to dismiss, the trial court's order to vacate, and the court's conclusion that defendants' counterclaims of waiver were moot.

Defendants argue that the trial court's order to vacate was in error because (1) the minimum housing Code of the City of Burlington, § 14-103 applies to premises which have been condemned and these premises had not been condemned; and (2) it was inequitable to allow plaintiff to evict defendants when plaintiff had unclean hands. We find the trial court correctly applied § 14-103 and that the doctrine of unclean hands does not apply here. We thus affirm the trial court's order to vacate.

Section 14-103(b) of the Code of the City of Burlington states: "[W]hen the inspector finds that a building is unfit for human habitation within the meaning of this chapter and has notified the owner to

such effect and the time limit set by the inspector for the correction of defects and vacating same has expired, no person shall receive rentals, offer for rent or occupy such building for any purpose." Thus, contrary to defendants' assertion, the application of this section is not limited to premises which have been condemned. Since the trial court's findings of fact establish that the inspector declared defendants' buildings unfit and that plaintiff failed to correct the defects within the time set, we find that the trial court correctly applied § 14-103(b).

The trial court did not order the premises vacated because of defendants' nonpayment of rent. Rather, the court found (1) the premises were uninhabitable, (2) the City Code provided that the premises could not be rented, and (3) it is necessary to protect defendants from the unsafe, uninhabitable environment. Since the trial court was not granting equitable relief sought by plaintiff when it ordered the premises vacated, the doctrine of clean hands is inapplicable here. Moreover, since the trial court did not order defendants to vacate due to nonpayment of rent, we find the trial court properly denied defendants' motions to dismiss and correctly concluded that defendants' counterclaims for waiver were moot.

Defendants also contend that the following conclusions of the trial court are unsupported by the findings of fact and the evidence in the record: (1) the trial court's conclusion denying special damages and denying defendant's motion for consequential damages; (2) that there is insufficient evidence to find that the heating/air conditioning units in the apartments rented by defendants Poteat, Currie and Dawkins caused the apartments to be unreasonably cold or hot; (3) that the plumbing in defendants Poteat's and Currie's units were timely repaired; (4) that, with respect to defendant Dawkins' apartment, plaintiff timely made repairs to the plumbing and air conditioning and made repairs to the stair and the hall light within a reasonable time; and (5) that in December 1992 and January 1993 plaintiff made reasonable efforts to cure the cockroach infestation or make other necessary repairs in defendants' apartments. We disagree.

Findings of fact made by a trial court sitting as finder of fact are conclusive on appeal if there is evidence to support them, although evidence might have supported findings to the contrary. *Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979). We have reviewed the findings of fact and evidence in the record and find support for the challenged conclusions of the trial court.

We have reviewed the remaining arguments presented by defendants and find no error.

In sum, we reverse the trial court's denial of defendants' counterclaims for breach of implied warranty of habitability and for unfair and deceptive trade practices. We remand the case to the trial court for (1) a determination of the entire period the premises were unfit; (2) entry of an award of abatement damages for this period; and (3) entry of judgment for defendants on their counterclaim for unfair trade practices. The remainder of the trial court's order is affirmed.

Affirmed in part, reversed in part, and remanded.

Judges ORR and MARTIN concur.

WILSON HAYMORE AND SANDRA LEE HAYMORE, PLAINTIFFS v. THE THEW SHOVEL COMPANY, LORRAIN CRANE, AND THE KOEHRING COMPANY, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. ALLIED SIGNAL, INC., THIRD PARTY DEFENDANT

No. 9321SC190

(Filed 16 August 1994)

1. Products Liability § 3 (NCI4th)— crane brake failure—who manufactured boom brake cylinder—jury question

In an action to recover for injuries sustained when the brake on a crane malfunctioned, the trial court properly allowed the jury to decide whether defendant Koehring Co. was the apparent manufacturer of the subject boom brake cylinder where defendant sold the boom brake cylinder to the crane owner; the "chamber" apparatus of the brake was clearly identified by the trademark of the third-party defendant; and there was therefore a clear issue of fact which a jury should decide.

Am Jur 2d, Products Liability §§ 164-177.

Products liability: Manufacturer's responsibility for defective component supplied by another and incorporated in product. 3 ALR3d 1016.

Products liability: Necessity and sufficiency of identification of defendant as manufacturer or seller of product alleged to have caused injury. 51 ALR3d 1344.

2. Products Liability § 29 (NCI4th)— crane not inherently dangerous—cases involving nondelegable duty inapplicable

Since cranes are not inherently dangerous, plaintiff's reliance on cases involving nondelegable duty was misplaced.

Am Jur 2d, Products Liability §§ 740, 741.

Products liability: Cranes and other lifting apparatuses. 13 ALR4th 476.

3. Evidence and Witnesses § 582 (NCI4th)— OSHA report—evidence as to cause of accident properly excluded—report based on crane operator's belief—author of report not expert on crane brake failure

In an action to recover for injuries sustained when the brake on a crane malfunctioned, the trial court did not err in refusing to allow an OSHA report and testimony from its author to be introduced in their entirety, since the author's conclusions as to the cause of the accident were based only on the beliefs of the crane operator, and the trial court determined that the author was not an expert on the subject of crane brake mechanisms. N.C.G.S. § 8C-1, Rule 803(8).

Am Jur 2d, Expert and Opinion Evidence § 70.

4. Evidence and Witnesses § 2152 (NCI4th)— cause of accident—legal conclusion—nonexpert witness not allowed to give

The trial court properly prohibited an OSHA safety inspector from offering his opinion on the cause of a crane accident as an expert witness because this was a legal conclusion which the witness was not qualified to make, and the witness had no specialized knowledge of the boom brake cylinder operation which he attributed as the cause of the accident.

Am Jur 2d, Expert and Opinion Evidence §§ 1, 136 et seq.

5. Evidence and Witnesses § 1099 (NCI4th)— admissions in pleadings not allowed by trial court—no error

The trial court did not err in refusing to permit plaintiff to introduce admissions made by defendant in the pleadings during the testimony of a witness who knew nothing about the matters admitted.

Am Jur 2d, Evidence §§ 774 et seq.; Trial §§ 321 et seq.

6. Products Liability § 29 (NCI4th)— plaintiff's proposed jury instruction—jury question taken for granted—standard of care not established—instruction not given—no error

In an action to recover for injuries sustained when the brake on a crane malfunctioned, the trial court did not err in refusing to give plaintiff's proposed instruction that defendants admitted that the presence of foreign substances in the canister of a boom brake cylinder would constitute negligence by defendants where, contrary to plaintiff's contention, the standard of care was not established by the testimony of a defense witness that it would not be within his expectations of good manufacturing practices for such a canister to have loose particles in it, and the proposed instruction assumed that defendants were the apparent manufacturer of the cylinder when this was a question for the jury.

Am Jur 2d, Trial § 1093.

7. Trial § 464 (NCI4th)— trial court's remarks to jury after verdict—no effect on jury—no reversible error

Though the trial court's remarks to the jury after its verdict was reached were perhaps inappropriate under N.C.G.S. § 1A-1, Rule 51(c), they did not constitute reversible error, since there was no "effect on the jury" from the remarks.

Am Jur 2d, Trial §§ 276 et seq.

Appeal by plaintiffs and cross appeal by defendant, the Koehring Company, from judgment filed 16 October 1992 by Judge Judson D. DeRamus, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 5 January 1994.

Plaintiff was working as an employee of Famco, Inc. at the R.J. Reynolds' Bailey Power Plant in Winston-Salem on 22 October 1987. He was engaged in construction work approximately seven stories above the ground.

A Koehring Crane supplied by C.P. Buckner, Inc. and operated by Mr. Edward Bell was located at the construction site. Mr. Bell was using the crane to lift a roll of conveyor material weighing 1,600 pounds. As the conveyor material was moved into place, it suddenly dropped and struck the plaintiff. The impact caused several injuries to plaintiff including a broken pelvis.

After the accident, the North Carolina Department of Labor sent Mr. John Saunders, a safety inspector, to the site to conduct an OSHA investigation. The OSHA report concluded that the brake operation on the crane malfunctioned causing the sudden fall of the conveyor material. A mechanic from C.P. Buckner, Inc., Mr. Bernard McCaul, inspected the crane several days afterwards and found particles which appeared to be paint chips inside the air chamber of the boom brake cylinder. The crane has a "spring on/air off" brake. A spring permanently keeps the brake locked until air is forced into the cylinder. The air compresses the spring, releasing the brake. Mr. McCaul stated his belief that these particles caused the boom brake cylinder to malfunction.

Prior to the accident, C.P. Buckner, Inc. replaced the boom brake cylinder during an overhaul of the crane in August of 1987. The replacement boom brake cylinder was ordered from a distributor of Koehring Crane. Koehring Crane sent the cylinder directly to C.P. Buckner, Inc. The air chamber component of the boom brake cylinder was made by the Bendix Heavy Vehicle Division of Allied Signal, Inc. The chamber was marked with a Bendix/Westinghouse trademark.

Plaintiff seeks damages from the Thew Shovel Company, Lorrain Crane, and the Koehring Company, for negligent manufacture. Defendant Thew Shovel was the original company, which was later purchased by Koehring. Because it was located in Lorrain, Ohio, the crane division of Koehring was called Lorrain Crane. The three defendants were represented by one counsel. Before trial, defendants made a motion for summary judgment, which the trial court denied. At trial, the jury returned a verdict for defendants.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Douglas B. Abrams, for plaintiff-appellants.

Wishart, Norris, Henninger & Pittman, P.A., by June K. Allison and Robert J. Wishart, for defendant-appellees and third party plaintiffs.

ORR, Judge.

I.

[1] Plaintiff contends that the trial court erred by not ruling as a matter of law that Koehring was the apparent manufacturer of the subject boom brake cylinder. We believe that the trial judge was correct in allowing the jury to decide this question.

This Court considered a similar scenario in *Warzynski v. Empire Comfort Systems, Inc.*, 102 N.C. App. 222, 401 S.E.2d 801 (1991). *Warzynski* involved a Spanish manufacturer of gas heaters, Safel-Inelsa Orbaiceta, S.A. (Safel), which sold in the United States through Empire Comfort Systems (Empire). Plaintiff contended that their Empire gas heater caused their house to burn down. The trial court granted summary judgment in favor of Empire Comfort Systems on the basis of the "sealed container defense." N.C. Gen. Stat. § 99B-2(a). This Court held that the trial court erred in granting summary judgment for Empire because there was a genuine issue of material fact as to the apparent manufacturer of the gas heater. 102 N.C. App. at 225, 401 S.E.2d at 803.

In so holding, this Court adopted § 400 of the Restatement (Second) of Torts, which says:

> One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.

Restatement (Second) of Torts § 400 (1965). In the same opinion this Court quoted comment d of § 400 of the Restatement (Second) of Torts, which acts to limit the scope of § 400. Comment d, in relevant part, says:

> [W]here it is clear that the actor's only connection with the chattel is that of a distributor of it (for example as a wholesale or retail seller), he does not put it out as his own product and the rule stated in this section is inapplicable. Thus, one puts out a chattel as his own product when he puts it out under his name or affixes to it his trade name or trademark. . . . *However, where the real manufacturer or packer is clearly and accurately identified on the label or other markings on the goods, and it is also clearly stated that another who is also named has nothing to do with the goods except to distribute or sell them, the latter does not put out such goods as his own.*

Restatement (Second) of Torts § 400 comment d (1965) (emphasis added).

This Court considered the lack of any "made in Spain" references in Empire's advertising of the heaters. In fact, the record stated that one of Empire's advertisements stated that the heater was "America's best made and best-selling unvented gas wall furnace." Nowhere on the package was there an indication that Safel was the manufacturer.

The only indication that the heater was *not* made by Empire was a decal on the carton and heater saying the heater was made in Spain. On the basis of these facts found in the record, this Court concluded that the trial court should have submitted to the jury the question of whether Empire was the apparent manufacturer of the gas heaters. *Warzynski* at 228, 401 S.E.2d at 805.

The instant case is similar to *Warzynski* in that there is a clear issue of fact which a jury should decide. While Koehring sold the boom brake cylinders, the "chamber" apparatus of the brake was clearly identified by the Bendix/Westinghouse trademark. In *Warzynski* we ruled that the trial court erred in not submitting this issue to the jury when the status of a company as "apparent manufacturer" was in dispute. In the instant case a similar question existed, and so we hold that the issue was properly submitted to the jury by the trial court.

[2] Plaintiff argues that Koehring had a non-delegable duty which prevents assertion of defenses available in negligence cases. Relying on *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), in which the Court stated that a person "who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others." *Id.* at 352, 407 S.E.2d at 235. In making this argument, plaintiff contends that cranes are "inherently dangerous." In *McCollum v. Grove Mfg. Co.*, 58 N.C. App. 283, 293 S.E.2d 632 (1982), *aff'd*, 307 N.C. 695, 300 S.E.2d 374 (1983), we considered an alleged design defect in a crane which plaintiff claimed caused an accident at a worksite. Plaintiff claimed the crane was inherently dangerous. This Court found from the record that there was "no evidence that the crane was an inherently dangerous instrumentality." *Id.* at 291, 293 S.E.2d at 637. Based on *McCollum's* reasoning that cranes are not inherently dangerous, plaintiff's reliance on cases involving non-delegable duty is misplaced.

II.

[3] Plaintiff's second and third assignments of error concern the trial court's refusal to allow the OSHA report and testimony from its author, Mr. Saunders, to be introduced in their entirety. The trial court allowed Mr. Saunders to introduce the report and discuss its findings, but it would not allow him to state the report's conclusion that the accident was caused by brake failure. In his report, Mr. Saunders had stated, "[i]n summary, a crane used to lift conveyor belting had a

brake malfunction causing the load to drop." Plaintiff first contends that the conclusions of the report concerning the cause of the accident should have been admitted into evidence. Plaintiff also contends that the conclusions of Mr. Saunders on what he considered to be the cause of the accident should have been allowed.

The trial court properly introduced the OSHA report pursuant to N.C.G.S. § 8C-1, Rule 803(8), which reads in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or, (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (c) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

N.C.G.S. § 8C-1, Rule 803(8).

This Court considered a similar fact pattern involving Rule 803(8) in *Mickens v. Robinson*, 103 N.C. App. 52, 404 S.E.2d 359 (1991). In *Mickens*, a police officer investigated an automobile accident scene and took a statement which tended to establish the cause of the accident. The court allowed the officer to read the following quote taken from his report of what the witness said:

> Vehicle # 1 traveling east on West Sixth Street failed to stop for a red light and was involved in an accident with vehicle # 2 traveling north on Main Street. Account given by disinterested witness.

Id. at 56, 404 S.E.2d at 362. This Court said that the trial court erred by allowing the officer to read this statement in response to being asked if he had any "conclusions as to the cause of the accident." *Id.* at 57, 404 S.E.2d at 362. The Court reasoned that the question asked the officer to express an opinion as to fault in the accident. *Id.* This Court further held, however, that the officer saved the testimony "by limiting his response to repeating from his report what he had been told about what happened. The sum total of Officer Turner's testimony

was to disavow any assessment or attribution of fault." *Id.* Accordingly, the trial court's error was held to be non-prejudicial. *Id.*

Applying *Mickens* to the instant case, the trial court was correct in not allowing Mr. Saunders to offer his report's conclusions on the cause of the accident. Much like the policeman whose conclusions were based on an eyewitness, Mr. Saunders' conclusions were based only on the beliefs of the crane operator, Mr. Bell. The OSHA report's statement that it was Mr. Bell's opinion that brake failure caused the accident was admitted into evidence. However, Mr. Saunders' own "conclusions as to the cause of the accident" could not be given to the jury because the trial court, within its discretion, determined that he was not an expert on the subject of crane brake mechanisms. Thus, the trial court followed *Mickens* in not allowing Mr. Saunders to share his conclusions as to the cause of the accident.

[4] Plaintiff's next assignment of error is that Mr. Saunders was improperly prohibited from offering his opinion on the cause of the accident as an expert witness. Conclusory statements made by experts are admissible if the experts are qualified to make them. *State v. Weeks*, 322 N.C. 152, 164, 367 S.E.2d 895, 903 (1988). In *Weeks*, a homicide case in which defendant sought to use an insanity defense, the trial court refused to admit into evidence conclusory statements by psychiatrists that defendant acted under a violent passion and that defendant could not conform his behavior to the requirements of the law as a result of his mental disorder. The Court held that "[s]uch testimony embraces precise legal terms, definitions of which are not readily apparent to medical experts." *Id.* at 166, 367 S.E.2d at 904. Accordingly, the Court upheld the trial court's decision to not allow legal conclusions by the experts. The Supreme Court and this Court have made similar decisions in other cases. *See State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309 (1986) (under new rules experts still precluded from stating that a legal standard has been met, i.e., that injuries were the proximate cause of death), *Murrow v. Daniels*, 85 N.C. App. 401, 355 S.E.2d 204, *rev'd and remanded on other grounds*, 321 N.C. 494, 364 S.E.2d 392 (1987) (expert's opinion that defendant's lack of security was "gross negligence" an improper legal conclusion).

We believe that the trial court properly did not allow Mr. Saunders to testify on his belief of the cause of the accident because this was a legal conclusion which Mr. Saunders was not qualified to make. We also note that, though he had investigated crane accidents

before, Mr. Saunders did not have any specialized knowledge of the boom brake cylinder operation which he attributed as the cause of the accident. In fact, he admitted in court that this was his first case dealing with a crane boom brake malfunction, and that his conclusions on the defectiveness of the brake system were based solely on the conclusions of other people. Out of the presence of the jury, the trial court stated:

> This Court will consider a determination of expertise if you show training and experience of this witness relative to matters in question such as the operation of these brake cylinders and his opportunity to inspect it and otherwise determine what was going wrong with it. So far I don't think there's been enough showing of any expertise to deduce what happened to this particular cylinder, whether it's contained in the report or not.

Plaintiff made no attempt to further establish Mr. Saunders' expertise on the subject. On the basis of the above cited authority and facts, we believe the trial court acted properly in not allowing Mr. Saunders to testify as an expert on his conclusion as to the cause of the accident.

III.

[5] Plaintiff also assigns error to the trial court's refusal to introduce admissions made by the defendant in the pleadings. The admissions concerned the ownership of the crane and the chain of suppliers of the boom brake cylinder. Plaintiff sought to introduce these admissions during the testimony of Mr. Bernard McCaul, a mechanic for C.P. Buckner, Inc. In response to the request, the trial court stated:

> If you want to read these things that are judicially admitted by the defendants, I think there is an appropriate time and place for that, but not during the testimony of a witness that doesn't have specific knowledge of those things that are admitted. . . .

Plaintiff cites *Brown v. Lyons*, 93 N.C. App. 453, 457, 378 S.E.2d 243, 246 (1989). *Lyons* states that "[a] party is bound by his pleadings and may not take a contradictory position." *Id.* However, in the instant case, plaintiff does not assert that the defendant was improperly permitted to introduce testimony contrary to its pleadings. Plaintiff only asserts that introduction of the pleadings was not allowed at a certain time. We believe that the trial court was acting within its authority by delaying the introduction of the admissions. In addition, we note that there was no other attempt later in the trial by the plaintiff to offer

admissions made by defendants in their pleadings and we therefore find no merit in this assignment of error.

IV.

[6] Plaintiff's next assignment of error concerns the trial court's rejection of plaintiff's proposed jury instruction. Proposed special jury instructions must follow the guidelines set forth in N.C.G.S. § 1-181. The trial court must give the instructions requested, at least in substance, if they are proper and supported by evidence. *State v. Lynch*, 46 N.C. App. 608, 265 S.E.2d 491, *rev'd on other grounds*, 301 N.C. 479, 272 S.E.2d 349 (1980). However, the trial court may exercise discretion to refuse instructions based on erroneous statements of the law. *State v. Agnew*, 294 N.C. 382, 395, 241 S.E.2d 684, 692, *cert. denied*, 439 U.S. 830, 58 L. Ed. 2d 124 (1978).

Plaintiff submitted a jury instruction stipulating that the defendant admitted that the presence of foreign substances in the canister of a boom brake cylinder would be negligence. Plaintiff based this instruction on the following testimony of Mr. Norman Hargreaves, an engineer for defendant:

> Q: Well, do you have an opinion satisfactory to yourself and to a reasonable certainty in the field of engineering that you've told us about whether the failure or that—or whether receiving this boom brake cylinder in such a condition would be a violation of acceptable engineering standards of design, manufacture—and manufacture?
>
> MR. CARRUTHERS: Objection.
>
> THE COURT: Overruled.
>
> A: I think as I mentioned I wouldn't talk about design, but certainly it would not be within my expectations of good manufacturing practices.

On the basis of this testimony, plaintiff asked the trial court for the following jury instruction:

> The Defendants, The Thew Shovel Company, Lorrain Crane, and the Koehring Company, admit and do not contest that if the facts of this case are that the subject rotochamber was delivered to C.P. Buckner containing contaminants within the rotochamber that the rotochamber was defective and that the rotochamber would contain a manufacturing defect. Therefore, if you find by

> the greater weight and to your satisfaction that the subject rotochamber as delivered to C.P. Buckner did in fact contain contaminants of such a size and character as to obstruct the air exhaust and that these contaminants did in fact obstruct the rotochamber and prevent the rotochamber from functioning properly, and that therefore these obstructions caused the boom of the crane to fall, then you should answer the first issue "Yes" in favor of the Plaintiffs.

Plaintiff cites *Shuffler v. Blue Ridge Radiology Assoc., P.A.*, 73 N.C. App. 232, 326 S.E.2d 96 (1985). In *Shuffler*, plaintiff claimed defendant was negligent in providing medical care. On defendant's motion for directed verdict, the trial court held that defendant's uncontradicted testimony on the standard of practice among radiologists was sufficient to establish the standard of care. In the instant case, plaintiff contends that the testimony of defendants' engineer on the standard of care for boom brake cylinders should establish the relevant standard. If this were permitted, plaintiff contends, the jury only has to answer whether there were contaminants in the air canister.

We believe the trial court was acting within its discretion established in *Agnew* when it denied the proposed jury instruction. We first distinguish *Shuffler* from this case on the basis of the credibility of a standard of care established. In *Shuffler*, the defendant, a physician, described the standard of care which he owed his own patients. Thus, the only remaining question for the jury was whether this standard was breached. In the instant case, plaintiff contends that the standard of care is established by the testimony of one witness' remark that "it would not be within my expectations of good manufacturing practices" for an air canister to have loose particles in it. We do not believe that the determination of the standard of care is established based upon this response to counsel's question.

We further note that even if we considered the testimony of Mr. Hargreaves to establish the standard of care, the jury instruction would still not be proper in this case. There was no prior issue for the jury to consider in *Shuffler* before deciding whether the defendant breached the established standard of care, and therefore the tendered instruction was correct. In plaintiff's proposed jury instruction in the instant case, the issue of whether defendants were the apparent manufacturer is an issue which must be decided prior to a determination of whether defendants were negligent. This prior issue was taken for granted by plaintiff's proposed jury instruction. By the proposed

instruction, if contaminants are found to be present, defendants are liable (without any determination of whether defendants were the apparent manufacturer). If the jury had concluded that defendants either were the apparent manufacturer or that defendants had a reasonable opportunity to inspect, then the jury could have proceeded to the question of whether there were contaminants in the chamber, and *Shuffler* would be applicable. However, since the jury answered in the negative on its first two instructions concerning whether defendants were the apparent manufacturer, there would be no reversible error even if we considered the standard of care to be established by Mr. Hargreaves' testimony.

For the above reasons, the trial court was acting within its discretion under *Agnew* when it refused to allow plaintiff's proposed jury instructions.

V.

[7] Plaintiff's next assignment of error is that the trial court erred in making comments to the jury after their verdict was reached. Following the jury's presentation of their verdict, the court made the following comments:

> Since you're not going to be involved in any other matters, I say to you I agree particular[ly] with your verdict with respect to the third issue on negligence and the Court felt like it was very close to being a matter of law, there was insufficient evidence to take the showing of negligence as to the defendant and third-party defendants beyond the realm of conjecture and speculation and surmise.

The relevant rule on comments by judges to the jury is Rule 51(c), which states that "[t]he judge shall make no comment on any verdict in open court in the presence or hearing of any member of the jury panel." N.C.G.S. § 1A-1, Rule 51(c). This Court discussed the effect of prejudicial statements made by judges before the jury in *Worrell v. Hennis Credit Union*, 12 N.C. App. 275, 182 S.E.2d 874 (1971). In *Worrell* we stated:

> The criterion for determining whether the trial judge deprived a litigant of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect on the jury.

Id. at 278-79, 182 S.E.2d at 877. Applying *Worrell* to the instant case, we find that there is no "effect on the jury" from the judge's remarks in the instant case. The remarks were made after the verdict was returned. Plaintiff does not contend that the judge was unfair or impartial during the trial. While the remarks made by the court were perhaps not appropriate under a strict reading of Rule 51, they do not constitute reversible error.

Plaintiff's final assignment of error is that the trial court erred in granting its own motion for a directed verdict after the jury had returned its verdict. The jury improperly proceeded to the issue of defendants' negligence after deciding that the defendants were not the apparent manufacturer. The judge's *sua sponte* motion for directed verdict reaffirmed the unnecessary verdict of the jury on the issue. It is not necessary for us to decide this issue because the trial court was not required to address the defendants' negligence at all after the jury concluded that the defendants were not the apparent manufacturer.

For the reasons stated above, we affirm the judgment of the trial court. Accordingly, we need not address defendants' cross-assignments of error.

Affirmed.

Judges LEWIS and JOHN concur.

IN THE MATTER OF: JOSEPH CHASSE, DOB: 6/23/83

No. 9314DC203

(Filed 16 August 1994)

1. Evidence and Witnesses § 2170 (NCI4th)— expert testimony from psychologist excluded—lack of clinical experience—exclusion improper—no substantial right violated

In a hearing to determine whether a sexually abused child should be allowed supervised visits with the parents and whether the child should be moved from Durham to Cumberland County, the trial court erred in excluding testimony by a psychologist con-

cerning adult sex offender therapy because the witness had no clinical experience, since the witness's acknowledged expertise in the field of adolescent sex offenders and his study of all the psychological literature, including articles on treatment of adult sexual offenders, made him better qualified than the trial court to render an opinion on the length and efficacy of adult sexual offender therapy; however, exclusion of this evidence did not amount to the denial of a substantial right, and appellant guardian was therefore not entitled to a new hearing.

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

2. Evidence and Witnesses § 2041 (NCI4th)— sexually abused child—testimony of therapist excluded—cumulative evidence—exclusion proper

In a hearing to determine whether a sexually abused child should be allowed supervised visitation with his parents and whether he should be moved from Durham to Cumberland County, the trial court did not err in refusing to allow the child's therapist to testify concerning her therapy session with the child following the child's in-court revelation of an incident of sexual abuse at his group home in Durham, since that testimony would have been cumulative.

Am Jur 2d, Evidence, §§ 355, 356; Expert and Opinion Evidence § 5.

3. Infants or Minors § 120 (NCI4th)— sexually abused child—visitation with parents sought—visitation allowed in courthouse—no error

In a hearing to determine whether a sexually abused child should be allowed supervised visitation with his parents, the trial court did not err in allowing the child to visit with his parents in the courthouse, since the governing standard was not change of circumstances but the best interest of the child, and the guardian showed no harm or prejudice to the child or his case arising out of the visit.

Am Jur 2d, Infants §§ 16, 43.

Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.

4. Infants or Minors § 128 (NCI4th)— sexually abused child—placement changed—sufficiency of findings of fact

Findings were sufficient to support the trial court's conclusion that it was in the best interest of a sexually abused child to change his placement from a group home in Durham where he had "done well" and formed emotional attachments but had experienced further sexual abuse to a renowned clinic in Cumberland County closer to the parents who had abused and neglected him.

Am Jur 2d, Infants §§ 16, 43, 53, 55.

Appeal by the guardian *ad litem* for Joseph Chasse from order entered 27 August 1992 by Judge Carolyn D. Johnson in Durham County District Court. Heard in the Court of Appeals 5 January 1994.

Durham County Department of Social Services (Durham DSS) instituted this action, pursuant to N.C. Gen. Stat. § 7A-561 (1989), alleging that the child, Joseph Chasse, was abused and neglected. Following a hearing on 26 May 1992, Judge Johnson found, *inter alia*, that the respondent-mother, Amey Chasse, had sexually abused the child and that respondent-father Michael Chasse had neglected the child by failing to protect the child from sexual abuse. The judge adjudicated the child to be abused and neglected and entered a dispositional order, suspending visitation between the child and his parents, placing custody of the child with Durham DSS, and ordering that the child remain in his placement at the Agape School in Durham "until such time as any of the parties can present to the Court and identify a placement which better meets the needs of the child." On 24 July 1992, the mother made a motion requesting that the court allow supervised visits with the child and permit the child to move to Cumberland County.

The court held hearings on the motion on 20 and 27 August 1992, and ordered that the child's placement be transferred to Cumberland County. From this order, the child's guardian *ad litem* appeals.

Janice Perrin Paul for appellant Guardian ad Litem.

Assistant County Attorney Wendy C. Sotolongo for petitioner-appellee Durham County Department of Social Services.

Joseph M. Wilson, Jr. for respondent-appellee Amey Chasse.

Jeffrey R. Ellinger for respondent-appellee Michael Chasse.

McCRODDEN, Judge.

The guardian makes numerous assignments of error to the court's conduct of the hearing and its order, and presents four arguments in support thereof: (I) that the trial court erred in prohibiting an alleged expert witness from testifying about adult sexual offender treatment, (II) that the court erred in denying the guardian's motion to recall the child's therapist to testify, (III) that the court erred in allowing the child to meet with his parents in the courthouse, and (IV) that the court's order was not supported by sufficient findings of fact and the findings did not support the conclusions of law. We find no reversible error and affirm the order of the trial court.

Joseph Chasse was born on 23 June 1983, and was adopted by respondents in late 1983. According to medical records, the child's biological mother used cocaine and heroin throughout her pregnancy, causing addiction in the child who underwent withdrawal for several weeks after birth. In 1987, the child was diagnosed with Attention Deficit Hyperactivity Disorder. Until early 1991, the child resided with his parents in Germany, where the father was stationed in the military; at that time, respondents sent him to live with his adoptive brother Gerald. In April 1991, Gerald, unable to handle the child's behavior, arranged for Joseph to stay at the Agape Corner School (Agape), a private, non-profit boarding school in Durham. While there, he lived in an apartment with Agape's director, Louise Roudebush, and developed some attachment to her.

In early October 1991, the child was evaluated by the Durham Community Guidance Clinic (the DCGC) to determine his intellectual, academic, and personality conditions. The evaluation concluded that he was learning disabled in reading and mathematics under formal North Carolina criteria, that he was an "extremely fearful and anxious child, who provides evidence of generalized fearfulness, separation-related anxieties, and fears of physical harm." The staff determined that these findings were consistent with a traumatic stress response, and that the findings, considered with his statements, suggested that he might have been exposed to physical and/or sexual abuse. Based on these findings, the DCGC recommended that he be assessed for possible sexual and physical abuse.

Nancy Berson, of the University of North Carolina Hospitals Child Trauma and Maltreatment Team, interviewed the child on several occasions. During these interviews the child stated that on

numerous occasions when he was living with his parents in Germany, the mother had hurt his private parts and had made him touch her genital area and that on at least one occasion his father had seen this happening and had told the mother to stop but with no success. The Child Trauma and Maltreatment Team reported the results of its interviews to Durham DSS.

In late 1991, respondents returned to the United States and were stationed at Fort Bragg in Cumberland County. The mother contacted Agape and the DCGC to gain information about the child and indicated to Agape that she wished to retake custody of the child. However, on 30 January 1992, she spoke with a doctor at DCGC and indicated that she was not interested in taking custody of the child at that time but merely wanted to ensure the appropriateness of his placement.

In December 1991, Durham DSS filed a petition alleging abuse and neglect of the child for whom it obtained nonsecure custody. Although Durham DSS opposed the placement of the child with Agape, the court ordered that the child continue to reside at Agape until the adjudicatory hearing.

The mother's 24 July 1992 motion, following the adjudication of abuse and neglect, alleged that a psychologist and a psychiatrist in Cumberland County had evaluated her and had determined that she would pose no threat to the child; that Cumberland County Department of Social Services (Cumberland DSS) had agreed to evaluate and place the child within Cumberland County; and that DSS had located an opening for placement of the child in Cumberland County. She requested visitation with the child, relocation of the child to Cumberland County, and a transfer of custody to Cumberland DSS. On 20 August 1992, the case came up for review.

At the hearing, Durham DSS called Valerie Wylly, a social worker with the Rumbaugh Mental Health Clinic (the Clinic) in Fayetteville, to testify as to the services that would be available to the child if the court transferred him to Cumberland County. According to her testimony, the Clinic is a unique demonstration program co-funded by the Department of the Army and the State of North Carolina that provides comprehensive mental health services to military dependents. She testified that she had interviewed the child to determine if he would be eligible to receive services from the Clinic and, upon determining that he was eligible, the treatment team recommended a therapeutic home, further therapy, and a neuropsychological examination for the child. She further testified that having to move to Cumberland Coun-

ty would be traumatic for the child because he had formed a bond with Roudebush and because he had been moved several times in the past.

Susan Shields, the supervisor of the social worker assigned to the child, testified that, by law, Durham DSS was required to work toward the reunification of a child with his parents and that such was the goal of Durham DSS in this case. Shields also testified that she understood that the child had developed a close relationship with Roudebush but that she believed that the child was not doing well at Agape.

Gael McCarthy, who had been the child's therapist since April 1992, testified that she believed that the child's placement at Agape was meeting his needs and that he should stay there. She testified that she believed that reunification of the child with his parents was not a reasonable goal because of the alleged sexual abuse. She stated that:

> [M]ost sex offender treatment takes three to five years when it's successful. In severe cases involving allegations of physical coercion, it's very rarely successful. There will be, I think, more evidence to that effect in future years. There is certainly some in the literature right now that adult sex offender treatment is, in the average case, not successful.

McCarthy further testified that the child had repeatedly expressed his desire to remain at Agape, that she believed that moving him from Agape to a therapeutic foster home, either in Durham or Cumberland County, would be traumatic for him, and that she could cite no reason for moving him.

The child's guardian *ad litem* called Dr. Richard Rumer, a psychologist, to testify. However, the trial court refused to allow him to testify as to adult sexual offenders because he had no personal knowledge of adult sex offenders.

Upon the recommendation of McCarthy, the court allowed the child to testify at the hearing. He testified that he wanted to stay at Agape because he felt safe there and that he did not want to return to his parents' house because his mother had done "ugly things" to him. He stated that on the previous night he had engaged in sexual behavior with his roommate at Agape, a fourteen-year-old boy named Roger. The child also testified that he would like to visit his parents but not live with them. The court asked the child if he would like to see his parents, and, when he said he would, ordered that his parents,

who were waiting outside the courtroom, be allowed to visit him immediately. McCarthy and a representative of Durham DSS supervised the visit, which took place in the court anteroom.

The court then recalled Roudebush who explained that Roger had reported the incident to her the previous night and that she had contacted the Durham police but not Durham DSS or the child's therapist. Finally, the court recalled McCarthy to give her reaction to the child's revelation that he had been sexually abused at Agape the previous night.

The hearing ended on 20 August 1992, before counsel could make their closing arguments. When the hearing resumed on 27 August 1992, the guardian moved to recall McCarthy to testify as to what she had learned from the child during a therapy session two days previous. The court denied this motion and, after hearing closing arguments, entered an order placing the child in the joint custody of Cumberland DSS and Durham DSS, ordering a transition of the child to Cumberland County according to the recommendations of the Clinic, denying visitation between the child and his parents unless the child's therapist and the parents' therapist agreed, and ordering that the child not be placed in the parents' home without further directive of the court.

I.

[1] The guardian first argues that the trial court erred in refusing to allow Dr. Rumer to testify as an expert witness in adult sex offender therapy. After refusing to hear Rumer's opinion testimony, the court stated, "[t]he witness is dismissed inasmuch as he has no personal knowledge of adult sexual offenders and that is the issue [for which guardian's counsel] has called him to testify."

The competency of a witness to testify is a matter within the sound discretion of the trial court and we will not ordinarily disturb its ruling. A finding that a witness is not qualified to give expert testimony is not reversible error, unless it represents an abuse of discretion or is based upon an erroneous view of the law. *In re Adoption of P.E.P.*, 100 N.C. App. 191, 199, 395 S.E.2d 133, 138 (1990), *rev'd on other grounds*, 329 N.C. 692, 407 S.E.2d 505 (1991).

The guardian argues that the court abused its discretion by incorrectly applying N.C. Gen. Stat. § 8C-1, Rule 702 (1992). She contends

that the court's refusal to allow Rumer to testify was based solely on his lack of clinical experience and was error. We agree.

The record reflects that counsel for Durham DSS objected to Rumer's testifying as to adult sex offenders because he had worked only with adolescent sex offenders. The following exchange occurred:

> Court: Well, can you—do you know his credentials? Could you just ask him?
>
> Q: Dr. Rumer, do you have any knowledge as to the length of therapy for sex offenders, adolescents and adults?
>
> Court: I think you need to find out whether he has worked with adult sex offenders, [counsel]. That would be one way of doing it.
>
> Q: Dr. Rumer, have you worked with adult sex offenders?
>
> A: No, I have not. As I stated, in the course of preparing a paper about adolescent sexual offenders, I did the literature, reviewed the entire psychological literature, which included the review articles on treatment of adult sexual offenders.
>
> [The father]: I will renew [Durham DSS]'s objection, Your Honor.
>
> Court: Sustained.
>
> [The guardian]: Your Honor, let me just ask, before I ask a bunch of other questions, if Dr. Rumer is going to be permitted to testify?
>
> Court: He's not going to be permitted to testify about adult sex offenders.

Rule 702 allows a witness to give opinion testimony if he qualifies as an expert by "knowledge, skill, experience, training, *or* education . . . ." Rule 702 (emphasis added). An expert need not have had experience in the very subject at issue. *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598, 603 (1985), *disc. review denied*, 316 N.C. 198, 341 S.E.2d 581 (1986). It is enough that through study or experience the expert is better qualified than the fact-finder to render the opinion regarding the particular subject. *Id.* at 270, 337 S.E.2d at 604.

Rumer's lack of clinical experience should not have disqualified him from giving expert opinion testimony. His acknowledged expertise in the field of adolescent sex offenders and his study of the "entire psychological literature, which included the review articles on

treatment of adult sexual offenders," made him better qualified than the trial court to render an opinion on the length and efficacy of adult sexual offender therapy, and his testimony, therefore, would have been helpful to the trier of fact. It was error for the trial court to prohibit Rumer from testifying about adult sex offenders.

An error in the exclusion of evidence, however, is not ground for a new hearing unless the exclusion amounted to the denial of a substantial right. N.C. Gen. Stat. § 1A-1, Rule 61 (1990). To show that he was denied such a right, an appellant must show that the error prejudiced him and that it is likely that a different result would have ensued had the error not been committed. *Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864, *disc. review denied*, 314 N.C. 336, 333 S.E.2d 496 (1985).

In this case, we believe that the exclusion of Rumer's opinion testimony did not prejudice the guardian. Since the guardian made no offer of proof to show what Rumer's testimony would have been, we have no way of ascertaining how the guardian was prejudiced. *Gibbs v. Light Co.*, 268 N.C. 186, 190, 150 S.E.2d 207, 210 (1966). Even if we were to assume that Rumer would have testified that the recidivism rate is high among adult sex offenders and that treatments are long and frequently unsuccessful, we can find no prejudicial error in excluding the testimony. The trial court admitted evidence to this effect when the therapist McCarthy testified that successful treatment programs for adult sexual offenders last from three to five years and that few programs are actually successful. The exclusion of Rumer's testimony was, therefore, harmless error. *See id.* Consequently, we reject this first argument.

II.

[2] The guardian next argues that the trial court erred in refusing to allow the child's therapist to testify concerning her therapy session with the child following the child's in-court revelation of the incident of sexual abuse at Agape. We disagree.

Whenever a trial court holds a dispositional hearing, pursuant to N.C. Gen. Stat. § 7A-640 (1989), or a review hearing, pursuant to N.C. Gen. Stat. § 7A-657 (1989), it must determine the best interest of the child, and "any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court

to exclude cumulative testimony." *In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984).

The guardian asserts that the testimony that McCarthy would have given was "critical to an appropriate dispositional determination." McCarthy would have testified that transferring the child away from Agape would have been detrimental to him and that, when she spoke with him about the incident at Agape, the child explained that he had been touched many times during that particular night, but not on many nights.

We believe that this testimony would have been cumulative of that which McCarthy had given previously and that the trial court, therefore, properly excluded it. In her original testimony, McCarthy expressed her opinion that the child should not be transferred because it would be traumatic for him. When she was recalled to testify after the child testified at the hearing, she expressed concern that he might have meant he was touched many times on one occasion rather than on many occasions. However, she stated that the question of whether it occurred on many occasions or just one, was really irrelevant to his protection; what mattered was that it occurred at all. Thus the substance of any testimony McCarthy would have given on 27 August was already before the court, and the trial court did not err in refusing to allow her to testify again. We reject the guardian's second argument.

III.

[3] The guardian's third argument concerns the trial court's allowing the child to visit with his parents in the courthouse. The guardian asserts that because there was no showing of substantial change of circumstances, the trial court erred in allowing the child to visit his parents.

As was made plain in *In re Shue*, the governing standard in dispositional hearings and review hearings is not change of circumstances but the best interest of the child. 311 N.C. at 597, 319 S.E.2d at 574. Moreover, the guardian has shown no harm or prejudice to the child or his case arising out of the visit. *See Warren v. City of Asheville.*

IV.

[4] Finally, the guardian argues that there were not sufficient findings to support the trial court's conclusion that it was in the best

interest of the child to change his placement to Cumberland County. We disagree.

In deciding the custody and placement of a child pursuant to Chapter 7A, a trial judge is vested with broad discretion, *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991), but must exercise that discretion to serve the best interest of the child. N.C. Gen. Stat. §§ 7A-640, -657 (1989). When making a disposition or reviewing one, a trial court must enter an order with findings sufficient to show that it considered the best interest of the child. *In re Shue.*

In this case the trial court found, among other things, that:

> 3. Although Agape is not a licensed foster care facility, the Court, in its adjudication and disposition order, authorized continued placement of the child at Agape Corner on a temporary basis. Testimony at the adjudicatory hearing tended to show that the child was progressing in that placement and at the time of said hearing, no more appropriate placement was available.
>
> . . . .
>
> 6. . . . . It is the assessment of the Court and the Rumbaugh Clinic that placement in a therapeutic foster home in Cumberland County would meet the child's placement needs. All other appropriate and available services would be provided to meet the mental health needs of the child.
>
> . . . .
>
> 9. The child testified that he had been sexually abused by his mother and that his father was aware of the abuse.
>
> 10. The child further testified that he had been sexually abused "many times" by a 14-year-old boy named "Roger" who lived with him in Louise Roudebush's apartment at Agape Corner.
>
> . . . .
>
> 12. Subsequent to the child's testimony, Louise Roudebush testified that there was a 14-year-old boy named "Roger" who shared a bedroom with Joseph Chasse in her apartment. Louise Roudebush testified that on the night of August 19, 1992, "Roger" had revealed to her that he had showed [*sic*] himself to Joseph Chasse, gotten in Joseph's bed and gotten on top of Joseph that night. She did not contact Durham DSS to give them this infor-

mation. She did not contact the child's CGC therapist to give her this information. Louise Roudebush was in the courthouse during the day of August 20, 1992 and had the opportunity to reveal this information prior to the child's testifying at approximately 4:30 p.m.

Based on these findings, the court concluded that it was in the best interest of the child that he be placed in the joint custody of Durham DSS and Cumberland DSS and that the Clinic develop and implement a plan to place the child in a therapeutic foster home in Cumberland County and to provide the child with mental health services.

The trial court in this case faced a nearly impossible choice: to allow the child to remain at Agape, where he had "done well" but had been sexually assaulted, or to subject the child to the trauma of being uprooted from Agape in order to move him to a renowned clinic closer to the parents who had abused and neglected him. The findings show that the court determined that it was not in the best interest of the child to remain at Agape. The court placed special emphasis on the facts that the child had been sexually abused at Agape on at least one occasion and that Roudebush had not reported the incident to DSS or the guardian and had not volunteered the information at any time before the child testified. Having found that the child should not stay at Agape, the court determined that placement in Cumberland County offered the most benefit to the child. The previously quoted findings support the court's conclusions that to stay at Agape was not in the child's best interest and that it was in his best interest to be placed in Cumberland County.

We believe that the trial court made a considered choice between unattractive options, and we shall not substitute our judgment for that of the trial court. We note, moreover, that over a year and a half have passed since the trial court entered its judgment. To reverse the trial court at this point and remand the case for a new hearing would only serve to disrupt the child's life further. Finding no reversible error, we refuse to do this.

Affirmed.

Judges JOHNSON and LEWIS concur.

KIMBERLY WASHINGTON BOWDEN, ADMINISTRATRIX OF THE ESTATE OF HUBERT WASHINGTON, PLAINTIFF v. MICHAEL VANCE BELL, GRETA BATTS AND RICKY BATTS, DEFENDANTS

No. 934SC1135

(Filed 16 August 1994)

1. Automobiles and Other Vehicles § 570 (NCI4th)— last clear chance—sufficiency of evidence

The evidence was sufficient to warrant the submission of the issue of last clear chance to the jury where it tended to show that defendant was driving within the speed limit of 35 m.p.h., had his headlights on, and had good visibility; the officer who arrived on the scene to assist the responding officer testified that the area was lit with streetlights and that he had no problems seeing anybody or anything; defendant had driven through the area many times; defendant saw plaintiff's dog very near the center of the highway; because plaintiff was three feet to the right of the dog, plaintiff would have been in defendant's line of vision; when defendant saw the dog, he did not apply his brakes but merely eased off the accelerator; when defendant finally saw plaintiff, he applied the brakes; at no time did defendant sound his horn; and defendant's tires left skid marks on the highway for twenty feet.

Am Jur 2d, Automobiles and Highway Traffic §§ 438-441.

2. Evidence and Witnesses § 1656 (NCI4th)— exclusion of testimony and photographs—similar evidence already admitted—no error in exclusion

In an action to recover for injuries sustained by plaintiff pedestrian when he was struck by a car driven by defendant, the trial court did not err in excluding testimony and photographs regarding the skid marks found at the scene of the accident, since testimony of other witnesses was identical to the excluded testimony, and a witness testified as to the subject matter of the photographs.

Am Jur 2d, Evidence §§ 960 et seq.

3. Evidence and Witnesses § 3104 (NCI4th)— evidence of plaintiff's statements—admissibility for corroboration

The trial court did not err in admitting testimony regarding statements made by plaintiff, since the statements were substan-

tially consistent with plaintiff's deposition testimony and were therefore admissible as corroborative evidence.

Am Jur 2d, Witnesses §§ 632 et seq.

4. Automobiles and Other Vehicles § 716 (NCI4th)— jury instruction—no expression of opinion

The trial court's use of the phrase "the negligent defendant" in its instruction on last clear chance served only to distinguish that defendant whom the jury might find negligent from the other defendant and therefore did not constitute an impermissible expression of opinion regarding the alleged negligence of defendants.

Am Jur 2d, Automobiles and Highway Traffic § 1118.

Sufficiency of evidence to raise last clear chance doctrine in cases of automobile collision with pedestrian or bicyclist—modern cases. 9 ALR5th 826.

Appeal by defendant Michael Vance Bell from judgment entered 13 May 1993 and order filed 4 August 1993 by Judge Ernest B. Fullwood in Duplin County Superior Court. Heard in the Court of Appeals 8 June 1994.

Harry H. Harkins, Jr. for plaintiff-appellee.

Wallace, Morris, Barwick & Rochelle, P.A., by Edwin M. Braswell, Jr., for defendant-appellant Michael Vance Bell.

LEWIS, Judge.

Plaintiff's decedent, Hubert Washington, commenced this negligence action for injuries received when he was struck by a car driven by defendant Michael Bell (hereinafter "defendant"). Prior to trial, Hubert Washington died, and Kimberly Washington Bowden, as personal representative of Hubert Washington, was substituted as the plaintiff. For purposes of this opinion, however, Hubert Washington will be referred to as "plaintiff." The trial court submitted to the jury issues of negligence, contributory negligence, and last clear chance. The jury found that defendant had the last clear chance to avoid the accident, and awarded plaintiff $35,000 in damages, and judgment was entered accordingly. Defendant moved for a new trial, or alternatively, for judgment notwithstanding the verdict. The trial court

denied both motions. From the judgment and the order denying defendant's motions, defendant appeals.

The evidence at trial tended to show that at approximately 10:00 p.m. on 6 July 1990, plaintiff was attempting to walk across North Carolina Highway 11, a two-lane road. Plaintiff had been drinking alcohol with friends at a house on the east side of Highway 11 and had become intoxicated. At some point during the evening, he left the house to go across the street, and at the time of the accident, he was returning to the house. Plaintiff was accompanied by his medium-sized black and light brown dog.

Defendant was traveling south on Highway 11, driving a car owned by Ricky Batts. Greta Batts was his only passenger. Defendant was driving within the thirty-five mile per hour speed limit. Plaintiff and his dog had started to cross the road from west to east, i.e., from defendant's right to left. Defendant testified that shortly after a car traveling north passed by him, he saw the dog in the road very near the centerline. Defendant did not see plaintiff, who was in defendant's lane of travel, three feet behind the dog. Upon seeing the dog, defendant took his foot off the accelerator to slow the car. He then saw plaintiff, who was standing still in the road, and immediately applied the brakes. Defendant's brakes locked, and the car skidded for approximately twenty feet. As the car skidded, defendant turned it to the right and missed the dog, but was unable to avoid hitting plaintiff. Plaintiff was struck by the left corner of the front bumper and the left side mirror of the car.

I.

Defendant's first contention on appeal relates to the doctrine of last clear chance. That doctrine allows a plaintiff to recover despite his contributory negligence if the defendant had the last clear chance to avoid the accident by exercising reasonable care and prudence but failed to do so. *Williams v. Odell*, 90 N.C. App. 699, 703, 370 S.E.2d 62, 65, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 557 (1988). We note from the outset that the doctrines of contributory negligence and last clear chance have been sharply criticized. In fact, forty-six states have abandoned the doctrine of contributory negligence in favor of comparative negligence. *Bosley v. Alexander*, 114 N.C. App. 470, 471, 442 S.E.2d 82, 83 (1994). In this state, in 1981, the Legislative Research Commission recommended to the General Assembly that it abolish the doctrines of contributory negligence and last clear chance by enacting the Commission's proposed statute on comparative fault.

North Carolina Legislative Research Comm'n, Rep. to the 1981 General Assembly of North Carolina, Laws of Evidence and Comparative Negligence (1981). The Commission noted that "[g]eneral agreement exists that courts have utilized special devices, such as last clear chance, . . . primarily to mitigate against the harshness of the contributory negligence rule." *Id.* at 6. *See also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 66, at 463-64 (5th ed. 1984) ("No very satisfactory reason for the rule [of last clear chance] ever has been suggested. . . . The real explanation would seem to be a fundamental dislike for the harshness of the contributory negligence defense.")

The doctrines of contributory negligence and last clear chance are both common law creations. The former was first adopted by the North Carolina Supreme Court in *Morrison v. Cornelius*, 63 N.C. 346 (1869), and the latter appears to have been first adopted in *Gunter v. Wicker*, 85 N.C. 310 (1881). We note that if the circumstances are compelling, the Supreme Court also has the authority to alter judicially created common law when it deems it necessary in light of experience and reason. *Stephenson v. Rowe*, 315 N.C. 330, 338-39, 338 S.E.2d 301, 306 (1986). However, until the Supreme Court or the General Assembly decides otherwise, these doctrines are part of the law of this state and will remain so. *See Corns v. Hall*, 112 N.C. App. 232, 237, 435 S.E.2d 88, 91 (1993).

[1] Defendant's first contention is that there was insufficient evidence to support the trial court's instruction on last clear chance. In order to invoke the doctrine of last clear chance, an injured pedestrian struck by a vehicle must establish the following four elements:

> "(1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him."

Clodfelter v. Carroll, 261 N.C. 630, 634-35, 135 S.E.2d 636, 638-39 (1964) (quoting *Wade v. Jones Sausage Co.*, 239 N.C. 524, 525, 80 S.E.2d 150, 151 (1954)). We note that the application of the doctrine has been liberalized by our courts over the years, *Stephens v. Mann*, 50 N.C. App. 133, 135, 272 S.E.2d 771, 773 (1980), *disc. review denied*, 302 N.C. 221, 276 S.E.2d 919 (1981), and that the rule today is that the contributory negligence of the plaintiff does not nullify or cancel the original negligence of the defendant. *Exum v. Boyles*, 272 N.C. 567, 576, 158 S.E.2d 845, 853 (1968). That is, the original negligence of the defendant can be relied on to bring into play the doctrine of last clear chance. *Id.*

The issue of last clear chance must be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine. *Stephens*, 50 N.C. App. at 135, 272 S.E.2d at 772. Defendant contends that there was not sufficient evidence to support the third element of the doctrine, that after he discovered, or should have discovered the peril of plaintiff, he had the time and means to avoid injury to the plaintiff.

When viewed in the light most favorable to plaintiff, the evidence tended to show that defendant was driving within the speed limit of thirty-five miles per hour, that he had his headlights on, and that visibility was good. Trooper Charles Olive, who arrived on the scene to assist the responding officer, testified that the area was lit with streetlights and that he "had no problem seeing anybody or anything" in the street when he arrived. Defendant testified that he had driven through the area on many occasions. In addition, defendant testified that when he first saw the medium-sized black and light brown dog, it was very near the center of the highway, and that because plaintiff was three feet to the right of the dog, plaintiff would have been in defendant's line of vision. When defendant saw the dog he did not apply the brakes, but merely eased off the accelerator. However, when he finally saw plaintiff, he applied the brakes. At no time did defendant sound his horn. Defendant also testified that when he saw plaintiff, plaintiff was standing still in the highway. Finally, defendant's tires left skid marks on the highway measuring approximately twenty feet. We conclude that this evidence was sufficient to support a reasonable inference that after defendant discovered, or should have discovered, plaintiff's peril, he had the time and means to avoid the injury to plaintiff.

We find support for this conclusion in *Earle v. Wyrick*, 286 N.C. 175, 209 S.E.2d 469 (1974). There, the plaintiff and a friend were walking on the paved surface of a road, with their backs toward the defendant's car. The defendant was driving approximately twenty-five to thirty miles per hour. It was nighttime, but the street was well lighted. The defendant saw the plaintiff only a split second before impact and did not sound the horn. The defendant's tires left skid marks measuring twenty-six feet. The Court concluded that this evidence was sufficient to warrant the submission of the issue of last clear chance to the jury. *Id.* at 178, 209 S.E.2d at 471. Likewise, in the instant case we conclude that the evidence supported the instruction on last clear chance.

II.

[2] Defendant's next argument is that the trial court erred in excluding testimony and photographs regarding the skid marks found at the scene of the accident. First, defendant argues that the investigating police officer, Roger Bass, should have been permitted to testify as to the location and nature of the skid marks. At issue was whether defendant's car ever crossed the centerline into the northbound lane. Officer Bass would have testified that he observed skid marks in the southbound lane of Highway 11 at the scene of the accident and that the skid marks veered to the right and were the only skid marks on the highway. Even if we assume that the trial court erred in excluding this testimony, such error was not prejudicial, as the testimony of other witnesses was identical to the excluded testimony. *Environmental Landscape Design Specialist v. Shields*, 75 N.C. App. 304, 308, 330 S.E.2d 627, 629 (1985). Trooper Olive, defendant, his mother, and his passenger, Greta Batts, all testified that the skid marks were in the southbound lane, veered to the right, and never crossed the centerline. Additionally, Trooper Olive, defendant, and Greta Batts testified that they saw no other skid marks on the highway.

Defendant's second argument regarding the skid marks is that the trial court erred in excluding photographs of the skid marks. The photographs were taken the day after the accident and were offered to illustrate Trooper Olive's testimony. Where a photograph is offered to illustrate the testimony of a witness, and the witness testifies as to the subject matter of the photograph, the exclusion of the photograph is not prejudicial error. *Wells v. French Broad Elec. Membership Corp.*, 68 N.C. App. 410, 415, 315 S.E.2d 316, 319, *disc. review denied*,

312 N.C. 498, 322 S.E.2d 565 (1984). Accordingly, this assignment of error is overruled.

III.

[3] Defendant's next contention is that the trial court erred in admitting testimony regarding statements made by plaintiff. Specifically, various witnesses testified that plaintiff made statements to them about the pain in his leg that he suffered as a result of the accident, his inability to sleep because of the pain, his desire to go back to work, and his feeling that he was a burden on his family. There was also testimony that plaintiff's complaints about his leg pain continued until his death. Finally, some of the witnesses testified that plaintiff told them that he had almost completed crossing Highway 11 when he was struck by defendant's car. Defendant contends that this testimony was hearsay and should not have been admitted.

It is clear that out-of-court statements offered to corroborate the prior testimony of a witness are not hearsay. *State v. Gilbert*, 96 N.C. App. 363, 365, 385 S.E.2d 815, 816 (1989). Corroborative evidence in the form of a prior consistent statement is admissible evidence provided that it is substantially consistent with the witness's testimony at trial. *Wachovia Bank & Trust Co., N.A. v. Guthrie*, 67 N.C. App. 622, 627, 313 S.E.2d 603, 606, *disc. review denied*, 311 N.C. 407, 319 S.E.2d 280, *cert. denied*, 312 N.C. 90, 321 S.E.2d 909 (1984). In the case at hand, the video deposition of plaintiff was played for the jury and was admitted into evidence. At deposition, plaintiff testified about the pain in his leg. He stated that his leg hurt all of the time, but sometimes more than others. In addition, plaintiff testified that he was unable to work as a bricklayer because of his injury and that he relied entirely on his family for financial support. Finally, plaintiff testified that at the time he was struck by defendant's car, he had crossed defendant's lane of travel and was almost across the far lane of Highway 11. The out-of-court statements to which defendant objects were substantially consistent with plaintiff's deposition testimony and were therefore admissible as corroborative evidence. We note that the testimony of some of the witnesses was admitted without limitation. However, the admission of evidence, competent for a restricted purpose, such as corroboration, will not be held error in the absence of a request by defendant for a limiting instruction. *State v. Chandler*, 324 N.C. 172, 182, 376 S.E.2d 728, 735 (1989). In the case at hand, since defendant made no such requests, we find no error in the admis-

sion of the witnesses' testimony, which was competent and admissible for corroborative purposes.

IV.

Defendant's next contention also relates to the testimony of plaintiff's witnesses. Defendant contends that the trial court erred in allowing plaintiff's son to testify that plaintiff was in a "very poor" emotional state and that plaintiff's leg "was broken in three different places." Plaintiff's daughter testified that plaintiff looked "very uncomfortable" and that he was "bleeding from his left ear which was the ear he had problems hearing out of." Defendant argues that the witnesses should not have been permitted to express their opinions on these subjects. We note that, as to the testimony about plaintiff's broken leg and left ear, the witnesses were not stating their opinions, but were merely giving a factual account of what they observed. Thus, defendant's argument as to these two statements is without merit. However, the witnesses' other testimony did include opinions or inferences.

Rule 701 of the Rules of Evidence governs the admissibility of opinion testimony by lay witnesses, and it provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (1992). The state of a person's health, the emotions he displayed on a given occasion, or other aspects of his physical appearance are proper subjects for lay opinion. *State v. Jennings*, 333 N.C. 579, 607, 430 S.E.2d 188, 201, *cert. denied*, — U.S. —, 126 L. Ed. 2d 602 (1993). In the case at hand, the witnesses' testimony was rationally based on their perceptions and was helpful to a clear understanding of their testimony or the determination of a fact in issue. Accordingly, this assignment of error is overruled.

V.

[4] Defendant's final contention on appeal is that the trial court erred in its instruction to the jury on the issue of last clear chance in that the court expressed an opinion regarding the evidence, in violation of N.C.G.S. § 1A-1, Rule 51(a) (1990). Rule 51(a) provides in part that "a judge shall not give an opinion as to whether or not a fact is fully or

sufficiently proved." To determine whether a party's right to a fair trial has been impaired by remarks of the trial court, this Court must examine the probable effect of the remarks on the jury, irrespective of the motives of the trial court. *Russell v. Town of Morehead City*, 90 N.C. App. 675, 680, 370 S.E.2d 56, 59 (1988). This test requires an examination of the circumstances under which the remarks were made and the probable meaning of the remarks to the jury. *Id.*

The present case involved alternative allegations of negligence by plaintiff against defendant Michael Bell and defendant Greta Batts. Plaintiff alleged that each was the driver of the car and was negligent in its operation, and alternative issues of negligence were submitted to the jury. Issue one concerned the alleged negligence of defendant Bell, and issue two, that of defendant Greta Batts. Issue three concerned the alleged contributory negligence of plaintiff. It is in this context that we must review the court's charge on last clear chance. The court began its instruction on last clear chance as follows:

> The fourth issue reads again, did *the negligent defendant* have the last clear chance to avoid injury to the plaintiff[']s intestate? You will answer this issue only if you have already answered one of the issues yes as to one of the defendants' negligence in favor of the plaintiff. And the issue as to the plaintiff['s] intestate['s] contributory negligence in favor of the defendants.

(Emphasis added). Thereafter, in setting forth the elements of the doctrine of last clear chance, the court again used the phrase "the negligent defendant." Defendant argues that the court's use of that phrase in the instruction amounted to an expression of an opinion by the court that plaintiff had sufficiently proven that defendant was negligent.

We believe that when the instruction on last clear chance is viewed in the context of the alternative allegations of negligence, it is apparent that the court was not expressing its opinion as to the alleged negligence of the defendants. From the issues submitted, the jury could find that either, but not both, defendant Bell or defendant Greta Batts was negligent. And, the doctrine of last clear chance would apply only to the negligent defendant. Thus, the court's use of the phrase "the negligent defendant" in the instruction on last clear chance served only to distinguish that defendant whom the jury might find negligent from the other defendant. Further, the court instructed the jury:

> The law as indeed it should requires that the presiding judge should be absolutely impartial and express no opinion as to the facts. Therefore, you're not to draw any inference from any ruling that I have made, nor let any inflection in my voice or anything else that I may have said or done during this trial influence you as to whether any part[] of the evidence should be believed or disbelieved, as to whether any fact has or has not been proved, or as to what your findings ought to be. It is your duty to find the true facts of the case from the evidence presented.

We conclude that when the instruction on last clear chance is viewed in the context of the entire charge, the instruction could not be seen by the jury as an expression of an opinion by the court. Accordingly, this assignment of error is overruled.

For the reasons stated, we conclude that the trial court committed no error.

No error.

Judges EAGLES and COZORT concur.

CHERYL SMITH LOCKERT, PLAINTIFF v. CHARLES RAY LOPEZ LOCKERT, DEFENDANT

No. 9319DC782

(Filed 16 August 1994)

1. Judges, Justices, and Magistrates § 1 (NCI4th)— temporary assignment of district court judge—commission not for one day only

A commission issued by the Chief Justice transferring a district court judge to another district for "one day, or until the business is disposed of" did not authorize the judge to conduct only a one day session of court but assigned him to the district until matters before him were concluded. N.C. Const. Art. IV, § 11.

Am Jur 2d, Judges § 26.

2. Judges, Justices, and Magistrates § 1 (NCI4th)— temporary assignment of district court judge—commission signed after case began

A commission issued by the Chief Justice temporarily assigning a district court judge to another district was not invalid for an equitable distribution case because it was signed on 13 September 1990 and the judge initially presided over preliminary matters in the case on 11 September 1990 since the written commission itself did not endow the judge with jurisdiction or authority to hear the case but merely memorialized the judge's assignment to the district.

Am Jur 2d, Judges § 26.

3. Judges, Justices, and Magistrates § 1 (NCI4th)— temporary assignment of district court judge—applicability to later trial

A commission issued by the Chief Justice assigning a judge to another district "to begin on September 11, 1990 and continue one day, or until the business is disposed of" authorized the judge to preside over the actual trial of an equitable distribution proceeding in November 1990 where the judge initially presided over preliminary matters in the case on 11 September 1990, since the commission was still effective for the purpose of disposing of the business for which the judge was initially assigned.

Am Jur 2d, Judges § 26.

4. Judges, Justices, and Magistrates § 1 (NCI4th)— temporary assignment of district court judge—exceptional case finding not required

A commission issued by the Chief Justice assigning a district court judge to another district to hear an equitable distribution case was not required to contain a finding that the case was "exceptional" to be valid.

Am Jur 2d, Judges § 26.

5. Judgments § 36 (NCI4th)— dismissal of appeal—order signed outside county, out of district, out of session—consent by parties

The trial court's dismissal of defendant's appeal from an equitable distribution judgment was not void because it was signed outside the county, out of district, and out of session, since there

was abundantly clear indication of consent on the record to the trial court's hearing the matter outside the county and entering its ruling outside the district and out of session.

Am Jur 2d, Judges §§ 58 et seq.

6. Appeal and Error § 368 (NCI4th)— transcript not certified by reporter—time for serving proposed record on appeal not expired—dismissal of appeal error

Since a court reporter did not certify delivery of her portion of a transcript prior to the hearing on plaintiff's motion to dismiss the appeal for failure timely to serve a proposed record on appeal, the defendant's 35-day period to serve the record on appeal never began to run, and the trial court erred when it concluded that defendant's time for serving his proposed record on appeal and the time for filing and docketing the record on appeal with the Court of Appeals had expired. N.C.R. App. P. 7(b), 11(a).

Am Jur 2d, Appeal and Error §§ 415, 416.

Appeal by defendant from order entered 2 June 1993 by Judge William M. Neely in Rowan County District Court. Heard in the Court of Appeals 15 April 1994.

Plaintiff commenced this action on 21 September 1987, seeking an absolute divorce and an equitable distribution of the marital property. Judgment was entered on 29 October 1987 granting plaintiff's claim for absolute divorce and reserving plaintiff's claim for equitable distribution.

Because all of the district court judges within Judicial District 19-C had some personal knowledge of the parties and/or the facts of the case, the Chief District Court Judge requested the Chief Justice to assign a judge from outside the district to conduct the equitable distribution trial. The Chief Justice issued a commission for Judge Neely "to preside over a session or sessions of District Court in Judicial District Nineteen C, to begin on, September 11, 1990, and continue one day, or until the business is disposed of." The commission was memorialized in writing and signed by Chief Justice Exum on 13 September 1990.

On 11 September 1990, the parties appeared before Judge Neely in Judicial District 19-C for an initial hearing concerning the scheduling of pre-trial hearings and pre-trial motions. The equitable distribution trial began on 19 November 1990 and ended on 13 December

1990. The proceedings were recorded by three separate court reporters. The equitable distribution judgment was signed by Judge Neely on 1 December 1992 and filed in Rowan County on 22 December 1992. Both plaintiff and defendant filed notice of appeal. Defendant, through counsel, contracted with the three court reporters for the preparation of the trial transcripts of the proceedings on 31 December 1992. Plaintiff did the same on 4 January 1993. Two of the three court reporters certified delivery of their transcripts by 7 March 1993, however, the third court reporter, Nancy Rorie, did not certify delivery of her portion of the transcript until 9 July 1993. On 26 April 1993, plaintiff filed a motion to dismiss the appeals on the grounds that the record on appeal had not been timely settled. Defendant thereafter moved for an order directing Ms. Rorie to prepare and deliver the transcript and permitting the parties to settle the record after delivery of the transcript.

Plaintiff's motion to dismiss was heard before Judge Neely on 20 May 1993. Judge Neely reserved his ruling until 26 May 1993, when he indicated to counsel that he would grant plaintiff's motion to dismiss the appeal. Defendant's subsequent motion, filed in this Court, for an extension of time for Ms. Rorie to prepare and deliver her portion of the transcript of the proceedings was denied by order dated 1 June 1993. On 2 June 1993, Judge Neely signed, in Randolph County, the order dismissing both appeals, and filed such order in Rowan County. Defendant filed notice of appeal from the order dismissing his original appeal.

Morrow, Alexander, Tash & Long, by John F. Morrow and Daniel A. Landis, for plaintiff-appellee.

Douglas, Ravenel, Hardy, Crihfield & Moseley, by G.S. Crihfield and David W. McDonald, for defendant-appellant.

MARTIN, Judge.

By five assignments of error, defendant contends (1) that the trial court lacked jurisdiction over this equitable distribution case because the commission which assigned Judge Neely to this case is defective, (2) that the order dismissing defendant's appeal is void since it was entered out of term, out of session, and out of county, and (3) that the trial court improperly dismissed defendant's original appeal from the equitable distribution judgment.

Initially, defendant argues that the equitable distribution judgment dated 1 December 1992 and the order dismissing defendant's

appeal dated 2 June 1993 are void because Judge Neely did not have proper jurisdiction to hear or decide these matters. According to his argument, Judge Neely did not have jurisdiction because the commission by which he was purportedly assigned to Judicial District 19-C is invalid for three separate reasons: that the commission which the Chief Justice issued granted only a one day commission to Judge Neely, that the commission was insufficient since it was made retroactively, and that the wrong commission was issued. We find no merit in these contentions.

Article IV, § 11 of the North Carolina Constitution provides in pertinent part: "[t]he Chief Justice of the Supreme Court, acting in accordance with rules of the Supreme Court, . . . may transfer District Judges from one district to another for temporary or specialized duty." The written commission issued by the Chief Justice states:

> To the Honorable WILLIAM M. NEELY
>
> One of the REGULAR Judges of the District Court of North Carolina, Greeting:
>
> As Chief Justice of the Supreme Court of North Carolina, by virtue of authority vested in me by the Constitution of North Carolina, and in accordance with the laws of North Carolina and the rules of the Supreme Court, I do hereby find that the public interest requires, and therefore I do hereby assign and commission you to preside over a session or sessions of District Court in Judicial District NINETEEN C, to begin on, September 11, 1990 and continue ONE DAY, or until the business is disposed of.
>
> In Witness Whereof, I have hereunto signed my name as Chief Justice of the Supreme Court of North Carolina on this day, SEPTEMBER 13, 1990. [Signed] Chief Justice James G. Exum, Jr.

[1] Defendant argues initially that the commission was authorization for Judge Neely to conduct only a one day session of court. This reading of the commission is too narrow and is incorrect. The commission clearly states that Judge Neely was assigned to Judicial District 19-C for the period of "one day **or until the business is disposed of.**" Thus, until the proceedings in the matter before Judge Neely were concluded, he remained properly assigned to Judicial District 19-C for the purpose of conducting them. To hold otherwise would deny the clear and explicit meaning of the commission.

[2] Defendant further contends that, because the order is dated 13 September 1990 and Judge Neely initially presided over preliminary matters in the case on 11 September 1990, the commission is in effect a retroactive one which could not breathe jurisdiction into a hearing completed prior to its issuance. However, assignments are often issued orally by the Chief Justice and subsequently memorialized by written commission. A commission issued pursuant to N.C. Const. Art. IV, § 11 "does not [by itself] endow the judge with jurisdiction, power, or authority . . . . The commission so issued merely manifests that such judge has been duly assigned pursuant to our Constitution to preside over such session of court." *State v. Eley*, 326 N.C. 759, 764, 392 S.E.2d 394, 397 (1990).

[3] Even so, defendant asserts that Judge Neely had no commission to preside in Judicial District 19-C in November 1990, when the actual trial of the equitable distribution action began. Defendant relies on an affidavit of Dallas Cameron, Assistant Director of the Administrative Office of the Courts, which states that "[d]uring the month of November, 1990, there do not appear to be any records of assignments, commissions, or transfers of the Honorable William M. Neely, Chief District Judge, District Court Judicial District 19B to preside over the district court in District Court Judicial District 19C." However, no additional assignment for the month of November was necessary because the commission issued in September was still effective for the purpose of disposing of the business for which Judge Neely was initially assigned.

[4] Defendant also argues that the commission issued by the Chief Justice did not contain the specific finding that this case had been designated an "exceptional" case as provided by § 2.1(a) of the General Rules of Practice in the District and Superior Courts. Defendant cites no authority to support his argument that such a finding is required. Our Constitution "only directs that the Chief Justice make such assignments, the method of so doing is left to the Chief Justice and the Supreme Court." *Eley, supra.* We hold that the commission utilized in this case is sufficient and that Judge Neely had proper jurisdiction when he signed both the equitable distribution judgment dated 1 December 1992 and the order dismissing defendant's appeal dated 2 June 1993.

[5] By his next argument, defendant contends that the order dismissing defendant's appeal from the equitable distribution judgment is void because it was signed outside the county, out of district, and

out of session. In *Nationwide Mutual Ins. Co. v. Anderson*, 111 N.C. App. 248, 431 S.E.2d 552 (1993), this Court held that in order for a trial court to render a judgment out of county and out of session the trial court must have either the express consent of the parties, recorded the fact of consent for the record, or there must be a clear indication of consent in the record. In the record on appeal in this case, the parties have stipulated "[t]hat at the end of the trial in Rowan County and on each subsequent hearing and entry of order in this matter counsel stated that orders in this case could be entered out of term, out of session and out of county." Moreover, in the hearing on plaintiff's motion to dismiss held in Randolph County on 20 May 1993, the court inquired into the parties consent to conducting the hearing out of forum and out of session:

> THE COURT: I assume by your appearance that I need to clarify before—does anybody have any objection to hearing it in this forum, out of term and out of session for Rowan County?
>
> Mr. Morrow: No, sir.
>
> Mr. Crihfield: **No**.

Thus, there is an abundantly clear indication of consent on the record to the trial court's hearing the matter outside Rowan County and entering its ruling outside the district and out of session. Defendant's assignments of error based upon lack of jurisdiction are overruled.

[6] Next, defendant contends that the trial court improperly dismissed defendant's original appeal. Defendant argues that the trial court erred when it found as fact and concluded as a matter of law that defendant's time to perfect his appeal had expired by 20 May 1993, and, in addition, that the trial court's order dismissing the appeal is insufficient because it does not make the requisite finding under N.C.R. App. P. 25 that defendant failed to take some action necessary to present his appeal.

The trial court concluded that defendant's time for serving his proposed record on appeal on plaintiff had expired. The order dismissing defendant's appeal states:

> that as the defendant's time for serving his proposed record on appeal has expired, and as plaintiff's time for serving her proposed record on appeal has expired, and as neither party has served a proposed record of case on appeal, and as the time for filing and docketing the record of case on appeal with the North

Carolina Court of Appeals has expired, and as this trial Court does not have authority to grant any extensions of time, the plaintiff's motion to dismiss appeals herein should be granted.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff's motion to dismiss appeals be and is hereby granted and the plaintiff's appeal and defendant's appeal be and are hereby dismissed.

Rule 11 of the North Carolina Rules of Appellate Procedure provides the time frame within which an appellant must serve a proposed record on appeal. Section (a) and (b) provide in pertinent part:

Settling the Record on Appeal

(a) By Agreement. **Within 35 days after the reporter's certification of delivery of the transcript, if such was ordered** (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal. (Emphasis added.)

(b) By Appellee's Approval of Appellant's Proposed Record on Appeal. If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9 . . .

The record in this case was not settled by agreement. Thus, according to Appellate Rule 11(b), defendant, as appellant, was required to serve a proposed record on appeal within the times provided under Rule 11(a). Since a transcript was ordered, defendant had thirty-five days from the date of the court reporter's certification of delivery of the transcript in which to serve plaintiff with a proposed record on appeal. The evidence clearly establishes and the court found as fact that Ms. Rorie had not delivered her portion of the transcript by 20 May 1993.

Defendant argues that, because the third court reporter did not certify delivery of her transcript prior to the hearing on the motion to dismiss, the time within which defendant was required to serve his proposed record on appeal on plaintiff never began to run. Plaintiff argues that because the court reporter did not certify delivery of her portion of the transcript within the sixty days as required by Appel-

late Rule 7(b) and did not obtain an extension of time to do so, the thirty-five days allowed for service of the proposed record on appeal by Rule 11(a) began to run on the day the time expired for the court reporter to certify delivery of the transcript. In this case plaintiff argues that the sixty-day time period within which Ms. Rorie was required to certify delivery of transcript expired by 5 March 1993, and that the time within which defendant was permitted to serve the proposed record on appeal had expired thirty-five days thereafter.

Rule 11(a) of the Rules of Appellate Procedure explicitly provide that the time in which the record of a case on appeal must be filed runs from the date of the court reporter's certification of delivery of the transcript. Thus, we hold that if the court reporter fails to certify that the transcript has been delivered within the sixty-day period permitted by Appellate Rule 7(b), the thirty-five day period within which an appellant must serve the proposed record on appeal does not begin to run until the court reporter does certify delivery of the transcript. To hold otherwise would allow a delay by a court reporter, whether with or without good excuse, to determine the rights of litigants to appellate review. In this case, we hold that since Ms. Rorie had not certified delivery of her portion of the transcript prior to the hearing on plaintiff's motion to dismiss the appeal, the defendant's thirty-five day period to serve the record on appeal never began to run, and the trial court erred when it concluded that defendant's time for serving his proposed record on appeal, and the time for filing and docketing the record on appeal with this Court, had expired.

Defendant also asserts that in order to dismiss his appeal, the trial court was required to find that defendant had failed to take some action necessary to present the appeal. Pursuant to N.C.R. App. P. 25(a), an appeal may be dismissed for failure to take any action required to present such appeal. Rule 25(a) states:

> Penalties for Failure to Comply with Rules
>
> Failure of Appellant to Take Timely Action. If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed . . . .

The trial court based its order dismissing defendant's appeal upon defendant's failure to serve a proposed record on appeal upon plain-

tiff by the date of the order. Since we have already determined that the time period within which the proposed record on appeal was required to be served had not begun to run in this case because Ms. Rorie had not certified delivery of her portion of the transcript, this finding was in error.

The trial court's order dismissing the appeal in this case is reversed. Defendant shall cause the record on appeal to be settled and docketed as provided by the Rules of Appellate Procedure as though certification of delivery of the transcripts by the court reporters had taken place on the date the mandate of this Court in this matter is issued to the clerk of the trial tribunal.

Reversed.

Judges COZORT and ORR concur.

PATRICIA CANADY, ADMINISTRATRIX OF THE ESTATE OF DENNIS EARL CANADY v. MICHAEL McLEOD, LYNDON YOUNG AND TITUS CAPERS

No. 9310SC3

(Filed 16 August 1994)

1. Workers' Compensation § 62 (NCI4th)— death of roofer—death within coverage of Workers' Compensation Act—provision of alcohol to roofers not an intentional tort

In a wrongful death action where intestate fell from the roof of a house on which he was working, the trial court properly granted summary judgment for defendant homeowner since, even if defendant were deceased's employer, intestate's death would fall within the exclusive coverage of the Workers' Compensation Act, unless plaintiff could show that deceased's death was the result of an intentional tort committed by defendant, and evidence that defendant provided the roofers with alcoholic beverages was insufficient to show that he engaged in conduct knowing that it was substantially certain to cause serious injury or death.

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.

2. **Negligence § 28 (NCI4th)— roofing accident—wrongful death action barred by roofer's contributory negligence**

Plaintiff's action against a homeowner for wrongful death of her intestate who was working on a roof on a cold, windy day was barred by deceased's contributory negligence in consuming alcohol provided by the homeowner.

Am Jur 2d, Negligence §§ 804 et seq., 842 et seq., 1128 et seq.

3. **Labor and Employment § 190 (NCI4th)— re-roofing house in cold wind—steep roof—no inherently dangerous activity—no recovery for breach of non-delegable duties**

Deceased's job of re-roofing defendant's steep roof on a cold windy day was not an inherently dangerous activity so that plaintiff could not recover from defendant for breaches of non-delegable duties of safety.

Am Jur 2d, Independent Contractors §§ 40 et seq.

Appeal by plaintiff from order entered 3 September 1992 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 17 November 1993.

This is a wrongful death action arising out of the death of Dennis Earl Canady who fell from the roof of a house on which he was working. Plaintiff Patricia Canady, the administratrix of the estate of deceased, filed a complaint on 1 March 1991. On 21 August 1992, defendant Titus Capers filed a motion for summary judgment which the trial court granted on 3 September 1992. From the order granting summary judgment, plaintiff appeals.

Ligon & Hinton, by Lemuel W. Hinton, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, by Susan K. Burkhart and Buxton S. Copeland, for defendant-appellee.

McCRODDEN, Judge.

Plaintiff assigns error to the trial court's granting of summary judgment for defendant Capers. We have reviewed plaintiff's arguments and affirm the trial court.

A trial court may grant a motion for summary judgment only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E.2d 287, 290 (1978). Where a case involves either (1) a claim or defense which is utterly baseless in fact or (2) a controversy on a question of law on indisputable facts not needing the full exposure of trial, summary judgment is appropriate. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). In ruling on the motion, the trial court must construe all evidence in the light most favorable to the non-moving party, allowing the non-moving party a trial upon the slightest doubt as to the facts. *Moye v. Thrifty Gas Co.*, 40 N.C. App. 310, 314, 252 S.E.2d 837, 841, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979).

The evidence, when considered in the light most favorable to plaintiff, shows the following. Sometime prior to December 1989, defendant Capers hired Lyndon Young to re-roof a house owned by him and his wife in Middlesex, North Carolina. Young hired the deceased to be part of his crew. Around lunchtime on 3 December, Young informed defendant Capers that he needed more plyboard for the roof, so defendant Capers left the work site around 2:00 p.m. to purchase the additional plyboard. He did not return to the Middlesex house until after the accident occurred. The only eyewitnesses to the fall were Young and Titus Gunter (another crew member), neither of whom could be located at the time of the hearing. However, Anthony Tart, who was also working on the Middlesex house on 3 December, testified that the deceased had been on the roof cutting boards with a circular saw prior to his fall. The roof was an A-frame with a steep pitch, approximately 8 on 12.

Tart's testimony was that he had been a friend of Canady's for two or three years prior to the deceased's death. On the day of the accident, Young hired the deceased as a replacement for a member of Young's crew. Using Capers' truck, defendant Capers and Young drove him and the deceased to the work-site on the morning of 3 December. Tart testified that, when the deceased got in the truck, Tart could tell that he was "drunk."

According to Tart, between 12:00 and 12:30 p.m. that day, defendant Capers volunteered to get lunch for the ten men at the work site. Capers returned with sandwiches, a six-pack of Miller beer, and "two liters or fifths" of Richards Wine. Tart consumed some of the alcohol

without noticing any effect upon his ability to function on the roof. He noticed, however, that the deceased was "hitting kind of heavy" on the wine, drinking one-half of a bottle of the Richards Wine.

About 4:00 p.m., while working on the roof, the deceased slipped and fell. He was transported to Wilson Memorial Hospital and was later taken to Pitt County Memorial Hospital. While at Wilson Memorial, medical personnel tested the deceased's blood alcohol content, and the pathology reports later indicated that his blood alcohol content at the time of the test, 5:45 p.m., was 0.293. He died on 10 December 1989.

I.

[1] In plaintiff's first argument, she contends that, because defendant Capers was the employer of the deceased, he had a duty to provide both a safe place to work and appropriate safety appliances and tools. Defendant Capers responds that he was not the employer of the deceased, but rather that the deceased was an employee of Young, an independent contractor. Citing *Brown v. Texas Co.*, 237 N.C. 738, 741, 76 S.E.2d 45, 46 (1953), defendant Capers submits that because he hired Young, an independent contractor, he is not required to take proper safeguards against dangers which may be incident to the work undertaken by the independent contractor. Thus, he claims that he owed no duty to the deceased.

Assuming, without deciding, that plaintiff's forecast of evidence tended to show that defendant Capers was the deceased's employer, plaintiff has no cause of action in the general courts of justice unless she has also forecast evidence that would allow her to bring an action outside the Workers' Compensation Act. N.C. Gen. Stat. §§ 97-1 to -101 (1991 and Supp. 1993). If the death can only be considered accidental, the trial court properly granted summary judgment because Dennis Canady's death would fall within the exclusive coverage of the Act, and there are no other remedies available to plaintiff against the deceased's employer. *Woodson v. Rowland*, 329 N.C. 330, 337, 407 S.E.2d 222, 226 (1991). If the forecast of evidence is sufficient to show that Canady's death was the result of an intentional tort committed by Capers, then summary judgment was improperly allowed because Capers' intentional tort will support a civil action. *Id.*

The *Woodson* case adopted for North Carolina the substantial certainty test:

> [W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Id. at 340-41, 407 S.E.2d at 228.

Applying the *Woodson* principles to the case at bar, we must determine whether plaintiff's forecast of evidence is sufficient to show that defendant Capers intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death. The *Woodson* 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.

Id. at 341, 407 S.E.2d at 228-29. Substantial certainty requires more than a mere possibility or substantial probability of serious injury or death. *See id.* at 345, 407 S.E.2d at 231.

In the instant case, plaintiff's forecast of evidence does not persuade us that defendant Capers engaged in misconduct *knowing* that it was substantially certain to cause serious injury or death. There is

no doubt that defendant Capers' actions in furnishing alcohol to the deceased while he was re-roofing a house were inappropriate. Nevertheless, plaintiff's evidence is insufficient to show that defendant Capers knew that it was substantially certain when he provided the alcohol to the deceased that he would suffer serious injury or death.

II.

[2] In the alternative, plaintiff alleges that, even if Lyndon Young were an independent contractor, summary judgment was improper because defendant Capers' actions were willful and wanton. Assuming, again without deciding, that Young were a contractor rather than an employee of defendant Capers, defendant Capers is still entitled to summary judgment. Willful and wanton conduct is conduct which shows either a deliberate intention to harm, or an utter indifference to, or conscious disregard for, the rights or safety of others. *Siders v. Gibbs*, 31 N.C. App. 481, 485, 229 S.E.2d 811, 814 (1976). We believe that, if proven, defendant Capers' actions, in furnishing alcohol to the deceased while he was re-roofing a house on a cold and windy December day, may have risen to a level constituting willful and wanton behavior.

Despite this, however, we are constrained to hold that the deceased's own negligence in consuming the alcohol while working on a roof rose to the same level of negligence as that of defendant Capers and thus bars plaintiff's claim. *See Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 423 S.E.2d 72 (1992) (even though plaintiff's allegations in a negligence claim against the provider of alcohol establish more than ordinary negligence on the part of defendant, plaintiff's claim is barred since the allegations also establish a similarly high degree of contributory negligence on the part of the decedent for voluntarily consuming alcohol and then driving while intoxicated). Accordingly, we hold that, as a matter of law, the deceased's contributory negligence bars plaintiff's claim, and that the trial court properly granted summary judgment.

III.

[3] In addition, plaintiff argues that she may proceed to trial on her claim that, even if Young were a contractor, defendant Capers breached non-delegable duties of safety owed to plaintiff's deceased. Generally, one who employs an independent contractor is not liable for an independent contractor's negligence unless the employer retains the right to control the manner in which the contractor per-

forms his work. *Woodson*, 329 N.C. at 350, 407 S.E.2d at 234. However, as an exception to this rule, plaintiff may recover from defendant Capers for breaches of non-delegable duties of safety, if the roofing activity was an "inherently dangerous activity." *See Id.*

Our Supreme Court has held as a matter of law that certain activities, such as building construction, resulting in injury are not inherently dangerous. *See Vogh v. Geer*, 171 N.C. 672, 88 S.E. 874 (1916). This Court in *Olympic Products Co. v. Roof Systems, Inc.*, ruled that re-roofing a building is not inherently dangerous so as to fall within those activities considered non-delegable in nature. 88 N.C. App. 315, 334, 363 S.E.2d 367, 378, *disc. review denied*, 321 N.C. 744, 366 S.E.2d 862 (1988). Subsequent to the decision in *Olympic Products*, *Woodson* altered the rule that certain activities are always inherently dangerous while others may never be, stating that "bright-line rules and mathematical precision are not always compatible with discerning whether an activity is inherently dangerous." *Woodson*, 329 N.C. at 353, 407 S.E.2d at 236.

In light of *Woodson*, we must look at the particular circumstances surrounding the re-roofing of the Middlesex house on 3 December 1989 to determine whether the roofing job was inherently dangerous. Plaintiff's forecast of evidence shows that the deceased, prior to his fall, was operating a circular saw on a steep roof on a cold and windy December day. Tart testified that the weather conditions on 3 December were "kind of tough," that the wind "was gusting real hard," but that he did not feel unsafe on the roof. We do not believe that this forecast of evidence is sufficient to qualify the deceased's job as an inherently dangerous activity. Even if it were, we cannot find in plaintiff's forecast of evidence a causal connection between such activity and the deceased's fall from the roof. Indeed, at the time of the hearing, plaintiff was unable to locate anyone who had witnessed the deceased's fall. Accordingly, we overrule this assignment of error. We affirm the trial judge's grant of summary judgment.

Affirmed.

Judges LEWIS and WYNN concur.

STATE OF NORTH CAROLINA v. TIASEER JANIL RAMBERT

No. 934SC915

(Filed 16 August 1994)

1. **Assault and Battery § 80 (NCI4th); Constitutional Law § 177 (NCI4th)— three shots fired by defendant—insufficiency of indictment to charge three offenses—three convictions—error**

The trial court violated defendant's right against double jeopardy by allowing three separate convictions for three separate shots fired by defendant at the victim's vehicle at three different times and at different ranges where the indictments did not specifically allege the factual basis for the separate events of the three shots.

Am Jur 2d, Assault and Battery §§ 90, 91; Criminal Law § 277.

2. **Weapons and Firearms § 24 (NCI4th)— going armed to the terror of the people—insufficiency of indictment to elevate offense to felony**

The bill of indictment failed to charge defendant with the felony of going armed to the terror of the people, since, for a misdemeanor to be elevated under N.C.G.S. § 14-3(b), the indictment must warn the defendant of a possible elevation to felony status with a specific reference to "infamy," "secrecy and malice," or "deceit and intent to defraud," and the indictment in this case made no such reference.

Am Jur 2d, Weapons and Firearms § 29.

Judge WYNN concurs in the result only.

Appeal by defendant from judgment entered 29 July 1993 by Judge Anthony M. Brannon in Onslow County Superior Court. Heard in the Court of Appeals 6 June 1994.

Defendant was convicted of three counts of discharging a firearm into occupied property in violation of N.C. Gen. Stat. § 14-34.1, one count of assault with a deadly weapon, in violation of N.C. Gen. Stat. § 14-32(c), and one count of going armed to the terror of the people, in violation of the common law. Defendant was sentenced to three

concurrent terms of seven years for the three convictions for discharging a firearm into occupied property. Defendant was also sentenced to three years for the going armed to the terror of the people conviction, to run concurrently with a two-year sentence for the assault conviction. Defendant gave notice of appeal in open court.

Attorney General Michael F. Easley, by Assistant Attorney General Sueanna Sumpter, for the State.

Jordan and Best, by David L. Best, for defendant-appellant.

ORR, Judge.

The evidence tended to show that the defendant encountered John Dillahunt at 4:00 p.m. on 25 May 1992 in the parking lot of a store. Mr. Dillahunt was waiting in his car for two friends who were in the store. The defendant was in the back seat, on the passenger side, of a car driven by his cousin. A friend of the defendant's, Rick, was in the front seat of the car. There were other people in the parking lot of the store.

According to the State's evidence, the defendant's car pulled alongside Mr. Dillahunt's car and defendant said: "Talk that shit now." Defendant's statement was a reference to prior confrontations that he had had with Mr. Dillahunt. Mr. Dillahunt then noticed that the defendant was holding a gun and ducked. Defendant shot his gun at Mr. Dillahunt's car. The bullet hit the front windshield of the car and cracked the glass. The bullet did not enter the car, but a hole was made in the windshield. Mr. Dillahunt then drove away from the defendant's car. When he was approximately ten yards away from the defendant's car he heard a second shot, which hit his car in the center of the passenger-side door. Mr. Dillahunt ducked once again after the second shot was fired. He heard a third shot fired from a distance of approximately 20 yards. This bullet hit the rear bumper of his car. Mr. Dillahunt did not see the defendant fire this shot, though he saw the first and second shots fired by the defendant. Neither Mr. Dillahunt nor any of the other persons in the parking lot were injured by the gunshots.

Mr. Dillahunt rapidly drove away from the defendant and proceeded towards downtown Jacksonville. Upon realizing that defendant's car was following him, and that traffic was stopped ahead, Mr. Dillahunt turned into a residential neighborhood, driving at approximately 75-80 miles per hour. Defendant's car continued to follow him.

Mr. Dillahunt heard two more shots fired from the defendant's car during this chase. Mr. Dillahunt found a police officer and asked her assistance. At this point, defendant's car turned around and left.

Mr. Dillahunt went to the police station to give a statement. An evidence technician removed a thirty-eight (.38) caliber bullet from the rear bumper of his car and one of the officers who investigated the crime found a thirty-two (.32) caliber bullet at the crime scene. At the conclusion of the State's evidence, the defendant moved to dismiss the charges against him on the grounds that they subjected him to double jeopardy and accordingly violated the Fifth and Fourteenth Amendments of the United States Constitution.

I.

[1] The double jeopardy objection to the three separate convictions for discharging a firearm into occupied property is the basis for defendant's first assignment of error. We hold that the trial court erred by allowing three separate convictions.

In *State v. Ray*, 97 N.C. App. 621, 389 S.E.2d 422 (1990), Judge Duncan applied the framework for analyzing double jeopardy arguments established in *State v. Hicks*, 233 N.C. 511, 516, 64 S.E.2d 871, 875, *cert. denied*, 342 U.S. 831, 96 L. Ed. 629 (1951), specifically to N.C. Gen. Stat. § 14-34.1. The *Ray* opinion restated the two questions in *Hicks'* double jeopardy analysis:

> 1) whether the facts alleged in the second indictment if given in evidence would have sustained a conviction under the first indictment, or 2) whether the same evidence would support a conviction in each case.

97 N.C. App. at 623, 389 S.E.2d at 424. *See also State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375 (1972); *State v. Irick*, 291 N.C. 480, 502, 231 S.E.2d 833, 847 (1977).

In *Ray*, the Court applied the *Hicks* test to hold that the defendant's two convictions did not subject him to double jeopardy. The first indictment against the defendant charged that he shot into 3606 Jonquil Street, while the second indictment alleges he shot into 3608 Jonquil Street. The State offered evidence showing that he fired into the two dwellings which were both located in the same apartment building. Applying the first part of the test, this Court reasoned that the evidence offered in support of the second indictment would not have supported a conviction in the first indictment. *Id.* at 624, 389

S.E.2d at 424. Applying the second part of the test, this Court held that the same evidence would not have supported a conviction on both counts. *Id.* Accordingly, defendant was properly convicted of two separate counts of firing into occupied property.

Applying the *Hicks* test to the instant case, we find that the three shots fired by defendant can only support one conviction. The indictments against the defendant were for the three shots he took at Mr. Dillahunt's vehicle at different times and at different ranges. However, the indictments do not allege the specific events of each shot. In fact, the indictments for each shot are identically worded. The first question in the *Hicks* test is whether the evidence for the second or third weapon discharges would sustain a conviction for the first indictment. The second and third shots were fired several moments after the first shot. In addition, they hit Mr. Dillahunt's car in different areas than did the first shot. Nevertheless, the bill of indictment does not distinguish between the shots fired. Accordingly, evidence for the second or third weapon discharge would support a conviction for the first indictment. Applying the second part of the *Hicks* test, the same evidence would support a conviction in each of the three indictments against the defendant. Again, this is because the indictments did not specifically allege the factual basis for the separate events of the first, second and third shots.

We note that had the indictments, under the facts of this case, specifically alleged the factual basis for each of the three shots, each shot could have been treated as grounds for separate convictions. For example, the three indictments could have alleged, respectively, that (1) defendant discharged a handgun into the front windshield of the car; (2) defendant discharged a handgun into the passenger side door of the car as the car was ten yards from where the first shot was fired; and (3) defendant discharged a handgun into the rear bumper of the car as the car was twenty yards from where the first shot was fired. However, because the indictments did not specifically allege the factual basis for each of the three shots, we conclude that the trial court erred in treating each shot as grounds for separate convictions.

II.

[2] Defendant's second assignment of error involves the trial court's finding that the common law offense of going armed to the terror of the people was a felony because it was "infamous" under N.C. Gen. Stat. § 14-3(b). We do not reach the substantive aspect of this assignment of error because the bill of indictment improperly failed to charge the defendant with a felony.

The trial court found the common law offense of going armed to the terror of the people to be an infamous crime within the meaning of N.C. Gen. Stat. § 14-3(b). This statute states:

> If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, . . ., be guilty of a Class H felony.

In order for a misdemeanor offense to be elevated under N.C. Gen. Stat. § 14-3(b), the indictment must make the defendant aware that the state seeks conviction on a Class H felony. This Court first addressed this issue in *State v. Preston*, 73 N.C. App. 174, 176, 325 S.E.2d 686, 688 (1985). In *Preston* the defendant was charged with the misdemeanor offense of obstruction of justice. The court convicted the defendant as a Class H felon under N.C. Gen. Stat. § 14-3(b). This Court held that the conviction was improper because the indictment "fails to charge the essential elements of deceit and intent to defraud which are necessary to elevate the misdemeanor offense of obstruction of justice to a felony." *Id.* The Court reasoned that the bill of indictment "must allege all essential elements of the offense to be charged in order that the defendant may be adequately informed of the offense with which he is charged; that he have a reasonable opportunity to prepare his defense." *Id.* Thus, this Court in *Preston* overturned the conviction because the indictment improperly failed to warn the defendant of conviction for a Class H felony by neglecting to use the words "deceit and intent to defraud" from N.C. Gen. Stat. § 14-3(b).

This Court addressed the same issue later in *State v. Clemmons*, 100 N.C. App. 286, 396 S.E.2d at 616 (1990). In *Clemmons* defendant claimed that the Superior Court lacked jurisdiction because his indictments only charged the misdemeanor offenses of solicitation to obstruct justice and attempt to obstruct justice. He was convicted as a felon on these charges pursuant to N.C. Gen. Stat. § 14-3(b). This Court observed that "[e]ach of defendant's three indictments charged that the offenses were infamous, which the statute requires to raise the offenses to a Class H felony. In addition, the indictments detailed defendant's actions involving elements of deceit and intent to defraud." *Id.* at 292, 396 S.E.2d at 619. As a result of the indictment's specific allegations of infamy, deceit, and intent to defraud, the Court held that the conviction could be elevated to a felony. *Preston* and *Clemmons* clearly stand for the proposition that for a conviction to

be elevated under N.C. Gen. Stat. § 14-3(b), the indictment must warn the defendant of a possible elevation to felony status with a specific reference to "infamy," "secrecy and malice," or "deceit and intent to defraud."

Applying *Preston* and *Clemmons* to the instant case, there was no proper warning in the indictment of a possible elevation of the defendant's conviction to felony status. The State claims that defendant's crime was "infamous," and accordingly should be punished as a felony pursuant to N.C. Gen. Stat. § 14-3(b). However, in the bill of indictment charging defendant with the misdemeanor of going armed to the terror of the people, there is no mention of "infamy." The State contends that the indictment is sufficiently suggestive of the "infamy" of the defendant's actions that defendant was adequately informed that the offense charged was intended to be a felony. This argument is not supported by *Preston's* and *Clemmons'* requirement that specific language be used to inform defendant that the State seeks a felony conviction. Furthermore, in the instant case the defendant only became aware that the State sought a felony punishment *after* the jury had decided the issue. In *Preston* we stated that defendant must be "adequately informed of the offense with which he is charged; that he have a reasonable opportunity to prepare his defense." *Preston* at 176, 325 S.E.2d at 688. The State's unexpected move to seek punishment for a Class H felony at the end of the trial clearly violates the principle we set forth in *Preston.* The bill of indictment must give defendant a "reasonable opportunity to prepare his defense."

Accordingly, we reverse the trial court's three separate convictions for discharging a weapon into occupied property. We also reverse the trial court's Class H felony conviction for the crime of going armed to the terror of the people.

Reversed and remanded for resentencing.

Judge JOHNSON concurs.

Judge WYNN concurs in the result only.

DIGGS v. DIGGS

[116 N.C. App. 95 (1994)]

BRENDA DIGGS v. ARTHUR DIGGS

No. 935SC124

(Filed 16 August 1994)

1. **Partition § 36 (NCI4th)— equitable distribution proceeding barred by separation agreement—partition proceeding—jurisdiction of superior court**

Where the parties' separation agreement, incorporated into their divorce decree, barred an equitable distribution proceeding, the superior court had jurisdiction to partition property included in the separation agreement, and there was no merit to respondent's contention that the district court had exclusive jurisdiction to enforce separation agreements.

Am Jur 2d, Partition § 102.

2. **Divorce and Separation § 19 (NCI4th)— tenants in common—right to partition waived by separation agreement—time limit on waiver implied**

Petitioner waived her right to partition a house owned by petitioner and respondent as tenants in common and occupied by respondent where the parties entered into a separation agreement which provided that respondent would remain in the house and be responsible for making mortgage payments; respondent met the only condition on his right to occupy the house by making all the required payments; and the silence of the agreement as to a time limitation for the waiver did not make such waiver ineffective, as respondent's lifetime implicitly limited the duration of the waiver of the right to partition.

Am Jur 2d, Divorce and Separation §§ 838 et seq.

Appeal by respondent from judgment entered 15 September 1992 by Judge George K. Butterfield in New Hanover County Superior Court. Heard in the Court of Appeals 9 December 1993.

Petitioner filed a petition against her ex-husband for partition of a house owned by petitioner and respondent as tenants in common and occupied by respondent. Respondent answered and moved, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (1990), to dismiss the petition for lack of subject matter jurisdiction. The Clerk of New Hanover County Superior Court granted the motion to dismiss and

petitioner appealed to the Superior Court. Respondent again moved to dismiss the petition for lack of subject matter jurisdiction. The superior court heard arguments, denied respondent's motion to dismiss, and granted summary judgment in petitioner's favor. From this order, respondent appeals.

Pennington & Wicks, by Ralph S. Pennington and Ellen Arnold Kiernan, for respondent-appellant.

Smith & Smith, by W.G. Smith and Walter M. Smith, for petitioner-appellee.

McCRODDEN, Judge.

We face two questions in this case: I. If a separation agreement, incorporated into a divorce decree, bars an equitable distribution proceeding, does the superior court have jurisdiction to partition property included in the separation agreement? II. Assuming the answer to I is affirmative, did the petitioner waive her right to partition by entering into the agreement?

The facts are as follows. Petitioner and respondent were married on 26 March 1971. During the course of the marriage, they acquired the house in question, taking title as tenants by the entirety. Subsequently, petitioner and respondent separated and, on 5 March 1990, entered into a separation agreement (the Agreement) which provided that the respondent:

> [S]hall continue to occupy the marital residence, located at 10 Ballard Drive, Prince George Estates, Castle Hayne, North Carolina. [Respondent] shall be responsible for making the mortgage payment while living in the marital home. Should this property be placed on the market for sale [respondent] and [petitioner] shall divide equally any proceeds from the sale.

On 19 March 1991, petitioner filed a complaint for absolute divorce, requesting that the Agreement be incorporated into the divorce decree and that the court exercise its jurisdiction and hold an equitable distribution proceeding at a later date. Respondent answered and moved for summary judgment on petitioner's claim for equitable distribution. Following a hearing on 9 August 1991, District Court Judge Jacqueline Morris-Goodson granted respondent's motion for summary judgment on the equitable distribution claim, dismissed that claim, and entered a judgment of absolute divorce, incorporating the Agreement.

Petitioner appealed the dismissal of her equitable distribution action to this Court. This Court held that the Agreement "reveals the parties' desire for a full and final disposition of their marital property which is binding on the Court," and affirmed the entry of summary judgment in respondent's favor. *Diggs v. Diggs*, 106 N.C. App. 394, 417 S.E.2d 854 (1992) (unpublished).

On 16 June 1992, petitioner filed a petition to partition the parties' marital home with the New Hanover County Clerk of Superior Court. Respondent filed his answer on 29 June 1992, and on 2 July 1992, filed a motion to dismiss, alleging that the superior court lacked subject matter jurisdiction to partition the property and that the Agreement precluded partition of the property. The clerk entered an order on 4 August 1992, denying respondent's motion to dismiss for lack of subject matter jurisdiction but also denying petitioner's petition, on the ground that petitioner had waived her right to partition in the Agreement. Petitioner appealed to the superior court.

The superior court judge held a hearing in the matter on 24 August 1992. On its own motion, the court converted the hearing to one on a motion for summary judgment. After arguments and evidence, the court denied respondent's motion to dismiss for lack of subject matter jurisdiction, found that the Agreement was not effective to waive petitioner's right to partition because it contained no limit on the time within which the waiver was to be effective, and granted summary judgment on petitioner's petition for partition.

I.

[1] Respondent argues that the superior court lacked subject matter jurisdiction to hold the partition proceeding because the district court has exclusive jurisdiction to enforce separation agreements. We disagree.

"A valid separation agreement that waives rights to equitable distribution will be honored by the courts and will be binding upon the parties." *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987). "[I]n the absence of an equitable distribution of entireties property under N.C.G.S. § 50-20, an ex-spouse (now tenant in common) retains the right to possession and the right to alienate and may bring an action for waste, ejectment, accounting, or partition." *Id.* at 292, 354 S.E.2d at 233. In *Hagler*, the plaintiff-husband was granted summary judgment on the defendant-wife's request for an equitable distribution. The Supreme Court upheld the entry of summary judg-

ment on the ground that a separation agreement signed by the parties evinced an intention to make a complete disposition of their respective property rights and barred a subsequent claim for equitable distribution.

In the prior appeal of this case, this Court held that the Agreement precluded petitioner from having a proceeding for equitable distribution. This is the law of the case. *See N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983). Nonetheless, under *Hagler*, petitioner would be entitled to bring an action for partition of the house that she owns as a tenant in common with respondent. A co-tenant may only obtain partition "by petition to the superior court." N.C. Gen. Stat. § 46-3 (Supp. 1993).

Respondent counters by citing the case *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988), for the proposition that the superior court has no authority to partition marital property once the jurisdiction of the district court has been invoked by a request for equitable distribution. *Garrison*, however, is distinguishable.

In *Garrison*, the respondent-wife requested an equitable distribution in her answer to her husband's complaint for divorce. The trial court entered a judgment of divorce but left the equitable distribution proceeding pending. Subsequently, the petitioner-husband sought partition of the marital home. This Court held:

> The superior court has no authority to partition marital property pursuant to the provisions of G.S. 46-1 *et seq.* where, as here, the jurisdiction of the district court has been properly invoked to equitably distribute such marital property. *Had the parties not asserted their right to have the property equitably distributed pursuant to G.S. 50-20, either tenant in common could have filed a special proceeding to have the property partitioned as provided by G.S. 46-1 et seq.*

Id. at 672, 369 S.E.2d at 629 (emphasis added). In the instant case, petitioner tried but failed to invoke the jurisdiction of the district court for equitable distribution of the parties' marital property. Therefore, under *Hagler* and *Garrison*, the superior court had subject matter jurisdiction to hear the proceeding for the partition of the subject property. We reject respondent's first assignments of error.

II.

[2] Respondent next argues that the trial court erred in granting summary judgment in petitioner's favor because she had waived her

right to partition by entering into the Agreement. We find that the Agreement was effective to waive the parties' right to partition.

Upon divorce, former tenants by the entireties become tenants in common, *Hagler* 319 N.C. at 292, 354 S.E.2d at 233, and are entitled to partition as a matter of right. *Coats v. Williams*, 261 N.C. 692, 695, 136 S.E.2d 113, 115 (1964). However, a cotenant may, by express or implied agreement, waive this right for a reasonable time. *Properties, Inc. v. Cox*, 268 N.C. 14, 19, 149 S.E.2d 553, 557 (1966). A separation agreement may contain such a waiver. *Hepler v. Burnham*, 24 N.C. App. 362, 210 S.E.2d 509 (1975).

In *Winborne v. Winborne*, 54 N.C. App. 189, 282 S.E.2d 487 (1981), this Court, relying on *Hepler*, found that the parties to a separation agreement had implicitly waived their right to a partition. The separation agreement in that case provided that "[t]he parties own a home as 'tenants by the entirety,' in which husband will continue to live and make payments." *Winborne*, 54 N.C. App. at 189, 282 S.E.2d at 488. The Court found that this agreement was indistinguishable from the one considered in *Hepler*, in that "the gravamen of the separation agreement as to the disposition of the entirety property is that the respondent will be allowed to live in the house so long as he or she meets certain conditions." *Id.* at 190, 282 S.E.2d at 488. The only condition of the *Winborne* respondent's right to occupy the house was that he continue to make payments on the house.

Insofar as the property held in tenancy in common is concerned, the language of the Agreement in this case is strikingly similar to the agreement in *Winborne*. Here the Agreement gives respondent the right to occupy the house and requires that he make payments on the house. As in *Winborne*, there is no dispute that respondent has met the only condition on his right to occupy the house, *i.e.* he has made all the required payments on the house. We believe that *Winborne* controls our decision concerning petitioner's waiver of equitable distribution rights.

The final question we address is whether, as the trial court found, the silence of the agreement as to a time limitation for the waiver made such waiver ineffective. In *McDowell v. McDowell*, 61 N.C. App. 700, 301 S.E.2d 729 (1983), this Court considered a separation agreement which contained no explicit limit on the time within which the right to partition had to be exercised. We found that the length of the respondent's life implicitly limited the time, found that "an agreement providing for the wife's continued possession of property for her life

is valid and not subject to attack as an unreasonable restraint on alienation," and concluded, therefore, that the provision was enforceable. *Id.* at 704, 301 S.E.2d at 731.

In this case, the respondent's right to occupy the house can last no longer than his lifetime, thus implicitly limiting the duration of the waiver of the right to partition. The Agreement did not unreasonably limit the petitioner's right to partition and was effective to waive that right. Hence, the trial court erred in not dismissing the petition to partition. We vacate its judgment.

Vacated.

Judges JOHNSON and MARTIN concur.

BARCLAYS AMERICAN/MORTGAGE CORPORATION, PLAINTIFF, v. BECA ENTERPRISES, A NORTH CAROLINA GENERAL PARTNERSHIP; W.G. ERWIN, JR., GENERAL PARTNER; CHARLES H. ALBRITTON, III, GENERAL PARTNER, DEFENDANTS

No. 923SC1296

(Filed 16 August 1994)

Process and Service § 94 (NCI4th)— deficiency action—lack of notice of foreclosure proceedings—summary judgment for defendant proper

Plaintiff deed of trust holder did not exercise due diligence or make a reasonable and diligent effort in attempting to serve defendant partner in the debtor-partnership with notice of a foreclosure hearing, could thus not rely on notice by posting, and was not entitled to recover deficiencies from defendant following the foreclosure sales where plaintiff's only attempt at personal service was one letter mailed to the parnership's business address; plaintiff made no attempt to ascertain defendant's personal address even though this address was a matter of public record; and plaintiff's attorney readily ascertained defendant's address and without difficulty obtained personal service upon him in this deficiency action. N.C.G.S. § 45-21.16(b)(2).

Am Jur 2d, Process §§ 248 et seq.

Appeal by plaintiff from judgment entered 15 September 1992 by Judge Ernest B. Fullwood in Pitt County Superior Court. Heard in the Court of Appeals 28 October 1993.

Browning, Hill & Hilburn, by W. Gregory Duke, for plaintiff-appellant.

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

JOHN, Judge.

In this foreclosure action plaintiff challenges the entry of summary judgment in favor of defendant Charles H. Albritton, III (Albritton) and the denial of its motion for summary judgment. Upon review, we affirm the action of the trial court.

The material facts are not in dispute. On 16 December 1986, BECA Enterprises (BECA), a North Carolina General Partnership, through its two general partners W. G. Erwin, Jr. (Erwin) and Albritton, executed and delivered four deeds of trust to Cameron-Brown Company. Each secured a separate promissory note in the amount of $40,250. Cameron-Brown thereafter assigned the instruments to plaintiff.

BECA subsequently defaulted on the notes, and plaintiff requested commencement of foreclosure proceedings against each of the four pledged properties. The trustee under the deeds sought to serve BECA and its general partners with Notice of Foreclosure Hearing by mailing a separate certified letter concerning each of the respective properties to P. O. Box 2622, Greenville, N.C. 27836, the business address of BECA. Three of the letters were returned unclaimed. The other was not returned, nor was a return receipt. Thereafter, Notice of Hearing was posted at the four affected premises. Following foreclosure sales, deficiencies remained under each of the promissory notes.

On 25 June 1991, plaintiff brought the instant action seeking to recover the deficiencies. Albritton was sued in his individual capacity and as a general partner of BECA. On 16 September 1991, he filed answer asserting *inter alia* the affirmative defense of plaintiff's failure to serve him with Notice of Hearing in the foreclosure proceeding as required by N.C.G.S. § 45-21.16 (1991). The trial court allowed Albritton's motion for summary judgment on 15 September 1992. Default was entered against BECA and Erwin and they are not parties to this appeal.

The sole question for resolution herein is the propriety of the trial court's entry of summary judgment in favor of defendant Albritton. "Summary judgment is properly granted when there is no genuine issue of material fact and one of the parties is entitled to judgment as a matter of law." *Federal Land Bank v. Lackey*, 94 N.C. App. 553, 554, 380 S.E.2d 538, 538-39 (1989), *aff'd*, 326 N.C. 478, 390 S.E.2d 138 (1990); *see also* N.C.R. Civ. P. 56 (1990). This burden may be met by "showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or *cannot surmount an affirmative defense which would bar the claim.*" *Roumillat v. Simplistic Enterprises, Inc.* 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992); (emphasis added) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

Albritton contends plaintiff was unable to overcome the affirmative defense of lack of notice set out in his answer and that, since G.S. § 45-21.16(b)(2) provides that a person who has no notice of hearing shall not be held liable upon any deficiency, his motion for summary judgment was properly allowed. We agree.

Concerning the requirement of notice, G.S. § 45-21.16 provides in pertinent part as follows:

> The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall serve upon each party entitled to notice . . . a notice of hearing.
>
> . . .
>
> The notice shall be served in any manner provided by the Rules of Civil Procedure for the service of summons, or may be served by actual delivery by registered or certified mail, return receipt requested; *provided, that in those instances in which service by publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property . . . ; provided further, if service upon a party cannot be effected after a reasonable and diligent effort* in a manner authorized above, *notice to such party may be given by posting a notice in a conspicuous place and manner upon the property . . . .*

G.S. § 45-21.16(a) (emphasis added).

Under our Rules of Civil Procedure referenced in the statute, service by publication is authorized only when a party "cannot with

due diligence be served by personal delivery or registered or certified mail." N.C.R. Civ. P. 4(j1) (1990); *see also Lackey*, 94 N.C. App. at 556-57, 380 S.E.2d at 540 (Notice by posting is permissible under G.S. § 45-21.16(a) only when "the party's name and address are not reasonably ascertainable."). Service of process by publication is in derogation of the common law, and a statute sanctioning it must therefore be strictly construed both as a grant of authority and in determining if service has been effected in conformity therewith. *Emanuel v. Fellows*, 47 N.C. App. 340, 345, 267 S.E.2d 368, 371, *disc. review denied*, 301 N.C. 87 (1980).

In determining whether due diligence has been exerted in effecting service, this Court has rejected use of a "restrictive mandatory checklist" and has held determination in each case is based upon the facts and circumstances thereof. *Emanuel*, 47 N.C. App. at 347, 267 S.E.2d at 372. However, the "due diligence" test of Rule 4(j1) requires a party to use all reasonably available resources to accomplish service. *Williamson v. Savage*, 104 N.C. App. 188, 192, 408 S.E.2d 754, 756 (1991). Likewise, a "reasonable and diligent effort" under G.S. § 45-21.16(a) would similarly necessitate employment of "reasonably ascertainable" information. *See Lackey*, 94 N.C. App. at 556-57, 380 S.E.2d at 540.

In the case *sub judice*, plaintiff's sole attempt at personal service of Notice upon Albritton consisted of a certified letter mailed to the business address of BECA, a postal box number. Strictly construing plaintiff's effort, *Emanuel* 47 N.C. App. at 345, 267 S.E.2d at 371, we believe this solitary venture constituted neither application of "due diligence" as required by Rule 4(j1) nor a "reasonable and diligent effort" as required by G.S. § 45-21.16(a).

First, Albritton's correct address was reasonably discoverable in that it was listed on the public record. On 22 November 1986, BECA and its general partners had filed a Certificate of General Partnership and Assumed Name with the Office of Register of Deeds of Pitt County. This document indicated the residential address of Albritton as 1800 Windsor Road, Kinston, North Carolina 28501. It is uncontroverted that this remained his address at all pertinent times. In addition, the record reflects the Albritton Company, an unrelated business of defendant Albritton, maintained at all relevant times a location in Pitt County, recorded taxes for both 1990 and 1991 with the Pitt County Tax Assessor, advertised with a street address in the Greenville *Daily Reflector* and was listed in the local telephone directory.

The public record is generally regarded as being reasonably available, and this Court has consistently attached a level of significance to whether or not the public record has been inspected in order to ascertain an appropriate address for service of process. *Winter v. Williams*, 108 N.C. App. 739, 742, 425 S.E.2d 458, 460, *disc. review denied*, 333 N.C. 578, 429 S.E.2d 578 (1993). *In re Clark*, 76 N.C. App. 83, 87-88, 332 S.E.2d 196, 199-200, *appeal dismissed*, 314 N.C. 665, 335 S.E.2d 322 (1985). Evidence before the trial court in the case *sub judice* revealed the public record and other sources mentioned above were easily accessible to plaintiff, but not utilized.

Second, all information necessary to communicate with Albritton at his personal address had been provided to the original lender Cameron-Brown, which itself had previously utilized this address to contact Albritton. Additionally, when Albritton presented the loan applications in question to Cameron-Brown, he listed the address of the unrelated business of which he was president, as well as home and business telephone numbers which remained current at the time foreclosure hearings commenced. We observe the Deeds of Trust assigned by Cameron-Brown to plaintiff contain no address for BECA, but that the affidavit of Ralph Carrigan, Vice-President of Plaintiff, states that "the general partners of Beca Enterprises provided to . . . Cameron-Brown" the post office box address at which certified mail service was attempted. Acknowledgement of this information not contained on the assigned instruments suggests possession by plaintiff of, or at a minimum, reasonable access to Cameron-Brown documents containing Albritton's actual address as well as the other information noted above.

Finally, we note plaintiff's attorney readily ascertained the address of Albritton and without difficulty obtained personal service upon him of the instant deficiency complaint at the Windsor Road address.

Under these circumstances, we determine that plaintiff neither utilized "due diligence" nor exerted a "reasonable and diligent" effort in attempting to serve the Notice of Foreclosure Hearing upon Albritton. Consequently, plaintiff failed to satisfy the statutory prerequisite to notice by posting and such attempted notice was ineffective. Plaintiff thus was unable to surmount the affirmative defense mounted by Albritton, and the trial court properly granted his motion for summary judgment. Accordingly, we do not address plaintiff's argument concerning its motion for summary judgment.

Affirmed.

Judges GREENE and MARTIN concur.

BRENTON D. ADAMS, TRUSTEE OF THE BRENTON D. ADAMS RETIREMENT PLAN v. BEARD DEVELOPMENT CORPORATION AND H. TERRY HUTCHENS, TRUSTEE

No. 9314SC193

(Filed 16 August 1994)

1. Interest and Usury § 19 (NCI4th)— action barred by two-year statute of limitations—no interest actually paid by plaintiff

Plaintiff was not entitled to double recovery for any usurious interest paid on a promissory note since plaintiff's complaint was filed more than two years after the execution of the note, and the two-year statute of limitations barred plaintiff's claim for forfeiture of interest pursuant to N.C.G.S. § 24-2; furthermore, plaintiff's claim for double recovery failed since he had not actually paid any interest himself.

Am Jur 2d, Interest and Usury §§ 307-338.

2. Injunctions § 12 (NCI4th)— injunction denied—no reasonable likelihood of prevailing on underlying action—legal remedy available

The trial court properly denied a preliminary injunction enjoining defendant from proceeding with a foreclosure sale of property owned by plaintiff subject to the first and second deeds of trust, since plaintiff failed to establish that he was reasonably likely to succeed on the merits of his usury suit, and since he had an adequate legal remedy which would have protected his interests in that he could have tendered the amount demanded by defendant and subsequently brought an action against defendant under N.C.G.S. § 24-2 for double the amount of interest paid.

Am Jur 2d, Injunctions §§ 23 et seq.

Appeal by plaintiff from order entered 19 March 1992 by Judge Henry W. Hight, Jr., and order entered 28 September 1992 by Judge

Jack A. Thompson in Durham County Superior Court. Heard in the Court of Appeals 7 December 1993.

This action arises out of a promissory note in the principal amount of $3,519.84 and deed of trust dated 19 January 1989, which were executed by Betty J. Hopkins. Hopkins defaulted on the note and a foreclosure sale for the property described as Lot 34 was conducted. Plaintiff was the highest bidder at the foreclosure sale and became the fee simple owner of the property subject to the first and second deeds of trust.

After plaintiff became the fee simple owner of this real estate, defendant Beard Development Corporation demanded a sum in excess of $34,000.00 for the cancellation of its deed of trust and subsequently instituted a proceeding to foreclose. On 4 October 1991, plaintiff filed a complaint, seeking a preliminary injunction to enjoin the foreclosure of the property, a declaration that all interest charges collected on defendant's note were usurious, a further declaration that "there is nothing due under the terms of the note," and an order that the note be marked "Paid in Full." Judge Henry W. Hight, Jr. denied plaintiff's motion for a preliminary injunction on 19 March 1992, and on 28 September 1992, Judge Jack A. Thompson granted summary judgment in favor of defendant Beard. From the orders denying plaintiff's motion for a preliminary injunction and awarding summary judgment for defendant Beard, plaintiff appeals.

Brenton D. Adams for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Robin K. Vinson, for defendant-appellee Beard Development Corporation.

McCRODDEN, Judge.

In this appeal, plaintiff brings forward two assignments of error: first, he contends that the trial court erred in failing to enjoin defendant from proceeding with the foreclosure sale pending a judicial determination of the correct amount due on the promissory note; and, second, he assigns as error the granting of summary judgment, alleging that, because of his allegations of usurious interest, there was a genuine issue of material fact as to the correct amount due. For the following reasons, we affirm the orders of the trial judges.

I.

For a clearer analysis of the questions presented in this appeal, we first address plaintiff's argument that Judge Thompson's order granting summary judgment for defendant was erroneous.

A trial judge may grant a motion for summary judgment only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 231 (1987). In ruling on the motion, the trial court must construe all evidence in the light most favorable to the non-moving party. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Plaintiff's forecast of evidence, construed in the light most favorable to him, tends to show the following. On 26 October 1989, plaintiff became the holder of the note secured by a third deed of trust on property described as Lot 34. The note plaintiff held fell into default, triggering a foreclosure sale. At that time, plaintiff purchased the property and became the fee simple owner, subject to two deeds of trust.

The promissory note held by defendant and securing a second deed of trust was in the stated amount of $26,000.00 and contained an interest rate of 18.38%. Defendant claims that the amount due on the note was $43,046.44 as of 11 September 1992, plus costs and attorney's fees. Before plaintiff foreclosed on the note he held, Betty Hopkins, whose debt was evidenced by the deeds of trust, had provided payments constituting principal and interest on the defendant's note within two years of the filing of plaintiff's current lawsuit. Plaintiff, however, had paid no amount on the note.

Plaintiff argues that there was a dispute as to the amount due on the note and that the trial court should not have granted summary judgment when this material fact was at issue. Plaintiff, however, failed in his complaint to request that the trial court determine the amount due on the note held by defendant. As noted above, the thrust of plaintiff's complaint was that the interest defendant charged was usurious and plaintiff prayed the court to declare, among other things, that the note be marked "Paid in Full."

[1] In support of his current argument, plaintiff continues to claim that the interest on the note is usurious and should be forfeited and that he should be awarded double recovery for any interest paid. Sec-

tion 24-2 of the North Carolina General Statutes sets forth the penalties for usury, stating:

> The taking, receiving, reserving or charging a greater rate of interest than permitted by this chapter or other applicable law, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid may recover back twice the amount of interest paid in an action in the nature of action for debt.

N.C. Gen. Stat. § 24-2 (1991). Thus, under this statute, there are two statutory penalties for usury: (1) the entire amount of interest due is subject to forfeiture, and (2) the debtor may recover twice the amount of interest paid. N.C.G.S. § 24-2; *Merritt v. Knox*, 94 N.C. App. 340, 342, 380 S.E.2d 160, 162 (1989).

Section 24-2 allows the forfeiture of the entire interest which the note carries with it when there has been a "taking, receiving, reserving or charging a greater rate of interest" than allowed by law. N.C.G.S. § 24-2; *Northwestern Bank v. Barber*, 79 N.C. App. 425, 429, 339 S.E.2d 452, 455, *disc. review denied*, 316 N.C. 733, 345 S.E.2d 391 (1986). The "charging" which constitutes a forfeiture under section 24-2 is the contract, promise, or agreement to a usurious rate of interest, as opposed to the actual collection or payment of that interest. *Northwestern Bank*, 79 N.C. App. at 429, 339 S.E.2d at 455. This remedy is subject to a two-year statute of limitations, N.C. Gen. Stat. § 1-53(3) (1983); *Merritt*, 94 N.C. App. at 342, 380 S.E.2d. at 162, and the limitations period "begins to run from the time an agreement or charge for usurious interest is *first made.*" *Haanebrink v. Meyer*, 47 N.C. App. 646, 649, 267 S.E.2d 598, 600 (1980) (emphasis added).

The law as it has developed in North Carolina and as applied to this case compels us to disagree with plaintiff that his forecast of evidence demonstrates an action for forfeiture of interest. The record on appeal shows only one agreement charging interest at the rate of 18.38%: the promissory note executed by Betty Hopkins on 19 January 1989, secured by a deed of trust to Lot 34. Although plaintiff became the holder of the promissory note secured by the deed of trust on 26 October 1989, the record reveals no other agreement executed by plaintiff. Therefore, the only agreement charging usurious interest is the promissory note dated 19 January 1989. Plaintiff filed

his complaint seeking, *inter alia*, forfeiture of all interest on 4 October 1991, more than two years after the execution of the promissory note. Hence, the two-year statute of limitations bars plaintiff's claim for forfeiture of interest pursuant to N.C.G.S. § 24-2.

Furthermore, plaintiff's claim to recover twice the amount of interest paid fails since he has not actually paid any usurious interest. The language of N.C.G.S. § 24-2 is clear that "in case a greater rate of interest has been paid, the person . . . by whom it has been paid" may recover twice the amount of interest paid. Thus, to be entitled to recover this penalty for usury, plaintiff must have been charged usurious interest and must have actually paid the usurious interest. *Steed v. First Union National Bank*, 58 N.C. App. 189, 293 S.E.2d 217, *disc. review denied*, 306 N.C. 751, 295 S.E.2d 763 (1982). Although plaintiff states that $4,848.76 in interest has been paid since the execution of the note, the record is clear that Betty Hopkins paid this amount. In addition, the record shows that plaintiff has provided no payments on the note. He is certainly not entitled to recover twice the amount of interest paid by Betty Hopkins. We overrule this assignment of error.

II.

[2] We now address plaintiff's contention that the trial court should have granted a preliminary injunction enjoining defendant Beard from proceeding with the foreclosure sale. The burden is on plaintiff to establish his right to a preliminary injunction. *Superscope, Inc. v. Kincaid*, 56 N.C. App. 673, 675, 289 S.E.2d 595, 596, *disc. review denied*, 305 N.C. 592, 292 S.E.2d 14 (1982). In order to justify issuance of a preliminary injunction, plaintiff must show a likelihood of success on the merits of his case and either that he is likely to sustain irreparable loss unless the injunction is issued or that issuance is necessary for the protection of plaintiff's rights during the course of litigation. *Id.* Issuance of an injunction is a matter of discretion which the trial court exercises after weighing the equities and the advantages and disadvantages to the parties. *Id.*

We believe that the trial court properly denied plaintiff's motion for a preliminary injunction since plaintiff failed to establish that he was reasonably likely to succeed on the merits of his usury suit. As discussed above, the statute of limitations barred plaintiff's action for forfeiture of interest and he is not entitled to a double recovery of interest paid.

Moreover, plaintiff had an adequate legal remedy that would have protected his interests in that he could have tendered the amount demanded by defendant and subsequently brought an action against defendant, under N.C. Gen. Stat. § 24-2, for double the amount of interest paid.

For these reasons, we find that plaintiff failed to establish his right to a preliminary injunction which the trial court properly denied. We overrule this assignment of error.

Affirmed.

Judges JOHNSON and MARTIN concur.

LINDSAY FLOYD WATLINGTON, ET AL., PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANTS

No. 9315SC216

(Filed 16 August 1994)

Insurance § 690 (NCI4th)— prejudgment interest included in damages by policy definition—award of prejudgment interest error

By defining damages to include prejudgment interest, the insurance policy in this case intended to prevent the inclusion of prejudgment interest as a cost charged to defendant above the stated liability of the policy, and the trial court erred in awarding prejudgment interest to plaintiffs where the insurer had paid the policy limit.

Am Jur 2d, Automobile Insurance § 428.

Liability insurer's liability for interest and costs on excess of judgment over policy limit. 76 ALR2d 983.

Appeal by defendant from judgment entered 24 September 1992 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 8 December 1993.

In a consolidated jury trial defendant's insured was found liable for wrongful death and personal injuries to plaintiffs arising out of an automobile accident. The verdict amounts exceeded the amount of coverage included in the insured's policy with defendant. On 4 Octo-

ber 1991, defendant offered to settle the case for the maximum amount of coverage, but the parties could not agree whether defendant would owe plaintiffs prejudgment interest in addition to the stated policy limit, and plaintiffs therefore rejected defendant's offer. Eventually plaintiffs and defendant agreed to the entry of releases and consent orders, settling the controversy for the maximum amount of coverage, with plaintiffs reserving the right to seek a declaratory judgment to the effect that defendant was liable for prejudgment interest in excess of the limit of the policy. The releases and consent judgments were executed on 30 October 1991.

Plaintiffs filed this declaratory judgment action on 27 November 1991, seeking to have the court determine the rights of the parties under a policy of automobile liability insurance issued by defendant to Donald Lee Piland. Plaintiffs contended that the policy provided that defendant would pay prejudgment interest that exceeded defendant's limit of liability under the policy. Judge J.B. Allen, Jr. entered judgment for plaintiffs on 24 September 1992, and ordered defendant to pay plaintiffs prejudgment interest in addition to the amount of the policy limit. The trial court determined that the prejudgment interest accrued from the date of the filing of the action until 30 October 1991, the date of the execution of the releases and consent judgments. Defendant appeals from the trial court's judgment.

Charles L. Bateman, P.A., by Charles L. Bateman; and Latham, Wood, Hawkins & Whited, by B. F. Wood, for plaintiff-appellee.

Henson Henson Bayliss & Sue, by Perry C. Henson and Brian A. Buchanan, for defendant-appellant.

ORR, Judge.

The portions of the insurance policy giving rise to this controversy are as follows:

PART A—LIABILITY COVERAGE

Insuring Agreement

We will pay damages for **bodily injury** or **property damage** for which any insured becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the **insured**. . . . In addition to our limit of liability, we will pay all defense costs we incur.

Supplementary Payments

In addition to our limit of liability, we will pay on behalf of an **insured**:

. . .

3. All costs taxed against the **insured** and interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage.

(Emphasis in original.)

I. Prejudgment Interest

Defendant assigns as error the trial court's finding that the policy is ambiguous, as well as the trial court's ensuing interpretation of the terms of the policy to exclude prejudgment interest from the stated limits of defendant's liability under the policy.

North Carolina's Legislature has provided for prejudgment interest: "In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate." N.C. Gen. Stat. § 24-5(b) (1991). There is no statutory provision mandating that insurance carriers pay prejudgment interest that exceeds the stated limit of liability under the terms of the insurance contract. *Sproles v. Green*, 329 N.C. 603, 612, 407 S.E.2d 497, 502 (1991). Furthermore, N.C.G.S. § 24-5 is not part of the Financial Responsibility Act and is not therefore written into every insurance policy. *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 6, 430 S.E.2d 895, 898 (1993). Accordingly, courts must look to the actual language in each insurance policy at issue to determine whether the insurance company is obligated to pay prejudgment interest in excess of its contractual limit of liability.

The trial court found the language in the policy susceptible to more than one reasonable interpretation and therefore ambiguous. Our Supreme Court has explained that language in an insurance contract is ambiguous only if the language is "fairly and reasonably susceptible to either of the constructions for which the parties contend." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). Otherwise, the court is obligated

to enforce the contract as written and may not "under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay." *Id.*

Plaintiffs assert that the language in the policy is ambiguous because 1) the policy defined "damages" to include prejudgment interest; 2) the policy stated that "in addition to our limit of liability, we will pay all defense costs we incur;" and 3) the policy stated that in addition to the limit of liability, defendant would pay "[a]ll costs taxed against the insured." The trial court agreed with plaintiffs that these provisions contradicted each other, giving rise to ambiguity. We disagree.

In *Lowe v. Tarble*, our Supreme Court construed an insurance contract in which the insurer expressly agreed to pay, in addition to its contractual limit of liability, "all costs taxed against the insured." 313 N.C. 460, 463, 329 S.E.2d 648, 651 (1985). The Court explained that "we hold that prejudgment interest provided for by N.C.G.S. § 24-5 is a 'cost' within the meaning of the contract which, *under the contract in the present case*, the insurer is obligated to pay." *Id.* at 464, 329 S.E.2d at 651 (emphasis added). The Court's determination was clearly limited to the contractual terms actually before it in *Lowe*.

In *Sproles v. Greene*, our Supreme Court determined that an insurer was not required to pay prejudgment interest beyond its limit of liability where the terms of the contract provided that the insurer would pay "all defense costs" in excess of the limit of liability. 329 N.C. 603, 611, 407 S.E.2d 497, 502 (1991). The Court determined that "all defense costs" was not as broad a term as "all costs" because "defense costs" include only such things as attorney fees, deposition expenses, and court costs. *Id.* In *Sproles*, our Supreme Court again clearly manifested its intent to look to the language of individual insurance contracts to determine whether an insured is obligated to pay prejudgment interest beyond its stated limit of liability. *Id.*

In the policy before us, the "Insuring Agreement" expressly provides that prejudgment interest is calculable as a part of damages and is therefore included under the liability limits of the policy. Although the "Supplementary Payments" provision does not repeat the definition of damages, defendant is not obligated to pay prejudgment interest above the policy limit of liability. *See York Indus. Center, Inc. v.*

Michigan Mut. Liab. Co., 271 N.C. 158, 162, 155 S.E.2d 501, 505 (1967) (if policy defines term that definition is applied); *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978) (all parts of insurance policy construed harmoniously to give effect to policy provisions). By defining damages to include prejudgment interest, the policy *intended* to prevent the inclusion of prejudgment interest as a cost charged to defendant *above* the stated liability of the policy. As we recently explained in *Nationwide Mutual Insurance Co. v. Mabe*, 115 N.C.App. 193, 444 S.E.2d 664 (1994), a definition clause expressly including prejudgment interest as an element of damages controls the determination whether prejudgment interest is payable beyond the policy limit.

We note further that even if the insurance policy itself had not defined damages to include prejudgment interest, our Supreme Court recently held that prejudgment interest is an element of damages because it compensates a plaintiff for the loss of the use of his or her money. *Baxley* at 8, 430 S.E.2d at 900. Therefore, we find that the policy at issue is not ambiguous, and we hold that the terms of the policy, as written, specifically exclude prejudgment interest in excess of the policy limit, and we find that the trial court erred in awarding prejudgment interest to plaintiffs.

II.

Because we find that defendant is not liable to plaintiffs for prejudgment interest in addition to the limits of the policy, we need not address defendant's remaining assignments of error. For the reasons stated above, we reverse the decision of the trial court ordering defendant to pay prejudgment interest in excess of its limit of liability under the policy.

Reversed.

Judges LEWIS and JOHN concur.

TIPTON & YOUNG CONSTRUCTION CO., INC., PLAINTIFF v. BLUE RIDGE STRUCTURE CO., AND BALBOA INSURANCE COMPANY, DEFENDANTS AND BALBOA INSURANCE COMPANY, THIRD PARTY PLAINTIFF v. J. B. FAGAN, THIRD PARTY DEFENDANT

No. 9324SC884

(Filed 16 August 1994)

1. Limitations, Repose, and Laches § 80 (NCI4th)— action against surety—time for instituting based on specific events—statute of repose

N.C.G.S. § 44A-28(b), which provides that the limitation period for instituting suit against a surety runs from the longer period of one year from the last day on which labor was performed or material was furnished, or one year from the date of final settlement with the contractor, is a statute of repose rather than limitation.

Am Jur 2d, Bonds § 37; Limitation of Actions § 16.

2. Limitations, Repose, and Laches § 152 (NCI4th)— statute of repose as condition precedent—failure to specially plead compliance

Statutes of repose are conditions precedent which must be specially pled, and in this case plaintiff failed to specially plead compliance with N.C.G.S. § 44A-28(b) and failed to prove at trial that it instituted the action within the period of the applicable statute of repose.

Am Jur 2d, Pleading §§ 83 et seq.

Appeal by plaintiff from orders entered 17 May 1993 and 2 June 1993 by Judge Charles C. Lamm, Jr., in Yancey County Superior Court. Heard in the Court of Appeals 21 April 1994.

Lindsay & True, by Ronald C. True, for plaintiffs-appellants.

Waggoner, Hamrick, Hasty, Monteith and Kratt, by S. Dean Hamrick, for defendant-appellee Balboa Insurance Company.

LEWIS, Judge.

On 2 February 1988 plaintiff Tipton & Young Construction Company, Incorporated (hereinafter "Tipton") agreed to work as a subcontractor for a Department of Transportation project in Madison

County. Defendant Blue Ridge Structure Company (hereinafter "Blue Ridge") was the general contractor, and defendant Balboa Insurance Company (hereinafter "Balboa") was the surety on the contract. Tipton completed its work in June 1988, and the entire project was completed in January 1989. After completing its work, Tipton experienced difficulties collecting its payment.

On 30 May 1991 Tipton filed the present lawsuit against Blue Ridge and Balboa for breach of contract, seeking payment and alleging that Tipton had fully performed its obligations under the contract and that Blue Ridge had been paid in full by the State. Balboa cross-claimed against Blue Ridge and filed a third-party complaint against J.B. Fagan, the president of Blue Ridge, on the basis of an indemnity agreement. At trial, the court denied Blue Ridge's directed verdict motion, and Blue Ridge thereafter confessed judgment in favor of Tipton. The court granted a directed verdict for Balboa, and denied Tipton's Rule 59 motion as to Balboa. Tipton appeals from the court's rulings regarding Balboa.

Tipton argues that Balboa should have been precluded from asserting the statutes of limitation and repose as grounds for its directed verdict motion on the basis that Balboa waived its affirmative defenses by failing to plead them. Tipton also argues that Balboa is incorrect in asserting that the applicable statute, N.C.G.S. § 44A-28(b) (1989), is a statute of repose, and in asserting that a statute of repose is not an affirmative defense for purposes of Rule 8 of the North Carolina Rules of Civil Procedure.

[1] What, then, is G.S. 44A-28(b)? Is it a statute of limitation or a statute of repose? We note that, because the State of North Carolina was a party to the contract, sections 44A-25 to 44A-34 of the General Statutes are presumed to have been written into the payment bond issued by Balboa. N.C.G.S. § 44A-30(b) (1989). Section 44A-28(b) states:

> No action on a payment bond shall be commenced after the expiration of the longer period of one year from the day on which the last of the labor was performed or material was furnished by the claimant, or one year from the day on which final settlement was made with the contractor.

The only case construing this section is *Pyco Supply Co. v. American Centennial Insurance Co.*, 85 N.C. App. 114, 354 S.E.2d 360 (1987). In that case, a panel of this Court determined that section 44A-28(b) is a

statute of repose. Although the Supreme Court overruled that opinion one year later in *Pyco Supply Co. v. American Centennial Insurance Co.*, 321 N.C. 435, 364 S.E.2d 380 (1988), it did not determine whether section 44A-28(b) is a statute of limitation or a statue of repose. It did, however, allow the plaintiff to amend its pleadings and have such amendment relate back to the original filing date. According to Tipton, in doing so the Court impliedly treated it as a statute of limitation.

A statute of limitation is a procedural bar which limits the time within which a plaintiff may commence an action after the cause of action has accrued. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 368, 293 S.E.2d 415, 419 (1982); *Trustees of Rowan Tech. College v. J. Hyatt Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985). The statute of limitation runs from the time of an injury or the discovery of the injury. *Rowan*, 313 N.C. at 234 n.3, 328 S.E.2d at 276-77 n.3. Statutes of limitation are clearly procedural and affect only the remedy and not the right to recover. *Boudreau v. Baughman*, 322 N.C. 331, 340, 368 S.E.2d 849, 857 (1988).

A statute of repose, on the other hand, is a time limitation which begins to run at a time unrelated to the traditional accrual of a cause of action. *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985) (citations omitted). Our Supreme Court distinguished statutes of limitation and statutes of repose as follows:

> Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. Thus, the repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue . . . .

Id. A statute of repose is a substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit. *Boudreau*, 322 N.C. at 340-41, 368 S.E.2d at 857. This aspect of a statute of repose has been described as follows:

> Unlike a limitation provision which merely makes a claim unenforceable, a condition precedent establishes a time period in which suit must be brought in order for the cause of action to be recognized. If the action is not brought within the specified period, the plaintiff 'literally has *no* cause of action. The harm that

> has been done is *damnum absque injuria*—a wrong for which the law affords no redress.' For this reason, we have previously characterized the statute of repose as a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights.

Id. (quoting *Rosenberg v. Town of North Bergen*, 293 A.2d 662, 667 (N.J. 1972), and citing *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983)).

Applying the above rules, we find that section 44A-28(b) is a statute of repose. The limitation period contained therein runs from the longer period of one year from the last day on which labor was performed or material was furnished, or one year from the date of final settlement with the contractor. Thus, the statute provides a fixed time period within which suit must be brought. The limitation period does not depend upon an injury or the accrual of a cause of action, but depends upon the occurrence of either of two specific events, both of which usually occur without giving rise to a course of action. Suing within the one-year time period is a condition precedent to the maintenance of a lawsuit against a surety.

[2] Having determined that section 44A-28 is a statute of repose, we must now determine whether it is an affirmative defense or a condition precedent. According to Tipton, statutes of repose are affirmative defenses, which will be waived if not pled. N.C.G.S. § 1A-1, Rule 8(c) (1990). According to Balboa, statutes of repose are conditions precedent, the performance of which must be averred by the plaintiff. N.C.G.S. § 1A-1, Rule 9(c) (1990).

We find that under North Carolina law statutes of repose are conditions precedent which must be specially pled. *See, e.g., Boudreau*, 322 N.C. at 340, 368 S.E.2d at 857; *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 426, 391 S.E.2d 211, 213, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). In *Chicopee*, this Court stated that the plaintiff had the burden of proving the condition precedent that its cause of action was brought within the period of the applicable statute of repose. 98 N.C. App. at 426, 391 S.E.2d at 213. Furthermore, "[i]f plaintiff fails to prove that its cause of action is brought before the repose period has expired, a directed verdict for defendant is appropriate, since plaintiff's case is insufficient as a matter of law." *Id.*

In the case at hand, Tipton's complaint does not mention compliance with section 44A-28 or any conditions precedent. According to Balboa, Tipton did not introduce Balboa's bond at trial, and did not discuss section 44A-28 during the trial. We note that Tipton has not produced any evidence of compliance with section 44A-28, and that the transcript was not included in the record on appeal. We conclude that Tipton not only has failed to satisfy Rule 9's requirement that it specially plead compliance with conditions precedent, but failed as well to prove at trial that it instituted the action within the period of the applicable statute of repose, section 44A-28.

We note that because Tipton has presented no argument regarding the denial of its Rule 59 motion for a new trial, we need not address that assignment of error. Even if Tipton had argued that issue, we would find that the judge did not abuse his discretion in denying the motion. *See Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982).

The judgment of the trial court is hereby

Affirmed.

Judges EAGLES and WYNN concur.

COASTAL READY-MIX CONCRETE CO., INC., ALFRED McCOY TILLETT AND ST. CLAIR TILLETT, PETITIONERS v. NORTH CAROLINA COASTAL RESOURCES COMMISSION, RESPONDENT

No. 931SC976

(Filed 16 August 1994)

Appeal and Error § 87 (NCI4th)— interlocutory appeal—no substantial right affected

Respondent North Carolina Coastal Resources Commission could not appeal from orders of the trial court reserving for another proceeding the issue of whether the Commission's designation of petitioners' property as a portion of the Jockey's Ridge Area of Environmental Concern constituted a taking, since those orders did not dispose of the entire case and were therefore interlocutory; there was no substantial right involved which would be prejudiced absent immediate appeal; the Commission had no right to appeal from the portion of the order affirming the denial

of petitioners' permit to mine in the area, as this was the relief which the Commission sought; and appeal from that portion of the order which held that no findings of the Commission would be binding at a jury trial on the "takings" issue was not necessary to avoid relitigation of factual issues pertaining to the "takings" issue which were determined by the Commission in its final decision, as the Commission concluded in its final decision that the takings issue was not properly before it.

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

Appeal by defendant from orders entered 21 June 1993 by Judge Gary E. Trawick in Dare County Superior Court. Heard in the Court of Appeals 12 May 1994.

At all times relevant to this action, petitioners owned real property located in the Town of Nags Head abutting the south side of Jockey's Ridge State Park, the tallest active sand dune on the Atlantic coast. Between 5 March 1985 and February 1988, petitioners used their land for mining sand to manufacture concrete and to use as fill material on residential lots. In January 1988, the North Carolina Coastal Resources Commission (the "Commission") designated Jockey's Ridge as "a unique coastal geological formation Area of Environmental Concern" ("AEC") pursuant to N.C. Gen. Stat. § 113A-113(b)(4)(g) and adopted guidelines for development within the Jockey's Ridge AEC, which included restrictions on the removal of sand.

Subsequently, the Jockey's Ridge AEC encompassed petitioners' property. On 22 August 1991, petitioners applied to the Town of Nags Head for a minor development permit pursuant to the provisions of the Coastal Area Management Act ("CAMA"), N.C. Gen. Stat. § 113A-100, to -134.9, to use this property for the purpose of mining sand to manufacture concrete for petitioners' business, which application the Town denied. Thereafter, petitioners filed a petition for a contested case hearing with the Office of Administrative Hearings.

The Administrative Law Judge ("ALJ") entered a recommended decision finding that the designation of petitioners' property as a portion of the AEC constituted a taking and recommending that the North Carolina Department of Environment, Health and Natural Resources Division of Coastal Management enter a final decision that "the Jockey's Ridge State Park Area of Environmental Concern does not apply to" petitioners' property.

Thereafter, the Commission conducted a hearing pursuant to N.C. Gen. Stat. § 150B-36. On 18 February 1993, the Commission entered an order declining to adopt the ALJ's recommended decision because the ALJ's decision "failed to address the issue of whether petitioners' permit application was properly denied under coastal management statutes and rules" and denying petitioners' request for a CAMA minor development permit.

Petitioners filed a complaint against the Respondent North Carolina Coastal Resources Commission (in order to distinguish between the Commission's actions of entering decisions in this action and the Commission's actions as respondent, we will refer to respondent as "CRC") in Dare County Superior Court seeking judicial review of the Commission's decision to deny petitioners' request for a CAMA permit to mine sand and alleging a taking of property without compensation pursuant to N.C. Gen. Stat. § 113A-123(b). On 26 April 1993, Respondent CRC filed a motion for a continuance of the jury trial on the takings issues in petitioners' complaint until after the court determined the issues raised on judicial review from the final decision of the CRC. Thereafter, on 30 April 1993, CRC filed a motion for summary judgment on the issue of whether the Commission's denial of petitioners' permit was a taking.

On 21 June 1993, Judge Gary E. Trawick entered an order denying CRC's motion for summary judgment on the "takings" issue. Additionally, on this same date, Judge Trawick entered an order affirming the Commission's denial of petitioners' application for a permit and transferring to the Dare County Superior Court trial docket the issue of whether "the application of the Jockey's Ridge State Park Area of Environmental Concern to [p]etitioners' property constitutes a 'taking.' " From these orders, Respondent CRC appeals.

Aycock, Spence & Butler, by W. Mark Spence, for plaintiffs/petitioner-appellees.

Attorney General Michael F. Easley, by Assistant Attorney General Robin W. Smith, for defendant/respondent-appellant.

ORR, Judge.

Respondent appeals from two orders, bringing forward three assignments of error. Because we find that both of the orders from which respondent appeals are interlocutory and because we find that respondent does not have the right to an immediate appeal from these

orders, we need not address respondent's assignments of error. Accordingly, we dismiss respondent's appeals.

Both orders from which Respondent CRC appeals reserve the "takings" issue for another proceeding. Thus, these orders do not dispose of the entire case, and are, therefore, interlocutory. *See Donnelly v. Guilford County*, 107 N.C. App. 289, 291, 419 S.E.2d 365, 366 (1992) (citation omitted); *See also Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) ("An order is interlocutory 'if it does not determine the issues but directs some further proceeding preliminary to final decree.' ") (citation omitted).

Further, the trial court did not certify that there existed no just reason to delay the appeal as required by N.C.R. Civ. P. 54(b); CRC is not, therefore, entitled to immediately appeal from these orders unless the orders deprive CRC "of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Southern Uniform Rentals, Inc. v. Iowa Nat'l Mut. Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988); N.C. Gen. Stat. § 1-277; *See Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993).

Essentially a two-part test has developed to determine whether an interlocutory order affects a substantial right—"the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). This test "is more easily stated than applied," and in determining whether interlocutory orders are appealable, the court "must consider the particular facts of each case and the procedural history of the order from which an appeal is sought." *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 292, 420 S.E.2d 426, 428 (1992) (citations omitted).

First, we will address whether CRC had the right to immediately appeal the trial court's denial of its motion for summary judgment on the "takings" issue.

> Ordinarily, the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken. . . . [I]n case a substantial right is thought to be affected to the prejudice of the movant, then a petition for a writ of *certiorari* is available. To allow an appeal from a denial of a motion for summary judg-

ment would open the flood gate of fragmentary appeals and cause a delay in administering justice.

Motyka v. Nappier, 9 N.C. App. 579, 582, 176 S.E.2d 858, 859 (1970); *See also Hill v. Smith*, 38 N.C. App. 625, 626, 248 S.E.2d 455, 456 (1978) ("Generally, orders denying motions for summary judgment are not appealable.")

In the present case, the record does not reveal that a substantial right is involved that would be prejudiced absent immediate appeal. Accordingly, we hold that CRC's appeal from the denial of its summary judgment motion should be dismissed. *See Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 164, 265 S.E.2d 240, 242, *disc. review allowed, appeal dismissed*, 301 N.C. 92 (1980).

Next, we address CRC's appeal from the order affirming the denial of petitioners' application for a mining permit and transferring the "takings" issue to the Dare County Superior Court trial docket. At the outset we note that CRC does not have the right to appeal from the portion of the order affirming the denial of petitioners' permit, as this was the relief which CRC sought, and "[o]nly the party aggrieved by a judgment may appeal." *Carawan v. Tate*, 304 N.C. 696, 700, 286 S.E.2d 99, 101 (1982) (citation omitted).

CRC appeals, however, from the portion of the order in which the trial court held, "No findings contained within the order of the North Carolina Coastal Resources Commission referenced above shall be binding on [p]etitioner at said jury trial." Further, CRC contends that it is entitled to an immediate appeal from this portion of the order to avoid the relitigation of factual issues pertaining to the "takings" issue which were determined by the Commission in its final decision. We disagree.

"We agree that 'the 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) (emphasis in original). Such is not, however, the case here. In the present case, the Commission concluded in its final order that the takings issue was not properly before it and limited its decision to the issue of whether the denial of petitioners' application for a CAMA minor development permit was proper. The sole issue left to be tried, as stated by the trial court, however, is whether "the application of the Jockey's Ridge State Park Area of Environmental Concern to [p]etitioners' property constitutes a 'taking.' " Thus we do not agree with CRC's contention.

Further, our review of this appeal shows no substantial right that CRC will lose absent the right to an immediate appeal. CRC may preserve its right to appeal from the trial court's order in this case following entry of a final judgment upon proper exception. Accordingly, we dismiss CRC's appeal from the trial court's second order.

Dismissed.

Judges COZORT and MARTIN concur.

JACQUELINE SPIVEY, PLAINTIFF-APPELLANT v. WOODROW LOWERY, DEFENDANT-APPELLEE

No. 9326SC891

(Filed 16 August 1994)

Insurance § 531 (NCI4th); Torts § 12 (NCI4th)— UIM carrier's consent to release—nature of release not altered—derivative liability of UIM carrier not circumvented

Plaintiff who signed a general release could not thereafter assert any claims arising out of the accident; furthermore, because plaintiff released the tortfeasor, she could not assert a claim against the UIM carrier because of the derivative nature of the UIM carrier's liability, and the UIM carrier's consent to settlement did not alter the legal effect of the general release or circumvent the derivative liability of a UIM carrier.

Am Jur 2d, Automobile Insurance § 322; Release §§ 28 et seq.

Appeal by plaintiff from order entered 9 August 1993 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 April 1994.

Jeffrey L. Bishop for plaintiff-appellant.

Morris York Williams Surles & Brearley, by John F. Morris, for defendant-appellee.

LEWIS, Judge.

On 17 October 1989, plaintiff suffered injuries in an automobile accident with defendant Woodrow Lowery. Plaintiff was a passenger in a car driven by her sister and insured by The Hartford Accident and Indemnity Company (hereinafter "Hartford"), an un-named defendant in this action. Lowery was insured by Integon Indemnity Company (hereinafter "Integon"). On 23 August 1990 Hartford gave plaintiff permission to accept settlement from Integon on behalf of Lowery in the amount of $25,000, and stated that it waived its subrogation rights. On 24 August 1990 plaintiff accepted the settlement from Integon. In consideration for the payment, plaintiff signed a general release, which provided that she was "releas[ing], acquit[ting], and forever discharg[ing]" Lowery, Integon, and

> all other persons, firms, corporations, associations or partnerships of and from any and all claims of action, demands, rights, [and] damages . . . whatsoever, which the undersigned now has . . . or which may hereafter accrue . . . [as a result of] the accident . . . which occurred on or about the 17th day of October, 1989, at or near Laurinburg, N. C.

On 11 March 1991 plaintiff filed this action for damages and underinsured motorist (hereinafter "UIM") coverage against Lowery and Hartford pursuant to N.C.G.S. § 20-279.21(b)(4) (1993). Hartford, in an amended answer, pled the general release as a bar to plaintiff's claim. The trial court, with the consent of the parties, treated Hartford's amended answer as a motion for summary judgment, and entered summary judgment in favor of Hartford on 9 August 1993.

On appeal, plaintiff emphasizes that Hartford had notice of, and expressly consented to, the proposed settlement with Lowery and Integon. While conceding that Hartford's liability is derivative of the tortfeasor's, plaintiff contends her release of the tortfeasor does not release Hartford. Hartford's consent, she says, at least raises a genuine issue of material fact as to whether the release was intended to release the underinsured motorist carrier.

Hartford, on the other hand, contends that the general release discharged all claims, and points out that since its liability was derived from Lowery, the release of Lowery also released Hartford. Defendant notes that plaintiff has raised no issue as to the release itself, and argues that plaintiff is therefore bound by its clear and express language.

At the outset we note that by signing a general release, plaintiff discharged all claims between the parties. *See McGladrey v. Syntek Finance Corp.*, 92 N.C. App. 708, 710-11, 375 S.E.2d 689, 691, *disc. review denied*, 324 N.C. 433, 379 S.E.2d 243 (1989). Plaintiff raises no questions regarding the validity of the release itself. *Cf. McBride v. Johnson Oil & Tractor Co.*, 52 N.C. App. 513, 279 S.E.2d 117 (1981) (reversing summary judgment because allegations of mutual mistake regarding release); *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E.2d 718 (1981) (reversing summary judgment due to allegations of fraud and mutual mistake regarding release).

As a general rule, a UIM carrier's liability is derivative of the tortfeasor's liability. *See Buchanan v. Buchanan*, 83 N.C. App. 428, 350 S.E.2d 175 (1986), *disc. review denied*, 319 N.C. 224, 353 S.E.2d 406 (1987). Although the policy in question is not contained in the record on appeal, and we therefore cannot determine whether it includes the standard provision that a plaintiff is not entitled to UIM coverage unless the plaintiff is "legally entitled to recover" from the tortfeasor, we note that plaintiff concedes that Hartford's liability is derivative. Furthermore, N.C.G.S. § 20-279.21(b)(3) (1993) mandates that liability insurance be available for the protection of people who are "legally entitled to recover damages from owners or operators of uninsured motor vehicles."

Thus, because plaintiff signed a general release, plaintiff may not assert any claims arising out of the accident. Furthermore, notwithstanding the fact that plaintiff signed a general release, since plaintiff released the tortfeasor, Lowery, plaintiff may not assert a claim against Hartford because of the derivative nature of Hartford's liability.

In support of her argument that Hartford's consent to the settlement and release raises a genuine issue of material fact, plaintiff cites several cases. She cites *Silvers v. Horace Mann Insurance Co.*, 324 N.C. 289, 378 S.E.2d 21 (1989), and *Gurganious v. Integon General Insurance Corp.*, 108 N.C. App. 163, 423 S.E.2d 317 (1992), *disc. review denied*, 333 N.C. 538, 429 S.E.2d 558 (1993), for the proposition that a release of the tortfeasor does not bar a claim against the UIM carrier, even though the carrier's liability is derivative of the tortfeasor's. She further argues that Hartford's 23 August 1990 letter, which authorized the settlement, raises genuine issues of material fact regarding the intention of the release.

We find that *Silvers* and *Gurganious* are distinguishable from the case at hand. Neither involved a general release. There is no language in either case which indicates that an insurer's consent to settlement would render that insurer subject to suit even if the plaintiff had signed a general release. *Silvers* and *Gurganious* both involved conflicting provisions in the relevant statute and their policies. Section 20-279.21(b)(4) requires a UIM plaintiff to exhaust all remedies by seeking payment of judgments or settlements from the tortfeasor and liability insurer before seeking payment from the UIM insurer. However, the policies involved in those cases provided that release of or settlement with a tortfeasor operates to release the UIM insurer because of the derivative nature of its liability. The Courts construed the conflicting provisions in favor of the plaintiffs, permitting them to seek UIM coverage. Plaintiff in the case at hand has presented no argument regarding the provisions of her policy or the North Carolina General Statutes. Her appeal is based solely on the fact that Hartford consented to the settlement.

Plaintiff also asserts that the similar case of *Buchanan v. Buchanan*, 83 N.C. App. 428, 350 S.E.2d 175 (1986), *disc. review denied*, 319 N.C. 224, 353 S.E.2d 406 (1987), provides support for her argument. In that case, the plaintiff accepted a settlement from the tortfeasor's insurance carrier, and signed a general release. The court granted summary judgment for the UIM carrier in a subsequent action, holding that a release of the tortfeasor released the UIM carrier on the basis of derivative liability. Contrary to plaintiff's assertions, the Court did not decide the case on the basis of the plaintiff's failure to obtain the UIM carrier's consent to settlement. In affirming summary judgment, the Court only mentioned the derivative nature of the UIM carrier's liability.

Finally, we are not persuaded by plaintiff's argument that Hartford's letter permitting settlement with the tortfeasor somehow raises a genuine issue of material fact regarding the intention of the release. The letter was sent before plaintiff signed the release. Although the letter authorized settlement, it did not mention a release and did not indicate that it authorized plaintiff to enter into a general release. Furthermore, according to *Buchanan*, whether or not plaintiff intended to release the UIM carrier is irrelevant. As long as plaintiff intended to release the tortfeasor, the UIM carrier is released as well. *Buchanan*, 83 N.C. App. at 430, 350 S.E.2d at 177.

We conclude that plaintiff has presented no authority supporting her position that the UIM carrier's consent to settlement alters the legal effect of a general release or circumvents the derivative liability of a UIM carrier. We therefore affirm summary judgment in favor of defendant.

Affirmed.

Judges EAGLES and WYNN concur.

SHERRY BAXTER COLLINS AND EDWARD ABSHIRE COLLINS, PLAINTIFFS v. AARON (NMN) BECK, DEFENDANT

No. 9322SC336

(Filed 16 August 1994)

Judgments § 649 (NCI4th)— tender of judgment accepted— judgment signed without award of prejudgment interest— no error

The trial court did not err in failing to award prejudgment interest pursuant to N.C.G.S. § 24-5(b) where defendant tendered an offer of judgment which plaintiff accepted, but a final judgment, including a judgment as to liability, had not been entered, as required by the statute.

Am Jur 2d, Interest and Usury §§ 59 et seq.

Judge GREENE dissenting.

Appeal by plaintiffs from judgment entered 26 January 1993 by Judge Peter W. Hairston in Davidson County Superior Court. Heard in the Court of Appeals 14 January 1994.

Barnes, Grimes & Bunce, by Linwood Bunce, for plaintiff appellants.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Stephen W. Coles, for defendant appellee.

COZORT, Judge.

Plaintiffs Sherry Collins and Edward Collins filed an action on 30 July 1991 against defendant Aaron Beck seeking damages for Ms.

Collins' bodily injuries and for Mr. Collins' loss of consortium resulting from an automobile collision involving Ms. Collins and the defendant. On 5 January 1993, defendant tendered an offer of judgment to plaintiffs in the amount of $70,000.00 pursuant to N.C.R. Civ. P. 68(a). Plaintiffs filed a notice of acceptance of the judgment on 14 January 1993. The judgment in the sum of $70,000.00 for "compensatory damages together with cost accrued at the time of the filing" was signed on 30 January 1993. Plaintiffs appeal the judgment, contending the trial court erred by failing to award them prejudgment interest on the judgment from the commencement of the cause of action pursuant to N.C. Gen. Stat. § 24-5(b).

The statutory provision relied upon by plaintiffs reads as follows:

> In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C. Gen. Stat. § 24-5(b) (1991). In *Barnes v. Hardy*, 98 N.C. App. 381, 384, 390 S.E.2d 758, 760 (1990), *aff'd*, 329 N.C. 690, 407 S.E.2d 504 (1991), this Court explained:

> Plaintiffs' reliance on this statute, however, is misplaced since G.S. § 24-5(b) provides for the recovery of interest in instances where there has been both a judgment as to liability and a determination of appropriate compensatory damages. We do not equate the release of claims to the entry of a judgment as to liability, nor do we find prejudgment interest to be equal to "defense costs" to be paid over and beyond the [payments made] in a settlement. G.S. § 24-5(b) therefore does not apply.

Following the reasoning in *Barnes*, we find the trial court did not err by failing to award prejudgment interest in this case. We agree with plaintiffs that the statute is non-discretionary in nature when the provision applies. However, as in *Barnes*, N.C. Gen. Stat. § 24-5(b) is inapplicable here, since a final judgment, including a judgment as to liability, has not been entered. Accordingly, the trial court's refusal to award prejudgment interest based on the holding in *Barnes* was not error.

Finally, we note that plaintiffs' argument on appeal was predicated solely on a violation of N.C. Gen. Stat. § 24-5(b) and failed to raise any questions based either on other statutory provisions or common

law authority, including a recent case of this Court, *Aikens v. Ludlum*, 113 N.C. App. 823, 440 S.E.2d 319 (1994). In *Aikens*, this Court remanded a case in which the offer of judgment was ambiguous as to whether the offer was a lump sum which included costs or whether costs were intended to be separate from the settlement amount. We are cognizant that the language in the offer of judgment in the case below is virtually identical to the language of the offer in *Aikens*. We nonetheless decline to review any issue with respect to ambiguity of the lump sum without such issue having been raised by either party. The trial court's judgment is therefore

Affirmed.

Judge ORR concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the conclusion of the majority that plaintiff is not entitled to prejudgment interest in this case. Defendant made a written offer of judgment, plaintiff made a written acceptance of the judgment, both documents were served on the other party, and subsequently filed with the clerk of the court, all consistent with Rule 68(a) of our Rules of Civil Procedure. The offer of judgment thus became a judgment of the court, N.C.G.S. § 1A-1, Rule 68(a) (1990), and as such, accrues interest on the compensatory damages, in this case $70,000, "from the date the action is instituted until the judgment is satisfied." N.C.G.S. § 24-5(b) (1991). *Barnes v. Hardy*, 98 N.C. App. 381, 390 S.E.2d 758 (1990), *aff'd*, 329 N.C. 690, 407 S.E.2d 504 (1991), relied on by the majority does not require a different result. In *Barnes*, although there was an offer of judgment, it was not accepted within the meaning of Rule 68(a) and even had it been accepted, the offer and acceptance were not recorded with the clerk of court. A close reading of *Barnes* reveals that the defendant made an offer of judgment and subsequently the case was settled with the execution of a release by the plaintiff. A judgment was never entered.

Although the offer of judgment in this case could have been drafted so as to make a lump sum offer which would have precluded the assessment of prejudgment interest in addition to the $70,000, *see Harward v. Smith*, 114 N.C. App. 263, 265, 441 S.E.2d 313, 314 (1994),

such is not the case in this instance. *See Aikens v. Ludlum*, 113 N.C. App. 823, 826, 440 S.E.2d 319, 321 (1994) (offer of "$10,001 . . . together with the remaining cost accrued" did not preclude assessment of interest in addition to $10,001). I would therefore reverse the trial court and remand for entry of a judgment granting the plaintiff prejudgment interest consistent with N.C. Gen. Stat. § 24-5(b).

CHAPEL HILL-CARRBORO CITY SCHOOLS SYSTEM v. SANDRA W. CHAVIOUX

No. 9310DC222

(Filed 16 August 1994)

Schools § 86 (NCI4th)— child domiciled outside school district but residing inside district—no recovery of tuition from mother

Although defendant and her daughter were domiciled outside plaintiff board of education's administrative unit, the daughter resided within that unit; therefore, plaintiff was not entitled to recover out-of-district tuition from defendant because plaintiff was only empowered to charge tuition to students who did not reside within its administrative unit. N.C.G.S. § 115C-366.1.

Am Jur 2d, Schools § 212.

Determination of residence or nonresidence for purpose of fixing tuition fees or the like in public school or college. 83 ALR2d 497.

Appeal by plaintiff from order entered 11 December 1992 by Judge Stafford G. Bullock in Wake County District Court. Heard in the Court of Appeals 5 January 1994.

Plaintiff instituted this action to recover out-of-district tuition from defendant, who is domiciled in Wake County, for her child who resides and attends school within plaintiff's administrative unit. Following a hearing on 3 December 1992, the trial court entered an order on 11 December 1992, ruling that plaintiff recover nothing of defendant. From this order, plaintiff appeals.

John G. McCormick, P.A., by John G. McCormick and Eric W. Hinson, for plaintiff-appellant.

No brief for defendant-appellee.

McCRODDEN, Judge.

Plaintiff presents two arguments based upon two assignments of error: (1) that the trial court's order did not contain adequate findings of fact or conclusions of law and (2) that the trial court erred in denying plaintiff the relief sought. Although we agree that the trial court's order was inadequate for purposes of appellate review, we find that plaintiff's allegations, both in its complaint and in its brief, acknowledge facts sufficient for our determination of the issue.

The trial judge's order reads as follows:

> THIS MATTER COMING ON FOR HEARING and having been heard by the undersigned Judge, sitting without a jury, at the December 3, 1992, Civil Session of the District Court and
>
> This matter appearing on the regular printed calendar, copies of which were mailed to both parties as Notice of the hearing, and
>
> The plaintiff was represented by counsel; the defendant was not present for trial but the defendant's spouse was present Pro Se, and
>
> Upon call of the case for trial the defendant's spouse requested a continuance, which was denied.
>
> Having reviewed the pleadings and having heard the evidence the Court concludes that the plaintiff should recover nothing of the defendant.
>
> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff recover nothing of the defendant.
>
> This the 11th day of December, 1992.

Rule 52 of the North Carolina Rules of Civil Procedure requires that in all actions tried upon the facts without a jury, "the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a) (1990). A bare conclusion such as the one in this case does not meet the requirements of Rule 52(a)(1). *See Hinson v. Jefferson*, 287 N.C. 422, 429, 215 S.E.2d 105, 107 (1975). We cannot deter-

mine what the judge's factual and legal grounds for his judgment were and, thus, may not review it on appeal. But for the plaintiff's allegation of facts sufficient for our determination, we would have to remand the case for more complete findings of fact and conclusions of law.

Plaintiff alleges facts sufficient to show that it is not entitled to recover from the defendant. In its verified complaint, plaintiff alleged that defendant was domiciled in Wake County, North Carolina while her daughter attended school in the plaintiff's administrative unit, and that neither defendant nor her daughter was domiciled within the territory of plaintiff's administrative unit. In its brief, plaintiff has relied on evidence showing that defendant's daughter resided within the territory of plaintiff's administrative unit while attending school there.

N.C. Gen. Stat. § 115C-366.1 (1991) provides that local boards of education, such as plaintiff, may charge tuition to "[p]ersons of school age who are *domiciliaries* of the State but who do not *reside* within the school administrative unit or district." (Emphasis added); s*ee Streeter v. Greene County Board of Education*, 115 N.C. App. 452, 446 S.E.2d 107 (1994); *Floyd v. Lumberton Bd. of Education*, 71 N.C. App. 670, 680, 324 S.E.2d 18, 25 (1984). This does not mean, however, that local school boards may charge tuition to students who reside within its administrative unit but are domiciled elsewhere within the State.

"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." *Hall v. Board of Elections*, 280 N.C. 600, 605-606, 187 S.E.2d 52, 55 (1972). An unemancipated minor may not establish a domicile different from his parents, surviving parents, or legal guardian, *In Re Hall*, 235 N.C. 697, 702, 71 S.E.2d 140, 143 (1952), but obviously may reside in a place separate from his parents.

In summary, although the defendant and consequently her daughter were domiciled outside plaintiff's administrative unit, the daughter resided within that unit. Therefore, plaintiff may recover nothing from defendant because it is only empowered to charge tuition to students who do not reside within its administrative unit.

We remand this case for entry of judgment consistent with this opinion.

Remanded.

Judges JOHNSON and MARTIN concur.

ROY E. SMITH D/B/A ARSCO SELF STORAGE v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 9317SC43

(Filed 16 August 1994)

Insurance § 896 (NCI4th)— injuries not arising from accident—insurer not under duty to defend

Defendant insurer, which provided plaintiff with general liability and property insurance coverage, was not under a duty to defend plaintiff in an action by neighbors of his self-storage business alleging breach of restrictive covenants, since the injuries alleged by the neighbors were substantially certain to result from the insured's actions, were therefore not accidental, and did not impose a duty to defend.

Am Jur 2d, Insurance §§ 703 et seq.

Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured. 31 ALR4th 957.

Appeal by plaintiff from order entered 10 November 1992 by Judge James C. Davis in Surry County Superior Court. Heard in the Court of Appeals 18 November 1993.

Under an insurance policy issued 22 November 1989, defendant Nationwide Mutual Fire Insurance Company provided plaintiff Smith (the insured) with general liability and property insurance coverage. During the term of the insurance contract, some neighbors of his self storage business sued the insured, alleging that his business violated restrictive covenants applicable to the property. The insured prevailed in that suit (the *Hall* action) and brought this action seeking reimbursement for the costs he incurred while defending it. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990), defendant moved to dismiss the case for failure to state a claim upon which relief can be granted. Following a hearing, the trial court entered an

order granting defendant's motion to dismiss. From this order, the insured appeals.

Bennett & Blancato, by William A. Blancato, for plaintiff-appellant.

Wilson & Iseman, by G. Gray Wilson and Elizabeth Horton, for defendant-appellee.

McCRODDEN, Judge.

The insured raises only one argument in this appeal, contending that the trial court erred in determining that defendant had no duty to defend the *Hall* action. We disagree and affirm the order of the trial court.

An insurer's duty to defend its insured is broader than its duty to pay damages incurred by events covered by the policy. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). When the facts alleged in the complaint against an insured indicate that the policy covers the alleged injury, then the insurer owes the insured a duty to defend the action, regardless of whether the insured is ultimately held liable. *Id.* In determining whether the insurer owes a duty to defend the lawsuit, we use the so-called comparison test; "the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded," *id.* at 693, 340 S.E.2d at 378, and when the policy provision at issue is one which extends coverage, we must interpret it liberally "so as to provide coverage, whenever possible by reasonable construction." *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986).

In this case, the policy provided coverage for liability due to bodily injury and property damages caused by an "occurrence," which was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." An accident is "an unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty." *Tayloe v. Indemnity Co.*, 257 N.C. 626, 627, 127 S.E.2d 238, 239-40 (1962) (quoting Black's Law Dictionary, 3d Ed.).

The complaint in the *Hall* action alleged, in pertinent part, that the insured had sold lots in a residential subdivision to the plaintiffs or their predecessors in interest, that each of the lots had been sold subject to a covenant restricting its use to residential purposes, that the insured constructed a mini-warehouse facility on several of the lots he had retained within the subdivision, that he breached a legal duty to make no use of the retained lots which would be incompatible with the restrictive covenants imposed upon the lots he sold to the plaintiffs, that he breached reciprocal negative covenants in favor of the plaintiffs, and that his actions greatly reduced the value of the plaintiffs' property. The complaint also alleged that the insured had spitefully placed a mobile home on one of his lots and had thereby impaired the value of the *Hall* plaintiffs' property.

Applying the law to these facts, we do not believe under any stretch of the imagination that the insured's behavior in the *Hall* action was an occurrence warranting coverage under the insurance policy. Assuming, without deciding, that there were property damages as alleged by the *Hall* plaintiffs, such damages simply were not due to an accident, and defendant, therefore, had no duty to defend against them. The case of *Prudential Property and Casualty Ins. Co. v. Lawrence*, 724 P.2d 418 (Wash. App. 1986), urged by plaintiff, is distinguishable because it did not address the issue, raised by the policy in this case, of whether property damage (obstruction of view caused by the construction of a home) was accidental.

Even if we were to do as the insured suggests and apply the reasoning our Supreme Court expressed in its most recent case on the subject, *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 412 S.E.2d 318 (1992), we would reach the same conclusion. The injuries alleged by the *Hall* plaintiffs, whatever their extent, were substantially certain to result from the insured's actions. The injuries were, therefore, not accidental and defendant owed the insured no duty to defend the *Hall* action. The insured's complaint failed to state a claim upon which relief could be granted, and we affirm the order of the trial court.

Affirmed.

Judges LEWIS and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 AUGUST 1994

ALLISON v. DEPT. OF HUMAN RESOURCES No. 938SC1108	Wayne (93CVS106)	Affirmed
COLLINS COIN MUSIC CO. v. N.C. ALCOHOLIC BEVERAGE CONTROL COMM. No. 9318SC439	Guilford (91CVS10996)	Dismissed
DALTON v. BARKER No. 9326SC974	Mecklenburg (93CVS2708)	Affirmed
EARP v. PAGE No. 9211SC993	Johnston (91CVS2243)	Affirmed in part; Reversed in part
GEE v. JAMES No. 9226SC1048	Mecklenburg (91CVS17410)	Affirmed
HELBEIN v. SOUTHERN METALS CO. No. 9226SC1162	Mecklenburg (91CVS8032)	Reversed & Remanded
HENKE v. FIRST COLONY BUILDERS No. 9310IC255	Ind. Comm. (050286)	Vacated & Remanded
IN RE WILL OF LADD No. 9214SC1102	Durham (91CVS682)	Affirmed
JOHNSON v. NATIONWIDE MUTUAL INS. CO. No. 9323SC184	Wilkes (91CVS1297)	Affirmed
JONES COUNTY DSS v. GREEN No. 944DC16	Jones (92CVD27)	Affirmed
McLAUGHLIN v. McLEOD No. 9210SC1052	Wake (90CVS2856)	Affirmed
MULLINS v. WEBER No. 9312SC64	Cumberland (91CVS4774)	Affirmed
NEMMERS v. NEMMERS No. 935DC945	New Hanover (89CVD3328) (90CVD2830)	Reversed
OAKLEY v. UNIVERSITY OF NORTH CAROLINA No. 9210IC1247	Ind. Comm. (TA-11652)	Affirmed

REAVIS v. ITT CONSUMER FINANCIAL CORP. No. 9321SC769	Forsyth (91CVS4153)	No Error
SMITH v. DEPT. OF HUMAN RESOURCES No. 9310SC290	Wake (92CVS3457)	Affirmed
STATE v. CHAMBERS No. 9322SC1163	Iredell (92CRS13688)	No Error
STATE v. DRIGGERS No. 9320SC1314	Richmond (92CRS2586)	No Error
STATE v. SHROPSHIRE No. 9318SC429	Guilford (90CRS38066) (90CRS38067) (90CRS38068) (90CRS38069) (90CRS38071) (90CRS38077) (90CRS38078) (90CRS38079) (92CRS20474) (92CRS20475)	No Error
STATE v. WESLEY No. 9329SC1174	Rutherford (93CRS1451)	No Error
STATE v. WHITE No. 933SC33	Pitt (91CRS10740) (91CRS10741) (91CRS10742) (91CRS10743) (91CRS10744)	No Error
UNIVERSAL UNDERWRITERS INS. CO. v. PHOENIX INS. CO. No. 9326SC473	Mecklenburg (91CVS544)	Reversed
WILSON v. DEVOE No. 9327DC118	Cleveland (92CVD926)	No Error
WOODARD v. W. M. WIGGINS & CO. No. 9310IC171	Ind. Comm. (817319)	Affirmed

PINCKNEY v. VAN DAMME

[116 N.C. App. 139 (1994)]

JACKSON "ROCK" PINCKNEY, PLAINTIFF/CROSS-APPELLANT v. JEAN CLAUDE VAN DAMME, DEFENDANT/APPELLANT

No. 9312SC785

(Filed 6 September 1994)

1. Workers' Compensation § 69 (NCI4th)— injury suffered while filming movie—action by fellow employee—intentional negligence

The trial court did not abuse its discretion by denying defendant's motion for judgment notwithstanding the verdict in an action to recover damages for injuries sustained during the filming of a movie where plaintiff had received workers' compensation benefits and thereafter filed this action alleging that defendant, a fellow employee of Cannon Films, Inc., had engaged in willful and wanton, negligent and reckless conduct in striking plaintiff. The jury could conclude that defendant was reckless or manifestly indifferent to the consequences of his conduct and that he intentionally breached his duty to use ordinary care not to injure plaintiff from evidence that defendant, in this and other movies, had injured other actors, stunt people and extras and had been warned not to make excessive, injurious contact with those people; defendant made contact with plaintiff during rehearsal of this scene and was warned not to do so; defendant held his knife open during the actual filming, rather than in the "tucked" position in which it was supposed to have been held; and there was ample evidence that defendant wanted his fight scenes to look as authentic and realistic as possible and that he had a reputation for engaging in excessive contact in order to do so.

Am Jur 2d, Workers' Compensation §§ 100, 101.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Willful, wanton, or reckless conduct of co-employee as ground of liability despite bar of workers' compensation law. 57 ALR4th 888.

2. Trial § 533 (NCI4th)— intentional negligence—movie stunt—perception of out-of-court information received by juror—motion for new trial denied

The trial court did not abuse its discretion by denying defendant's motion for a new trial based on juror misconduct where plaintiff alleged that defendant had engaged in willful and wanton, negligent and reckless conduct in striking plaintiff during a movie stunt; the foreperson sent a note to the judge during deliberations expressing concern that one juror had visited a karate school, discussed the case with an instructor, watched news reports of the trial, and discussed it with her husband; defendant's motion for an immediate mistrial was denied; each juror was examined by the trial court and counsel in chambers and on the record after a verdict against defendant; and defendant's motions for a judgment notwithstanding the verdict and a new trial were denied. The examination of the jurors supports the trial court's conclusion that Juror No. 12's actions in going to the karate school, observing the news with the sound turned down, and seeing her husband do a "crescent kick" caused no actual prejudice to defendant. All of the jurors in this case indicated that their deliberations and verdict were based solely and entirely on the evidence, the arguments of counsel, and the charge of the court, and were not affected by any extraneous information provided by the one juror.

Am Jur 2d, Trial § 1953.

3. Evidence and Witnesses § 336 (NCI4th)— injury during movie stunt—willful and wanton conduct—prior acts with others—admissible

The trial court did not abuse its discretion in admitting evidence regarding defendant's prior acts in engaging in excessive conduct with other co-employees and his reputation created thereby in an action for damages from an injury suffered during a movie stunt where plaintiff alleged willful and wanton, negligent and reckless conduct by defendant. The evidence was probative of defendant's motive, intent and the absence of mistake and was admissible under N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 404 et seq., 435 et seq., 447.

Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases. 64 ALR Fed. 648.

4. Judgments § 43 (NCI4th)— judgment entered out of session, term and county—proceedings held in session and in district—no error

The trial court did not err by entering judgment out of session, out of term, and out of county where the session ended on 26 February 1993; the clerk entered the verdict on the minutes, but the court directed plaintiff's counsel to prepare the judgement, precluding application of the automatic entry provision of N.C.G.S. § 1A-1, Rule 58; and the written judgment was signed on 2 April, but was not marked filed until 21 July 1993. The proceedings to which the judgment relates were held and concluded prior to the expiration of the session and in the district. Under *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, N.C.G.S. § 1A-1, Rule 6(c) provides that the expiration of the court's session has no effect on the power of the court to do any act or take any proceeding, which clearly allows a superior court judge to sign a written order out of session without the consent of the parties so long as the hearing to which the order relates was held in term.

Am Jur 2d, Judgments §§ 58 et seq.

Appeal by defendant from judgment entered 25 February 1993 and from the order denying defendant's motions for judgment notwithstanding the verdict and for new trial both entered 29 April 1993 by Judge Coy E. Brewer, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 15 April 1994.

Plaintiff brought this civil action to recover damages for injuries sustained on 12 July 1988 during filming of the motion picture "Cyborg" in Wilmington, North Carolina. Plaintiff was hired by Cannon Films, Inc., as a "special ability talent," to play the part of a villain in the motion picture which starred defendant Jean Claude Van Damme. Plaintiff was not a professional actor or stuntman but was a body-builder and member of the United States Army who was hired based upon his body type. On the night of 11 July and early morning of 12 July 1988, during a "night shoot" plaintiff and defendant were to stage a fight scene, during which plaintiff was to run through standing water, come to a stop and swing toward defendant with a rubber prop knife. Defendant was then to simulate kicking the knife with his left foot out of plaintiff's right hand and to then "slash" plaintiff's throat with his right hand, "beheading" plaintiff with a plastic prop knife. After the movie director and stunt coordinator discussed with

plaintiff and defendant how the scene would be shot, the parties rehearsed the scene several times. Although never rehearsed that way, the actual scene was filmed under simulated thunderstorm conditions of high winds, lightening, smoke, fire and rain created by machines. Strobe lights were also used. Plaintiff was given a "mark" on the ground where he was to stop after he ran up to attack defendant in the scene at issue. During the actual filming, the prop knife in defendant's right hand struck plaintiff in his left eye resulting in permanent loss of vision in that eye. Plaintiff was subsequently medically discharged from the United States Army.

After he was injured, plaintiff received workers' compensation benefits from Cannon. Thereafter, he filed this civil action against defendant alleging that defendant engaged in willful and wanton, negligent and reckless conduct in striking plaintiff. Defendant answered, interposing multiple defenses and denying the material allegations of the complaint.

The trial began on 15 February 1993 and the evidence was concluded on 22 February 1993. During the jury deliberations, which began the following day, the foreperson sent a note to the judge expressing concern that one juror had visited a karate school and discussed the case with an instructor and had watched news reports of the trial and discussed it with her husband. Defendant's motion for an immediate mistrial was denied. On 25 February 1993, the jury returned a verdict against defendant in the amount of $487,500 in compensatory damages. After the verdict, each juror was examined by the trial court and counsel in chambers, on the record, as to their knowledge of juror misconduct. Defendant subsequently filed a motion for judgment notwithstanding the verdict pursuant to G.S. § 1A-1, Rule 50(b) and a motion for a new trial pursuant to G.S. § 1A-1, Rule 59. Both motions were denied. Defendant appealed from the order denying his post trial motions and from the judgment entered upon the verdict.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by H. Gerald Beaver and Harold Lee Boughman, Jr., for plaintiff-appellee.

Millberg & Gordon, P.L.L.C., by John C. Millberg, for defendant-appellant.

MARTIN, Judge.

Defendant argues on appeal that the trial court erred (1) in denying his motion for judgment notwithstanding the verdict because the evidence was insufficient to support a finding of willful, wanton and reckless misconduct, (2) in denying defendant's motion for new trial based on juror misconduct, (3) in denying defendant's motion for new trial on the ground that reputation evidence was improperly admitted, and (4) by entering judgment out of session, out of term, and out of county. We find no reversible error.

[1] Defendant first argues that the trial court erred by denying his motion for judgment notwithstanding the verdict because the evidence was insufficient to support a finding of willful, wanton and reckless misconduct so as to avoid the exclusivity provisions of the Workers' Compensation Act. In reviewing a ruling upon a motion for judgment notwithstanding the verdict made pursuant to G.S. § 1A-1, Rule 50, the evidence must be viewed in the light most favorable to the non-movant "deeming all evidence which tends to support his position to be true, resolving all evidentiary conflicts favorably to him and giving the non-movant the benefit of all inferences reasonably to be drawn in his favor." *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E.2d 788, 789 (1978). A motion to set aside the verdict as being against the greater weight of the evidence is directed to the sound discretion of the presiding judge, whose ruling is not reviewable on appeal in the absence of abuse of discretion. *Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Although the Workers' Compensation Act provides the exclusive remedy when an employee is injured in the course of his employment by the ordinary negligence of co-employees, *Abernathy v. Consolidated Freightways Corp.*, 321 N.C. 236, 362 S.E.2d 559 (1987), *reh'g denied*, 321 N.C. 747, 366 S.E.2d 855 (1988), the Act does not preclude suits against co-employees for intentional torts. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), *disc. review denied*, 305 N.C. 395, 290 S.E.2d 364 (1982). Injury to another resulting from willful, wanton and reckless negligence is treated as intentional injury for purposes of the Act. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). Our Supreme Court has explained the concept of willful, wanton and reckless negligence:

> The concept of willful, reckless and wanton negligence inhabits a twilight zone which exists somewhere between ordinary negligence and intentional injury. The state of mind of the perpe-

trator of such conduct lies within the penumbra of what has been referred to as "quasi intent." . . .

We have described "wanton" conduct as an act manifesting a reckless disregard for the rights and safety of others. The term "reckless," as used in this context, appears to be merely a synonym for "wanton"' and has been used in conjunction with it for many years . . . .

The term "willful negligence" has been defined as the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed . . . .

Constructive intent to injure may also provide the mental state necessary for an intentional tort. Constructive intent to injure exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified. Wanton and reckless negligence gives rise to constructive intent.

Id. at 714-15, 325 S.E.2d at 247-48. (Citations omitted.)

When considered in the light most favorable to him, plaintiff's evidence tended to show the following: Blaise Loong, the sword and martial-arts consultant for the film "Cyborg," and an actor and stuntman, testified that generally there is a goal to avoid actual physical contact between weapons and individuals when filming fight scenes. Several other stuntmen and actors in "Cyborg" complained to Loong about excessive contact from defendant in fight scenes. Elizabeth Featherston, a casting agent for "Cyborg" testified that based upon conversations with others on the set of "Cyborg," defendant had a widely discussed overall reputation of making unnecessary contact with people and hurting them. Charles Allen, another special ability talent for the film and ranked as a first degree black belt in karate, testified that during the rehearsal of fight scenes he noticed a considerable amount of unplanned contact being made by defendant who did not appear to be "pulling his punches," by stopping his punches before they made impact, a skill learned in karate. Allen also testified that other cast members complained about defendant not "pulling his punches," and that defendant had a reputation for engaging in a pattern of near contact or contact designed to create realism in filming fight scenes in "Cyborg." From observing the scene at issue between

defendant and plaintiff, Allen believed that defendant was not concerned whether he had contact with plaintiff because his only concern was to "do his movie."

Martha Lee, the owner of the casting company that supplied special ability talent for "Cyborg," observed an extra, who had a role in the movie similar to plaintiff's, who suffered injuries to his leg and side and told her that defendant had hit him. Lee made a formal complaint and spoke with other members of the production staff. Lee discovered that defendant was purposely making physical contact on a regular basis to make the movie more realistic. Another of the cast members told Lee that defendant hit him but he did not want to be a "crybaby." After Lee's complaint and before plaintiff's injury, Tom Elliot, the stunt coordinator of "Cyborg" told her that defendant had been warned and that there would be no more contact on the set. Linda Pickett, a Cannon Films employee who prepared food for the crew, observed a fight scene between defendant and Blaise Loong during which defendant pushed Loong up against a concrete pillar as the scene called for, but with what Pickett assumed was "much more force than necessary because of the loud noise when the guy [Loong] hit the pillar, because of [sic] expression on his face and because of the expressions on everyone else's faces." Loong was pretty upset and the next day showed her a bruise he had acquired from the incident. Pickett also stated that based upon discussions she had with other stunt people and special ability talent in the movie, defendant had a reputation for using more force than needed to "make it look good for the camera." Timothy Baker, a karate expert who worked as an actor with defendant in an earlier film testified that defendant had kicked him very hard during a fight scene. Baker, the production manager and the director all asked defendant to try and hold back the contact, but defendant just shrugged and kept kicking him. Defendant kicked Baker in the groin so hard that he could not get up for over five minutes.

During a rehearsal of defendant's fight scene with plaintiff, defendant kicked plaintiff's hand and came so close to his face with a prop knife that plaintiff could feel the wind. The director, Albert Pyun, told defendant that he had come too close; defendant made no response. During the actual filming of the scene, defendant made physical contact when he kicked plaintiff's right hand, and, although defendant had been instructed to hold his knife in a tuck close to his forearm, he held it up and struck plaintiff's eye with the knife. Plain-

tiff fell into the water and grabbed his face. Plaintiff testified that defendant just stood there and did not say anything or help him.

John Taylor, a journalist, testified that he interviewed defendant for an article that appeared in the 1 April 1991 edition of New York Magazine during which defendant expressed his preference for doing fight scenes in Asia where "guys [are] not afraid to touch, really fight, go for it. Because when you do slow motion you have to see," and that "[i]n America when you do it you have, like, union and, 'Oh, I'm going to sue.' " The article reported that defendant said his fight scenes were so real, he did not dare stage them in the United States.

In summary, plaintiff's evidence demonstrated that in filming "Cyborg" and other movies defendant had injured other actors, stunt people and extras and had been warned not to make excessive, injurious contact with those people, which warnings he often ignored. During rehearsal of the scene at issue, defendant made physical contact with plaintiff and was warned not to do so. Also, during the actual filming of that scene defendant held his knife open, instead of in the "tucked" position in which it was supposed to have been held. There was ample testimony that defendant wanted his fight scenes to look as authentic and realistic as possible and that he had a reputation for engaging in excessive contact in order to do so. From this evidence a jury could conclude that defendant was reckless or manifestly indifferent to the consequences of his conduct and that he intentionally breached his duty to use ordinary care not to injure plaintiff. *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993). (Mere knowledge by coworkers of dangerous condition did not support inference of intent to injure or manifest indifference.) *Abernathy, supra.* (Evidence that co-employees were aware that a tow motor was brakeless, but thought that it could be stopped without brakes by using foot pedal, had seen numerous employees operate it in such a manner, and tow motor had been stopped by using the foot pedal just moments before the accident supported only a finding of ordinary negligence, rather than willful, wanton, and reckless conduct.) *Pleasant, supra.* (Employee's allegations that co-employee had been willfully, wantonly, and recklessly negligent in driving vehicle very close to employee as part of prank were sufficient to state cause of action.) *Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, 416 S.E.2d 193, *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992). (Project foreman not liable for death of employee when trench collapsed where evidence showed that foreman's conduct, although arguably negligent in not supervising every portion of work

site being worked by inexperienced crew, was not willful, wanton, and reckless.) Accordingly we find no abuse of discretion in the denial of defendant's motion for judgment notwithstanding the verdict.

[2] In his second argument, defendant contends that the trial court erred by denying his motion for a new trial based on juror misconduct. On the morning of 24 February 1993, the second day of jury deliberations, the court received the following handwritten note from the jury foreperson ("Juror No. 4"):

> Several jurors feel one juror sitting on the jury has disobeyed the Court's orders and feel this should be brought to your attention. They have visited a karate school and discussed this with an instructor plus has [sic] been discussing it with their spouse. Also admitted to watching the news with the volume down. This was admitted when I confronted them about it. Thank you.

After discussing the matter with counsel on the record in the absence of the jury, the trial court instructed the jury that its verdict should be based solely upon the evidence presented in the courtroom. Defendant's motion for a mistrial was denied. Directly following the verdict, the court, with counsel, conducted an extensive, in-chambers, individual examination of each juror which was transcribed by the court reporter. In its order denying defendant's Rule 59 motion for a new trial, the court made the following pertinent findings:

9. Based upon the examination of the jurors and affidavits submitted by the parties, the Court finds that no improper independent external investigation was conducted by any juror.

10. The Court finds, however, that one juror did visit a karate school and that statements were made in the jury room by this juror which reasonably conveyed to some jurors the existence of an apparent external investigation arising from the juror's visit to a karate school. The Court further finds that such statements were in fact perceived by some jurors as evidence obtained from an independent external investigation, even though such investigation did not occur.

11. The Court finds that by the final morning of deliberations, some jurors became aware from various sources, that a motion for mistrial had been made based upon juror misconduct and that three jurors were aware that the motion had been made by the defendant. At this time, all matters except punitive damages

had been resolved and this issue was resolved in favor of the defendant. There is no reasonable possibility of prejudice based upon this information.

12. The Court finds that while no actual extraneous information was brought to the attention of the jurors, what some jurors perceived to be extraneous information was, in fact, brought to the attention of some jurors.

13. The Court finds that . . . the post-verdict examination of the jurors demonstrates the absence of any actual prejudice to the defendant. Absence of any actual prejudice to the defendant is further based upon evidence introduced at trial with substantially the same information as contained in the juror's statements and that therefore such statements were cumulative in nature.

The trial court concluded that there was no presumption of prejudice which arises in a civil action from a showing that extraneous information or perceived extraneous information is improperly brought to the jury's attention, and that no new trial would be allowed on such grounds unless the moving party demonstrated actual prejudice. The court found that defendant had not demonstrated actual prejudice and denied his motion for a new trial.

The granting or denial of a motion for new trial rests within the sound discretion of the trial judge, and his ruling will not be disturbed on appeal in the absence of a manifest abuse of such discretion or determination that his ruling is clearly erroneous. *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E.2d 363 (1962); *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 437 S.E.2d 519 (1993), *disc. review denied*, 336 N.C. 71, 445 S.E.2d 29 (1994). Our Supreme Court has held:

> In North Carolina, in instances where the contention was made by the defendant that the jury has been improperly influenced, it has been held that it must be shown that the jury was actually prejudiced against the defendant, to avail the defendant relief from the verdict, and the findings of the trial judge upon the evidence and facts are conclusive and not reviewable.

State v. Hart, 226 N.C. 200, 203, 37 S.E.2d 487, 489 (1946); *State v. Gilbert*, 47 N.C. App. 316, 319-20, 267 S.E.2d 378, 380 (1980).

Although it is the general rule that, once rendered, a verdict may not be impeached by the jurors, G.S. § 8C-1, Rule 606(b) permits testimony

by a juror as to whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. *State v. Lyles*, 94 N.C. App. 240, 380 S.E.2d 390 (1989). A juror may not, however, testify as to the subjective effect of the extraneous information upon the jury's decision. *Id.* "Extraneous information" is information dealing with the defendant or the case being tried, which information reaches a juror without being introduced in evidence and does not include information which a juror has gained in his experience which does not deal with the particular defendant or the case being tried. *State v. Rosier*, 322 N.C. 826, 370 S.E.2d 359 (1988). In *Lyles*, *supra*, a criminal case, we held that a showing of the jury's exposure to extraneous information is presumed to be prejudicial, because it involved the right of a criminal defendant to confront the witnesses and evidence against him guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution. In a criminal prosecution, violation of a constitutional right is presumed prejudicial, and the presumption must be overcome by a showing that the violation was harmless beyond a reasonable doubt. *Id.* However, no such presumption of prejudice arises in the present case because no violation of any constitutional right is involved. Therefore, defendant must demonstrate that he suffered actual prejudice.

In *Wright v. Holt*, 18 N.C. App. 661, 197 S.E.2d 811, *cert. denied*, 283 N.C. 759, 198 S.E.2d 729 (1973), we upheld the trial court's refusal to set aside the verdict because one of the jurors disclosed after the verdict that she had overheard the defendant make a statement in the restroom that the windshield of plaintiff's car was not broken. In that case, as in the present case, the record demonstrated that the court made a careful investigation, and after a full inquiry into all of the circumstances surrounding the making of the statement and its relevance upon the issue of negligence, which was decided adversely to plaintiff, concluded that it had no prejudicial effect upon the verdict. *Id.* at 662-3, 197 S.E.2d at 812.

After careful review of the examinations which the trial judge conducted of each juror in the present case, we discern no manifest abuse of discretion in the trial court's conclusion that the one juror's conduct did not result in actual prejudice to defendant. All jurors indicated that their deliberations and verdict were based solely and entirely on the evidence, the arguments of counsel, and the charge of

the court, and were not affected by any extraneous information provided by the one juror, identified as Juror No. 12.

Juror No. 4 stated that Juror No. 12 told the other jurors in the jury room on Monday morning, 22 February 1993, during the middle of defendant's presentation of evidence, that over the weekend she had gone to a karate school in Fayetteville and had discussed the "crescent kick," which resulted in plaintiff's injury, with an instructor. According to Juror No. 4, Juror No. 12 stated that the instructor told her that as a trained professional defendant "should have been able to stop on a dime" and "should have full control to be able to stop at any time." Juror No. 4 also testified that the remarks that defendant should have been able to stop on a dime came up during deliberation "only because it was brought out in testimony. It was not referred to—it was never brought up in deliberation." Juror No. 4 was referring to the following testimony elicited from defendant on cross-examination:

> Q. Mr. Van Damme your experience in martial arts has taught you to have a great deal of control over your body, hasn't it?
>
> A. Yes, sir.
>
> Q. You can basically start and stop on a dime, can't you?
>
> A. Yes, sir.

Juror No. 4 could not recall anything specific regarding discussions that Juror No. 12 allegedly had with her husband concerning the case.

Juror No. 12 denied stating that she had spoken with a karate instructor or that the instructor made any of the foregoing comments. She did testify that she said that "as a professional, I thought he should be able to pull a kick, you know, because they're trained . . . . But that was my opinion." Juror No. 12 stated that she went to look at a karate school with her husband who "wanted to get back into it." She did not go to the karate school to gather information to use at trial and did not see anything that she had not seen on previous occasions when she had gone to karate schools. She acknowledged that she had watched the class but "never spoke to an instructor" and "never asked him to show me a specific move." She did ask her husband to translate what the instructor was saying because "he spoke in oriental" and "had a very thick accent." Juror No. 12 said that she told the other jurors that:

> I had been to the place, that I watched the way they showed the techniques, and then I stated my opinion. I said I watched the instructor, how he did, you know, how he showed them how to—to do their moves, and then I made my statement and I said, um—I said, "Oh, well, it seems like he [defendant] should have known how to pull his punch—how to pull it—how to pull the kick."

Juror No. 12 said that her statement that defendant should have been able to stop on a dime only came up in reference to defendant's own testimony.

Juror No. 12 also testified that on one occasion, her husband was watching the television news when she came home and she asked him to turn it down because she could not watch it. She only observed footage of defendant in court giving a demonstration of the kick which she had previously witnessed. Juror No. 12 also stated that she asked her husband to "execute a crescent kick" which he did but did not tell him why. She testified that she and her husband "never discussed the trial," but that her husband told her that he had heard on the news that defendant's attorneys would seek a mistrial and that she would be "humiliated." According to Juror No. 12, defendant's testimony, a movie presented in the courtroom and "the law of North Carolina" were the only things which had any bearing on her decision.

Additionally, Juror No. 12 offered the affidavits of her husband and the karate instructor. In his affidavit, the husband stated that his wife was never aware of any news reports in the case, that they never discussed the case and that he never expressed an opinion about the case. He stated that it was his idea to stop by a Tae Kwon Do center to determine if he wanted to resume the study of karate. There was a single instructor who spoke poor English and they both left after only a few minutes without speaking to him. He and his juror wife did not discuss what they had seen at the Tae Kwon Do center in relation to the case. The karate instructor testified that he did not speak or understand English and did not remember anyone coming to him and discussing defendant's karate ability.

Other jurors gave various accounts recalling discussions concerning Juror No. 12 visiting a karate school and seeing some news coverage. Several of the jurors did not recall hearing of any of these things and several of those who did indicated that they did not pay attention to Juror No. 12's comments or could not remember details of the conversation she allegedly had with a karate instructor. One juror specifically stated that she understood Juror No. 12's discussion

concerning defendant being able to "stop on a dime" to reflect only Juror No. 12's opinion based on the evidence. Several of the jurors stated specifically that their decision in the case was based solely on the evidence presented at trial.

The examination of the jurors supports the trial court's conclusion that Juror No. 12's actions in going to the karate school, observing the news with the sound turned down, and seeing her husband do a "crescent kick" caused no actual prejudice to defendant. *See State v. Welch*, 65 N.C. App. 390, 308 S.E.2d 910 (1983). (No prejudice when juror read newspaper article about another crime defendant committed where court found juror was in no way influenced by it and verdict resulted from deliberation on the evidence and other matters coming solely from the courtroom.) *State v. Hawkins*, 59 N.C. App. 190, 296 S.E.2d 324 (1982), *disc. review denied*, 307 N.C. 471, 299 S.E.2d 225 (1983). (Defendant's motion for appropriate relief properly denied when based upon affidavits of four jurors stating that during deliberation they used information related to them by juror concerning degree of lighting he observed on a visit to the scene of the crime, as there was considerable testimony as to the visibility during commission of the offenses, the findings of the court were amply supported by the evidence and affidavits did not contain additional or different matters not in evidence at trial.)

Finally, we observe that the trial court, upon notification of the possibility of the jury's exposure to extraneous information, instructed the jury to consider only matters introduced at trial. It is well established that "when the court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Smith*, 301 N.C. 695, 697, 272 S.E.2d 852, 855 (1981). This assignment of error is overruled.

[3] Defendant next argues that the trial court erred by denying his motion for new trial on the ground that reputation evidence was improperly admitted. We disagree.

Defendant contends that several witnesses impermissibly testified that he had an overall reputation of engaging in unnecessary and excessive contact with co-workers and injuring them. Specifically he refers to the previously summarized testimony of Elizabeth Featherston, Charles Allen and Martha Lee. Plaintiff asserts, and we agree, that the disputed testimony was not offered to demonstrate a propensity to injure fellow actors, which would violate G.S. § 8C-1, Rule 404, but rather was offered as substantive evidence to demon-

strate the existence of willfulness, wantonness and recklessness, and to negate defendant's contention that plaintiff's injury was the result of an accident or mistake.

G.S. § 8C-1, Rule 404(a) provides generally that evidence of a person's character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. However, Rule 404(b) allows evidence of other acts as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Rule 404 is a general rule of inclusion of evidence, subject to an exception when the only probative value of the evidence is to show a person's propensity or disposition to certain conduct. *State v. West*, 103 N.C. App. 1, 404 S.E.2d 191 (1991). G.S. § 8C-1, Rule 405 provides that in those cases where character evidence is admissible, proof may be made by reputation or opinion testimony and in cases where character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

The test for determining whether evidence of crimes, wrongs or acts other than those specifically at issue in the trial is admissible is whether the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial under the balancing test of G.S. § 8C-1, Rule 403. *State v. Schultz*, 88 N.C. App. 197, 362 S.E.2d 853 (1987), *affirmed*, 322 N.C. 467, 368 S.E.2d 386 (1988). *See also State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, 126 L.Ed.2d 341 (1993), *reh'g denied*, 126 L.Ed.2d 707 (1994). (Testimony about defendant's frequent arguments with, violent acts toward, separations from, reconciliations with, and threats to, his wife admissible under subsection Rule 404(b) to prove issues defendant disputed in a trial for her murder, namely, lack of accident, intent, malice, premeditation and deliberation.) *State v. Wilson*, 106 N.C. App. 342, 416 S.E.2d 603 (1992). (Evidence that defendant had been convicted of armed robbery thirteen and one-half years prior to trial admissible where evidence was sufficiently similar to crimes charged to be admitted for purpose of showing motive.) *West, supra.* (Past incidents of mistreatment admissible to show intent in child abuse case.)

We hold that the testimony of the witnesses to which defendant objects was admissible under G.S. § 8C-1, Rule 404(b). The evidence regarding defendant's prior acts in engaging in excessive conduct with other co-employees and his reputation created thereby was probative of defendant's motive, intent, and the absence of mistake. The

court did not abuse its discretion in allowing the evidence. Defendant did not request a limiting instruction. The evidence of defendant's misconduct lay at the heart of plaintiff's complaint and was not introduced to prove defendant's character, rather it was introduced and admitted as substantive evidence in support of his claims of willful and wanton negligence. *See MacClements v. LaFone*, 104 N.C. App. 179, 408 S.E.2d 878 (1991), *disc. review denied*, 330 N.C. 613, 412 S.E.2d 87 (1992). (In malpractice action brought against therapist who had sexual relationship with plaintiff client, testimony of three prior relationships between defendant and his patients admissible under Rule 404(b) to show defendant's intent to take advantage of female patients.) *Medina v. Town and Country Ford*, 85 N.C. App. 650, 355 S.E.2d 831, *affirmed*, 321 N.C. 591, 364 S.E.2d 140 (1988). (In action against car dealership alleging breach of contract, malicious prosecution, and unfair and deceptive practices, similar occurrence evidence was probative of defendant's motive, intent, absence of mistake and possible bad faith in its dealings with plaintiff.)

[4] By his final assignment of error defendant argues that the trial court erred by entering judgment out of session, out of term and out of county. Absent consent, an order of the superior court must be entered during the term, during the session, and in the county and in the judicial district where the hearing was held, and an order entered inconsistent with that rule is null, void and of no legal effect. *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984).

The session of court at which the trial was conducted ended on 26 February 1993. The clerk entered the verdict on the minutes of the court, which normally would constitute the entry of judgment. N.C. Gen. Stat. § 1A-1, Rule 58. However, the trial court directed plaintiff's counsel to prepare the judgment, precluding application of the automatic entry provision of the rule. *Reed v. Abrahamson*, 331 N.C. 249, 415 S.E.2d 549 (1992). The written judgment was signed on 2 April 1993, but for some reason not apparent from the record, was not marked "Filed" by the clerk until 21 July 1993. Nevertheless, the proceedings to which the judgment relates were held and concluded prior to the expiration of the session and in the district. Our Supreme Court recently held that:

> We believe the correct rule to be, as stated by a contemporary writer of the subject, "Rule 6(c) permits a judge to sign an order out of term [which we interpret to mean both out of the session and out of the trial judge's assigned term] and out of district with-

out the consent of the parties so long as the hearing to which the order relates was held in term and in district."

Capital Outdoor Advertising Inc. v. City of Raleigh, 337 N.C. 150, 159, 446 S.E.2d 289, 294-95 (1994), quoting W. Brian Howell, *Howell's Shuford North Carolina Civil Practice and Procedure* § 6-7, at 68 (4th ed. 1992). G.S. § 1A-1, Rule 6(c) provides that the expiration of the court's session has no effect on the power of the court "to do any act or take any proceeding" which rule "clearly allows a superior court judge to sign a written order out of session *without* the consent of the parties so long as the hearing to which the order relates was held in term." *Id.* at 158-59, 446 S.E.2d at 294; *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987); *Feibus & Co. v. Const. Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981). (Rule 6(c) clearly allows written order to be signed out of term, especially when such act merely documents decision made and announced before expiration of the term.) This assignment of error is overruled.

No error.

Judges COZORT and ORR concur.

WANDA JORDAN, CHRISTINE JORDAN, PAUL JORDAN, BY AND THROUGH HIS GUARDIAN AD LITEM JOEL WINSTON, AND DIANNE KEHRLE, PLAINTIFFS v. FOUST OIL COMPANY, INC., WILFRED PHELPS, AND NANCY PHELPS, DEFENDANTS

No. 9315SC501

(Filed 6 September 1994)

1. Gas and Oil § 40 (NCI4th)— delivery of gas—leaking underground storage tanks—summary judgment for defendant—erroneous

The trial court erred by granting summary judgment for defendant Foust Oil Company on a claim for violation of the Oil Pollution and Hazardous Substances Control Act where the forecast of evidence showed that gas was transported from Foust's plant to Phelps Store by tanker and pumped from the truck into underground storage tanks; gas from the store's UST then entered groundwater drawn into plaintiff's wells, resulting in injuries to

plaintiffs' property and persons; the delivery man stated that Mr. Phelps had informed him that Tank 1 was leaking and that he made no further deliveries to that tank; the delivery man also stated that he had tested tanks 2 and 3, which were connected, determined that there was a shortage in tanks 2 and 3 that could indicate a leak, and refused to make further deliveries to those tanks; and plaintiffs presented invoices and loading tickets for deliveries made to Phelps from which it could be inferred that Foust pumped gasoline into leaking tanks 1, 2, 3, or 5. This evidence presents a genuine issue of material fact.

Am Jur 2d, Electricity, Gas, and Steam §§ 211 et seq., 244 et seq.; Gas and Oil §§ 228 et seq.

Liability of one selling or distributing liquid or bottled fuel gas, for personal injury, death, or property damage. 41 ALR3d 782.

2. Gas and Oil § 40 (NCI4th)— leaking underground storage tanks—liability of dealer making delivery—ownership interest

A gasoline supplier like defendant Foust Oil Company may be found to have "control over" gasoline discharged from an unsound underground storage tank it filled but does not own. Although defendant argued that it cannot be found in control after possession and ownership of the gasoline have passed to the store to which the gasoline is delivered unless it had an ownership interest in the tanks or the store or was obligated to service, monitor, or repair the tanks, statutory "control over" oil is not necessarily coextensive with physical control or possession of oil or ownership of oil at the time of its discharge. In defining "having control over" oil, the Legislature expressly included storing or transporting oil "immediately prior" to a discharge of such oil, so that Foust can be found to have control over the gasoline even though it relinquished ownership and possession of the oil after its discharge. The Legislature clearly intended to provide broad protection of the land and waters of North Carolina from pollution by oil and other hazardous substances and to thereby promote the health, safety, and welfare of the citizens of this state; liability for damages caused to persons and property by unlawful discharges is broadly and strictly imposed on "[a]ny person hav-

ing control over" such oil or other hazardous substances. N.C. Gen. Stat. § 143-215.93.

Am Jur 2d, Electricity, Gas, and Steam §§ 211 et seq., 244 et seq.; Gas and Oil §§ 228 et seq.

Liability of one selling or distributing liquid or bottled fuel gas, for personal injury, death, or property damage. 41 ALR3d 782.

3. Trespass § 46 (NCI4th)— leaking underground storage tanks—trespass—summary judgment

The trial court erred by granting summary judgment for defendant Foust Oil Company on a trespass claim arising from leaking underground storage tanks owned by a third party to which Foust had delivered gasoline. The evidence forecast in this case was that plaintiffs possessed the land at the time gasoline from the storage tanks leaked into their well water and that Foust delivered gasoline several times into the tanks when it knew or should have known the tanks were leaking.

Am Jur 2d, Trespass § 16.

4. Nuisance § 11 (NCI4th)— leaking underground storage tanks—summary judgment

The trial court erred by granting summary judgment for defendant Foust Oil Company on a nuisance action arising from leaking underground storage tanks owned by a third party to which Foust had delivered gasoline where the forecast of evidence raises genuine issues as to plaintiffs' loss of use and enjoyment of their property and as to whether Foust unreasonably interfered with plaintiffs' use of their land by knowingly delivering gasoline into leaking tanks.

Am Jur 2d, Nuisances §§ 1-4, 43-48.

Appeal by plaintiffs from order of Judge E. Lynn Johnson signed 26 August 1992 in Orange County Superior Court. Heard in the Court of Appeals 10 February 1994.

Berman & Shangler, by Dean A. Shangler, for plaintiff appellants.

Coleman, Gledhill & Hargrave, by Kim K. Steffan and Mark T. Sheridan, for defendant appellee, Foust Oil Company, Inc.

COZORT, Judge.

Since 30 March 1990, the Jordan family, plaintiffs herein, have lived in a home on N.C. Highway 86 North in Hillsborough. Beginning about 1983 defendants Wilfred and Nancy Phelps operated the Phelps Store, a convenience store-gas station-restaurant, located near the plaintiffs' home, where they sold gasoline pumped from underground gasoline storage tanks (UST's). There were five underground gasoline storage tanks at the Phelps Store and one pump island with three gasoline pumps. The defendant Foust Oil Company, Inc., transported gasoline by tanker truck to Phelps Store several times each week and filled Phelps Store UST's with gasoline. Foust also provided, maintained and serviced the gasoline pumps used at Phelps Store and conducted inventory control tests on Phelps Store UST's to detect possible leaks and shortages.

In early October of 1990, plaintiffs noticed their well water had a foul taste and smell. Plaintiffs contacted the Division of Environmental Management of the North Carolina Department of Environment, Health and Natural Resources (DEHNR). DEHNR took water samples from plaintiffs' well and their neighbors' wells. Gasoline was found in these samples. The state toxicologist tested plaintiffs' water and prepared a health risk evaluation of plaintiffs' well water which stated that the samples indicated extensive gasoline contamination. Specifically, the evaluation stated:

> Benzene levels are 62 times the EPA MCL of 5 ppb, with high levels of other products detected. Benzene is a known human carcinogen. *Any* continued water use from this well for *any* purposes may pose a significantly increased long-term cancer risk. It is strongly recommended that all use of water from this well be discontinued immediately.

On 26 November 1990, DEHNR obtained soil samples from the Phelps Store property and, on 10 December 1990, confirmed a release of petroleum products from the Phelps Store UST's. Wilfred Phelps was notified of this and of his consequent violation of N.C. Gen. Stat. § 143-215.75 *et. seq.* On 10 December 1990, DEHNR also received results of tests done on additional water samples collected from plaintiffs' and plaintiffs' neighbors' wells. The results showed contaminant levels had risen dramatically over the dangerous levels found previously.

Foust made no further deliveries of gasoline to the Phelps Store after 15 November 1990, and in December of 1990 Foust removed the pumps from the Phelps Store. DEHNR later removed the Phelps Store UST's from the ground and discovered holes in the bottom of the largest tank. The investigator who removed and inspected the UST's stated:

> [G]asoline was probably released from one or more [UST's] at Phelps Grocery beginning before October 31, 1990; that the constituents of gasoline found in water pumped from both the Jordan and Long wells in October, 1990, and thereafter were probably from gasoline released from the underground tank systems at Phelps Grocery; and that, as a result of the probable release of gasoline from the underground tank systems at Phelps Grocery, water drawn from the Jordan and Long wells was contaminated with constituents of gasoline, including benzene.

Plaintiffs discontinued drinking their well water after noticing the foul odor, but continued to use it for other purposes for several weeks, when they were informed of the significant health risk posed by their water and advised not to use their water for anything. Before they stopped using the water, plaintiffs suffered skin redness and irritation, headaches, nausea, and dizziness.

Plaintiffs sued Wilfred and Nancy Phelps and Foust Oil Company, Inc., in April 1991. None of the claims involving the Phelpses are before us. From this point on, "defendant" shall refer to Foust Oil Company, Inc. Plaintiffs alleged that Foust Oil Company violated the Oil Pollution and Hazardous Substances Control Act [OPHSCA]. Plaintiffs also alleged claims for trespass, infliction of emotional distress, unfair trade practice, and nuisance. Defendant answered in August of 1991 and moved for summary judgment on 10 July 1992. On 17 August 1992, plaintiffs took a voluntary dismissal on the claims of infliction of emotional distress. On 26 August 1992, Judge E. Lynn Johnson signed an order granting summary judgment for Foust on all "remaining claims." Plaintiffs appeal.

[1] We first review the grant of summary judgment on the plaintiffs' claim for violation of OPHSCA. Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). After reviewing the record, we conclude that there was a gen-

uine issue of material fact as to whether Foust is liable under OPHSCA for delivering gas to the leaking tanks.

N.C. Gen. Stat. § 143-215.83 (1993), North Carolina's Oil Pollution and Hazardous Substances Control Act, states, in pertinent part:

> It shall be unlawful, except as otherwise provided . . . for any person to discharge, or cause to be discharged, oil or other hazardous substances into or upon any waters . . . within this State, . . . regardless of the fault of the person having control over the oil or other hazardous substances . . . .

N.C. Gen. Stat. § 143-215.93 (1993) provides, in pertinent part:

> Any person having control over oil or other hazardous substances which enters the waters of the State in violation of this Part shall be strictly liable, without regard to fault, for damages to persons or property . . . caused by such entry . . . .

Pursuant to § 143-215.77(8), gasoline is "oil." "Waters" is broadly defined under § 143-215.77(18) as: "any stream, river . . . or any other body or accumulation of water, surface or underground, public or private, natural or artificial, which is contained within, flows through, or borders upon this State . . . ." Thus, plaintiffs' well water constitutes "waters of the State" under § 143-215.93. The phrase "Having control over oil or other hazardous substances" is defined as:

> "Having control over oil or other hazardous substances" shall mean, but shall not be limited to, any person, using, transferring, storing, or transporting oil or other hazardous substances immediately prior to a discharge of such oil or other hazardous substances onto the land or into the waters of the State, and specifically shall include carriers and bailees of such oil or other hazardous substances.

N.C. Gen. Stat. § 143-215.77(5).

The forecast of evidence showed that gas was transported from Foust's plant in Mebane to Phelps Store by tanker truck and pumped from the truck into the UST's. Gas from the store's UST's then entered groundwater drawn into plaintiffs' wells, resulting in injuries to plaintiffs' property and persons. There were five tanks with varying capacities. Defendant admitted that he delivered gasoline to certain UST's at the Phelps property, but defendant denied the existence of leaks in those UST's.

Plaintiffs deposed Foust's delivery man, Larry Poole. Mr. Poole stated that when he began delivering to Mr. Phelps, Mr. Phelps informed him that Tank 1 was leaking. Mr. Poole further testified that he made no deliveries to Tank 1. Mr. Poole also testified that in September 1989, he tested tanks 2 and 3, which were connected, and determined that there was a shortage in tanks 2 and 3 that could indicate a leak. He then informed Phelps of this and refused to make further deliveries to tanks 2 and 3. Thereafter, Mr. Poole made deliveries only to tanks 4 and 5.

To rebut Mr. Poole's testimony, plaintiffs presented invoices and loading tickets for deliveries made to Phelps, from which it could be inferred that Foust pumped gasoline into leaking tanks 1, 2, 3, or 5. The invoices showed the amount of gas and types of gas delivered to Phelps' UST's. On 26 September 1989, Foust delivered 2743 gallons of gas to tanks 2, 3, 4 and 5. Since the total available combined capacity of these tanks was 2500 to 2600 gallons, it is reasonable to infer that the remaining gallons were put into tank 1. On 30 September 1989, after Foust knew that tanks 2 and 3 had developed a shortage and were possibly leaking, Foust delivered 2560 gallons of gasoline to Phelps. Since tanks 4 and 5 had a combined capacity of 1500, the remaining 1069 gallons delivered on 30 September 1989 were, drawing inferences against movant Foust, pumped into tanks 1, 2, or 3, or some combination of the three. On 25 May 1990, 8 June 1990, and 29 June 1990, Foust pumped 1185, 1150, and 1100 gallons, respectively, of Exxon Plus into Phelps' tanks. Foust averred that since September 1989, Exxon Plus was delivered only to the 1000 gallon capacity tank 5, and that premium grade gasoline was put into tank 4 only. Drawing inferences from this evidence in favor of plaintiffs, on 25 May 1990, 8 June 1990, and 29 June 1990, Foust delivered some Exxon Plus into tanks 1, 2, or 3, or some combination thereof. On 20 September 1990, Foust delivered 250 gallons of Exxon Supreme, 900 gallons of Exxon Regular, and 650 gallons of Exxon Plus. Assuming that Foust, as it has sworn, delivered the Exxon Plus into the 1000 gallon tank 5 and the Exxon Supreme into 500 gallon tank 4, it may be inferred that on 20 September 1990 Foust put 900 gallons of Exxon Regular into some or all of tanks 1, 2, and 3.

We find this evidence presents a genuine issue of material fact as to Foust's strict liability under OPHSCA.

[2] Defendant argues that since it did not own or possess the gas after it delivered it into the UST's, had no ownership interest in the

UST's or the Phelps Store, and had no obligation to Phelps to service, monitor, or repair the tanks, it did not have "control over" the gasoline. The substance of defendant's argument is that after possession and ownership of the gasoline have passed to the Phelps Store, Foust cannot be found in control unless plaintiffs can establish that Foust had an ownership interest in the UST's or in the Phelps Store or that Foust was obligated to service, monitor, or repair the tanks for Phelps. We disagree. Looking at the plain language of N.C. Gen. Stat. § 143-215.77(5), Foust may be found to have had control over the gasoline because it transported the gasoline immediately prior to its discharge.

Statutory "control over" oil is not necessarily coextensive with physical control or possession of oil or ownership of oil at the time of its discharge. Since carriers and bailees are expressly included in the definition of "having control over," one need not have an ownership interest in oil to "have control over" it. That "having control over" oil may be distinct from "owning" oil is suggested by the use of these two terms in the disjunctive in § 143-215.85:

> Every person owning *or* having control over oil or other substances discharged in any circumstances . . . shall immediately notify the [DEHNR] . . . .

N.C. Gen. Stat. § 143-215.85 (emphasis added). Moreover, in defining "having control over" oil, the Legislature expressly included storing or transporting oil "immediately prior" to a discharge of such oil. Thus, Foust can be found to have control over the gasoline even though it relinquished ownership and possession of the oil after its discharge. If the UST's Foust delivered into were unsound, and gasoline leaks out as or immediately after it is pumped in, Foust had statutory "control over" the discharged gasoline and is, under § 143-215.93, strictly liable for damages caused by entry of the gasoline into soil and water.

Defendant contends that an application of the basic principles of statutory construction to the language contained in Parts 1, 2, and 2A of OPHSCA yields a different conclusion. Defendant argues the Legislature intended that, with regard to discharges from underground storage tanks, persons "having control" over the gasoline immediately prior to discharge are those persons who come within the definition of "owner" and "operator," as those terms are defined in Part 2A. We disagree.

"In matters of statutory construction, the task of the courts is to ensure that the purpose of the Legislature, the legislative intent, is accomplished. The best indicia of that legislative purpose are the language of the act and what the act seeks to accomplish." *Wagoner v. Hiatt*, 111 N.C. App. 448, 450, 432 S.E.2d 417, 418 (1993) (citation omitted). "A court should always construe the provisions of a statute in a manner which will tend to prevent it from being circumvented. If the rule were otherwise, the ills which prompted the statute's passage would not be redressed." *Campbell v. First Baptist Church of Durham*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979) (citation omitted).

" 'Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible.' " *Justice v. Scheidt, Commissioner of Motor Vehicles*, 252 N.C. 361, 363, 113 S.E.2d 709, 711 (1960) (quoting *Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956)).

The purpose of the Oil Pollution and Hazardous Substances Control Act, as set out in N.C. Gen. Stat. § 143-215.76, is "to promote the health, safety, and welfare of the citizens of this State by protecting the land and the waters over which this State has jurisdiction from pollution by oil, oil products, oil by-products, and other hazardous substances."

To accomplish this purpose, Part 2 of OPHSCA contains various provisions to control the discharge of oil. Part 2 defines unlawful discharges of oil and provides for the removal of such discharges by "[a]ny person having control over oil or other hazardous substances . . . ." N.C. Gen. Stat. §§ 143-215.83, -215.84 (1993). "Having control over oil or other hazardous substances" is expressly and broadly defined in § 143-215.77(5). Section 143-215.83(b) excepts certain discharges from the unlawful discharge provision. We note that § 143-215.83(b) excepts an act or omission of a third party. Since the parties have not addressed this section, we do not comment on whether this exception applies. Part 2 also requires persons "owning or having control over oil or other substances discharged" to immediately notify the Department when it becomes aware of certain unpermitted discharges. N.C. Gen. Stat. § 143-215.85. Part 2 deters discharges of oil and hazardous substances by imposing civil and

criminal penalties, imposing liability for damage to public resources, and imposing strict liability on persons "having control over oil or other hazardous substances" for damages to persons or property, public or private, caused by discharges in violation of Part 2. *See* N.C. Gen. Stat. §§ 143-215.88A, -215.88B, -215.90, -215.93. Section 143-215.93, which imposes strict liability for damages to persons or property, is subject to the exceptions enumerated in § 143-215.83(b).

The "Leaking Petroleum Underground Storage Tank Cleanup" portion of OPHSCA provides additional mechanisms to protect the land and waters of North Carolina. It places a duty on owners and operators of UST's in North Carolina to notify DEHNR upon a determination that a discharge of petroleum from a UST has occurred and to immediately undertake to collect and remove the discharge. N.C. Gen. Stat. § 143-215.94E(a). With regard to tanks in operation on or after 8 November 1984, "owner" is defined as "any person who owns an underground storage tank used for storage, use or dispensing of petroleum products . . . ." N.C. Gen. Stat. § 143-215.94A(9)(a). With regard to tanks in use prior to 8 November 1984, but no longer in use afterwards, "owner" is defined as "any person who owned such tank immediately before the discontinuation of its use." N.C. Gen. Stat. § 143-215.94A(9)(b). "Operator" is defined as "any person in control of, or having responsibility for, the operation of an underground storage tank." N.C. Gen. Stat. § 143-215.94A(8). Part 2A establishes Commercial and Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Funds. N.C. Gen. Stat. §§ 143-215.94B, -215.94D. Section 143-215.94C requires owners and operators of commercial petroleum UST's to contribute to the Commercial Fund by paying an annual operating fee. N.C. Gen. Stat. § 143-215.94C. Section 143-215.94B(5) provides that "third parties" who have incurred "bodily injury and property damage in excess of one hundred thousand dollars ($100,000)" as a result of leaking UST's shall be paid from the Commercial Fund.

In enacting Part 2 of OPHSCA, the Legislature clearly intended to provide broad protection of the land and waters of North Carolina from pollution by oil and other hazardous substances and to thereby promote the health, safety, and welfare of the citizens of this state. Liability for damages caused to persons and property by unlawful discharges is broadly and strictly imposed on "[a]ny person having control over" such oil or other hazardous substances. N.C. Gen. Stat. § 143-215.93. We disagree with defendant's contention that in enacting the "Leaking Petroleum Underground Storage Tank Cleanup" part of

OPHSCA, the Legislature made clear its view that owners and operators of UST's, as those terms are defined, are the persons with "control over" the petroleum products stored inside them. We cannot construe the provisions of OPHSCA in this manner because it would narrow the statute's broad reach and thereby thwart the Legislature's intent. Moreover, "[h]aving control over oil or other hazardous substances" is expressly and broadly defined in § 143-215.77(5). " '[W]hen a statute contains a definition of a word or term used therein, such definition, unless the context clearly requires otherwise, is to be read into the statute wherever such word or term appears therein.' " *Campos v. Flaherty*, 93 N.C. App. 218, 222, 377 S.E.2d 282, 283 (1989) (quoting *Smith v. Powell, Commissioner of Motor Vehicles*, 293 N.C. 342, 345, 238 S.E.2d 137, 140 (1977)).

Although there are no cases holding a "bare supplier" liable under OPHSCA, our decision is supported in part by the recent Supreme Court case of *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 398 S.E.2d 586 (1990). In *Wilson*, plaintiffs argued third-party defendant Alamance Oil Company, Inc. (Alamance), was liable under N.C. Gen. Stat. § 143-215.93. *Id.* In *Wilson*, there were two pieces of property involved on which UST's had been located and from which, at various times, gasoline had been sold, the Mini-Mart and the Warren properties. Alamance had involvement with both. *Id.* at 500-02, 398 S.E.2d at 589-91.

The Baxters bought the Mini-Mart property on 7 May 1965 and owned it until 26 January 1976. *Id.* at 500, 398 S.E.2d at 589. There were several UST's on the property when the Baxters bought it; they claimed these were the property of Alamance. Alamance claimed the UST's were part of the real property. Until 1974, the Baxters sold gasoline purchased from Alamance. *Id.* Alamance last delivered gasoline to the Baxters on 5 April 1974. *Id.* at 500, 398 S.E.2d at 590.

Alamance owned the Warren property from January 1958, to 21 September 1971. After Alamance sold the property to Warren, it provided gasoline to the Warren UST's until March 1973. *Id.* at 502, 398 S.E.2d at 591.

In analyzing whether plaintiffs' claim against Alamance was barred by the 10-year statute of repose, N.C. Gen. Stat. § 1-52(16) (Cum. Supp. 1993), the court reasoned:

> Assuming *arguendo* that Alamance fits the definition of one "having control over" the gasoline, the forecast of evidence does not show that Alamance had "control" over the gasoline, in the lan-

> guage of the statute, less than ten years prior to the time this action was filed. Thus, Alamance had no "control" over the tanks at the Mini-Mart property after it was sold to Simmons on 26 January 1976, more than ten years before plaintiffs filed this action. The forecast of evidence shows that Alamance had no ownership of the tanks at the Warren property after it sold the property to J.R. Warren on 21 September 1971. Since Alamance had no ownership of the tanks at the Warren property, *its last act was its last delivery of gasoline in March 1973*, more than ten years before plaintiffs filed this action.

Wilson, 327 N.C. at 514, 398 S.E.2d at 598 (emphasis added).

The Court, thus, in assuming for the sake of argument that Alamance fit the definition of having control over the gasoline discharged at the Mini-Mart and Warren sites, identifies the events from which "control" could arise in order to determine whether any such event had occurred within ten years of the filing of the action. These events are owning property in which UST's are buried, owning the UST's, or delivering gasoline into UST's which Alamance did not own. This suggests that a supplier like Foust may be found to have "control over" gasoline discharged from an unsound UST it filled but does not own.

[3] We next review the grant of summary judgment on the plaintiffs' claims for trespass and nuisance. In *Biddix v. Henredon Furniture Industries*, 76 N.C. App. 30, 40, 331 S.E.2d 717, 724 (1985), this Court recognized plaintiff's private right of action for common law nuisance and trespass based upon a violation of N.C. Gen. Stat. § 143-215.93, notwithstanding the statutory enactment of the Clean Water Act.

The elements of a trespass claim are that plaintiff was in possession of the land at the time of the alleged trespass; that defendant made an unauthorized, and therefore unlawful, entry on the land; and that plaintiff was damaged by the alleged invasion of his rights of possession. *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952). The evidence forecast in this case was that plaintiffs possessed the land at the time gasoline from Phelps Store UST's seeped into their well water. Plaintiffs also forecast evidence that Foust delivered gasoline several times into Phelps Store UST's when it knew or should have known the tanks were leaking. We conclude this was sufficient evidence to withstand defendant's motion for summary judgment.

Defendant contends that summary judgment was proper because to commit a trespass, defendant must have legal responsibility for the person or thing that went onto the plaintiffs' land. Defendant argues that Phelps was solely responsible for any unauthorized seepage because Phelps, not Foust, controlled the gasoline from the time of delivery. We disagree. The plaintiffs produced evidence that defendant delivered gasoline several times into tanks it knew or should have known were leaking. This tends to show some legal responsibility on Foust's part for the unauthorized seepage and supports the claim of trespass.

[4] To recover in nuisance, plaintiffs must show an unreasonable interference with the use and enjoyment of their property. *Kent v. Humphries*, 303 N.C. 675, 677, 281 S.E.2d 43, 45 (1981). Since the evidence forecast raises genuine issues as to plaintiffs' loss of use and enjoyment of their property, and as to whether Foust unreasonably interfered with plaintiffs' use of their land by knowingly delivering gasoline into leaking tanks, we conclude that summary judgment was also improperly granted on plaintiffs' nuisance claim.

Plaintiffs also contended in their brief and at oral argument that the trial court erred by granting summary judgment on plaintiffs' claim for negligence. Our review of the complaint discloses no claim alleging negligence. We therefore decline to consider this portion of plaintiffs' argument.

In summary, we find the trial court erred in granting summary judgment for defendant Foust on plaintiffs' claims for (1) violations of OPHSCA, (2) trespass and (3) nuisance. The cause is remanded for further proceedings on those claims.

Reversed and remanded.

Judges ORR and GREENE concur.

RICHARD BUDD, PLAINTIFF v. DAVIE COUNTY; GLEN HOWARD; DIANE FOSTER; J. C. CLEARY; BERT BAHNSON AND SPURGEON FOSTER, JR., MEMBERS OF THE BOARD OF COMMISSIONERS FOR DAVIE COUNTY; VIRGINIA WALKER AND FRANK WALKER, DEFENDANTS

No. 9322SC897

(Filed 6 September 1994)

1. Zoning § 116 (NCI4th)— county zoning ordinance—standing to challenge

Plaintiff had standing to bring a declaratory judgment action to challenge the validity of an amendment to a county zoning ordinance where plaintiff was an adjacent and nearby property owner who had an easement interest in part of the land that was rezoned.

Am Jur 2d, Zoning and Planning §§ 1026 et seq.

Zoning: validity and construction of provisions of zoning statute or ordinance regarding protest by neighboring property owners. 7 ALR4th 732.

2. Zoning § 93 (NCI4th)— property rezoned from residential and agricultural to industrial special use—invalid spot zoning

A zoning amendment enacted by defendant board of commissioners which rezoned two tracts from residential and agricultural to industrial special use constituted illegal spot zoning, since the rezoning allowed the property in question to be used for a sand dredging operation; the land at issue was a 14-acre tract which was part of a larger 67-acre tract and a half mile, sixty-foot wide strip of land over an 81-acre tract of land; all of the land surrounding the rezoned property was zoned R-A; the rezoning of the property at issue was in direct contravention of the purpose behind the R-A district, which was to exclude commercial and industrial uses; the detriment to the community including noise, dust, traffic, litter, and safety issues outweighed any benefit to the county; and the industrial use in the rezoned tract was incompatible with the quiet residential and agricultural neighborhood.

Am Jur 2d, Zoning and Planning §§ 146 et seq.

Spot zoning. 51 ALR2d 263.

BUDD v. DAVIE COUNTY

[116 N.C. App. 168 (1994)]

Appeal by plaintiff from order entered 6 July 1993 by Judge James A. Beaty in Davie County Superior Court. Heard in the Court of Appeals 22 April 1994.

On 12 September 1991, plaintiff filed a complaint against defendants alleging that Defendant Davie County's act of rezoning certain property in Davie County from Residential-Agricultural to Industrial, Special Use, by and through its Board of Commissioners, was unlawful, invalid and void. Based on this allegation, plaintiff sought a declaratory judgment that the rezoning was unlawful, invalid and void, an order that the rezoned property revert back to its previous Residential-Agricultural classification, and a permanent injunction compelling Defendant Davie County to disapprove the property owner's application for rezoning. Further, plaintiff sought a mandatory injunction compelling Davie County to rescind the rezoning action of its Board of Commissioners and a preliminary and permanent injunction restraining the owners of the property from using the property for industrial use.

Defendants filed an answer denying that the rezoning action was unlawful, invalid, and void and alleging that plaintiff did not have standing to bring this action. Further, defendant asked the court to dismiss plaintiff's complaint and to "confirm" the validity of the rezoning action.

Subsequently, plaintiff and Defendants Virginia Walker and Frank Walker all moved for summary judgment. On 6 July 1993, Judge Beaty entered an order denying plaintiff's motion for summary judgment, granting defendants' motion for summary judgment, and dismissing plaintiff's complaint. From this order, plaintiff appeals.

Thomas M. King for plaintiff-appellant.

Burns & Price, by Robert E. Price, Jr.; and Pope, McMillan, Gourley, Kutteh & Simon, P.A., by William P. Pope and Lillian D. Michaels, for defendants-appellees.

ORR, Judge.

This is an action by plaintiff for a declaratory judgment in which plaintiff sought a declaration that a zoning amendment to the Davie County Zoning Ordinance was invalid. The sole issue presented by this appeal is whether the trial court erred in granting defendants' motion for summary judgment and denying plaintiff's motion for sum-

mary judgment. Based on our holding below that the amendment constituted an illegal spot zoning, we find that the trial court did err.

The zoning ordinance at issue is a comprehensive zoning ordinance which classifies all of the property in Davie County into various zoning districts. The two properties at issue are a fourteen acre tract of land that is part of a larger sixty-seven acre tract of land and a strip of land running across an eighty-one acre tract of land that is sixty feet wide and approximately a half of a mile long. Defendant Virginia Walker owns the sixty-seven acre tract of land, and her son, Defendant Frank Walker, owns the eighty-one acre tract of land. The fourteen acre tract is adjacent to the Yadkin River and is the northernmost point of Davie County. The eighty-one acre tract of land is adjacent to the sixty-seven acre tract of land on the east.

Prior to 1991, both the sixty-seven acre tract and the eighty-one acre tract of land were zoned as Residential-Agricultural Districts ("R-A"). Subsequently, on 18 April 1991, Virginia Walker submitted an application for an amendment to the zoning ordinance to the Davie County Board of Commissioners (the "Board") pursuant to Article XIII, Section 4 of the zoning ordinance. In this application, Virginia Walker asked the Board to rezone the fourteen acre tract from R-A to "Industrial I-4 Special Use Zoning" ("I-4-S"). As required by Article VIII, Section 2 of the zoning ordinance, which section describes the procedure for applying for a "special use district zoning," Virginia Walker stated in her application that the reason for the requested rezoning was "[t]o remove sand from the bed of the Yadkin River."

Pursuant to Article XIII, Section 4 of the zoning ordinance, the Davie County Planning Board reviewed Virginia Walker's application, and on 9 May 1991, the Planning Board voted 4-2 to recommend to the Board of Commissioners to deny the application. On 28 June 1991, Virginia Walker and Frank Walker submitted an amended application for a zoning amendment to the Board. In their amended application, Virginia and Frank Walker added an additional request to rezone the strip of land sixty feet wide and a little over a half of a mile long running from the fourteen acre tract through Frank Walker's property from R-A to I-4-S. This strip of land ran along an already existing farm road. The Davie County Planning Board again recommended 5-1 to the Board to deny the amendment to the zoning ordinance.

On 19 August 1991, the Board, at its regular meeting, held a hearing on the issue of rezoning the Walkers' land pursuant to Article XIII, Sections 1 and 2 of the zoning ordinance. Subsequently, the Board

voted 3-2 to approve the zoning amendment request with the restrictions that (1) the trucks hauling sand could only run from 7:00 a.m. to 4:00 p.m. and (2) only twenty-five trucks per day, five days a week, Monday through Friday, could haul sand off the property. Prior to this rezoning, all of the Walker property, including Frank Walker's property, was used for agricultural purposes.

Further, the evidence shows that the approximately four to five mile route from the sand dredging operation to Hwy. 801 that the trucks hauling sand would follow is bounded by land zoned either Residential, R-20, single family residential, or R-A. There is no property zoned as Industrial, I-3 or I-4, until the route intersects with Hwy. 801. Further, the land east and west of the fourteen acre tract that is bounded by the Yadkin Valley River is also zoned R-A.

Subsequently, plaintiff owns approximately 400 acres of land adjoining Frank Walker's property on the east. All of plaintiff's land is zoned R-A and is being used for agricultural purposes. In addition, plaintiff has an easement over a portion of the strip of land on Frank Walker's property that was rezoned from R-A to I-4-S.

I.

[1] First, before we can address the merits of this appeal, we must determine whether plaintiff had standing to bring this action. Our Supreme Court stated the applicable rule in *Godfrey v. Zoning Bd. of Adjustment of Union County, N.C.*, 317 N.C. 51, 66, 344 S.E.2d 272, 281 (1986):

> A suit to determine the validity of a city zoning ordinance is a proper case for a declaratory judgment. G.S. 1-254 . . . . The . . . owners of property in the adjoining area affected by the ordinance, are parties in interest entitled to maintain the action.

(Citations omitted.)

The present action is a declaratory judgment action wherein plaintiff seeks to challenge the validity of an amendment to the zoning ordinance. Plaintiff is an adjacent and nearby property owner who has an easement interest in part of the land that was rezoned. Thus, we conclude that plaintiff had standing to bring this action based on the law as cited in *Godfrey*. *See also Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972) ("The plaintiffs, owners of property in the adjoining area affected by the ordinance, are parties in interest entitled to maintain" a declaratory judgment action attack-

ing the validity of the ordinance.); *Concerned Citizens of Downtown Asheville v. Board of Adjustment of Asheville*, 94 N.C. App. 364, 366, 380 S.E.2d 130, 132 (1989) (stating that allegations that plaintiffs were nearby or adjacent property owners, although insufficient alone to support standing to appeal a decision of a board of adjustment under N.C.G.S. § 160A-388(e), "might be sufficient to challenge the validity of an amendment to the ordinance itself in a declaratory judgment action" based on *Godfrey*, 317 N.C. 51, 344 S.E.2d 272).

II.

[2] Next, we must determine whether the trial court erred in granting defendants' motion for summary judgment and denying plaintiff's motion for summary judgment. "[S]ummary judgment can be appropriate in an action for a declaratory judgment where there is no genuine issue of material fact and one of the parties is entitled to judgment as a matter of law." *North Carolina Ass'n of ABC Bds. v. Hunt*, 76 N.C. App. 290, 292, 332 S.E.2d 693, 694, *disc. review denied*, 314 N.C. 667, 336 S.E.2d 400 (1985) (citation omitted). In the present case, the facts are undisputed. The only issue is whether the zoning amendment was unlawful, invalid and void.

The undisputed facts show that the Board rezoned the fourteen acre tract and the half mile long strip of land specifically for a sand dredging operation under the I-4 District and not for any other conforming use found under the I-4 District. For the distinction between "general use" zoning and "special use" zoning, see Article VIII, Section 2 of the Davie County Zoning Ordinance. The zoning amendment is, therefore, an example of conditional use zoning. *See Chrismon v. Guilford County*, 322 N.C. 611, 618, 370 S.E.2d 579, 583 (1988) ("[C]onditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning.")

" 'In order to be legal and proper, conditional use zoning, like any type of zoning, must be *reasonable, neither arbitrary nor unduly discriminatory, and in the public interest.*' " *Covington v. Town of Apex*, 108 N.C. App. 231, 235, 423 S.E.2d 537, 539 (1992), *disc. review denied*, 333 N.C. 462, 427 S.E.2d 620 (1993) (emphasis added) (quoting *Chrismon*, 322 N.C. at 622, 370 S.E.2d at 586.

> Although the [C]ourt may not substitute its judgment for that of the City's legislative body concerning the wisdom of imposing restrictions upon the use of property within its jurisdiction, the Court may determine whether the rezoning ordinance was adopted in violation of statutorily required procedures, "or is arbitrary and without reasonable basis in view of the established circumstances."

Hall v. City of Durham, 88 N.C. App. 53, 59, 362 S.E.2d 791, 794 (1987), *aff'd*, 323 N.C. 293, 372 S.E.2d 564 (1988) (quoting *Blades*, 280 N.C. at 550-51, 187 S.E.2d at 46).

In the case *sub judice*, plaintiff contends that the conditional use zoning was unreasonable and improper based on the argument that it constituted an illegal "spot zoning." We agree.

In North Carolina, unlike in the majority of jurisdictions, "spot zoning practices may be valid or invalid depending upon the facts of the specific case." *Chrismon*, 322 N.C. at 626, 370 S.E.2d at 588.

> Accordingly, in this case, and indeed in any spot zoning case in North Carolina courts, two questions must be addressed by the finder of fact: (1) did the zoning activity in the case constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning.

Id. at 627, 370 S.E.2d at 589; *See also Mahaffey v. Forsyth County*, 99 N.C. App. 676, 680, 394 S.E.2d 203, 206 (1990), *aff'd per curiam*, 328 N.C. 323, 401 S.E.2d 365 (1991).

Our Supreme Court defined "spot zoning" in *Blades*, 280 N.C. at 549, 187 S.E.2d at 45:

> A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning."

"An essential element of spot zoning is a small tract of land owned by a single person and surrounded by a much larger area uniformly zoned." *Covington*, 108 N.C. App. at 237, 423 S.E.2d at 540.

In the present case, the evidence undisputably shows that the area rezoned is a relatively small tract of land and a small strip of land, each individually owned and each surrounded by a much larger area uniformly zoned as R-A. Further, the rezoning relieved the small tract and strip of land from restrictions imposed on the larger surrounding tracts. Thus, we find that the rezoning did in fact constitute "spot zoning." The next question raised is, therefore, whether the zoning authority made a clear showing of a reasonable basis for the zoning. *Chrismon*, 322 N.C. at 627, 370 S.E.2d 589.

> The North Carolina Supreme Court has enumerated several factors that are relevant to a showing of the existence of a sufficient reasonable basis for spot zoning.
>
> 1. The size of the tract in question.
>
> 2. The compatibility of the disputed action with an existing comprehensive zoning plan.
>
> 3. The benefits and detriments for the owner, his neighbors and the surrounding community.
>
> 4. The relationship of the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

Covington, 108 N.C. App. at 238, 423 S.E.2d at 541 (citing *Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589).

"The first factor is the size of the tract in question." *Covington*, 108 N.C. App. at 238, 423 S.E.2d at 541. The land at issue is a fourteen acre tract of land in Davie County adjacent to the Yadkin River that is part of a larger tract of land that is sixty-seven acres and a half mile, sixty foot wide strip of land over an eighty-one acre tract of land. All of the land surrounding the rezoned property is zoned as R-A.

"The second factor is the compatibility of the disputed action with an existing comprehensive zoning plan." *Id.* "Zoning generally must be accomplished in accordance with a comprehensive plan in order to promote the general welfare and serve the purpose of the enabling statute." *Mahaffey*, 99 N.C. App. at 682, 394 S.E.2d at 207.

In the present case, the applicable comprehensive zoning plan sets out the intent behind the property zoned R-A in Article VII, section 1.1:

> Intent—The R-A Residential-Agricultural District is established to maintain a rural development pattern where single-family housing dwellings are intermingled with agricultural uses.

> Generally, housing will be separated from one another by open fields or wooded areas. The impact of one homeowner's activities on his neighbor's will be less than if the property owners were located side by side in a subdivision. Consequently, the property owner may have more freedom to use his land as he sees fit. Therefore, some limited commercial uses will be permitted along with residential and agricultural uses; however, the intent is clearly to exclude commercial and industrial uses or residential subdivisions that require public services (principally water and sewer systems) before they are generally needed in the area.

(Emphasis added.) Thus, the objective set forth for the land zoned R-A is to provide an area where residential and agricultural uses can proceed without disturbing adjacent property owners, but the area specifically prohibits industrial uses. The rezoning of the property at issue, was, therefore, in direct contravention of the purpose behind the R-A District.

"The third relevant factor is the benefits and detriments to the owner, his neighbors and the surrounding community." *Covington*, 108 N.C. App. at 239, 423 S.E.2d at 542. "It has been stated that the true vice of illegal spot zoning is in its inevitable effect of granting a discriminatory benefit to one landowner and a corresponding detriment to the neighbors or the community without adequate public advantage or justification." *Chrismon*, 322 N.C. at 628-29, 370 S.E.2d at 589.

> The standard is not the advantage or detriment to particular neighboring landowners, but rather the effect upon the entire community as a social, economic and political unit. *That which makes for the exclusive and preferential benefit of such particular landowner, with no relation to the community as a whole, is not a valid exercise of this sovereign power.*

Id. at 629, 370 S.E.2d at 590 (emphasis in original) (citation omitted).

In the present case, defendants contend that "[t]he benefits [from the rezoning] are very significant to the area, while any detriments will be controlled by the use limitations." Defendants allege as benefits that the rezoning will increase revenues in Davie County, allow the state and county to use local resources of sand to build the interstates, roads, and other large public works projects in the area, and that the sand dredging operation has helped the water treatment facilities in Salisbury, which is in Rowan County.

The evidence in support of the alleged increased revenue to Davie County is that at the first meeting before the Planning Board, when asked what income the town could expect from the rezoning, William Hall, the attorney for the Walkers, stated that "there would be tax revenue from the plant. Other than that, he did not know of any. After more discussion, it was decided that there was no sales tax generated on the sale of sand." In addition, at the first Planning Board meeting, a potential employee for the sand dredging operation stated that he and other employees, as residents, would be spending much of their income in the county.

The evidence also shows, however, that 90% of the sand would be bought and transported by American Concrete, and, although American Concrete has several branches in North Carolina and a home office in Statesville, American Concrete does not have offices or plants in Davie County. Further, the evidence shows no roads or public work projects in Davie County that are presently benefitting from the sand dredging operation. In fact, the vice president in charge of maintenance and operations for American Concrete testified that none of the sand dredged from the Walker property had been used in the construction of the I-40 bypass and that he was not aware of any other major highway construction projects in either Davie County or any adjacent county. Although the vice president for American Concrete did know of "some bridgework that's going on," he stated that American Concrete was not supplying concrete manufactured from the sand for this work.

The detriment to the community is that the rezoning allows up to twenty-five 72,000 pound trucks filled with sand to drive from the sand dredging site through the residential community five days a week. All of the area surrounding the rezoned land and the area surrounding the routes the trucks hauling sand would drive are residential and agricultural areas. There is no industry in the area before reaching Hwy. 801, which is approximately four to five miles from the sand dredging site. Further, at the first Planning Board meeting, several local residents expressed their concern over the safety of their children with these trucks driving through their community. One school bus driver stated that there were several children in the area and that "[d]riving the school bus with the trucks on the road is a nightmare for her." Subsequently, at the first Planning Board meeting the Planning Board voted 4-2 to deny the rezoning based on the fact that the "economic aspect" of the community would not be improved by rezoning.

At the second Planning Board meeting, one local resident stated that she had problems with the truck drivers littering, with the dishes in the cupboard shaking when the trucks went by, and with dust coming in the house from the trucks. Another resident stated that he could not eat outside, hang clothes on the line or open the windows and doors because of the dust from the trucks. Further, Norris Collier, who has lived in the area for five years, stated "when the sand trucks were running it was a different world from the usual quite [sic], peaceful neighborhoods for everyone on Yadkin Valley, Jesse King, Sparks and Griffin roads." He stated that "he was first to complain about damage the trucks were doing to the area roads." Mr. Collier also stated that "[l]ast year the County paid $95,000 dollars to repair these roads which caused a deficit in the County budget with no revenue returning from the sand companies. He added that the trucks would tailgate and dump large amounts of sand on the road."

In addition, a board member at the second Planning Board meeting stated that "he had visited the neighborhood and found it to be beautiful and quite [sic]. He had also talked with other people about the ecological effect of pumping sand from the river and found it was of no great ecological value." At this second meeting, the Planning Board voted 5-1 to deny the rezoning. Subsequently, our review of the record leads us to conclude that the detriment to the community outweighs any alleged benefit.

"The final factor listed by the *Chrismon* Court in determining whether or not a reasonable basis exists for spot zoning focuses on the compatibility of the uses envisioned in the rezoned tract with the uses already present in adjacent tracts." *Covington*, 108 N.C. App. at 240, 423 S.E.2d at 542. "The compatibility of the uses envisioned in the rezoned tract with the uses already present in surrounding areas is considered an important factor in determining the validity of a spot zoning action." *Chrismon*, 322 N.C. at 631, 370 S.E.2d at 591.

> In determining whether a zoning amendment constitutes spot zoning, the courts will consider the character of the area which surrounds the parcel reclassified by the amendment. *Most likely to be found invalid is an amendment which reclassifies land in a manner inconsistent with the surrounding neighborhood.*

Id. (emphasis in original) (citation omitted).

The use envisioned under the rezoning in the present case is a sand dredging operation. Present uses of the property surrounding

the subject tract are agricultural and residential. We conclude that the sand dredging operation would destroy the tenor of the quiet residential and agricultural neighborhood. As stated by our Supreme Court in *Chrismon*, "rezoning of a parcel in an old and well-established residential district to a commercial or industrial district would clearly be objectionable . . . ." *Id.*

For the foregoing reasons, we find that the rezoning was an illegal spot zoning and was, therefore, "in excess of the authority" of the Board of Commissioners and invalid. *See Blades*, 280 N.C. at 551, 187 S.E.2d at 46. Accordingly, we conclude that the trial court erred in granting defendants' motion for summary judgment and remand this case for the entry of a judgment granting plaintiff's motion for summary judgment. The zoning classification of the property at issue reverts to the last legal classification of R-A as defined by the Davie County Zoning Ordinance. *See Mahaffey*, 99 N.C. App. at 684, 394 S.E.2d at 208.

Reversed and Remanded.

Judges COZORT and MARTIN concur.

IN THE MATTER OF: THE APPEAL OF STROH BREWERY COMPANY FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1991

No. 9310PTC1144

(Filed 6 September 1994)

1. Taxation § 99 (NCI4th); Attorneys at Law § 25 (NCI4th)—Property Tax Commission—appeal of valuation—out-of-state attorney

The Property Tax Commission did not err in denying the County's motion to dismiss an appeal from the Forsyth County Board of Equalization and Review's affirmation of Forsyth County's valuation of property owned by the Stroh Brewery Company where the County had moved to dismiss because Stroh's out-of-state attorney was not licensed to practice law in North Carolina. Assuming that the filing of a notice of appeal with the Commission is the practice of law, the question of the right of the attor-

ney to file the notice of appeal is a collateral matter, unrelated to the merits of the appeal before the Commission, and should not serve to prejudice Stroh Brewery. The attorney was a "property tax representative" or "consultant" of Stroh Brewery authorized to represent Stroh Brewery under Rule 3 of the North Carolina Property Tax Commission Rules.

Am Jur 2d, Attorneys at Law § 23; State and Local Taxation §§ 782 et seq.

2. Appeal and Error § 156 (NCI4th)—appearance of out-of-state attorney—failure to object—issue not preserved for appeal

An issue involving an appearence by an out-of-state attorney before the Property Tax Commission was not preserved for appeal where the County failed to timely object, stating "[w]e don't consent to it, but we do not contest it. Just for today, is that correct? . . . I wouldn't want to speak about the issue of her representation." N.C.R. App. P. 10(b)(1) (1994).

Am Jur 2d, Appeal and Error §§ 562 et seq.

3. Taxation § 87 (NCI4th)— property tax—valuation—obsolescence—sufficiency of evidence

There was sufficient evidence to support the Property Tax Commission's findings of total accrued depreciation where the Commission's finding that improvements on the property were affected by functional and economic obsolescence which the County did not consider was supported by competent, material and substantial evidence. Although the Commission agreed that the property was affected by functional and economic obsolescence, it was not then bound to accept the appraisor's percentage for such obsolescence and could arrive at its own percentage so long as it was supported by compentent, material, and substantial evidence.

Am Jur 2d, State and Local Taxation §§ 753 et seq.

Appeal by petitioner Stroh Brewery Company and respondent Forsyth County from the Final Decision of the North Carolina Property Tax Commission entered 14 June 1993. Heard in the Court of Appeals 9 June 1994.

Powell & Deutsch, P.C., by Robert J. Deutsch, and Freedman & Areeda, P.C., by Nanci Wolf Freedman, for petitioner-appellee/appellant.

Office of Forsyth County Attorney, by Bruce E. Colvin, for respondent-appellee/appellant.

GREENE, Judge.

On 14 June 1993, the North Carolina Property Tax Commission (the Commission), sitting as the State Board of Equalization and Review, reversed the Forsyth County Board of Equalization and Review's (the Board) affirming of Forsyth County's (the County) assignment of a value of $30,374,900.00 to property owned by the Stroh Brewery Company (Stroh Brewery) and assigned a value of $24,599,830.00 to such property. Stroh Brewery filed notice of appeal on 12 July 1993, and the County and its Tax Assessor filed notice of appeal on 14 July 1993.

Stroh Brewery, a national beer producer and distributor with its main corporate offices in Michigan, has owned and operated an industrial brewing facility in Winston-Salem, Forsyth County, North Carolina, since the early 1980's. The property encompasses approximately 125 acres and includes a 1,182,833 square foot industrial building used to house the machinery and equipment used in brewing beer. The property also accommodates packaging, warehouse, distribution, and offices for the brewing process.

In 1991, the County assessed the property at a value of $30,374,900.00. On 10 October 1991, John Dinsmore (Dinsmore), Stroh Brewery's Director of Real Estate and Ad Valorem Taxation, requested in writing on behalf of Stroh Brewery for the Board to review the County's ad valorem tax value of the property because the "property is over assessed." On 18 November 1991, the Board unanimously affirmed the County's $30,374,900.00 value. On 18 December 1991, Nanci Wolf Freedman (Freedman), a Michigan resident, filed with the Commission a notice of appeal. On 23 December 1991, Freedman filed with the Commission a letter dated 16 December 1991 from Dinsmore, stating "Nanci Wolf Freedman is hereby authorized to represent the Stroh Brewery Company in regards to any and all tax appeals in the State of North Carolina."

On 2 November 1992, Freedman filed a motion with the Commission to permit limited practice of an out-of-state attorney. Also on 12

November 1992, the Commission, based on Freedman's good standing with the Michigan bar, her limited request to represent Stroh Brewery in this matter only, and her association with Robert Deutsch (Deutsch), an attorney licensed to practice in North Carolina, granted Freedman's motion and ordered that she "be allowed to appear as counsel of record in this action pro hac vice pursuant to G.S. 84-4.1."

At the hearing held on 12 November 1992, Chairman Cocklereece (the Chairman) of the Commission first addressed "the subject, admitting Mrs. Freedman to practice before our Board" and stated "there has been a motion made to that effect, and I have signed an order admitting [Freedman] for the limited purpose of the hearing before us today. . . . I don't think there is any objection from the County." The County's attorney, Mr. Colvin, responded, "We don't consent to it, but we do not contest it. Just for today, is that correct? . . . I wouldn't want to speak about the issue of her representation."

The Chairman then addressed the issue of the County's motion to dismiss. The County argued that the appeal should be dismissed and that "[t]here is no appeal, no jurisdiction" because Freedman was not "qualified to appear in this case in North Carolina" until 12 November 1992. The Commission denied the County's motion to dismiss because a "notice of appeal was signed by Mrs. Freedman" and accompanied by "an authorization and power of attorney as it were, signed by Mr. Dinsmore on behalf of Stroh Brewery Company" and

> in accordance with our normal rules with respect to the filing of a notice of appeal that the filing of the notice of appeal does not have to be done by an attorney licensed in North Carolina. It can be done pursuant to power of attorney. A party does, however, need an attorney to represent them in the hearing, which we have done here.

The County excepted to this denial. The Commission proceeded to hear Stroh Brewery's appeal of the Board's decision.

The Chairman first noted that because "there is no significant difference in opinion of value as to the land" or Stroh Brewery's "replacement cost of the improvements and the County's replacement cost of the improvements," "we need to concentrate . . . on the value of the improvements to the land. . . . There is a substantial difference in the two parties' ideas of what the depreciation to be applied against that figure is." Stroh Brewery submitted an appraisal drafted by M.J. McCloskey & Associates which valued the property at

$12,500,000.00 as of 1 January 1988. Michael J. McCloskey, Jr. (McCloskey) testified that he reviewed the North Carolina Uniform Appraisal Standard and that his market value definition conforms to the requirements of that standard. He considered the "market data approach," "the income approach," and "[r]ather than to let it stand alone, I did a cost approach, to show support for the indication reflected by the market data approach. . . . The income approach was obviously out of the question. Not relevant." He also stated "[t]he cost approach simply, which the Board knows, cost to create property, reproduction costs, deduct the accrued depreciation, which is physical, functional, external, economic, from the reproduction cost, add the land value, and theoretically it will give you the indication of value, which properly done will do." "[T]hat's the key, physical, functional or economic. . . . The difference is accrued depreciation" which means "the value lost from all sources." He found that the property was affected by total, accrued depreciation in the amount of 65%. McCloskey also presented a comparison with the market value of the Heilman Brewery Company in Perry, Georgia, which is almost identical to Stroh Brewery's property and is valued at a price similar to McCloskey's valuation of Stroh Brewery's property.

Jesse Ring (Ring), tax assessor for the County, submitted an opinion of the value of the property and testified that although the International Association of Assessing Officers recommends the application of the market approach, the income approach, and the cost approach, he only applied the cost approach. He stated that "[i]n the mass appraisal business you consider all three approaches. But the cost approach is most relevant for what we have to do. Time does not permit for us to go out and do a market analysis on all properties. So, we rely on the cost approach to come up with the value of all property." Ring also stated that "[a]ccrued depreciation can be physical, economic or functional. In my report I used physical depreciation, age and condition of the buildings." He "did not make any deduction whatsoever for functional or economic obsolescence" "because [he] did not think at this point in time when [he] made the appraisal that it warranted any economic and functional depreciation."

The Commission made the following pertinent findings of fact:

5. Mr. McCloskey applied a total depreciation of 65% to the yard improvements; Mr. Ring applied a total depreciation of approximately 5% to the yard improvements.

6. Mr. McCloskey estimated that the subject improvements were affected by total accrued depreciation of 65 percent, consisting of physical depreciation of 15 percent and functional and/or economic depreciation of 50 percent.

7. Mr. Ring estimated that the subject improvements (except for the yard improvements) were affected by total accrued depreciation of approximately 20-25 percent. Mr. Ring did not make an adjustment for functional or economic obsolescence.

. . . .

11. Based on the analysis of data contained in [Stroh Brewery] Exhibit 1, particularly the offering data on the Heilman Brewery in Perry, Georgia, and on the testimony of [Stroh Brewery]'s witnesses, the Commission finds that the subject improvements were affected on 1 January 1988 by functional and economic obsolescence which the County did not consider in the course of its appraisal.

12. The Commission finds that a proper adjustment for obsolescence not considered by the County is as follows:

Replacement Cost New of Real Property Improvements	$36,703,020
Less accrued depreciation at 37.75%	$13,855,390
Depreciated replacement cost	$22,847,630

13. The Commission finds that the true value in money of the subject property as of 1 January 1988 was:

Depreciated replacement cost (see previous paragraph)	$22,847,630
Land value per County	$1,752,200
Total Value	$24,599,830

Based on these findings, the Commission made the following conclusions of law:

1. [Stroh Brewery] made a timely and proper appeal to the Property Tax Commission from a decision of the Forsyth County Board of Equalization and Review for 1991. . . .

. . . .

3. The County's appraisal of the subject property was affected by an appraisal error . . . the County's failure to make any adjustment for functional or economic obsolescence. [sic] in the appraisal of the real property improvements.

4. The County's appraisal of the subject property improvements at a value of $28,622,700 was substantially greater than the true value in money of the improvements, which the Commission found to be $22,847,630.

The issues presented are whether (I) the Commission lacked jurisdiction to hear Stroh Brewery's appeal because the notice of appeal was signed only by an attorney not licensed to practice law in North Carolina; and (II) there is competent, material and substantial evidence to support the Commission's finding that the County erred in failing to consider functional and economic obsolescence and the Commission's valuation of the property.

I

[1] The County contends that its motion to dismiss Stroh Brewery's appeal to the Commission should have been granted because the appeal violated the Commission's own rules and N.C. Gen. Stat. § 84-4, in that Freedman was not licensed to practice law in North Carolina. We disagree.

Rule 3 of the Commission's Rules provides:

> **A "property tax representative" or "consultant"** may file an appeal with the Property Tax Commission on behalf of a property owner, provided he attaches to such appeal a copy of his "power-of-attorney" or other authorization to represent the property owner. . . .

North Carolina Property Tax Commission, Rule 3. Thus, Rule 3 does not require a person filing an appeal on behalf of a property owner to be an attorney licensed to practice in North Carolina.

Assuming that the filing of a notice of appeal with the Commission is the practice of law and in violation of N.C. Gen. Stat. § 84-4 (1985), *see* N.C.G.S. § 84-2.1 (1985) ("practice law" means "performing any legal service for any other person, firm or corporation"), dismissal of the appeal is not an appropriate remedy. *See Duke Power Co. v. Daniels*, 86 N.C. App. 469, 472, 358 S.E.2d 87, 89 (1987) (violation of GS 84-5 "is not of such gravity . . . as to deprive the court of

jurisdiction and justify the dismissal of plaintiff's action"). The question of the right of Freedman to file the notice of appeal is a collateral matter, unrelated to the merits of the appeal before the Commission and should not serve to prejudice Stroh Brewery. *See Sawyer v. Boyajian*, 5 N.E.2d 348 (Mass. 1936); *see also Theil v. Detering*, 68 N.C. App. 754, 756, 315 S.E.2d 789, 791, *disc. rev. denied*, 312 N.C. 89, 321 S.E.2d 908 (1984) (pleading filed by attorney not authorized to practice law in this state is not a nullity); *Practice Mgmt. Assocs., Inc. v. Walding*, 138 F.R.D. 148, 149 (M.D. Fla. 1991) (violation of rule requiring attorney to be admitted within district did not warrant striking of pleadings, prejudicing party's cause for his attorney's technical errors); *Alexander v. Robertson*, 882 F.2d 421, 425 (9th Cir. 1989) (judgment rendered in case where unauthorized attorney practiced law is neither void nor subject to reversal); *see generally* Vitauts M. Gulbis, Annotation, *Right of Party Litigant to Defend or Counterclaim on Ground that Opposing Party or his Attorney is Engaged in Unauthorized Practice of Law*, 7 A.L.R. 4th 1146 (1981).

Therefore, because Freedman was a "property tax representative" or "consultant" of Stroh Brewery authorized to represent Stroh Brewery as evidenced by Dinsmore's letter stating "Freedman is hereby authorized to represent the Stroh Brewery Company in regards to any and all tax appeals in the State of North Carolina" and because her signing the notice of appeal does not justify dismissal, the Commission did not err in denying the County's motion to dismiss. Although the attorney for the County argued at the hearing that its motion to dismiss should be granted because an attorney licensed to practice in North Carolina did not sign Stroh Brewery's Application for Hearing, this issue is deemed abandoned because the County did not discuss it in its brief. N.C.R. App. P. 28(a) (1994).

[2] The County also argues that the Commission erred in granting Freedman's motion to permit limited practice of an out-of-state attorney because the motion did not comply with the requirements of N.C. Gen. Stat. § 84-4.1. In addressing this issue, we are assuming, without deciding, that an out-of-state attorney can move for limited practice in front of the Property Tax Commission under Section 84-4.1. *See* N.C.G.S § 84-4.1 (1993) (out-of-state attorney "may, on motion, be admitted to practice in the General Court of Justice or the North Carolina Utilities Commission or the North Carolina Industrial Commission or the Office of Administrative Hearings of North Carolina"). In this case, because the County failed to timely object to the granting of this motion and of Freedman's appearance at the hearing, stating

that "[w]e don't consent to it, but we do not contest it. Just for today, is that correct? . . . I wouldn't want to speak about the issue of her representation," the County has failed to preserve this issue for appellate review. N.C.R. App. P. 10(b)(1) (1994).

II

[3] Our General Assembly requires all property in this State be appraised for ad valorem taxation purposes at its "true value in money" or market value as far as practicable, N.C.G.S. § 105-283 (1992), and all the various factors, *see* N.C.G.S. § 105-317 (1992), which enter into the market value are to be considered by the assessors in determining this market value for tax purposes. *In re Appeal of Bosley*, 29 N.C. App. 468, 471, 224 S.E.2d 686, 688, *cert. denied*, 290 N.C. 551, 226 S.E.2d 509 (1976). An appraisal "is an estimate of value derived through the application of one, two, or all three of the generally accepted approaches to value—the *Market Data Approach*, *Cost Approach*, and *Income Approach*." Patrick K. Hetrick, Larry A. Outlaw, & James A. Webster, Jr., *North Carolina Real Estate for Brokers and Salesmen* ch. 16, at 604 (3d ed. 1986) [*Real Estate for Brokers*]. Part of the cost approach is deducting for depreciation, which is "a loss of utility and, hence, value from any cause . . . the difference between cost new on the date of appraisal and present market value." *Real Estate for Brokers* at 615. Depreciation may be caused by deterioration, which is a physical impairment such as structural defects, or by obsolescence, which is "an impairment of desirability or usefulness brought about by changes in design standards (*functional obsolescence*) or factors external to the property (*economic obsolescence*)." *Id.*; *see In re Valuation*, 282 N.C. 71, 191 S.E.2d 692 (1972) (our Supreme Court affirms State Board's conclusion County did not give proper consideration to functional and economic factors affecting property's value); *In re Appeal of Westinghouse Elec. Corp.*, 93 N.C. App. 710, 379 S.E.2d 37 (1989) (Commission properly subtracted physical depreciation from reproduction cost new and then subtracted depreciation for functional and economic obsolescence from resulting subtotal).

N.C. Gen. Stat. § 105-345.2 governs the standard of our review in this case and provides that:

> (b) . . . The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced

because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. . . .

N.C.G.S. § 105-345.2(b), (c) (1992). Review in this Court is further limited to the exceptions and assignments of error set forth to the decision of the Commission, *see Watson v. North Carolina Real Estate Comm'n*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988), and argued in the parties' brief, N.C.R. App. P. 28(a), so that the issue for determination in this case is whether the Commission's decision was supported by "competent, material and substantial evidence."

In this case, Stroh Brewery produced competent, material and substantial evidence that the property was affected by total accrued depreciation, which included physical, functional, and economic obsolescence, in the amount of 65%. The County, however, produced some evidence that only physical obsolescence should be considered in valuing the property because Ring "did not think at this point in time when [he] made the appraisal that it warranted any economic and functional depreciation." Therefore, although there was conflicting evidence as to the obsolescence to consider, the Commission's finding that improvements on the property "were affected on 1 January 1988 by functional and economic obsolescence which the County did not consider in the course of its appraisal" is supported by competent, material and substantial evidence.

Stroh Brewery argues that "[i]n the absence of any other evidence in the whole record as to obsolescence," the Commission erred in fail-

ing to adopt McCloskey's findings of 50% functional and/or economic obsolescence resulting in a finding of 65% total accrued depreciation. We disagree. Although the Commission agreed with McCloskey that the property was affected by functional and economic obsolescence, it was not then bound to accept McCloskey's percentage for such obsolescence and could arrive at its own percentage so long as supported by competent, material and substantial evidence. *See In re Appeal of Westinghouse Elec. Corp.*, 93 N.C. App. 710, 379 S.E.2d 37 (fact that Commission used one expert's testimony for depreciation did not bind it to use that expert's method of calculation, "as it was free to accept as much of their testimony as it found convincing"); *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993) (in equitable distribution case, if there is conflicting testimony as to value, court is not required to choose between values suggested but may arrive at value of its own choosing so long as based on appropriate factors in valuation process and evidence), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994); *Nix v. Nix*, 80 N.C. App. 110, 341 S.E.2d 116 (1986) (same as in *Smith*). Therefore, because the Commission's findings of a total accrued depreciation of 37.75% and valuation of $24,599,830.00 are supported by competent, material and substantial evidence, the Commission's decision is

Affirmed.

Judges JOHN and McCRODDEN concur.

TAYLOR HOME OF CHARLOTTE INC., PLAINTIFF v. CITY OF CHARLOTTE, NORTH CAROLINA, AND ZONING BOARD OF ADJUSTMENT OF THE CITY OF CHARLOTTE, DEFENDANTS, AND ROBERT F. MORAN, MARY O. MORAN, DONALD J. WINGO, PAT L. WINGO, DARRELL L. USSERY, CAROLYN H. USSERY, LINDA S. BECKHAM, BRIAN T. McFARLAND, SUE H. McFARLAND, MICHAEL J. HAZELTINE, MAXINE A. HAZELTINE, AND YVONNE P. CARLYLE, INTERVENORS

No. 9326SC1021

(Filed 6 September 1994)

1. Zoning § 113 (NCI4th)— facility for people with full-blown AIDS—adjacent property owners—standing to appeal decision of zoning administrator—showing of special damage

Adjacent property owners had standing to appeal the decision of the local zoning administrator concluding that a facility to

house people with full-blown AIDS was a group home and that the permit to build the facility was properly issued, since the property owners offered sufficient evidence with regard to market value, health, safety, and traffic considerations to show that they would suffer some special damage amounting to a reduction in the value of their property.

Am Jur 2d, Zoning and Planning §§ 737 et seq.

2. **Zoning § 46 (NCI4th)— group home primarily for rehabilitation—wide range of services not provided at group home**

Defendant board of adjustment did not act arbitrarily, manifestly abuse its authority, or commit an error of law when it interpreted a city zoning ordinance to require that a group home be "primarily" for rehabilitation, interpreted the phrase "sheltered living conditions for rehabilitation" to require that residents of a group home be such that some day they could live normal lives, and concluded that it was not the intent of the ordinance that group home residents be provided an extraordinarily wide range of personal, supportive, and medically related services but that such a facility would more closely resemble a nursing home or health institution.

Am Jur 2d, Zoning and Planning §§ 234 et seq.

3. **Zoning § 46 (NCI4th)— group facility for people with full-blown AIDS—mainstreaming not possible—residents not "handicapped"—facility not group home**

In determining whether a group facility designed to house six persons with full-blown AIDS was a group home permitted in a single-family residential area by a local zoning ordinance, the board of adjustment correctly interpreted the language "normal residential environment" to mean that the residents in a family care home would be able to be mainstreamed to live a life on a day-by-day basis in a single-family neighborhood"; furthermore, the board property concluded that persons with full-blown AIDS would not be similar to those handicapped persons described in N.C.G.S. § 168-20 in being able to be mainstreamed into daily living in a single-family zoned neighborhood.

Am Jur 2d, Zoning and Planning §§ 234 et seq.

Appeal by plaintiff from judgment entered 21 June 1993 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 May 1994.

Fontana, Fine & Copeley, by Leto Copeley, and Lesesne & Connette, by Louis L. Lesesne, Jr., for plaintiff-appellant.

David M. Smith, Senior Assistant City Attorney, for defendant-appellee City of Charlotte.

James, McElroy & Diehl, P.A., by Gary S. Hemric and J. Michael Mulvaney, for intervenors.

LEWIS, Judge.

Plaintiff commenced this action in the superior court for review of a decision by the Zoning Board of Adjustment of the City of Charlotte (hereinafter the "Board"). The superior court affirmed the decision of the Board, and plaintiff appeals.

Plaintiff is a North Carolina non-profit corporation established for the purpose of providing housing for persons with full-blown acquired immune deficiency syndrome (AIDS). "Full-blown" AIDS is the final stage of the development of the HIV virus and occurs when opportunistic infections attack a person's destroyed immune system, taking advantage of the inability of the body to fight them. Gary L. Fanning, Jr., Note, *Countering Workplace Fear and Misapprehension Through Legal Protection: Options for the HIV-Positive Public Employee*, 33 Washburn L.J. 186 (1993). Those persons with full-blown AIDS are persons who have developed at least one life-threatening clinical condition that is clearly linked to HIV-caused immunodeficiency. Nancy A. Moore, Comment, *AIDS Discrimination Under the Rehabilitation Act: When a Physician Refuses to Treat, Who is Liable?*, 42 DePaul L. Rev. 505 (1992).

On 22 July 1992, plaintiff received preliminary approval from the Division of Facility Services of the North Carolina Department of Human Resources to operate a facility (hereinafter "Taylor Home" or the "home") as a six-bed "family care home." A "family care home" is defined as "a home with support and supervisory personnel that provides room and board, personal care and habilitation services in a family environment for not more than six resident handicapped persons." N.C.G.S. § 168-21(1) (1987). "Handicapped person" is defined as "a person with a temporary or permanent physical, emotional, or mental disability including but not limited to mental retardation, cerebral palsy, epilepsy, autism, hearing and sight impairments, emotional disturbances and orthopedic impairments but not including mentally ill persons who are dangerous to others as defined in G.S.

122C-3(11)b." § 168-21(2). N.C.G.S. § 168-22 (1987) provides in part that "[a] family care home shall be deemed a residential use of property for zoning purposes and shall be a permissible use in all residential districts of all political subdivisions."

On 11 December 1992, the Charlotte-Mecklenburg Building Standards Department issued plaintiff a building permit to construct the home at 5026 Lansing Drive in Charlotte. The permit was for construction of a group home. The City of Charlotte's zoning ordinances define a "group home" as "[a] residential home provided by an agency, organization or individual for persons who need sheltered living conditions for rehabilitation, but not including mentally ill persons who are dangerous to others as defined in G.S. Sec. 122C-3(11)b, as amended." Charlotte, N.C., Code § 2.201(G3). The zoning ordinances further provide that a group home may be constructed in an area which is zoned single-family residential, though there is no mention of family care homes.

After construction of the home began, residents of the neighborhood, upon learning of the intended use, challenged the issuance of the building permit. The zoning administrator concluded that the facility was a group home and that the permit was properly issued. The neighbors then appealed the zoning administrator's decision to the Board, pursuant to N.C.G.S. § 160A-388(b) (1987). The Board held a hearing and concluded that the residents of the home would not be handicapped persons within the meaning of the family care home statutes and that the home was not a group home within the meaning of the local ordinance. The Board further concluded that the building permit was erroneously issued. From the decision of the Board, plaintiff petitioned the superior court for review by certiorari, pursuant to § 160A-388(e), and the neighbors filed a motion to intervene. The superior court allowed the motion to intervene and affirmed the decision of the Board. From the judgment of the superior court, plaintiff appeals.

I.

[1] Plaintiff's first contention is that the nearby homeowners lacked standing to appeal the decision of the zoning administrator to the Board. Appeals may be taken to the Board by "any person aggrieved." N.C.G.S. § 160A-388(b). An aggrieved person is one who can either show an interest in the property affected, or if the person is a nearby property owner, some special damage, distinct from the rest of the community, amounting to a reduction in the value of his property.

Allen v. City of Burlington Bd. of Adjustment, 100 N.C. App. 615, 618, 397 S.E.2d 657, 659 (1990).

In the case at hand, the neighbors all owned land adjacent to the Taylor Home property. Thus, they were required to show some special damage amounting to a reduction in the value of their property. The neighbors presented to the Board a letter from Clark W. Gregory, a certified North Carolina real estate appraiser, in which Clark stated: "The most important concern I have is the effect of the proposed facility on the marketability/expected prices of the adjacent properties. . . . [I]t is inevitable that the facility, if completed, will have an adverse impact on the adjacent properties." Fred Nordman, a nearby property owner, gave sworn testimony at the Board hearing regarding the increased traffic on the cul-de-sac that would result. Nordman testified that his concerns included the safety of the children who play in the cul-de-sac as well as the necessity of access for emergency vehicles to the cul-de-sac. Mary Elizabeth Moran, an adjacent property owner, testified before the Board of her concerns about the disposal of potentially bio-hazardous material at Taylor Home.

We conclude that the above evidence was sufficient to show that the adjacent property owners would suffer some special damage, amounting to a reduction in the value of their property. The Board appropriately considered, in addition to the evidence regarding market value, the testimony of the property owners concerning health, safety, and traffic considerations. *See Kentallen, Inc. v. Town of Hillsborough*, 110 N.C. App. 767, 769-70, 431 S.E.2d 231, 232 (1993) (persons may be "aggrieved" by effects such as increased traffic congestion, noise, risk of fire).

II.

Plaintiff's remaining arguments concern the merits of the Board's decision to rescind the building permit. The Board's hearing on the matter was conducted as a quasi-judicial proceeding, *see County of Lancaster, S.C. v. Mecklenburg County, N.C.*, 334 N.C. 496, 434 S.E.2d 604 (1993), and, therefore, the standard of review is that set out by our Supreme Court in *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E.2d 379 (1980). The standard of review is the same for the superior court and this Court, and it includes reviewing the record for errors of law, insuring that the decision was supported by competent, material, and substantial evidence in the whole record, and insuring that the decision of the board was not arbitrary and capricious. *Id.* at 626, 265 S.E.2d at 383.

Plaintiff contends that the superior court erred in affirming the decision of the Board, in that the Board's decision contained errors of law, was not supported by competent, material, and substantial evidence, and was arbitrary and capricious.

III.

[2] We first address plaintiff's arguments regarding the Board's conclusion that the home was not a group home under the city ordinance. Again, the ordinance defines a "group home" as "[a] residential home provided by an agency, organization or individual for persons who need sheltered living conditions for rehabilitation, but not including mentally ill persons who are dangerous to others." Code § 2.201(G3). Plaintiff's first contention concerns the Board's conclusion that the Taylor Home residents "will not be occupying the structure *primarily* 'for rehabilitation', as required by Code § 2.201(G3), and *cannot be restored to live normal lives* as meant by the 'sheltered living conditions for rehabilitation' in Code § 2.201(G3)." (Emphasis added). Plaintiff argues that the Board exceeded its authority by adding the language emphasized above to the language of the ordinance. We disagree.

It is the duty of a board of adjustment to interpret a local ordinance and to apply that interpretation to the facts before the board. *Midgette v. Pate*, 94 N.C. App. 498, 502, 380 S.E.2d 572, 575 (1989). Because the board of adjustment is vested with reasonable discretion in determining the intended meaning of an ordinance, a court may not substitute its judgment for the board's in the absence of error of law, or arbitrary, oppressive, or manifest abuse of authority. *P.A.W. v. Town of Boone Bd. of Adjustment*, 95 N.C. App. 110, 113, 382 S.E.2d 443, 444-45 (1989). Thus, our task on appeal is not to decide whether another interpretation of the ordinance might reasonably have been reached by the board. *Id.* at 115, 382 S.E.2d at 446.

We cannot say that the Board acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law when it interpreted the ordinance to require that a group home be "primarily" for rehabilitation. The ordinance itself mentions only one purpose for group homes, and that is rehabilitation. We find the conclusion that group homes must be primarily for rehabilitation to be reasonable and lawful.

Likewise, we conclude that the Board acted reasonably in interpreting the phrase "sheltered living conditions for rehabilitation." The

Board interpreted that language to require that the residents of a group home be such that some day they could live normal lives. The Board found as a fact that "a dictionary commonly defines 'rehabilitation' to mean the restoring of a handicapped or delinquent person to a useful life through education and therapy." As the ordinance does not define "rehabilitation," the Board properly used the ordinary and common meaning of the word to give meaning to the language of the ordinance. *See Raleigh Place Assocs. v. City of Raleigh, Bd. of Adjustment*, 95 N.C. App. 217, 219, 382 S.E.2d 441, 442 (1989).

Plaintiff's final argument regarding the group home ordinance is that the Board improperly concluded that it was not the intent of the ordinance that group home residents be provided "an extraordinarily wide range of personal, supportive, and medically-related services in order to be comfortable in a family environment with a terminal disease." Plaintiff argues that this conclusion bears no relation to the language of the ordinance, and specifically, that the ordinance does not mention the word "services."

The services the Board referred to were detailed in the Supportive Services Plan which plaintiff submitted to the U.S. Department of Housing and Urban Development. The services to be provided to the residents at the home included: housekeeping and laundry services; assistance with bathing, feeding, dressing, and other activities of daily living; transportation; detailed management, dispensing, labeling, administration, storage, and disposal of drugs; and arrangements for physician service. The Board concluded that because the residents of the home would have full-blown AIDS, thus requiring the extensive services set out above, the home did not fit the definition of a group home. Rather, the home more closely resembled a "nursing home" or a "health institution," as defined by city ordinance, neither of which is permitted in a single-family zoned district.

A "nursing home" is defined as "[a] facility providing care for 3 or more sick, aged or disabled persons not related by blood or marriage to the operator. Nursing homes are classified as 'dependent' or 'independent' living facilities depending upon the degree of support services on site." Code § 2.201(N5). "Dependent living facility" is defined as "[n]ursing homes, rest homes and homes for the aged which are designed for persons who need a wide range of health and support services located on the site, such as medical and nursing care, central dining, and transportation services." Code § 2.201(D3). Finally, a "health institution" is defined as

> [a] hospital, clinic (not including veterinary), health maintenance organization, or similar use or building, not including a group home, which routinely provides for the care of, treatment of, and testing for physical, emotional, or mental injury, illness, or disability, and for the overnight boarding of patients, either on a for-profit or not-for-profit basis.

Code § 2.201(H3).

We believe that the fact that the group home definition does not mention the word "services" does not cast doubt on the Board's conclusion. On the contrary, that fact and the fact that the nursing home and dependent living facility definitions do include the word "services" lends support to the Board's conclusion that a home whose residents would have full-blown AIDS and would require the services as described in the Supportive Services Plan would not be a group home, but would more closely resemble a nursing home or a health institution. We hold that the Board's conclusion regarding the intent of Code § 2.201(G3) (group homes) was not arbitrary, oppressive, without authority, or otherwise affected by error of law.

IV.

[3] Plaintiff's final contention on appeal is that the Board erred in concluding that the residents of Taylor Home would not be handicapped persons within the meaning of the family care home statutes. We note that the interpretation of a statute is a matter of law, and error in the interpretation of a statute is an error of law. *Savings & Loan League v. Credit Union Comm'n*, 302 N.C. 458, 464, 276 S.E.2d 404, 409 (1981).

N.C.G.S. § 168-21(2) defines "handicapped person" as "a person with a temporary or permanent physical, emotional, or mental disability including but not limited to mental retardation, cerebral palsy, epilepsy, autism, hearing and sight impairments, emotional disturbances and orthopedic impairments but not including mentally ill persons who are dangerous to others as defined in G.S. 122C-3(11)b." Plaintiff first argues that the Board erred in concluding that

> General Statutes' Chapter 168, Article 3 [Family Care Homes], contemplates that handicapped persons like those identified in G.S. § 168-21(2) (e.g., mental retardation or cerebral palsy) can be "mainstreamed" to live a life on a day-by-day basis in a single family neighborhood and the Taylor Home residents are not similar to those "handicapped persons" described in G.S. § 168-21(2) in

being able to be "mainstreamed" into daily living in a single family zoned neighborhood.

Specifically, plaintiff contends that the Board erred in adding to the statute the requirement that the residents be able to be " 'mainstreamed' to live a life on a day-by-day basis in a single family neighborhood." We disagree.

The intent of the legislature in providing for family care homes is stated in N.C.G.S. § 168-20 (1987): "[I]t is the public policy of this State to provide handicapped persons with the opportunity to live in a normal residential environment." We believe that the Board correctly interpreted the language "normal residential environment" to mean that the residents in a family care home would be able to be " 'mainstreamed' to live a life on a day-by-day basis in a single family neighborhood." Further, the Board properly concluded that persons with full-blown AIDS would not be similar to those handicapped persons described in the statute in being able to be mainstreamed into daily living in a single family zoned neighborhood.

Plaintiff's second argument is that the Board erred in concluding that the residents of Taylor Home would be receiving "an extraordinarily wide range of personal, supportive, and medically-related services in order to be comfortable in a family environment with a terminal disease, which is not the intent of Chapter 168, Article 3." In support of its argument, plaintiff points out that the family care home regulations promulgated by the Department of Human Resources detail the services to be provided in family care homes and are virtually identical to those listed in plaintiff's Supportive Services Plan. *See* N.C. Admin. Code tit. 10, r. 42C.2300 (November 1993). Further, plaintiff cites two sections of the regulations which specifically refer to HIV residents. For example, section 42C.2303(d)(1) regarding food service provides in part: "Variations from the required three meals, menus and specified time intervals to meet individualized needs of residents in an HIV designated facility shall be planned or reviewed by a physician and registered dietician and documented." Section 42C.2304(c)(2) regarding activities provides in part: "In addition to individual activities, there must be a minimum of 10 hours of planned group activities per week. Homes designated for residents with HIV disease are exempt from the 10-hour requirement . . . ." Plaintiff contends that these regulations show that the intent of the legislature was to include persons with AIDS within the definition of "handicapped person[s]" in N.C.G.S. § 168-21(2).

It is clear that the Department of Human Resources interprets the family care home statutes to include HIV residents. It is not clear, however, that the Department of Human Resources would also interpret the statutes to include residents with full-blown AIDS, such as the residents of Taylor Home. In any event, while the interpretation given a statute by the agency charged with administering that statute is traditionally accorded some deference by appellate courts, that interpretation is not binding. *Savings & Loan League*, 302 N.C. at 466, 276 S.E.2d at 410. In light of the legislature's goal of providing "handicapped persons with the opportunity to live in a normal residential environment," we conclude that it was not the intent of the legislature to include persons with full-blown AIDS within the definition of "handicapped person[s]" in section 168-21(2).

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

Affirmed.

Judges EAGLES and COZORT concur.

J. D. ROBINETTE, PLAINTIFF v. WILLIAM G. BARRIGER, W. MALCOLM BLALOCK AND ALEXANDER COUNTY, DEFENDANTS

No. 9322SC387

(Filed 6 September 1994)

1. Health § 2 (NCI4th); State § 38 (NCI4th)— health department as state agency—action against health department—jurisdiction in Industrial Commission

The Alexander County Health Department was a state agency rather than a county agency, and defendant health department employee was an agent of the State; therefore, this action alleging damages to plaintiff because of delays in the permitting process in connection with plaintiff's efforts to develop property in the county should have been filed with the Industrial Commission which has exclusive jurisdiction of negligence actions against the State.

Am Jur 2d, Health §§ 1-18; Municipal, County, School, and State Tort Liability §§ 649 et seq.

2. State § 31 (NCI4th)— public official—conduct not shown to be malicious, wanton, and reckless

In an action to recover damages allegedly suffered by plaintiff by delays in the permitting process in connection with plaintiff's efforts to develop property in Alexander County, the trial court did not err in failing to find that defendant DEHNR's employee's conduct in holding meetings and revoking improvement permits was malicious, wanton, and reckless.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 137 et seq.

3. State § 23 (NCI4th)— allegations against government employee—sovereign immunity applicable

Where plaintiff's allegations of negligence against one defendant related directly to his official duties as the Alexander County Environmental Health Supervisor for the Health Department, that defendant was entitled to immunity under the doctrine of sovereign immunity.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 70; States, Territories, and Dependencies §§ 104 et seq.

Judge GREENE concurring in part and dissenting in part.

Appeal by plaintiff and by defendant Barriger from order entered 17 March 1992 by Judge Preston Cornelius and judgment entered 5 November 1992 by Judge William H. Helms in Alexander County Superior Court. Heard in the Court of Appeals 2 February 1994.

Michael B. Brough & Associates, by Michael B. Brough, for plaintiff appellant-appellee.

Womble Carlyle Sandridge & Rice by Allan R. Gitter and James R. Morgan, Jr., for defendant appellant Barriger and defendant appellee Alexander County.

Attorney General Michael F. Easley, by Special Deputy Attorney General Mabel Y. Bullock, for defendant appellee Blalock.

COZORT, Judge.

In this case plaintiff sued Alexander County and three government employees, alleging he was damaged by delays in the permitting

process in connection with plaintiff's efforts to develop property in the County. The trial court granted summary judgment for the County and one employee, found no liability as to a second employee, and found the third employee liable to plaintiff for damages of $660,368.00. We reverse the award of damages as to the third employee, finding governmental immunity, and affirm the remainder of the trial court's rulings.

In September of 1988, plaintiff J.D. Robinette began examining tracts of land in Alexander County suitable for construction of a residential subdivision. Plaintiff obtained an option in October of 1988 on a 9.24-acre tract of land on which he intended to develop a ten-lot, lakeside subdivision called "Candlewick Cove." Plaintiff, through his real estate agent, requested that the Alexander County Health Department (Health Department) conduct a site evaluation of the property to determine whether the area was suitable for the installation of septic tanks. On 4 November 1988, defendant Susan Hughes, a sanitarian employed by the Health Department, conducted a preliminary site evaluation. She informed plaintiff both orally and in writing that the site was provisionally suitable for septic tanks. She did explain that drainfields would have to be placed in the rear of the proposed lots, because the front of the lots would need to be filled to accommodate the proposed development scheme. Plaintiff purchased the property on 21 November 1988 for $152,531.50.

On 3 January 1989, plaintiff sent Ms. Hughes a contour map showing the site "as is" and a copy of a grading plan for the proposed subdivision. The grading plan divided the property into ten lots. An attached cover letter acknowledged that plaintiff would locate the septic tanks and drainfields in the rear of the lots. On 6 January 1989, plaintiff, along with his engineer and contractor, met at the property with Ms. Hughes and her supervisor, defendant William G. Barriger, the Alexander County Environmental Health Supervisor. Plaintiff marked the areas on the plots where the septic tanks were to be located and received Mr. Barriger's approval for the installation of septic tanks if the designated areas remained undisturbed. Plaintiff's engineer drew up a plat map marking the areas Mr. Barriger and plaintiff had agreed upon, and the map was mailed to the Health Department. Both Mr. Barriger and Ms. Hughes approved the map, and Mr. Barriger assured plaintiff in a telephone conversation that so long as the areas remained undisturbed, the lots would be acceptable for development with conventional septic tank systems.

On 9 May 1989, plaintiff recorded a final plat of the Candlewick Cove subdivision and shortly thereafter contacted defendant Barriger to obtain a written certification that the lots were suitable for septic tanks. On 21 June 1989, plaintiff and Mr. Barriger went to the property with Al Slagle, a soil specialist employed by the North Carolina Department of Environment, Health, and Natural Resources (DEHNR). Mr. Slagle extracted soil samples and, upon examination of the soil, concluded that most of the lots were not suitable for development with conventional septic tank systems because the suitable soils were not of sufficient depth.

On 23 June 1989, Mr. Barriger met with Romey Baxley, a District Sanitarian for the State. Mr. Baxley reviewed Mr. Slagle's soil figures and stated the improvement permits could be issued for nine of the ten lots if a prefabricated, permeable block panel system (PPBP) was used. Mr. Baxley reminded Mr. Barriger that, because Mr. Slagle's data showed the depth of suitable soils on many of the proposed lots was inadequate to meet state requirements for a conventional septic system, permits for the systems he recommended could be issued only in accordance with N.C. Admin. Code tit. 10, r. 10A .1950(b) and .1948(c). Subsection .1950(b) requires certain levels of fill dirt to comply with state regulations. Subsection .1948(c) requires certain "substantiating data" before improvement permits are issued.

Sometime between 21 July and 27 July 1989, Mr. Barriger prepared the improvement permits without complying with the above regulation subsections. Mr. Barriger stated he believed the substantiating data and areal fill information did not need to be attached to the permits; he stated he also knew that permits were often amended. Following the issuance of the permits, defendant Malcolm Blalock, Assistant Chief of Environmental Health Services at DEHNR, reviewed the nine permits because Mr. Slagle and Mr. Baxley disagreed over whether the permits were properly issued. Mr. Slagle had rendered his opinion that the soil was inadequate under state regulations to accommodate the septic systems, while Mr. Baxley had indicated the area could be adapted to install the PPBP systems.

Mr. Blalock called a meeting on 25 September 1989 to discuss the disagreement over the permits. The meeting confirmed the dispute as to whether the permits should have been issued for Candlewick Cove. Mr. Blalock understood there was no dispute as to Mr. Slagle's figures or as to whether the permits *could* be issued for the lots. On 25 October 1989, without explanation, Mr. Blalock asked plaintiff for permis-

sion to enter the property to re-evaluate all of the lots. Plaintiff denied Mr. Blalock's request, explaining he had permits for nine of the lots that were valid for three years.

A week later, on 1 November 1989, Mr. Barriger, Mr. Blalock, Mr. Baxley and others attended a meeting at the Health Department to again review the permits. The participants concluded that the permits were defective. On 29 November 1989, Mr. Blalock wrote a letter to defendant Barriger stating that the improvement permits for lots 2, 3, 4, 5, 8, 9, and 10 were to be revoked. The basis for the revocations was the failure to show adequate fill, pursuant to N.C. Admin. Code tit. 10, r. 10A.1950(b), and the issuance of the permits for use of PPBP systems without the substantiating data required by N.C. Admin. Code tit. 10, r. 10A.1948(c). On 30 November 1989, Mr. Barriger signed and delivered a permit revocation letter to plaintiff. In response, plaintiff filed in the Office of Administrative Hearings (OAH) a contested case challenging the validity of the permit revocations.

On 1 January 1990, various amendments to the State Sanitary Sewage Collection, Treatment, and Disposal Rules became effective. Plaintiff filed new improvement permit applications under the amended rules on 8 January 1990. The lots were re-examined by Mr. Slagle. The results coincided with his findings from the evaluation conducted in June of 1989. By 2 April 1990, permits had been reissued for all but one of the lots. Plaintiff later withdrew his contested case in the OAH.

Plaintiff filed this action on or about 4 November 1991 to recover damages allegedly resulting from the misinformation as to the suitability of the lots in the development and the prolonged process necessary to receive development permits. Plaintiff claimed the delay disrupted the progress of the development. He requested $660,368.00 in damages.

Defendant Alexander County (County) filed a motion to dismiss and a motion for summary judgment on 9 December 1991. Defendant Susan Hughes filed a motion for summary judgment on 13 December 1991. Defendant William G. Barriger moved for summary judgment on 28 February 1992. The trial court entered an order on 17 March 1992 granting summary judgment as to defendant County and Susan Hughes, and denying summary judgment as to defendant William Barriger. (Summary judgment for Ms. Hughes is not raised in this appeal.) Defendant Malcolm Blalock moved for summary judgment on 3 April 1992; the trial court denied the motion on 16 June 1992. In

a judgment entered 5 November 1992, the trial court found no liability as to defendant Blalock. As to defendant Barriger, the court found him liable to plaintiff for $660,368.00 in damages. Plaintiff and defendant Barriger appeal.

Plaintiff brings forth two issues on appeal: (1) whether the trial court erred in granting defendant County's motion for summary judgment, and (2) whether the trial court erred in concluding that defendant Blalock's conduct was not malicious, wanton, and reckless. First, plaintiff argues the trial court erred in entering summary judgment in the County's favor. The County argued below that summary judgment was warranted because the trial court lacked subject matter jurisdiction, and the action was barred by governmental immunity. We hold the trial court indeed lacked subject matter jurisdiction and affirm summary judgment in favor of the County.

[1] Plaintiff argues that in granting summary judgment for the County, the trial court incorrectly concluded the County was acting as an agent of the State, holding that the action therefore should have been brought before the North Carolina Industrial Commission, which has exclusive jurisdiction for claims filed under N.C. Gen. Stat. § 143-291, the Tort Claims Act. Plaintiff asserts that the Health Department is a county agency, not a state agency, and that defendant Barriger was a county employee whose actions could be imputed to the County. We find plaintiff's argument unpersuasive.

In *EEE-ZZZ Lay Drain Co. v. N.C. Dep't of Human Resources*, 108 N.C. App. 24, 28, 422 S.E.2d 338, 341 (1992), this Court held that local health departments "are agents of the State," and that therefore, "the Transylvania County Health Department is, like DEHNR, immune from suit." As in *EEE-ZZZ Lay Drain*, the Alexander County Health Department is a state agency, rather than a county agency, and it follows that defendant Barriger was an agent of the State. Accordingly, the action should have been filed with the Industrial Commission, which has exclusive jurisdiction of negligence actions against the State. *See Vaughn v. North Carolina Dep't of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979). The trial court thus did not err in granting summary judgment for the County based on a lack of subject matter jurisdiction.

[2] Next, plaintiff claims the trial court erred in failing to find that defendant Blalock's conduct was malicious, wanton, and reckless. Plaintiff contends that to prove Mr. Blalock's conduct was malicious, plaintiff must only show defendant Blalock acted wrongly and with a

reckless indifference to the harmful consequences of his actions. We disagree. A public official acts with malice when he or she "wantonly does that which a [person] of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). In the present case, the record is lacking of evidence sufficient to meet the requisite element of intent to find that Blalock acted maliciously. Accordingly, we conclude the trial court did not err when it refused to find that defendant Blalock's actions were malicious, wanton, and reckless.

[3] We now turn to defendant Barriger's appeal. Defendant Barriger contends the trial court erred in denying his motion for summary judgment on the basis of sovereign immunity. We agree.

A public officer is shielded from tort liability by sovereign or governmental immunity when the public officer is acting in his or her capacity as a public officer. *See, e.g., Robinson v. Nash County*, 43 N.C. App. 33, 257 S.E.2d 679 (1979). Where a public officer's negligence is related solely to his or her official duties, a suit must be brought against the officer in his or her "official capacity," rather than in his "individual capacity." *See Stancill v. City of Washington*, 29 N.C. App. 707, 225 S.E.2d 834 (1976).

In the case below, plaintiff attempts to sue defendant Barriger in his individual capacity so that governmental immunity would not apply. A careful examination of the complaint reveals that plaintiff's allegations of negligence against defendant Barriger relate directly to his official duties as a sanitarian. Recently in *Whitaker v. Clark*, 109 N.C. App. 379, 427 S.E.2d 142 (1993), this Court held that the plaintiff failed to state a claim against the defendants individually where the allegations in the complaint pertained only to the defendants' actions in exercise of their official duties. In determining the defendants were entitled to governmental immunity protection, this Court explained:

> Plaintiff urges us to find that she has sued defendants as individuals, yet after careful review of the complaint, we find that she has asserted claims against defendants in an official capacity alone. Absent any allegations in the complaint separate and apart from official duties which would hold a nonofficial liable for negligence, the complaint cannot be found to sufficiently state a claim against defendants individually.

Id. at 383-84, 427 S.E.2d at 145. *See also, Dickens v. Thorne*, 110 N.C. App. 39, 429 S.E.2d 176 (1993).

Because the crux of plaintiff's action in this case is composed of allegations brought against defendant Barriger in his official capacity, rather than as an individual, the doctrine of governmental immunity applies. Defendant Barriger was the Alexander County Environmental Health Supervisor for the Health Department, and under our previous analysis of *EEE-ZZZ Lay Drain*, we conclude defendant Barriger was entitled to immunity as to plaintiff's tort claims. As a result, we reverse the trial court's denial of defendant Barriger's motion for summary judgment, and remand for an entry of summary judgment in Barriger's favor.

In summary, the trial court (1) correctly granted summary judgment for the County, (2) correctly found no liability against Mr. Blalock, and (3) erred by not granting summary judgment for Mr. Barriger.

Affirmed in part, reversed in part, and remanded.

Judge ORR concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

I agree with the majority that the trial court correctly granted summary judgment for the County on the basis of sovereign immunity and found no liability as to defendant Blalock. I disagree, however, that the trial court erred in denying summary judgment as to defendant Barriger and would therefore affirm the trial court's decision in its entirety.

Although Barriger, as a public official performing governmental duties involving the exercise of judgment and discretion, is "immune from liability for 'mere negligence' in the performance of those duties," he is "not shielded from liability if his alleged actions were 'corrupt or malicious' or if 'he acted outside of and beyond the scope of his duties'." *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985) (citations omitted), *appeal after remand*, 85 N.C. App. 237, 354 S.E.2d 365, *cert. denied*, 320 N.C. 178, 358 S.E.2d 72 (1987). If a plaintiff alleges that a public official is corrupt, malicious, or acted beyond the scope of his duties, the plaintiff is necessarily suing the public official in his individual capacity. *See Taylor v. Ashburn*, 112 N.C. App. 604, 607-08, 436 S.E.2d 276, 279 (1993) (if plain-

tiff fails to advance any allegations in his or her complaint other than those relating to a defendant's official duties, the complaint does not state a claim against a defendant in his or her individual capacity, and instead, is treated as a claim against defendant in his official capacity"), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994); 57 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* § 70 (1988) (State entities, agents, and employees share immunity where claim involves activities which may be attributed to the State unless there are allegations that state agent or employee acted beyond scope of authority through wrongful acts).

In this case, plaintiff alleged in his complaint that "[i]n issuing the improvement permits as alleged above with fabricated soils data and other false statements, defendant Barriger acted wantonly and maliciously to protect his own interests in reckless disregard of the consequences to plaintiff should the permits so issued be revoked." Plaintiff supports his allegation by stating that Barriger

> out of concern that his own negligent misrepresentations . . . might subject him to damages liability . . . fabricated soils depths for the lots that, at least in his mind, allowed him to issue permits without requiring the areal fill mandated by Section .1950(b). . . . In a further effort to present a facade of compliance with Section .1949(c) of the State Rules and for the express purpose of concealing his past malfeasance, defendant Barriger included among the "specifications and requirements" attached to the permits issued for lots 2, 3, 5, 8, 9, and 10 (all of which required PPB systems) that such systems were being used "at the request of the project engineer Mr. Wallace Davis." In fact, unbeknownst to plaintiff but well known to defendant Barriger, Mr. Davis had never made any such request since he was utterly unfamiliar with the workings of PPB systems.

Plaintiff has alleged that Barriger fabricated soil depths and attempted to conceal "his past malfeasance," actions not relating to Barriger's official duties as a sanitarian. Thus, plaintiff, by advancing allegations in his complaint other than those relating to his official duties, is suing Barriger in his individual capacity, and Barriger is "not shielded from liability if his alleged actions were 'corrupt or malicious' or if 'he acted outside of and beyond the scope of his duties'." Because Barriger, by basing his summary judgment motion on sovereign immunity, has failed to meet his burden of establishing that there is no genuine issue of material fact, the trial court correctly denied Barriger's motion for summary judgment.

WILLIAM EDMOND EARLY, JR. v. J. MELVIN BOWEN, ADMINISTRATOR CTA OF THE ESTATE OF JOHN T. DANIEL, JR.; VICKI DANIEL SIMPSON AND HUSBAND FRANK SIMPSON; ROGER DANIEL AND WIFE MARY ANNA DANIEL; DARRELL DANIEL AND WIFE VICKI DANIEL; KENNETH DANIEL AND WIFE DEBBIE M. DANIEL; AND WILLIE JOHN DANIEL AND WIFE DEBBIE M. DANIEL

No. 932SC740

(Filed 6 September 1994)

Wills § 164 (NCI4th)— anti-lapse statute—"or to the survivor"—statute applicable

The trial court incorrectly granted summary judgment for defendants Daniel in a declaratory judgment action to construe a will where John Daniel left all of his real and personal property to his brothers, "or to the survivor"; both brothers predeceased him, leaving children (the defendants Daniel from one brother and defendant Vicki Simpson from the other); John Daniel also had two sisters, to whom he left nothing, and both of whom also predeceased him; one of the sisters left a child, plaintiff Early; plaintiff contended that he was entitled to a one-sixth share by intestate succession; defendants Daniel contended that they were entitled to the entire estate; defendant Simpson contended that she was entitled to one-half the estate with the defendants Daniel taking the other half; and the court awarded the defendants Daniel the entire estate. Although plaintiff Early contends that the bequests to the brothers lapsed because they predeceased the testator and that the language "or to the survivor" indicates an intent contrary to the anti-lapse statute, so that the estate would pass by intestacy, the inclusion of that language indicates merely that the testator did not contemplate that both of his brothers would predecease him. And, although the defendants Daniel contend that the language demonstrates the testator's intent to benefit the last surviving brother and that the entire estate go to his issue, the language merely provides for an alternative disposition in the event that either brother were to predecease the testator, not if both predeceased him. The contention of the defendants Daniel would be an impermissible rewriting of the will and ignores the requirement that the survivors must be determined as of the date of the maker's death. The judgment of the trial court was reversed and remanded for entry of judgment awarding one-half to defendant Simpson and one half to defendant Daniel. N.C.G.S. § 31-42.

Am Jur 2d, Wills §§ 1671 et seq.

Appeal by plaintiff and defendants Simpson from order entered 7 June 1993 by Judge Quentin T. Sumner in Martin County Superior Court. Heard in the Court of Appeals 13 April 1994.

Plaintiff brought this declaratory judgment action seeking construction of two provisions of the will of John T. Daniel, Jr., ("Testator") in order to determine the respective interests of the parties to his estate. Testator died on 8 February 1992. His will, dated 31 August 1942, provides:

ITEM THREE

> I bequeath to my two brothers, Wheeler V. Daniel and Harry E. Daniel, any and all personal property which I may own at the time of my death to be shared equally between them, or to the survivor.

ITEM FOUR

> I devise to my brothers, Wheeler V. Daniel and Harry E. Daniel, any and all real estate of which I may stand seized at the date of my death to be shared equally between them, or to the survivor, in fee simple.

Testator was never married, had no children, and both of his parents predeceased him. He had four siblings: Mary B. Early, Virginia D. Casper, Harry E. Daniel, and Wheeler V. Daniel, all of whom also predeceased him. However, Testator was survived by several nieces and nephews: Vicki Daniel Simpson (hereinafter "defendant Simpson"), the child of his brother Harry Daniel; William Edmond Early, Jr., (hereinafter "plaintiff"), the son of his sister Mary Early; and the four children of his brother Wheeler Daniel (hereinafter "defendants Daniel").

Plaintiff brought this action for declaratory judgment contending that he is entitled to a one-sixth intestate share of Testator's estate. Defendants Daniel contended in their amended answer that they are entitled to the entire estate. Defendant Simpson contended that she is entitled to one-half of the estate, that defendants Daniel are entitled to one-half of the estate, and that plaintiff is not entitled to share in the estate in any respect. The trial court entered summary judgment in favor of defendants Daniel and awarded them Testator's entire estate. Both plaintiff and defendants Simpson appealed.

Daniel A. Manning for plaintiff-appellant.

Wilson & Waller, P.A., by Betty S. Waller and Thomas J. Wilson, for defendant-appellants Simpson.

Brady, Schilawski, Earls and Ingram, by John Randolph Ingram, II, for defendant-appellees.

MARTIN, Judge.

Summary judgment is appropriate in a declaratory judgment action where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *N.C. Association of ABC Boards v. Hunt*, 76 N.C. App. 290, 332 S.E.2d 693, *disc. review denied*, 314 N.C. 667, 336 S.E.2d 400 (1985). There are no disputes as to the facts of this case; only questions of law are presented. Those questions involve the applicability of G.S. § 31-42(a), North Carolina's anti-lapse statute, to Items Three and Four of Testator's Will and the resulting distribution of his estate.

Plaintiff contends that because neither Wheeler Daniel nor Harry Daniel survived Testator, the bequests to them lapsed and were void, leaving the entire estate to pass by intestacy. He argues that the anti-lapse statute does not apply because the Testator indicated a contrary intent by including the provision "or to the survivor" in the bequests. Defendants contend that G.S. § 31-42(a) does apply to the bequests to Harry and Wheeler to prevent the property from passing by intestacy. They disagree, however, with respect to the manner in which the estate should be distributed. We agree with defendants that G.S. § 31-42(a) is applicable here. However, we further agree with defendants Simpson that proper application of the statute results in a distribution of the estate contrary to that ordered by the trial court. Accordingly, we reverse summary judgment in favor of defendants Daniel and remand for entry of judgment awarding one-half of Testator's estate to defendants Simpson and the remaining one-half of the estate to defendants Daniel.

Whenever the meaning of a will or a part thereof is in controversy, the courts may construe the provision in question and declare its meaning. *Mitchell v. Lowery*, 90 N.C. App. 177, 368 S.E.2d 7, *disc. review denied*, 323 N.C. 365, 373 S.E.2d 547 (1988). It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any of his property. *Misenheimer v. Misenheimer*, 312 N.C.

692, 325 S.E.2d 195, *reh'g denied*, 313 N.C. 515, 334 S.E.2d 778 (1985). It is also presumed that a will is executed in contemplation of applicable statutes. *Id.*

The primary object in interpreting a will is to give effect to the intention of the testator insofar as that intent does not conflict with the law or with public policy. *Id.; Mitchell, supra.* In ascertaining this intention, the language used and the sense in which it is used by the testator is the primary source of information, as it is the expressed intention of the testator which is sought. *Wing v. Trust Co.*, 301 N.C. 456, 272 S.E.2d 90 (1980). The will is to be considered as a whole to ascertain the general plan and purpose of the testator, *Clark v. Connor*, 253 N.C. 515, 117 S.E.2d 465 (1960), and in determining the intent of the testator, greater regard must be given to the dominant purpose of the testator than to the use of any particular words. *Little v. Trust Co.*, 252 N.C. 229, 113 S.E.2d 689 (1960). Generally, ordinary words are to be given their usual and ordinary meaning. *Clark, supra.* It is not sufficient that the same words in substance or even literally have been construed in other cases, as the same identical words often require very different constructions according to context and the peculiar circumstances of each case. *Id.*

A will takes effect and speaks as of the date of the testator's death. *Trust Co. v. McKee*, 260 N.C. 416, 132 S.E.2d 762 (1963). However, in ascertaining a testator's intent the will must be considered in the light of the conditions and circumstances existing at the time it was made. *Trust Co. v. Green*, 239 N.C. 612, 80 S.E.2d 771 (1954). Additionally, as to the identity of the devisee, a will is to be construed, nothing else appearing, in the light of circumstances known to the testator at the time of its actual execution. *Peele v. Finch*, 284 N.C. 375, 200 S.E.2d 635 (1973).

G.S. § 31-42, commonly known as the anti-lapse statute, provides in pertinent part:

> (a) Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a person as an individual or as a member of a class and the person dies survived by qualified issue before the testator dies, then the qualified issue of such deceased person that survive the testator shall represent the deceased person, and the entire interest that the deceased person would have taken had he survived the testator shall pass by substitution to his qualified issue . . . .

> (b) The term "qualified issue" as used in subsection (a) means issue of the deceased person who would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will.
>
> (c) If subsection (a) is not applicable and if a contrary intent is not indicated by the will:
>
> (1) Where a devise or legacy of any interest in property is void, is revoked, or lapses or which for any other reason fails to take effect, such a devise or legacy shall pass:
>
> a. Under the residuary clause . . . or
>
> b. As if the testator had died intestate with respect thereto when there is no such applicable residuary clause . . . .

Under the applicable provisions of the Intestate Succession act, if the intestate is not survived by children, lineal descendants, parents, or brothers and sisters, the estate should be divided equally between the number of surviving nieces and nephews. N.C. Gen. Stat. §§ 29-15 and 29-16.

An antilapse statute should be liberally interpreted "with a view to attainment of its beneficent objective." *In re Estate of Kerr*, 433 F.2d 479, 483 (1970). The use of the words "or survivors" signifies a clear intent that the survivors shall be determined as of the date of the testator's death "for the reason that no preceding estate is given and no other time is fixed for vesting the estate." *Hummell v. Hummell*, 241 N.C. 254, 255, 85 S.E.2d 144, 145 (1954). The court can only construe wills and is not allowed to make them for testators. *Id.* A testator who desires to prevent lapse must express such intent or provide for substitution of another devisee in language sufficiently clear to indicate what person or persons testator intended to substitute for the legatee dying in his lifetime; otherwise the anti-lapse statute applies. *In re Will of Hubner*, 106 N.C. App. 204, 416 S.E.2d 401, *disc. review denied*, 332 N.C. 148, 419 S.E.2d 572 (1992).

With these basic principals in mind, we review the disputed portions of the will in the present case. Because in this case both Harry Daniel and Wheeler Daniel left qualified issue to whom Testator's estate would pass pursuant to G.S. § 31-42, the critical determination is whether a contrary intent is indicated by the will. Our research has found no other North Carolina case construing a survivorship provision in a will where all of the beneficiaries predeceased the testator.

Thus, we have reviewed decisions in similar cases decided by courts in other jurisdictions.

In *In re Estate of Ulrikson*, 290 N.W.2d 757 (Minn. 1980), the testatrix left her residuary estate to her brother and sister, "share and share alike, and in the event that either one of them shall predecease me, then to the other surviving brother or sister." *Id.* at 759. Both testatrix's brother and sister predeceased her and the court held that the Minnesota anti-lapse statute applied to pass the estate in equal shares to the issue of testatrix's brother (her sister died without issue). In rejecting the argument that the testatrix intended to establish an absolute condition of survivorship the court held:

> It is far more likely, however, as respondents contend, that Bellida Ulrikson simply did not contemplate that both her younger brother and sister would predecease her. The residuary clause in fact contains no instructions for the circumstances which occurred. In this case, we hold the words of survivorship to be effective only if there are survivors. Since there are no survivors . . . the anti-lapse statute is free to operate.

Ulrikson, 290 N.W.2d at 759.

Similarly, in *In re Doorley's Will*, 137 Misc. 663, 664, 244 N.Y.S. 262, 263 (1930), a New York court was asked to construe the following provision in a will, "I give, devise and bequeath all my estate, both real and personal, to my sister . . . and my brother . . . share and share alike, and should either be not living at the time of my decease then I give the share of the one so dying to the survivor." The testatrix survived both beneficiaries. Her sister left one child and her brother left two. Also, another sister survived the testatrix, but was not mentioned in the will. The court held that:

> From a reading of the will, it is manifest that the testatrix intended that the sister who survived her should not take any share of her estate, and that she had no preference between the sister and the brother whom she named as beneficiaries. . . . To hold that intestacy resulted . . . would give the surviving sister one-third of the estate and contravene the wishes of the testatrix . . . . The word 'survivor' . . . was clearly intended by the testatrix to mean the beneficiary who was living at the time of her decease, provided the other was then dead. Its position relative to the other language used in the will permits no other reasonable interpretation. The death of both therefore annulled the provision for

> substitution in the contingency which the testatrix foresaw in the preparation of her will. There being no other beneficiary substituted by the testatrix, nor any provision made for the circumstances that did occur, the gift remained to the named beneficiaries and would lapse were it not for the statute. . . . [T]heir legacies and devises do not lapse but vest in their respective children.

Id. at 664-5, 244 N.Y.S. at 263-4.

In *Galloupe v. Blake*, 248 Mass. 196, 197, 142 N.E. 818, 819 (1924), the Massachusetts Supreme Court was asked to construe a will leaving $5,000 dollars "[t]o my [two] cousins . . . in equal shares . . . or the survivor of them." Both beneficiaries predeceased the testator but both left children. In examining whether the children of the cousin who died last, thereby surviving the other cousin, should take the entire amount of the bequest, or whether it was to be distributed among the children of each of the named legatees, the court held that:

> It is plain that it was the intention of the testator that . . . both legatees, if living at her decease, should divide the $5,000; but as one might predecease her, she provided in that contingency that the survivor should take the whole amount. . . . [T]here is nothing to indicate that, in the event of the death of both of these named legatees before the death of the testatrix, she intended to distinguish in the survivorship provision between the children of these legatees, or to give a preference to the children of either. She must have known that both legatees named might predecease her, and that each might leave children. . . . We are of opinion that it was her intention that, in the event of the death of both of these cousins before her decease, the children of each should take one half the entire amount.

Id. at 198-99, 142 N.E. at 819-20.

Finally, in *In the Matter of the Estate of Burns*, 78 S.D. 223, 227, 100 N.W.2d 399, 401-2 (1960), the testatrix left the residue of her property to her three sisters "share and share alike; and in case of the death of any said persons, that said rest and residue shall be divided equally between the survivors of said persons." All three sisters predeceased the testatrix but only one left lineal descendants. In applying the anti-lapse statute to award the entire estate to the lineal descendants of the one sister, the court noted that the statute is not applicable if it appears that at the time he executed the will, testator

intended to substitute another in place of the deceased devisee or if he used words indicating an intention that the named beneficiary shall take only if he outlives the testator. *Id.* However, "[t]he intent that the gift is effective only if the recipient outlives the testators, must also be clear before the statute is ousted, and if this is doubtful, it too must be resolved in favor of the operation of the statute." *Id.* at 229, 100 N.W.2d at 403. The *Burns* Court recognized the division of authority as to whether a gift to two or more beneficiaries or the survivor of them shows an intent to exclude operation of the anti-lapse statute if all beneficiaries predecease the testator, and under the circumstances adopted the position that:

> [T]he survivorship requirement is applicable only in the case where one survives; that the testator did not contemplate or provide for the case where neither survives, and that accordingly the statute is left to operate . . . . Since on this view the provision about survivorship virtually becomes nugatory in the event that has happened, it should make no difference which of the legatees died first.

Id. at 230, 100 N.W.2d at 403.

Plaintiff argues that the words of survivorship contained in the disputed portions of Testator's will indicate a contrary intent to the application of G.S. § 31-42(a) such that the estate must pass by intestacy. Plaintiff contends that the will demonstrates Testator's intent to benefit his brothers while they lived and that he was not thinking of his brothers' lineage to the exclusion of his other heirs. We disagree. In our view, and we so hold, Testator's inclusion of the language "or to the survivor" in the bequests to his brothers indicates merely that at the time he prepared his will, Testator did not contemplate that both of his brothers would predecease him. We find no clear intent on Testator's part that either brother outlive him in order for his gift to be effective. We must presume that Testator executed his will in contemplation of the statute and that he did not intend to die intestate with respect to any of his property. *See Misenheimer, supra; Betts v. Parrish,* 312 N.C. 47, 320 S.E.2d 662 (1984) (where will subject to two interpretations, the one favoring complete testacy should prevail). Had he intended the anti-lapse statute not to apply, he could have very easily shown such contrary intent, and it is not for this Court to do that for him. *See Burns, supra.*

Defendants Daniel agree with defendants Simpson that the "survivor" language in Testator's will does not indicate an intent by Testator that G.S. § 31-42 not apply to the bequests, so that the statute operates to prevent the property from passing by intestacy. However, defendants Daniel contend that such language refers to survival *inter esse* between brothers Wheeler and Harry, as opposed to survival of the Testator. Thus, they argue that the "survivor" language demonstrates Testator's intent to benefit the last surviving brother and requires that the entire estate accordingly go to the issue of Wheeler Daniel. They say that the fact that Testator did not change his will subsequent to the death of Harry, who died after Wheeler, supports this expression of intent. We disagree.

Had either Wheeler Daniel or Harry Daniel outlived Testator, the anti-lapse statute would clearly not be applicable and the surviving brother would have received the entire estate. *See Hummell, supra.* The survivorship language merely provides for an alternative disposition in the event that **either** Wheeler Daniel or Harry Daniel were to predecease Testator, not if both predeceased him. Clearly it was Testator's intention, at the time his will was written, that his estate go to his brothers equally and that if one predeceased Testator, he provided in the contingency that the survivor should take the entire estate. The language does not indicate, in the event of the death of both brothers before the death of the Testator, an intent by Testator to distinguish between the children of the brothers, or to give a preference to the children of either.

To conclude from the language of Items Three and Four of Testator's will that his intent was to favor the children of the brother who lived longest over the children of the brother who died first is, in our view, an impermissible rewriting of the will rather than a construction of what is contained within the four corners of the document. *See Hummell, supra.* It also ignores the requirements that the survivors must be determined as of the date of the maker's death, *Id.*, and that the testator's intention and the identity of devisees must be determined at the time the will was made. *Trust Co. v. Green, supra; Peele v. Finch, supra.* The only clear intent expressed by Testator's devise is that his sisters not take any share of his estate and that he had no preference between the brothers whom he named as beneficiaries.

At Testator's death, the time at which the will speaks and the survivors are determined, neither brother was living, and thus, but for the provisions of the anti-lapse statute, their gifts lapsed. *See Betts,*

supra; Hummell, supra. Because Testator did not express an intent in his will to negate the application of the statute, G.S. § 31-42(a) applies to prevent such a lapse and results in a distribution of half of Testator's estate to the defendants Simpson and the other half to defendants Daniel.

Accordingly the judgment of the trial court is reversed and this case is remanded for entry of judgment awarding one-half of Testator's estate to defendants Simpson and one-half of Testator's estate to defendants Daniel.

Reversed and Remanded.

Judges COZORT and ORR concur.

ARCHIE Y. BARNHARDT AND CARLENE F. BARNHARDT; WILLIAM E. HOWARD AND SARAH P. HOWARD; JAMES RONNIE SHERRILL AND SYLVIA MANN SHERRILL; CHARLES K. UMBERGER; AND THE HEIRS OF C. J. GOODMAN, DECEASED; PLAINTIFFS v. CITY OF KANNAPOLIS, A MUNICIPAL CORPORATION, DEFENDANT

No. 9319SC664

(Filed 6 September 1994)

1. Municipal Corporations § 96 (NCI4th)— involuntary annexation—notice of public hearing—form for requesting extension of water and sewer lines

A city was not required by N.C.G.S. § 160A-47(3)(b) to provide to owners of property being involuntarily annexed, as a part of the mailing of notice of the public hearing on annexation, a form for requesting the extension of water and sewer lines to their property or notice of their right to request such a form.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 55 et seq.

2. Municipal Corporations § 123 (NCI4th)— compliance with annexation statutes—challenge time barred

A claim by owners of involuntarily annexed property that defendant city was statutorily required, without request, to provide them with a form for the extension of water and sewer lines and notice that they could request such extensions was a chal-

lenge to the city's compliance with statutory annexation provisions and was barred by the 30-day limit set forth in N.C.G.S. § 160A-50(a) where the complaint was filed more than three years after the annexation ordinance was adopted and more than two years after its effective date.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 74 et seq.

Proper remedy or procedure for attacking legality of proceedings annexing territory to municipal corporation. 18 ALR2d 1255.

3. Municipal Corporations § 105 (NCI4th)— annexation—water and sewer services—disputed lines on maps

There was plenary evidence in the record to support the trial court's findings that disputed lines on proposed water and sewer maps in an annexation report did not represent water and sewer lines proposed for construction as a part of the plan for providing services upon annexation but were city boundary lines, and that the city thus did not fail to install water mains and sewer trunks in substantial conformity with maps it had prepared pursuant to N.C.G.S. § 160A-47(1)(b).

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 55 et seq.

Appeal by plaintiffs from judgment entered 4 March 1993 by Judge Howard R. Greeson, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 22 March 1994.

By Annexation Ordinance adopted 27 June 1988 and effective 30 June 1989, defendant City of Kannapolis annexed certain areas into its corporate limits. Plaintiffs, all of whom own property within the areas annexed, commenced this action on 29 August 1991, alleging that defendant had failed to provide municipal water and sewer services as required by its annexation plan and by statute. Plaintiffs sought (1) a writ of mandamus to require defendant to provides services, (2) tax relief, and (3) compensatory damages. Defendant denied the material allegations of the complaint and asserted, as an affirmative defense, plaintiffs' failure to timely file their claim. After a bench trial, the trial court made findings of fact, conclusions of law, and entered judgment in favor of defendant, dismissing plaintiffs' complaint. Plaintiffs appealed.

Law Offices of William L. Mills, III, by William L. Mills, III, and William G. Hamby, Jr., for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., and Rutledge, Friday, Safrit & Smith, by Walter M. Safrit, II, for defendant-appellee.

MARTIN, Judge.

Plaintiffs contend on appeal that the trial court erred in granting judgment in favor of defendant because (1) defendant was obligated but failed to provide plaintiffs with reasonable, timely notice that they had the right to require the extension of water and sewer lines to their involuntarily annexed properties, and because (2) defendant failed to install water mains and sewer trunks in substantial conformity with representations made on annexation maps prepared to comply with G.S. § 160A-47(1)(b). We affirm the judgment of the trial court.

Judicial review of an annexation ordinance is limited to determining whether the annexation proceedings substantially comply with the requirements of the applicable annexation statute. *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980). Absolute and literal compliance with the statute is unnecessary because it would result in defeating the purpose of the statute in situations where no one has been or could be misled. *In re Annexation Ordinance*, 278 N.C 641, 180 S.E.2d 851 (1971). Mere adverse effect upon financial interests of a property owner is not grounds for attacking annexation proceedings. *Cockrell v. City of Raleigh*, 306 N.C. 479, 293 S.E.2d 770 (1982). The party challenging the ordinance has the burden of showing error. *Knight v. City of Wilmington*, 73 N.C. App. 254, 326 S.E.2d 376 (1985). On appeal, the findings of fact made below are binding on the Court of Appeals if supported by the evidence, even when there may be evidence to the contrary. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E.2d 189 (1980). However, conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal. *Id.*

[1] Plaintiffs argue first that defendant failed to comply with G.S. § 160A-47(3)(b) which provides that:

> A municipality . . . shall make plans for the extension of services to the area proposed to be annexed and shall, prior to the public hearing provided for in G.S. 160A-49, prepare a report setting forth such plans . . . . The report shall include:

(3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:

. . .

b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed . . . according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions. If requested by the owner of an occupied dwelling unit or an operating commercial or industrial property in writing on a form provided by the municipality, which form acknowledges that such extension or extensions will be made according to the current financial policies of the municipality for making such extensions, and if such form is received by the city clerk not less than 30 days before adoption of the annexation ordinance, [such plans shall] provide for extension of water and sewer lines to the property or to a point on a public street or road right-of-way adjacent to the property according to the financial policies in effect in such municipality for extending water and sewer lines. If any such requests are timely made, the municipality shall at the time of adoption of the annexation ordinance amend its report and plan for services to reflect and accommodate such requests.

Plaintiffs contend that G.S. § 160A-47(3)(b) should be construed to require defendant to provide the form described therein as a part of the G.S. § 160A-49(b) mailing, which provides notice of the public hearing on the question of annexation.

The trial court made the following pertinent conclusions of law:

3. The City policy requiring property owners to pay for the cost of water and sewer line extensions from their property to major mains complies with the relevant provisions of N.C.G.S. § 160A-47 since the policy is the same as that which existed within the City prior to the annexation.

4. N.C.G.S. § 160A-47(3)(b) does not require the City to provide notice to the property owners that they may request a form providing for extension of lines to their property in accordance with the financial policies of the City. In the absence of a request the City is not required to provide forms to property owners to be

used to request extensions from their property to a major main in accordance with the City financial policies for such extensions. Further, a claim that the City failed to follow proper annexation procedures by not providing the plaintiffs with notice of entitlement to a form for extending water and sewer lines pursuant to City policies was barred by the provisions of N.C.G.S. § 160A-50(a) which requires actions contesting the annexation procedure to be brought within thirty (30) days of the passage of the annexation ordinance. Still, further, attacks on the annexation procedure based upon due process or equal protection claims are limited to claims of racial discrimination which do not exist here.

5. The failure of the City to provide the plaintiffs with notice of entitlement to a form, or a form, for requesting water or sewer extension in accordance with City policies has caused the plaintiffs no harm inasmuch as the plaintiffs' ability to extend lines to their property in accordance with the City policy for such extensions existed at the time of annexation and at all times thereafter, even today. The plaintiff[s] cannot be entitled to greater benefits by not having requested and filed a form than they would have received had they requested and filed a form. The Court is without authority to order the City to construct lines from the plaintiffs' property to the major water and sewer lines at the City's expense when the policy within the City at the time of annexation required such extensions to be made at the expense of the property owner.

A city must stand ready to provide services to newly annexed areas on substantially the same basis and in the same manner in which these services are provided to the rest of the city. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987); *Wallace v. Town of Chapel Hill*, 93 N.C. App. 422, 378 S.E.2d 225 (1989) (where plaintiffs offered no evidence from which the trial or appellate courts could ascertain that a twelve-inch water extension was a "major water main," and the policy requiring these petitioners to pay for the cost of water line extensions to their property was consistent with the policy of water line extensions within the pre-existing municipal limits, the trial court did not err in concluding that the town had substantially complied with all of the relevant provisions of G.S. § 160A-47).

G.S. § 160A-47(3)(b) requires, as a prerequisite to annexation, that the annexation plan provide for the extension of water and sewer lines to the annexed property "[i]f **requested** by the owner . . . in

writing on a form provided by the municipality, which form acknowledges that such extension . . . will be made **according to the current financial policies of the municipality for making such extensions** . . . ." (Emphasis added). However, the statute contains no requirement that the City provide such forms absent a request from a property owner. Moreover, G.S. § 160A-49, which specifically describes the "Procedure for annexation" and the information that is required to be provided to residents of an area to be annexed, does not require that the City furnish the form described in G.S. § 160A-47 without a request.

If statutory language is clear and unambiguous, judicial construction is unnecessary and the plain and definite meaning of the statute controls. *McGladrey, Hendrickson & Pullen v. Syntek Finance Corp.*, 330 N.C. 602, 411 S.E.2d 585 (1992). Courts are without authority to add provisions not contained in the statute. *State v. Camp*, 286 N.C. 148, 209 S.E.2d 754 (1974). Had the legislature intended to include a requirement that a municipality provide such forms to property owners absent a request, it could have done so. *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

[2] Furthermore, the trial court correctly concluded that to the extent plaintiffs claim that defendant did not follow the prerequisites to annexation prescribed by G.S. § 160A-47(3)(b), such claims are time barred. G.S. § 160A-50 provides in part:

> (a) Within 30 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to this property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.
>
> . . .
>
> (f) . . . The court may hear oral arguments and receive written briefs, and may take evidence intended to show either
>
> (1) That the statutory procedure was not followed, or
>
> (2) That the provisions of G.S. 160A-47 were not met, or
>
> (3) That the provisions of G.S. 160A-48 have not been met.

Plaintiffs' contention that G.S. § 160A-47(3)(b) required defendant to provide them with a form and notice that they could request sewer and water line extensions was a challenge to defendant's compliance with the provisions of G.S. § 160A-47 and was consequently time barred since the complaint in this action was not filed until more than three years after the annexation ordinance was adopted and more than two years after its effective date. Statutes of limitation are inflexible and unyielding and operate without regard to the merits of a cause of action. *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986).

As noted by the trial court, plaintiffs' due process or equal protection challenge to defendant's annexation procedures is specifically foreclosed. *Baldwin v. City of Winston-Salem*, 544 F.Supp. 123 (M.D.N.C. 1982), *affirmed*, 710 F.2d 132 (4th Cir.), *cert. denied*, 464 U.S. 1012, 78 L.Ed.2d 716 (1983). Attacks upon state annexation procedures which rest on due process or equal protection claims are confined to claims of alleged racial discrimination. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980). No such challenge is presented by the case before us.

[3] Plaintiffs' second contention on appeal is that defendant failed to install water mains and sewer trunks in substantial conformity with maps which it prepared pursuant to G.S. § 160A-47(1)(b). As part of the report required by G.S. § 160A-47, defendant prepared four maps including both a Proposed Sewer System Map and a Proposed Water System Map. The notice of public hearing on the proposed annexation stated that a copy of the maps and Annexation Report would be available for public inspection at the office of the City Clerk for at least thirty days before the public hearing. The legend on the maps indicates that the designations for both the proposed water mains and sewer lines is a solid line. Plaintiffs argue that both maps show water and sewer lines proposed for construction along U.S. Highway 29, between a bridge or culvert south of Mt. Olivet Road and the south bound access ramp to Interstate Highway 85, and that defendant has failed to install the lines.

Defendant offered evidence tending to show that the lines on the maps to which plaintiffs refer do not represent proposed water and sewer lines but were, in fact, simply the city boundary lines. Defendant's evidence was to the effect that when the draftsman placed the city's boundary line on the maps in the center of U.S. 29, the bound-

ary lines for U.S. 29 and the boundary line for the city coincided to form a solid line at the point in question.

The trial court found, *inter alia*:

8. The four annexation maps were prepared by using a base map of the City which had existed for several years . . . . The base map from which the others were prepared showed the City limits in the middle of U.S. 29 at the U.S. 29 point in question causing it to be a solid line. That solid line was on the base map from which the others were prepared, and was also on each of the four maps referred to herein, including the maps that contained no water or sewer mains.

9 . . . . The solid lines which the City intended to represent new water lines have a number beside them representing the size of the proposed water line, but the solid line at the U.S. 29 point in question has no number designating a size.

10 . . . . Each of the solid lines intended to be a new sewer line has a number beside it designating the size of the line, but there is no size by the solid line formed by the City limits boundary being placed in the middle of U.S. 29 at the U.S. 29 point in question.

. . .

13. No plaintiff ever made an inquiry of any City official as to whether the solid line represented by the City boundary being drawn between the lines representing U.S. 29 at the U.S. 29 point in question, and appearing on all four maps . . . , and showing no size (when the other water and sewer lines on the water and sewer maps showed a size) constituted a proposed water and sewer line.

14. The Annexation Area Services Plan portion of the Annexation Report contains a section on water and sewer services and shows . . . the plan for service to annexed areas . . . and an estimate for Phase I construction costs . . . for new water line construction to be zero, and the estimated sewer line cost to be $134,400. The plan for service to annexed areas provides that "the City does not immediately plan to duplicate or assume service responsibility for those areas presently served by others," and thus the Annexation Report shows no planned expenditures for new major water mains. The planned expenditures for new major sewer lines in Annexation Area E have been spent, but no funds were intended

or have been spent for new water mains to duplicate existing mains.

15. The City never intended the solid line caused by the City boundary being in the center of U.S. 29 at the U.S. 29 point in question to be a major water or sewer main because: no engineering plans to provide a water or sewer line at that point were ever prepared; no money was placed in the annexation plan for the cost of a water or sewer line at that point; the placing of a major water main at the U.S. 29 point in question would constitute placing two major water mains adjacent to one another; no designation of a line size was placed by that solid line on either the proposed water or proposed sewer maps; a line in the center of U.S. 29 at the U.S. 29 point in question would be a considerable cost to the City, would not serve anyone, and would not be feasible as it would not be a reasonable means of serving anyone. Major mains are already available to plaintiffs' properties; construction at that point is impractical from a construction standpoint; and, the City would have to seek state approval in order to put a water or sewer main in the center of U.S. 29 at the U.S. 29 point in question and never sought such approval (getting approval would be extremely unlikely and probably impossible). Further, substantially all the property on the west side of the road is a cemetery and all the property on the east side of the road is already served by water and sewer lines.

16. Neither a water or sewer line at the U.S. 29 point in question would benefit the plaintiffs' property unless the plaintiffs are willing to construct at their own expense lines to get from their property to such lines at the U.S. 29 point in question, and the plaintiffs have not indicated a willingness to do so . . . .

. . .

19. Plaintiff Howard appeared at the annexation public hearing and advised that he opposed it since a pumping station would be needed to get service from his property to any major water or sewer main. Mr. Howard did not review the Land Use map or the Annexation Areas map, and did not take note of the fact that a number appeared by the proposed water and sewer lines on the proposed water and sewer maps representing a line size whereas no such numbers appeared by the solid line created by placing the City limits line in the center of U.S. 29 at the U.S. 29 point in question. Also, he did not review the Service Plan which showed

that the City did not intend to duplicate existing services and thus did not intend to add any new water mains at the U.S. 29 point in question as demonstrated by the fact that no funds were included for such a water main. He did not make any inquiry as to whether the solid line formed by the U.S. 29 lines and the city limits line merging constituted water or sewer lines. He did not consider the solid line at the U.S. 29 point in question to be both water and sewer but only sewer, even though it was the same on both the water and sewer map.

20. Plaintiff Barnhardt did not review the Service Plan or any of the annexation maps or attend the public hearing on annexation. Mr. Barnhardt did not even own property within Annexation Area E at the time of the annexation. Mr. Barnhardt did not request a form showing a desire to have water and sewer extensions to his street in accordance with City policies.

21. No testimony was offered by any plaintiff other than Mr. Howard and Mr. Barnhardt.

22. Many citizens within the limits of Kannapolis did not have water or sewer in the street in front of their property at the time of the annexation of Area E.

23. Area E was treated the same, insofar as water and sewer policy is concerned, as the area within the city limits prior to annexation. The same policies applied.

24. The City has provided all services called for in the Annexation Report.

The trial court made the following conclusion of law applicable to the issue:

2. The plaintiffs have failed to carry the burden of proving that the solid line formed by the merger of the City boundary of U.S. 29 at the U.S. 29 point in question was intended as a major water or sewer main in the annexation plans, or that the plaintiffs would be injured if a major water or sewer main were not constructed at the U.S. 29 point in question.

While plaintiffs direct us to evidence which might support contrary findings, there was plenary evidence in the record to support the trial court's findings that the disputed lines did not represent water and sewer lines proposed for construction as a part of the plan for providing services upon annexation. It is well established that where

the trial court sits without a jury, the court's findings of fact are conclusive if supported by competent evidence, even though other evidence might sustain contrary findings. *In re Estate of Trogdon*, 330 N.C. 143, 409 S.E.2d 897 (1991).

The judgment of the trial court is affirmed.

Affirmed.

Judges EAGLES and McCRODDEN concur.

STATE OF NORTH CAROLINA v. NATHANIEL WILLIAMS

No. 9312SC985

(Filed 6 September 1994)

1. Searches and Seizures § 48 (NCI4th)— warrantless search of crime scene—seized evidence admissible

In a prosecution for second-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in admitting evidence seized from defendant's residence, where the crimes occurred, pursuant to an emergency warrantless search which closely followed an initial sweep by the first responding officers.

Am Jur 2d, Searches and Seizures §§ 174-179.

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search. 19 ALR3d 727.

2. Criminal Law § 767 (NCI4th); Homicide § 678 (NCI4th)— assault with deadly weapon—defendant's diminished capacity—refusal to instruct error

The trial court erred by denying defendant's request to instruct the jury to consider the principle of diminished capacity in evaluating the charge of assault with a deadly weapon with intent to kill inflicting serious injury, since experts testified that defendant was incapable of forming the specific intent to kill, and defendant specifically requested such instruction; however, the

court did not err in denying defendant's request to instruct the jury to consider the principle of diminished capacity with respect to the element of malice in second-degree murder.

Am Jur 2d, Homicide § 516; Trial §§ 1270 et seq.

3. **Criminal Law § 1171 (NCI4th)— drugs found at crime scene—aggravating sentencing factor**

The trial court in a prosecution for second-degree murder and assault with a deadly weapon did not err by considering the unusually large amount of drug contraband found at the crime scene as an aggravating factor in sentencing defendant.

Am Jur 2d, Criminal Law §§ 598, 599.

4. **Criminal Law § 1189 (NCI4th)— aggravation of sentence— evidence supporting joined offense—consideration error**

The trial court erred in using evidence supporting a joined offense in aggravation of defendant's consolidated sentence.

Am Jur 2d, Criminal Law §§ 598, 599.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2D 768.

5. **Criminal Law § 1067 (NCI4th)— sentencing proceeding— consideration of victim impact statements not error**

The trial court did not commit reversible error by allowing victim impact statements as to sentence.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment signed 2 May 1993 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 7 June 1994.

On 1 February 1993, defendant was tried and convicted of second-degree murder (G.S. 14-17) and assault with a deadly weapon with intent to kill inflicting serious injury (G.S. 14-32(a)). The trial court consolidated the charges for judgment and sentenced defendant to a thirty-five year prison term.

The State's evidence tended to show the following: On 11 October 1988, two Fayetteville Police Department officers responded to an emergency call at 3:39 p.m. directing them to defendant's residence.

The officers found defendant pacing in the front yard and victim Steven Montgomery lying wounded in the doorway of the residence. Defendant told the officers that a man had shot his wife and was fleeing through the woods.

The officers radioed for emergency personnel and then entered the residence to check for other victims or suspects. They found the defendant's wife lying dead on a couch, with a gunshot wound above her left ear. The two officers then quickly conducted a sweep of the residence. Near the kitchen, they found a small pistol leaning against a wall. In the den where defendant's wife's body had been found, the officers found spent ammunition casings and a white, rock-like substance on top of a stereo. The initial responding officers then left the house but secured it against intruders. No one was allowed to enter the residence until the Police Department investigators arrived about fifteen minutes after the first two officers arrived. The investigators entered the house and continued to search the premises. They (the investigators) observed the items seen by the first two officers and in addition observed the following: an empty gun holster; a used condom on the floor; a bag containing 5.2 grams of heroin, victim Steven Montgomery's identification, and clothing; a denim jacket draped over a bag containing 8.2 grams of heroin; a live bullet; an ammunition clip; and a bullet hole in the wall. Two police identification officers made a videotape, took pictures, drew diagrams, and collected the evidence discovered by the other officers. Later, officers returned for another search after obtaining the consent of the defendant. All searches of defendant's residence were conducted without a search warrant.

Regarding defendant's mental state at the time of the murder, a psychiatrist from Dorothea Dix testified that defendant's actions on the day of the murder, as well as his medical examinations, produced no "findings that would indicate he (defendant) did not know that his alleged actions would be wrongful, or that he did not know the nature of his actions." The doctor did find that the defendant suffers from a mental illness he described as a mixed personality disorder with "narcissistic, histrionic features, as well as paranoid features."

Defendant's evidence did not contradict the State's evidence except regarding defendant's mental condition. Defendant's evidence tended to show the following: Defendant suffers from right brain damage resulting in impaired nonverbal skills including problem-solving ability, reasoning, and judgment. The brain damage could

have resulted from a car wreck, two army parachuting accidents, or a chemical imbalance in defendant's brain. In addition, defendant suffers from a bipolar (manic-depressive) disorder. Defendant's medical experts testified that as a result of his mental dysfunctions, defendant did not have the ability to form the specific intent to kill on the day of the shootings.

Following a hearing, the trial judge ruled on 15 November 1990 that defendant did not "knowingly, voluntarily, and understandingly" consent to the allegedly consensual search. Accordingly, the trial court suppressed evidence seized pursuant to the last search. However, the court allowed all evidence obtained during the earlier searches, concluding that "the officers had a legal right to sweep the premises and seize anything in plain view . . . ."

Attorney General Michael F. Easley, by Assistant Attorney General David M. Parker and Associate Attorney General Thomas O. Lawton, III, for the State.

Public Defender Malcolm Ray Hunter, Jr., by Assistant Public Defender Benjamin Sendor, for the defendant-appellant.

EAGLES, Judge.

Defendant brings forward five assignments of error. After careful consideration, we find no error in the admission of evidence seized pursuant to an emergency warrantless search which closely followed an initial sweep by the first responding officers. We also find no error in: 1) refusing to instruct the jury to consider diminished capacity in evaluating malice, 2) aggravating defendant's sentence because of the large quantity of drugs found at the crime scene, and 3) admitting victim impact statements as to sentence. We find the trial court erred in: 1) refusing to instruct the jury to consider defendant's diminished capacity in evaluating the specific intent element of assault with a deadly weapon with intent to kill inflicting serious injury and 2) using evidence supporting a joined offense in aggravation of defendant's consolidated sentence. Accordingly, we reverse and remand for a new trial on the charge of assault with a deadly weapon with intent to kill inflicting serious injury and we vacate the sentence and remand for resentencing on the second degree murder conviction.

I. Propriety of Warrantless Search

[1] Defendant contends that the trial court erred in allowing the admission of evidence seized by law enforcement officers pursuant to

warrantless searches of defendant's residence. Defendant argues that the searches violate his constitutional protection against unreasonable search and seizure. We disagree.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. *See also* N.C. Const. Art. I, § 19. Decisions of the United States Supreme Court require that the police obtain a search warrant before searching a home "subject only to a few specifically established and well delineated exceptions." *Thompson v. Louisiana*, 469 U.S. 17, 19-20, 83 L.Ed.2d 246, 250 (1984), *quoting Katz v. United States*, 389 U.S. 347, 357, 19 L.Ed.2d 576, 585 (1967). In creating exceptions to the general rule, the Court must consider the "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Mincey v. Arizona*, 437 U.S. 385, 406, 57 L.Ed.2d 290, 309 (1978) (Rehnquist, J., *concurring*) *quoting United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 45 L.Ed.2d 607, 615 (1975).

In *Mincey v. Arizona, supra*, the United States Supreme Court refused to create a blanket "murder scene exception" to the general rule requiring a search warrant. However, the Court reaffirmed the right of police to conduct a warrantless search and seizure when an emergency exists. The *Mincey* Court stated:

> We do not question the right of police to respond to emergency situations . . . . The Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises . . . . And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities.

Id. at 392-93, 57 L.Ed. at 300 (1978) (*citations omitted*).

In *Thompson v. Louisiana, supra*, the U.S. Supreme Court, citing *Mincey, supra*, reversed the Louisiana Supreme Court. The Louisiana Court had unsuccessfully attempted to distinguish *Thompson* from *Mincey* by noting that *Mincey* involved a four day search of the premises, while the search in Thompson began thirty-five minutes after the defendant was taken from her home and only lasted for two

hours. The U.S Supreme Court held that the later warrantless search in *Thompson* was not justified by emergency circumstances.

Unlike *Thompson*, the investigators here quickly responded to the dispatcher's call and arrived within fifteen minutes after the initial responding officers first reached the scene. During the time it took the investigators to arrive, the initial responding officers: 1) encountered the defendant in the front yard and a wounded victim on the front porch, 2) entered the house and conducted a thirty second inspection during which they found a deceased second victim in the den, and 3) secured the scene against intruders. The investigators arrived shortly after the initial thirty second sweep by the first responding officers. Responding to the ongoing emergency, the investigators conducted a more complete search of the premises which could have revealed additional victims or hiding suspects. In contrast to the ongoing police response here, the investigators in *Thompson* arrived thirty-five minutes after the first officers on the scene had already searched the home, secured the scene, and sent the defendant to the hospital.

We hold that the law enforcement officers' actions here comply with *Mincey* and *Thompson* which allow warrantless searches in emergency circumstances to determine if there are other victims or suspects still on the premises. To hold otherwise would result in a rule that once any law enforcement officer makes an initial sweep through a home no matter how hurried or brief it may be, no other officers may search the home until a search warrant is obtained. Such a rule ignores the fact that the first responding officers making a quick initial search of a home may overlook a victim or suspect located in less obvious places.

During the course of their emergency activities, law enforcement officers may seize evidence in "plain view." *Mincey v. Arizona*, 437 U.S. at 392-93, 57 L.Ed. at 300. Here, all of the seized evidence was in plain view during the ongoing emergency activities conducted by the law enforcement officers. It is irrelevant that some of the items seized were not noticed by the initial responding officers since all of the law enforcement officers acted pursuant to an emergency. Accordingly, this assignment of error fails.

II. Jury Instructions

[2] A. Defendant next contends that the trial court erred by denying his request to instruct the jury to consider the principle of diminished

capacity in evaluating the charge of assault with a deadly weapon with intent to kill inflicting serious injury (G.S. 14-32). We agree.

Defendant requested the following instruction:

> In order to convict the defendant of Assault with a Deadly Weapon With Intent to Kill Inflicting Serious Injury, the State is required to prove to the jury from the evidence beyond a reasonable doubt that the defendant unlawfully assaulted Steven Montgomery and that he did so in execution of an actual, specific intent to kill.
>
> Thus, before the jury may find the defendant guilty of Assault with a Deadly Weapon With Intent to Kill Inflicting Serious Injury, it must first find whether the State has proved beyond a reasonable doubt that Nathaniel Williams was, first, capable of forming a specific intent to kill and, second, did form the specific intent to kill within the meaning of our law. The jury must consider, in determining the answer to these two questions, the evidence of the defendant with regard to his mental condition at the time of the alleged offense. In other words, the defendant's evidence with regard to his mental condition is a circumstance which must be considered in determining whether or not the State has proved beyond a reasonable doubt that Nathaniel Williams was (1) capable of forming the specific intent to kill and (2) did form the specific intent to kill Steven Montgomery.

The defense of diminished capacity applies to the element of specific intent to kill which is an essential element of assault with a deadly weapon with intent to kill inflicting serious injury. *State v. Daniel*, 333 N.C. 756, 429 S.E.2d 724 (1993). Our Supreme Court held in *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988), that the trial court committed reversible error in refusing to instruct the jury to consider the defendant's mental condition in connection with his ability to form a specific intent to kill. Instead, the trial judge gave the pattern instruction which explains intent as a state of mind or mental attitude which may be inferred from surrounding circumstances rather than by direct evidence. In ordering a new trial, the *Rose* Court stated:

> [T]he trial court properly allowed . . . testimony that . . . defendant could not form the specific intent to kill . . . . Defendant was entitled to have the jury consider this testimony in determining whether he in fact premeditated and deliberated the murder of the two victims. It follows, therefore, that since the testimony

was before the jury, defendant was entitled to a jury instruction on this element of the crimes. See N.C.G.S. 15A-1232 (1987).

Id. at 458, 373 S.E.2d at 428 (1988).

Here, as in *Rose*, experts testified that defendant was incapable of forming the specific intent to kill. The trial court then refused to instruct the jury that it should consider defendant's mental condition in determining whether he formed the specific intent to kill. Instead, the trial court gave the pattern jury instruction which defined intent to kill in the same way as the *Rose* trial court instructed the jury. Accordingly, we hold the trial court erred in failing to instruct the jury that it should consider the defendant's mental condition in determining whether he formed the specific intent to kill.

The State argues that flaws in defendant's proposed instruction relieved the trial court of the obligation to instruct the jury on diminished capacity. Specifically, the State objects to the use of the word "must" in the proposed instruction. The State's argument is unpersuasive. A trial judge is not obliged to choose between using a jury instruction exactly as proposed or not at all. A judge is only required to instruct the jury in "substantial conformity to the requested instruction" when the proposed instruction is supported by the evidence. *Id.*

Because defendant's state of mind was a crucial issue in the charge of assault with a deadly weapon with intent to kill inflicting serious injury, a reasonable possibility exists that absent the error the jury would have reached a different result. G.S. 15A-1443(a); *see State v. Rose*, *supra*. Accordingly defendant is entitled to a new trial on the charge of assault with a deadly weapon with intent to kill inflicting serious injury.

B. Defendant next argues that the trial court erred by denying his request to instruct the jury to consider the principle of diminished capacity with respect to the element of malice in second degree murder (G.S. 14-32). We disagree. In the single case cited, *State v. Holder*, 331 N.C. 462, 418 S.E.2d 197 (1992), the Court focused on the adequacy of the jury instruction regarding the impact of defendant's mental state on his ability to form a specific intent to kill and to premeditate, but did not discuss the need for an instruction on the defendant's mental state and the existence of malice. Accordingly, this assignment of error fails.

III. Sentencing

[3] A. Defendant next argues that the trial court erred by considering the unusually large amount of drug contraband found at the crime scene as an aggravating factor in sentencing defendant. We disagree.

An aggravating factor exists when the "offense involved an unusually large quantity of contraband." G.S. 15A-1340.4(a)(1)(m). As this Court has noted, "the trial court must consider all circumstances that are both transactionally related to the offense and reasonably related to the purpose of sentencing . . . ." *State v. Flowe*, 107 N.C. App. 468, 472, 420 S.E.2d 475, 477-78 (1992) (*citations omitted*) (*emphasis added*). Defendant's own witness established that defendant and victim Steven Montgomery bagged up heroin at a motel in Wilmington, North Carolina, before returning to Fayetteville on the morning of the day of the shootings. The victim Montgomery's suitcase containing 5.2 grams of heroin was found in defendant's living room. Another 8.2 grams of heroin was found in a bag under a jacket. We hold this evidence meets the statutory criteria that defendant's offenses "involved an unusually large quantity of contraband." Accordingly, this assignment of error fails.

[4] B. Defendant also argues that the trial court erred in finding his "course of conduct" a nonstatutory aggravating factor. The State concedes that the trial court erred. We agree. The trial court stated:

> [T]he offenses for which the defendant stands convicted was [sic] part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against other person or persons.

A sentencing judge may not use a joined or joinable offense in aggravation. *State v. Rose*, *supra*; *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985); *State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984). *See* G.S. 15A-1340.4(a)(1)(o) (1983). This prohibition applies to both convictions for joined offenses and to the acts which form the substance of those joined offenses. *State v. Hayes*, 323 N.C. 306, 372 S.E.2d 704 (1988). Our Supreme Court explained in *Hayes:*

> [T]he trial judge did not explicitly use defendant's convictions as aggravating factors. Rather he relied on defendant's murderous course of conduct in committing the offenses that support the convictions . . . . Whatever name is given to it, the effect of the trial judge's action was to use defendant's contemporaneous

convictions of joined offenses as an aggravating factor in violation of *Lattimore*.

Id., 323 N.C. at 314, 372 S.E.2d at 709, *quoting State v. Westmoreland*, 314 N.C. at 449, 334 S.E.2d at 228. Accordingly, defendant must be resentenced.

IV.

[5] Finally, defendant contends that the trial court erred by allowing prosecution witnesses who are members of the victim's family to advocate regarding the length of sentence which defendant should receive. We find no reversible error. While receiving victim impact statements advocating a sentence is "a practice not to be encouraged," this Court has held that the practice does not constitute reversible error. *State v. Jackson*, 91 N.C. App. 124, 125, 370 S.E.2d 687, 688 (1988). Accordingly, this assignment of error fails.

V.

For the reasons stated, we hold defendant is entitled to a new trial on the charge of assault with a deadly weapon with intent to kill inflicting serious injury on Steven Montgomery and a new sentencing hearing for the second-degree murder of Loretta Williams.

No error in part; vacated and remanded for resentencing in part; new trial in part.

Judges COZORT and LEWIS concur.

NANCY CRAVEN ALLEN, DAUGHTER, BRENDA SIMBER, GUARDIAN AD LITEM FOR WILLIAM SCOTT CRAVEN, MINOR SON, OF WILLIAM PEARL CRAVEN, DECEASED, EMPLOYEE-PLAINTIFF v. PIEDMONT TRANSPORT SERVICES, INC. OF NORTH CAROLINA D/B/A TRANSPERSONNEL/MANPOWER TEMPORARIES, EMPLOYER, AETNA CASUALTY & SURETY COMPANY, CARRIERS-DEFENDANTS

No. 9310IC187

(Filed 6 September 1994)

Workers' Compensation § 273 (NCI4th)— minor child of decedent—entitlement to entire compensation—adult child entitled to no compensation

The Industrial Commission did not err in finding and concluding that the only minor child of the decedent at the time of his

work-related death was entitled to receive the entire compensation payable under N.C.G.S. § 97-38, even after the minor child turned 18, to the exclusion of an adult child of the decedent. N.C.G.S. § 97-40.

Am Jur 2d, Workers' Compensation §§ 207 et seq.

Appeal by plaintiff Nancy Craven Allen from Opinion and Award of the North Carolina Industrial Commission entered 19 November 1992. Heard in the Court of Appeals 4 January 1994.

Coleman, Gledhill & Hargrave, by Kim K. Steffan, for plaintiff appellant Nancy Craven Allen.

Charles N. Stedman, for plaintiff appellee Brenda Simber, guardian ad litem for William Scott Craven.

COZORT, Judge.

William P. Craven died as a result of a work-related injury. The Industrial Commission ordered that all of the workers' compensation death benefits would go to Mr. Craven's minor son Scott, age 14, and none to Mr. Craven's adult daughter Nancy, age 25. We affirm. The procedural history follows. Appellant Nancy Craven Allen, adult daughter of the deceased, filed a Request that Claim Be Assigned for Hearing before a Deputy Commissioner (Form 33) on 9 April 1991. On 20 April 1991, Aetna Life & Casualty Company filed a Form 33R stating that the parties were unable to agree on the person or persons entitled to receive death benefits under the Workers' Compensation Act. The case came on for hearing before Deputy Commissioner W. Joey Barnes on 2 December 1991. The parties stipulated that the decedent, William P. Craven, suffered an injury by accident on 5 March 1991 while working for defendant-employer and that at the time of the injury defendant-employer and decedent were subject to the Workers' Compensation Act. The only issue before the Commission at the hearing was what, if any, workers' compensation death benefits were decedent's surviving children, Nancy Michelle Craven (now Nancy Craven Allen) and William Scott Craven (Scott), eligible for under N.C. Gen. Stat. § 97-38(1) (1991). At the time of decedent's death, Scott was 14 years old and Nancy was 25 years old. In an Opinion and Award entered 27 January 1992, the Deputy Commissioner found, pursuant to N.C. Gen. Stat. §§ 97-2(12), -38, -39, that Scott was the only minor child of the decedent at the time of his death and,

being wholly dependent upon the decedent, was entitled to receive the entire workers' compensation death benefits.

On 30 January 1992, plaintiff Nancy Craven Allen filed a Notice of Appeal to the Full Commission, which heard the appeal on 19 November 1992. On 19 November 1992 the Full Commission entered an Opinion and Award which affirmed the Deputy Commissioner's award. Plaintiff Nancy Craven Allen appeals.

Appellant contends that the Industrial Commission erred in finding and concluding that Scott, the only minor child of the decedent at the time of his death, was entitled to receive the entire compensation payable under § 97-38, even after Scott turns 18 years of age. Specifically, appellant contends that, as a matter of law under the Workers' Compensation Act, she is entitled to share in the death benefits after Scott turns age 18.

"On appeal from an order of the Industrial Commission, [our] jurisdiction . . . is limited to the questions of law, whether there was competent evidence before the commission to support its findings of fact and whether such findings justify the legal conclusions and decision of the commission." *Gaines v. L.D. Swain & Son, Inc.*, 33 N.C. App. 575, 578, 235 S.E.2d 856, 859 (1977) (citations omitted). We find the evidence presented at the hearing was sufficient to support the Commission's findings of fact, that such findings justify the legal conclusions and decision of the Commission, and that the Commission made no error of law.

N.C. Gen. Stat. § 97-38, which provides for payment of death benefits for dependents of an employee whose death proximately results from compensable injury or occupational disease, provides in pertinent part:

> If death results proximately from a compensable injury . . . the employer shall pay or cause to be paid . . . weekly payments of compensation equal to . . . (66 2/3%) of the average weekly wages of the deceased employee at the time of the accident . . . and burial expenses not exceeding . . . ($2,000), to the person or persons entitled thereto as follows:
>
> (1) *Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be*

> *only one person wholly dependent, then that person shall receive the entire compensation payable.*
>
> * * * *
>
> . . . Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period . . . compensation payments due a dependent child shall be continued until such child reaches the age of 18.

N.C. Gen. Stat. § 97-38 (1991) (emphasis added).

N.C. Gen. Stat. § 97-39 provides that "a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee." N.C. Gen. Stat. § 97-2(12) (Cum. Supp. 1993) defines "child" to "include only persons who at the time of the death of the deceased employee are under 18 years of age." Where there are no persons wholly dependent, "then any person partially dependent for support upon the earnings of the deceased employee at the time of the accident" receives the weekly payments under § 97-38(2).

Thus Scott, the only minor child at the time of decedent's death, was conclusively presumed wholly dependent upon the decedent for support under § 97-39 and thus entitled to all of the compensation payable under § 97-38. Appellant, who was 25 at the time of decedent's death, was not entitled to any compensation under § 97-38. Scott will continue receiving payments after he reaches age 18 because he will turn 18 before the 400-week period expires.

Where the deceased employee leaves no persons wholly or partially dependent, § 97-40 provides that "the compensation which would be payable under G.S. 97-38 to whole dependents shall be commuted to its present value and paid in a lump sum to the next of kin as herein defined." " '[N]ext of kin' . . . include[s] . . . adult children . . of the deceased . . . ." N.C. Gen. Stat. § 97-40. The order of priority among such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under § 97-40 is "governed by the general law applicable to the distribution of the personal estate of persons dying intestate." *Id.*

Appellant observes that, if both plaintiffs in this case were over age 18 at the time of decedent's death, they would be entitled to share the benefits equally as next of kin under § 97-40 and N.C. Gen. Stat. § 29-16(a)(1) (1984), which provides that children of the deceased

take in equal shares. Appellant argues that, when Scott turns 18 during the initial 400-week death benefit period, the remaining portion of the death benefit should be divided equally between the two children, since they are both next of kin under § 97-40 and since there is no longer any wholly dependent beneficiary under § 97-38. We disagree with appellant's construction of §§ 97-38, -40.

In interpreting the statutory provisions of North Carolina's workers' compensation law, we are guided by the following rules of statutory construction:

> First, the Workers' 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. Second, *such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of "judicial legislation."* . . . Third, it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid "ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced." Fourth, in all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole—its language, purposes and spirit. Fifth, and finally, the Industrial Commission's legal interpretation of a particular provision is persuasive, although not binding, and should be accorded some weight on appeal and not idly cast aside, since that administrative body hears and decides all questions arising under the Act in the first instance.

Deese v. Lawn and Tree Expert Co., 306 N.C. 275, 277-78, 293 S.E.2d 140, 142-43 (1982) (citations omitted) (emphasis added).

The express language of § 97-38 fixes the rights and liabilities at the time of the employee's death, providing that where there is only one wholly dependent person at the time of decedent's death, *all* of the death benefits be paid to that person. Section 97-40 applies only where the deceased employee leaves no surviving whole or partial dependents. In *Chinault v. Pike Electrical Contractors*, 53 N.C. App. 604, 606-07, 281 S.E.2d 460, 462 (1981), *aff'd*, 306 N.C. 286, 293 S.E.2d 147 (1982), the court noted that "the General Assembly intended to fix

each recipient's share at the date of the decedent's death" and that "[a]ny anomaly in the statute is for the General Assembly and not [this Court] to resolve." Thus, we cannot construe the statute to divide benefits among claimants who were adult children at the time of decedent's death and the sole wholly dependent beneficiary when the latter turns 18 during the initial 400-week period.

Appellant contends that *Deese*, 306 N.C. 275, 293 S.E.2d 140, and its companion case, *Chinault*, 306 N.C. 286, 293 S.E.2d 147, support the idea of apportionment where the wholly dependent beneficiary pool, as here, decreases during the initial 400 weeks from one to zero. Both cases, unlike the case at bar, dealt with the question of distributing death benefits after the initial 400 weeks, in cases where dependency continues. In discussion, the Court notes the following about cases arising during the initial 400 weeks:

> [I]f there is a decrease in the dependent beneficiary pool *during* the 400 weeks following the employee's death, there must be a corresponding reapportionment of the full award payable for that set period among the remaining eligible members of the pool. . . . *That, we hold, is the only situation in which there will be an increase in the amount of the individual shares paid to the dependents still partaking of the compensation fund.*

Deese, 306 N.C. at 279-80, 293 S.E.2d at 144 (emphasis added). Applying this reasoning to the case at bar, appellant argues that when Scott turns 18, the wholly dependent beneficiary pool decreases from one to zero, putting the case squarely within N.C. Gen. Stat. § 97-40, which requires that next of kin shall divide the death benefit equally. We disagree. The *Deese* ruling would allow a reapportionment of the full award among dependents still partaking of the compensation fund only where there is a decrease in the dependent beneficiary pool. In this case, Scott, being the only person wholly dependent, was entitled under § 97-38(1) to receive the entire compensation payable. Because we cannot deviate from the express language of § 97-38(1), we cannot extend the reasoning of *Deese* to this case.

Lastly, appellant contends that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and its counterpart in the Constitution of North Carolina require reading §§ 97-39, -40 in a way that treats Nancy and Scott equally once they are both independent, adult children. We disagree.

In *Carpenter v. Tony E. Hawley Contractors*, 53 N.C. App. 715, 721-22, 281 S.E.2d 783, 787, *disc. review denied*, 304 N.C. 587, 289 S.E.2d 564 (1981), this Court rejected plaintiff's argument that N.C. Gen. Stat. § 97-38, which awards full compensation to a wholly dependent person and denies compensation to plaintiff as a partially dependent person, violates the equal protection clauses of the United States and North Carolina Constitutions. We stated that "[t]o withstand an equal protection claim, a legislative classification must be reasonable, must not be arbitrary, and must rest on some ground of difference having a fair and substantial relationship to the object of the legislation." *Carpenter*, 53 N.C. App. at 721-22, 281 S.E.2d at 787 (citing *Association of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 705, 195 S.E.2d 357, 360 (1973)). "This is to insure that all persons similarly circumstanced shall be treated alike." *Id.* We noted that "[o]ne of the primary purposes of the [Workers' Compensation] Act is to grant certain and speedy relief to injured employees, or in the case of death, to their dependents," and we found "that it is reasonable to provide that those persons wholly dependent upon the decedent for support are entitled to the payments provided for in the Act to the exclusion of those who have another, albeit partial, source of support, and that this difference has a fair and substantial relation to the object of the legislation." *Id.* at 722, 281 S.E.2d at 787 (citation omitted).

Appellant argues that an application of the test set forth in *Carpenter* leads one to conclude that the statute as interpreted by the Full Commission violates the federal Equal Protection Clause and its North Carolina counterpart because there is no reasonable basis for distinguishing between two independent adult children, and such a distinction bears no fair or substantial relationship to any purpose of the Act. We disagree. By providing in § 97-38(1) that the sole wholly dependent person receive the entire compensation payable, the Legislature furthered one of the primary purposes of the Act—to grant certain and speedy relief to injured employees, or in the case of death, to their dependents. Thus, we find that it is reasonable to provide that the sole wholly dependent person receive the entire compensation payable after reaching age 18 until the expiration of the initial 400-week period to the exclusion of other adult children of the decedent. Such a distinction among adult children has a fair and substantial relation to the object of the legislation.

Appellant further argues that there is no policy which supports giving Scott, once he is an adult, all of the remaining death benefits,

to the exclusion of his adult sister. Appellant points to this state's public policy for the support of minor children by their parents, as reflected in N.C. Gen. Stat. § 50-13.4(c) and our public policy that adult children be treated equally under the law, as reflected in North Carolina's Intestate Succession Act, which provides for equal division among members of the same class. *See* N.C. Gen. Stat. § 29-16(a)(1) (1984). Appellant argues that once the sole wholly dependent person, Scott, reaches 18, the public policy for the support of minor children by their parents yields to the public policy that adult children be treated equally under the law would require Scott, as an adult, to share the award with other adult children such as appellant. We disagree. A minor child is likely to suffer more immediate and long term economic loss as a result of his or her parent's death than an adult child. Whereas a minor child must still finish his or her education and has yet to embark on his or her career, an adult child is likely to have finished or at least substantially completed his or her education and to have begun his or her career. Thus, § 97-38(1) promotes the public policy for the support of minor children by their parents.

Affirmed.

Judges GREENE and WYNN concur.

VICKIE ROUSE, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR TRAVIS SENTEL ROUSE v. PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED, LYNN G. BORCHERT, ROBERT G. BRAME, JARLATH MACKENNA, MICHAEL R. WATKINS, THOMAS J. BYRNE AND JOEL B. MCCUAIG

No. 933SC256

(Filed 6 September 1994)

1. Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— attending physicians supervising residents—negligent supervision issue—summary judgment improper

In an action by plaintiff to recover for negligent delivery of her child, the trial court erred in granting summary judgment for defendants on the issue of negligent supervision where the evidence tended to show that defendants, as attending physicians, had accepted the responsibility to supervise the resident physi-

cians and that, when they accepted such responsibility, both defendants were aware that the residents were actually treating patients; plaintiff presented sufficient evidence of a breach of the appropriate standard of care sufficient to overcome defendants' motion for summary judgment; and there was no evidence that defendants followed their allegedly usual routine of making rounds with the residents on the day plaintiff's child was born.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 286 et seq.

2. Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— attending physicians—derivative liability—summary judgment on direct negligence issue proper

In an action to recover for negligence in the delivery of plaintiff's child, the trial court properly entered summary judgment against plaintiff on the issue of direct negligence, since the only allegations of negligence concerned residents' failure to render adequate care and supported the position that defendants' only liability to plaintiff was derivative.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 286 et seq.

3. Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— negligence by resident physicians—vicarious liability of attending physicians—summary judgment improper

Plaintiff's forecast of evidence was sufficient to raise a genuine issue of material fact as to whether defendant attending physicians had the right to control resident physicians so as to be vicariously liable for the negligence of the resident physicians in the delivery of plaintiff's child where the evidence tended to show that the residents' salaries were paid by the hospital which hired them and could terminate their employment, but it also tended to show that residents were allowed to practice only under the supervision of the attending physicians and that the attending physicians were responsible for the patients' care.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 286 et seq.

Appeal by plaintiff from orders signed by Judge Frank R. Brown in Pitt County Superior Court and filed 29 May 1990, 1 June 1990 and 9 November 1992 with the Pitt County Clerk of Court. Heard in the Court of Appeals 9 December 1993.

On 23 January 1989, plaintiff filed this action against defendants alleging that they had been negligent in the delivery of her first child, Travis Sentel Rouse. Defendants Borchert and MacKenna filed motions for summary judgment. The trial court granted summary judgment in Borchert's favor on 29 May 1990 and entered summary judgment in favor of MacKenna on 1 June 1990. Plaintiff appealed from these orders to this Court. In an unpublished opinion filed on 5 November 1991, a panel of this Court found that the appeal was premature because the judgments did not dispose of the entire case and no substantial right of the plaintiff would be prejudiced by delay.

On 22 April 1992, the North Carolina Supreme Court filed its opinion in *Mozingo v. Pitt County Memorial Hospital*, 331 N.C. 182, 415 S.E.2d 341 (1992), which dealt with the issue of negligent supervision of resident physicians by attending physicians. Based on the opinion in *Mozingo*, plaintiff filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990) to revise the orders of summary judgment in favor of defendants MacKenna and Borchert. Following a hearing on 7 August 1992, Judge Brown entered an order denying plaintiff's Rule 54(b) motion on 9 November 1992. By 8 January 1993, all the remaining claims and parties had been resolved. On that day plaintiff gave notice of her appeal of the orders granting summary judgment in favor of MacKenna and Borchert and the order denying her Rule 54(b) motion.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr. and Kenneth B. Oettinger, for plaintiff-appellant.

Walker, Young & Barwick, by Robert D. Walker, Jr., for defendant-appellee Lynn G. Borchert.

Yates, McLamb & Weyher, by Joseph W. Yates, III and Suzanne S. Lever, for defendant-appellee Jarlath MacKenna.

McCRODDEN, Judge.

In this appeal we consider whether summary judgment was properly granted in favor of physicians who were attending at the time plaintiff received allegedly negligent medical care from resident physicians.

A trial court properly enters summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c). The party moving for summary judgment bears the burden of establishing the lack of any triable issue. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence showing that the plaintiff will be able to make out at least a *prima facie* case at trial. *Id.* It is then incumbent upon the plaintiff to come forward with some specific evidence, not mere conclusory allegations, to support his claim. *Smock v. Brantley*, 76 N.C. App. 73, 77, 331 S.E.2d 714, 717 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 30 (1986). The trial court must consider the record in the light most favorable to the non-movant and must draw all inferences of fact from the evidence presented at the hearing in his favor. *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981).

Plaintiff assigns error to the entry of summary judgment in defendants' favor and the later denial of her Rule 54(b) motion and makes two arguments in support thereof. She argues that there were genuine issues of material fact as to whether the defendants were liable under the theories of (I) negligent supervision, (II) direct negligence, and (III) vicarious liability.

I.

[1] To recover for actionable negligence, a plaintiff must show that the defendant owed him a duty, that the defendant failed to exercise proper care in the performance of that duty and that the defendant's breach was a proximate cause of the plaintiff's injuries. *Hopkins v. Ciba-Geigy Corp.*, 111 N.C. App. 179, 186, 432 S.E.2d 142, 146 (1993). We find that the plaintiff's forecast of evidence was sufficient to demonstrate that she could make out a *prima facie* case of negligent supervision.

As supervising physicians, the defendants did owe a duty to plaintiff. In *Mozingo*, the plaintiff child brought an action against the defendant, who was the attending physician on call when the plaintiff was born, alleging that the resident physicians at the hospital had delivered him negligently and that the defendant had negligently failed to supervise the resident physicians. The trial court granted summary judgment in the defendant's favor, but, on appeal, the

Supreme Court reversed this judgment. The defendant argued that he owed no duty to the plaintiff and that his affidavits established that he did not breach the applicable standard of care for attending on-call physicians. The Court found that the defendant owed a duty to the plaintiff and that there was a genuine issue of material fact as to whether he breached the standard of care. The defendant had stipulated that he was responsible for the supervision of residents on the night in question and it was uncontested that he knew that those residents were treating patients when he undertook to supervise them. Based on these two points, the Court concluded that the doctor had a duty to his patients, including the plaintiff, to exercise reasonable care in supervising the residents. *Mozingo*, 331 N.C. at 188, 415 S.E.2d at 344-45.

In this case, it is uncontested that the defendants, as attending physicians, had accepted the responsibility to supervise the resident physicians, and that when they accepted such responsibility, both defendants were aware that the residents were actually treating patients. Following *Mozingo*, we find that defendants owed a duty to plaintiff to exercise reasonable care in supervising the residents.

We also find that the plaintiff in this case presented evidence of a breach of the appropriate standard of care sufficient to overcome defendants' motion for summary judgment. In *Mozingo*, the defendant presented the affidavits of the chairmen of three teaching hospitals in North Carolina, which stated that an on-call attending physician may take calls at home "unless a problem is specifically anticipated." *Id.* at 191, 415 S.E.2d at 346. The plaintiff's expert in that case averred that the defendant breached the standard of care of an on-call supervising physician, given the known condition of the plaintiff's mother. The expert stated that the defendant should have called in at the beginning of his shift and periodically thereafter to check on the condition of the patients. *Id.* at 186, 415 S.E.2d at 343. The plaintiff's forecast of evidence demonstrated the applicable standard of care and how the defendant breached it.

In support of their motions for summary judgment in the present case, defendants offered the affidavits of Dr. Watson A. Bowes and Dr. Joseph M. Ernest, III. Both affiants averred that they were familiar with the policies and methods of supervising resident physicians at the teaching hospitals in North Carolina at the time plaintiff gave birth. Both stated that the policies did not require that an attending physician personally examine each patient admitted while he was on

call and did not require that he review the medical charts of such patients. They further averred that on-call attending physicians were permitted to afford coverage by being present or, unless a problem were present or specifically anticipated, being available by telephone so that they could come to the hospital immediately upon request.

In opposition to the motion for summary judgment, plaintiff presented the affidavits of Dr. J. Patrick Lavery and Dr. Harold Schulman. Each of them asserted that the obstetrical management of the labor and delivery failed to comply with appropriate standards of practice. They also stated:

> [I]t was the obstetrical standard of care . . . to fully supervise and be responsible for the acts of residents working under their exclusive control and supervision. It is the duty of a fully trained attending physician (who is supervising resident physicians) to know the competency level of the training physicians they supervise. This duty to know the competency . . . is necessary and required in order to provide safe and adequate patient care. . . . [T]he labor and delivery records of Vickie Rouse demonstrate that the resident physicians caring for her were not able to give, and did not give, obstetrical care that complies with appropriate standards for obstetrical practice.

Both of plaintiff's affiants concluded that defendants "failed to adequately supervise their assistants, the resident physicians, who were managing the obstetrical care of their patient."

Dr. Robert Griffin Brame, who was also an attending physician at Pitt County Hospital at that time, stated in his deposition that he thought an attending physician should "tour" the wards with the residents to assure himself that the patients were receiving satisfactory care. Several residents and both of the defendants testified that each time one of the defendants was the attending on-call physician, he would make rounds with the residents, assure himself that things were under control, and address any problems there. However, there is no evidence that defendants actually toured the wards on the day plaintiff gave birth. The plaintiff's medical charts reveal no notations by either defendant that might indicate that they had seen her.

Despite the fact that defendants presented evidence of their usual practice, there is no evidence that they followed that routine on the day in question. There was evidence, however, that plaintiff's pregnancy presented something of a risk; she was obese, suffered from

chronic hypertension, and there was a history of diabetes within her family. Based upon these characteristics, Dr. Watkins, the resident physician, described plaintiff as a high risk patient. Taken in the light most favorable to the plaintiff, the evidence creates a genuine issue of material fact as to whether defendants breached their duty to exercise reasonable care in the supervision of the resident physicians. Hence, we find that the trial court erred in granting summary judgment on the issue of negligent supervision.

II.

[2] Secondly, plaintiff argues that the trial court improperly entered summary judgment on her claim of direct negligence. We disagree.

"Medical professionals may be held accountable *when they undertake to care for a patient* and their actions do not meet the standard of care for such actions as established by expert testimony." *Mozingo*, 331 N.C. at 189, 415 S.E.2d at 345 (emphasis added). Plaintiff alleged in her complaint that her physicians breached their duties of care to plaintiff by, among other things, failing to monitor her labor and failing to recognize that her son was in fetal distress. Plaintiff's experts described the failures of the physicians with specific evidence. However, plaintiff has failed to bring forward any evidence to show that the defendants owed her any direct duty of care. Simply put, plaintiff has failed to show that the named defendants in this action were her physicians. All the evidence tends to show that the defendant MacKenna never directly participated in plaintiff's care, and that defendant Borchert's only involvement was to attend the Caesarean section. Although plaintiff alleges that she "was admitted to the service of Dr. MacKenna," the evidence reflects only that MacKenna was the "attending physician," a term the record defines only by reference to supervisory duties.

We conclude that the allegations of negligence concern the *residents*' failure to render adequate care and support the position that defendants' only liability to plaintiff is derivative. The trial court properly entered summary judgment against plaintiff on the issue of direct negligence.

III.

[3] Finally, plaintiff argues that the trial court erred in granting summary judgment because there was a genuine issue of material fact as to whether the defendants were vicariously liable for the actions of the residents. We agree.

It is uncontested that the resident physicians were not employees of the defendants. The defendants could only be held vicariously liable for the residents' actions under the borrowed servant doctrine: "One who borrows another's employee may be considered a temporary master liable in *respondeat superior* for the borrowed employee's negligent acts" if he acquires the same right of control over the employee as possessed by the lending employer. *Harris v. Miller*, 335 N.C. 379, 387, 438 S.E.2d 731, 735 (1994). Thus, the defendants' liability depends upon whether they had the right to control the manner of the residents' performance of their duties. *Id.*

Plaintiff points to the Affiliation Agreement between the Hospital and the East Carolina School of Medicine, the bylaws of the Hospital's medical staff, the testimony of defendant Borchert, and the affidavits of her experts to demonstrate the defendants' right of control over the residents.

The Affiliation Agreement provides that "house staff shall be responsibly involved in patient care under the supervision of the Dean and the faculty of the School of Medicine." The bylaws provide that house staff officers, *i.e.* the residents, "will only practice under the direction of the department chairman or his delegate." At his deposition, Dr. Borchert gave a description of his understanding of supervision of resident physicians:

> Supervision can vary depending upon again the extended training of the residents. At times, I think supervision can be actually doing a task in the form of teaching. That's also supervision. I think supervision could be holding someone's hand while they do something. I think supervision could be observing them while they do something and commenting about their performance. I think supervision could say please don't do that; let me do that. I think supervision could be a combination of all these things, but basically I think supervision involves being able to respond when called on to help. Supervision involves being certain that the patient is being cared for well.

In their affidavits, plaintiff's experts averred that the resident physicians worked "under the supervision of, and at the pleasure of, the attending physician who is responsible for the medical care delivered to the patient."

In *Smock v. Brantley*, this Court found that a resident physician who was at the hospital on a two-month rotation from medical school

was not an agent of the hospital and thus the hospital could not be liable under *respondeat superior* for his actions. In that case, the Court relied heavily on the facts that the resident was not paid a salary by the Hospital; that the resident was exclusively supervised by attending physicians; that neither the hospital nor its staff had any control over his actions and seemed to have no regulations regarding the supervision of residents; and that the hospital had no control over which residents were assigned to it. *Smock*, 76 N.C. App. at 76, 331 S.E.2d at 717.

The *Smock* Court distinguished the case of *Waynick v. Reardon*, 236 N.C. 116, 72 S.E.2d 4 (1952), in which the defendant resident physician was found to be an agent of the hospital. In that case, the hospital paid the resident's salary, gave him accommodations, and, through its surgical staff, supervised his practice.

After considering the evidence of the factors the *Smock* Court found important, we believe that the plaintiff's forecast of evidence is sufficient to raise a genuine issue of material fact as to whether the defendants had the right to control the resident physicians. The evidence shows that the residents' salaries were paid by the hospital which hired them and could terminate their employment. However, it also tends to show that residents were allowed to practice only under the supervision of the attending physicians, and the attending physicians were responsible for the patients' care.

Based on the foregoing, we hold that the trial court improperly entered summary judgment for defendants on the claims of negligent supervision and *respondeat superior*. We reverse the order of summary judgment entered in favor of defendants Borchert and MacKenna.

Reversed.

Judges JOHNSON and MARTIN concur.

LAURA LEIGH BOONE (STOTT) BROMHAL v. E. GREGORY STOTT

No. 9310DC611

(Filed 6 September 1994)

1. **Divorce and Separation § 408 (NCI4th); Accord and Satisfaction § 8 (NCI4th)— child support payments offered—checks accepted and cashed—no accord and satisfaction of child support claim**

The trial court did not err in finding and concluding that defendant's tendering of checks and plaintiff's endorsement and negotiation of same did not constitute an accord and satisfaction with respect to child support, since there was no evidence of an agreement between the parties, nor of consideration passing between them.

Am Jur 2d, Accord and Satisfaction §§ 18-23, 44; Divorce and Separation §§ 1037, 1038.

2. **Divorce and Separation § 547 (NCI4th)— provision in separation agreement for attorney's fees—award proper**

The trial court did not err in awarding attorney's fees to plaintiff in an action to enforce the child support provision of a separation and property settlement agreement where the agreement provided for the recovery of attorney's fees in an action to enforce provisions of the agreement.

Am Jur 2d, Divorce and Separation §§ 586 et seq., 829.

Judge GREENE concurring in part and dissenting in part.

Appeal by defendant from judgment entered 3 November 1992 by Judge O. Henry Willis, Jr. in Wake County District Court. Heard in the Court of Appeals 7 March 1994.

Brady, Schilawski, Earls and Ingram, by Michael F. Schilawski, for plaintiff-appellee.

Jack P. Gulley for defendant-appellant.

WYNN, Judge.

The parties were married to each other on 23 April 1977 and separated on or about 17 August 1987. Two minor children were born to

the parties during the marriage. On 27 August 1987 the parties executed a separation agreement and property settlement. Paragraph 23 of the separation agreement provides:

> [H]usband will pay the sum of $175 per week as child support pending the sale of the marital home. . . . After the aforesaid sale is consummated and the funds therefrom disbursed, the parties agree to renegotiate the amount of child support to be contributed by husband; however, husband agrees that such support payment will not be less than twenty-five (25%) percent of his adjusted gross income.

On 25 November 1987, the parties executed a modification agreement to the 27 August separation agreement. It provided that defendant would purchase plaintiff's interest in the marital home and that upon plaintiff's vacation of the house, "[h]usband shall thereafter be required to begin making child support payments in accordance with the provisions for computing such payments detailed in paragraph 23 of the parties Separation Agreement dated 25 August 1987."

Defendant did purchase plaintiff's interest in the home and plaintiff and the children vacated it in August 1988. Defendant reoccupied the home but never increased the amount of child support payments, even though the $175 per week he was paying was less than 25% of his income.

On 28 December 1988, plaintiff filed a complaint for specific performance of the separation agreement and modification agreement. An amended complaint was filed on 13 June 1989. Plaintiff asked for an order requiring defendant to pay child support in an amount not less than 25% of his gross monthly income since 1 August 1988 and continuing thereafter. Plaintiff also requested attorney's fees and reimbursement of expenses pursuant to the paragraph of the separation agreement providing:

> Suit costs. If either party shall fail to keep and perform any agreement or provision hereof, the other party shall be entitled to recover reasonable attorney's fees and any and all other expenses incurred in any action instituted to enforce provisions of this agreement.

The parties entered into a stipulation agreement on 27 September 1989, which recited, among other things, that the parties agree that the separation agreement is valid and enforceable; that a district court judge may review the agreement and determine all matters in

controversy between the parties based on it; and that the modification agreement is valid and enforceable and "shall be reviewed and interpreted according to its terms and the intent of the parties."

Plaintiff moved for summary judgment on 6 December 1989. On 17 January 1990, Judge Jerry Leonard granted partial summary judgment for plaintiff, finding that, pursuant to the parties' stipulation agreement, the Separation Agreement and Modification Agreement are valid and enforceable; beginning at the time of sale or transfer of the marital residence, defendant was required to provide child support payments of "not less than twenty-five (25%) percent of his adjusted gross income"; defendant is obligated under the agreements to provide medical insurance and costs in excess of coverage; and "in any and all other respects Defendant's liability pursuant to the terms of the existing Agreements is established." Summary judgment was partial because, although plaintiff won summary judgment as to defendant's liability, the question of damages was reserved for later hearing.

Subsequent to Judge Leonard's 17 January 1990 order, plaintiff filed a separate and independent lawsuit pursuant to Chapter 50 of the North Carolina General Statutes, seeking, among other things, court-ordered child support. By special commission, Judge Lowry M. Betts heard the case on 11 April 1990 and, on 28 January 1991, issued a child support order requiring defendant to pay plaintiff $598.73 per month.

When the specific performance case next arose for hearing in the trial court, Judge O. Henry Willis, Jr. determined that due to the entry of Judge Betts's child support order, plaintiff "elected her remedy" when she pursued the child support action. The court granted summary judgment for defendant, determining that plaintiff's claim for specific performance of the child support provision of the separation agreement would terminate as of the date of entry of Judge Betts's order and that plaintiff's specific performance case should be repleaded "in the nature of a contract action." In other words, plaintiff's claim for child support was limited by summary judgment to a claim for arrearages in child support, among other things, accrued during the time from the date of activation of payments pursuant to the separation agreements to the date child support payments were ordered by the court. This order was entered 10 October 1991.

On 15 and 16 October 1992, Judge Willis heard the contract case. Judgment was announced in open court on 16 October 1992 and

entered on 3 November 1992. Plaintiff was awarded $22,550.49, plus interest, for unpaid child support and reimbursement for one additional marital debt, and defendant was ordered to compensate plaintiff for attorney's fees incurred at all stages of the case in the amount of $40,000. Defendant appeals this judgment.

We dispose of defendant's first four arguments without addressing them because the orders from which they arise were not designated in his notice of appeal. Defendant's first four arguments deal with previous rulings by the court: an award of attorney's fees to plaintiff and denial of attorney's fees to defendant on an earlier motion in the cause; the court's partial summary judgment ruling of 17 January 1990; and the court's denial of defendant's summary judgment motion of 10 October 1991 and subsequent denials of defendant's renewed motions for summary judgment on the issue of accord and satisfaction. There are two notices of appeal in the record. Both designate appeal from Judge Willis's judgment. One was filed on 28 October 1992, following the oral entry of judgment; the other was filed on 20 November 1992, following written entry of judgment. The notices clearly and exclusively recite that notice of appeal is given only as to that judgment. Rule 3(a) of the North Carolina Rules of Appellate Procedure requires that a notice of appeal "must designate the judgment or order from which appeal is taken." Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422 (1990); *Brooks, Comm'r of Labor v. Gooden*, 69 N.C. App. 701, 318 S.E.2d 348 (1984). Due to a lack of jurisdiction, then, we do not address defendant's first four issues.

In addition, defendant abandoned several of his arguments by failing to brief them or failing to cite any authority supporting them pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, which provides, "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. The body of the argument shall contain citations of the authorities upon which the appellant relies." *See also Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987).

[1] We are left with the following assignments of error. First, defendant assigns error to the trial court's finding of fact and conclusion of

law that defendant's tendering of checks "and Plaintiff's endorsement and negotiation of same did not constitute an accord and satisfaction with respect to child support." Defendant argues that plaintiff is precluded from recovering arrearages because her endorsement and negotiation of defendant's checks constitutes an accord and satisfaction.

"Accord and satisfaction is a method of discharging a contract or cause of action, whereby the parties agree to give and accept something in settlement of the claim or demand of the one against the other, and perform such agreement." 1 Strong's North Carolina Index 4th, Accord & Satisfaction § 1 (1990). In order for accord and satisfaction to be a successful defense, there must have been a negotiation or agreement between the parties concerning payment or acceptance of less than the full amount owed. *Fruit & Produce Packaging Co. v. Stepp*, 15 N.C. App. 64, 189 S.E.2d 536 (1972). This agreement must be supported by consideration. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969). There is no evidence on the record of an agreement between the parties nor of consideration passing between them. We thus find the accord and satisfaction defense inapplicable here and affirm the trial court's finding of fact.

[2] Finally, defendant appeals the trial court's award of attorney's fees to plaintiff, granted under the clause in the separation agreement providing:

> Suit costs. If either party shall fail to keep and perform any agreement or provision hereof, the other party shall be entitled to recover reasonable attorney's fees and any and all other expenses incurred in any action instituted to enforce provisions of this agreement.

In *Edwards v. Edwards*, 102 N.C. App. 706, 403 S.E.2d 530, *disc. rev. denied*, 329 N.C. 787, 408 S.E.2d 518 (1991), this Court upheld similar language in a separation agreement which indemnified the non-defaulting party. This Court ruled that under N.C. Gen. Stat. § 52-10.1, "separation agreements are 'binding in all respects' so long as they are 'not inconsistent with public policy.' " *Edwards*, 102 N.C. App. at 713, 403 S.E.2d at 530. This Court concluded that there is "nothing inconsistent with public policy in the . . . indemnity clause, and the agreement was executed pursuant to the statute." *Id.*

In *Carter v. Foster*, 103 N.C. App. 110, 404 S.E.2d 484 (1991), this Court concluded that "parties may, in settling disputes, agree to the

payment of attorney's fees." *Carter*, 103 N.C. App. at 115, 404 S.E.2d at 488. In the instant case, the "Separation Agreement and Property Settlement Agreement" entered into by the parties recites that "unfortunate differences" arose between them and that it was in the "best interest" of each to enter into the agreement. Included among the provisions were waivers by each of "any and all . . . rights arising out of the marriage relationship, in and to any and all property now owned" by the other, of "any claim against the other for the rights of 'Equitable Distribution,' " of "all claims and demands against the other for support, maintenance and alimony," and of "any [prior] conduct which may have constituted a basis for any legal claim by either party against the other." In addition, the agreement contained a "mutual release" by each party "from all causes of action, claims, rights, or demands whatsoever, in law or equity, which either . . . had or has against the other," save for absolute divorce. This language clearly constitutes an "agreement settling all . . . claims," *Carter*, 103 N.C. App. at 115, 404 S.E.2d at 488, between the parties. As in *Carter*, such settlement agreements may include provisions for attorney's fees. Accordingly, this assignment of error is overruled.

The order of the trial court is therefore

Affirmed.

Judge JOHN concurs.

Judge GREENE concurring in part and dissenting in part with separate opinion.

Judge GREENE concurring in part and dissenting in part.

I disagree only with that part of the majority's opinion affirming the trial court's award of attorneys' fees, granted under a provision in the separation agreement. Public policy may very well favor allowing contractual provisions for indemnification of attorneys' fees. *See Stuart M. Speiser, Attorneys' Fees*, ch. 15 §§ 15:3-15:8 (1973 & Supp. 1993) (discussing competing public policy arguments for and against allowing such provisions). Nonetheless, our Supreme Court has spoken directly to this issue and restated the well-established rule in North Carolina that "[e]ven in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory

authority therefor." *Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814-15 (1980). In the face of this unequivocal holding of our Supreme Court, this Court in *Edwards*, without any citation to *Stillwell*, upheld an award for attorneys' fees granted pursuant to a separation agreement even though there was no statutory authorization for such an award. *Edwards v. Edwards*, 102 N.C. App. 706, 403 S.E.2d 530, *disc. rev. denied*, 329 N.C. 787, 408 S.E.2d 518 (1991). In addition, this Court in *Carter*, without any attempt to apply or interpret *Stillwell*, approved parties' contracting for the payment of attorneys' fees. *Carter v. Foster*, 103 N.C. App. 110, 404 S.E.2d 484 (1991). I am aware that panels of this Court are bound by prior decisions of this Court, *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), but I do not believe that this rule applies when the prior decisions of this Court do not apply or purport to interpret a previous Supreme Court opinion clearly requiring a contrary result. In this event, this Court has "the responsibility to follow [Supreme Court] decisions 'until otherwise ordered by the Supreme Court'." *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993).[1] This principle is supported by federal cases, including *County of Monroe, Florida v. U.S. Dep't of Labor*, 690 F.2d 1359 (11th Cir. 1982), which is cited by our Supreme Court in *Civil Penalty*.

In *Monroe County*, the Eleventh Circuit recognizes that the general rule is "a three-judge panel may not disregard precedent set by a prior panel absent an intervening Supreme Court decision or *en banc* circuit decision." *Id.* at 1363. When, however, a decision set by a prior panel does not apply or purport to interpret an earlier controlling Supreme Court decision, the general rule does not apply because a panel is "without power to disregard" an earlier controlling Supreme Court decision. *Id.*; *Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. 1981).

Accordingly, because *Edwards* and *Carter* did not apply or purport to interpret *Stillwell* and because *Stillwell* is unambiguous in its holding and remains the law of this State, this Court is bound to follow *Stillwell*, not *Edwards* or *Carter*. I would therefore reverse the trial court's enforcement of the attorneys' fees provision in the parties' separation agreement.

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1. The fact that our Supreme Court denied discretionary review in the *Edwards* case does not mean that our Supreme Court "has determined that the decision of the Court of Appeals is correct." *Peaseley v. Coke Co.*, 282 N.C. 585, 592, 194 S.E.2d 133, 139 (1973).

BARLOW v. BARLOW

[116 N.C. App. 257 (1994)]

CHERYL ANN BARLOW, PLAINTIFF v. JAMES DAVID BARLOW, DEFENDANT

No. 938DC712

(Filed 6 September 1994)

Divorce and Separation § 168 (NCI4th)— equitable distribution—pension benefits—calculation—service after separation

The trial court did not err in an equitable distribution action in its calculation of plaintiff's share of defendant's pension benefits. Although defendant contended that the calculation was erroneous because the formula would permit plaintiff to benefit from contributions made by defendant after the date of separation, defendant's contention is essentially identical to that presented and rejected in *Workman v. Workman*, 106 N.C. App. 562.

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

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Judge GREENE concurring.

Appeal by defendant from judgment entered 13 January 1993 in Lenoir County District Court by Judge J. Patrick Exum. Heard in the Court of Appeals 11 March 1994.

William W. Gerrans, P.A., by William W. Gerrans, for plaintiff-appellee.

Perry, Perry, Perry & Grigg, by David L. Grigg, Jr., for defendant-appellant.

JOHN, Judge.

Plaintiff and defendant were married 12 June 1966 and separated 5 August 1991. A year and one day following the separation, plaintiff instituted this action seeking an absolute divorce and equitable distribution of marital property. Judgments were entered 7 January 1993 and 13 January 1993 on the divorce and equitable distribution claims respectively. Defendant appeals the latter.

By assignments of error numbers 3, 5, 6, and 7, defendant argues plaintiff's share of his pension benefits was erroneously calculated because the trial court's formula would permit plaintiff to benefit from contributions made by defendant after the date of separation. We disagree.

The details of defendant's pension plan (the Plan) with his employer, the Du Pont Company, are uncontroverted. The Plan is a "defined benefit plan" because benefits are determined "without reference to contributions and [are] based on factors such as years of service and compensation received." *Seifert v. Seifert*, 82 N.C. App. 329, 333, 346 S.E.2d 504, 506 (1986) (citation omitted), *aff'd*, 319 N.C. 367, 354 S.E.2d 506, *reh'g denied*, 319 N.C. 678, 356 S.E.2d 790 (1987); *see also Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994). Indeed the Plan is entirely non-contributory on the part of the employee, and no identifiable contributions by Du Pont are made on behalf of a participant or allocated to or set aside for any specific individual. Benefits are payable only in the form of a life annuity. An employee must be at least fifty-eight (58) years old and have accumulated twenty-seven (27) years of service to receive full benefits. With fifteen (15) years of service, an employee may elect to receive a reduced pension upon reaching age fifty (50). Defendant, forty-five (45) years old as of the parties' separation, would be eligible to receive full pension benefits of an estimated two thousand, one hundred and fifty-four dollars ($2,154.00) per month beginning 14 September 2003, or, alternatively, eight hundred sixty-six dollars ($866.00) per month as a reduced pension commencing 14 September 1995.

The trial court made the following findings of fact concerning the Plan in its equitable distribution judgment:

> 68. That the defendant had certain pension benefits as a result of his employment at Du Pont. That the defendant's employment with Du Pont began on October 1, 1968, and the parties were married on June 12, 1966 and separated on August 5, 1991. Therefore, during the marriage, the defendant was employed at the Du Pont Company for a total of 274 months. Therefore, all of the defendant's pension benefits as of the date of separation were marital property.
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> . . . .
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> 74. That the parties, through the assistance of an expert witness, Jeff Hale, C.P.A., arrived at a value based on the present value of the defendant's pension benefits with the Du Pont Com-

pany of $56,522.00 as of the date of separation. Mr. Hale's calculations were admitted into evidence and the Court incorporates said exhibit as a part of this Order in its entirety. That because of the substantial disparity between the value of the pension benefits and the other assets of the parties, the Court finds that it should award a percentage of the defendant's pension benefits attributed to the marriage to the plaintiff. Further, the Court finds that it would be equitable in this case to award fifty-five percent (55%) of the portion of the defendant's pension benefits that were accumulated during the marriage to the plaintiff as provided for in N.C.G.S. 50-20(b)(3)(c). The Court finds that the plaintiff is entitled to the following share of the defendant's Du Pont pension benefits: the defendant's monthly accrued pension benefits as determined upon the earliest of (1) his retirement, (2) his death, (3) his separation of service, or (4) as of such date the alternate payee is eligible and elects to receive her share of the pension benefits multiplied by the product of 274 months (total months of service during marriage) divided by the defendant's total months of service at Du Pont as of the earliest of (1) his retirement, (2) his death, (3) his separation of service, or (4) as of such date the alternate payee is eligible and elects to receive her share of the pension benefits multiplied by fifty-five percent (55%) to determine the plaintiff's portion which would be paid on a monthly basis to the plaintiff at such time as the earliest of (1) his retirement, (2) his death, (3) his separation of service, or (4) as of such date the alternate payee is eligible and elects to receive her share of the pension benefits. That is, plaintiff's share of the defendant's pension benefits shall be calculated according to the following formula:

Participant's
monthly accrued benefit X

Number of months participant and the alternate payee were married while the participant was in the Plan (274 months)
Number of months participant worked for Du Pont as of the earliest of (1) his retirement, (2) his death, (3) his separation of service, or (4) as of such date the alternate payee is eligible and elects to begin receiving her share of the pension benefits

X 55%

> However, in no event shall the plaintiff actually receive more than fifty percent (50%) of the pension/retirement benefits the defendant is entitled to receive.

The foregoing formula reflects application by the trial court of the "fixed percentage" method of evaluating and distributing pension benefits. According to our Supreme Court, under the fixed percentage method, after valuation of the marital estate:

> the nonemployee spouse is awarded a percentage of each pension check based on the total portion of benefits attributable to the marriage. The portion of benefits attributable to the marriage is calculated by multiplying the net pension benefits by a fraction, the numerator of which is the period of the employee spouse's participation in the plan during the marriage . . . and the denominator of which is the total period of participation in the plan.

Seifert, 319 N.C. 367, 370, 354 S.E.2d 506, 509 (1987) (citation omitted). Under this method:

> deferral of payment is possible without unfairly reducing the value of the award. The present value of the pension or retirement benefits is not considered in determining the percentage to which the nonemployee spouse is entitled. Moreover, because the nonemployee spouse receives a percentage of the benefits actually paid to the employee spouse, the nonemployee spouse shares in any growth in the benefits. . . . Yet, the formula gives the nonemployee spouse a percentage only of those benefits attributable to the period of the marriage, and that spouse does not share in benefits based on contributions made after the date of separation.

Id. at 370-71, 354 S.E.2d at 509 (citations omitted).

In the case *sub judice*, we note initially that defendant assigns no error to the trial court's valuation of his pension benefits. We therefore do not consider whether the methodology utilized by the court in that regard comports with the formulation recently adopted by this Court in *Bishop*. *Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595-96. Further, defendant does not argue the trial court improperly calculated the coverture fraction as framed by the *Seifert* Court in the above-cited passage. He concedes the court properly determined the portion of defendant's pension benefits acquired during his marriage to plaintiff. However, defendant maintains that, by applying the coverture fraction to his monthly accrued pension benefits deter-

mined at the earliest of (1) his retirement, (2) his death, (3) his separation of service, or (4) as of such date the alternate payee is eligible and elects to receive her share of the pension, the court thereby included in plaintiff's award "contributions, years of service or compensation [accruing] after the date of separation" in contravention of N.C. Gen. Stat. § 50-20(b)(3) (1987 & Cum. Supp. 1993).

Defendant's contention is essentially identical to that presented and rejected in *Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992), a case involving equitable distribution of IBM pension benefits. In *Workman*, we found no error in the trial court's application of the coverture fraction to "the total retirement benefit to be received by the plaintiff from the IBM Retirement Plan." *Id.* at 564, 418 S.E.2d at 270-71. This Court held such a calculation did *not* include "contributions, years of service or compensation which may accrue after the date of separation." *Id.* at 570-71, 418 S.E.2d at 274 (quoting G.S. § 50-20(b)(3)). While defendant has attempted to distinguish the instant case, we conclude such distinctions as may be present are unavailing and that our decision in *Workman* is controlling. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 383-84, 379 S.E.2d 30, 36-37 (1989).

We have examined defendant's remaining assignments of error and determine them to be unfounded.

Affirmed.

Judge JOHNSON concurs.

Judge GREENE concurs with separate opinion.

Judge GREENE concurring

The issue, generally stated, is whether the formula utilized by the trial court to fix the marital property share of the employee spouse's (defendant) pension is consistent with N.C. Gen. Stat. § 50-20(b). The defendant argues that the formula utilized by the trial court, which classifies as marital a fixed percentage of his retirement benefits which in this case is to be based on his total years of service (a substantial number of which will occur after the date of separation) and his highest salary (which will likely occur after the date of separation and is determined on merit), violates N.C. Gen. Stat. § 50-20(b). I agree.

It is a basic teaching that only that portion of a vested pension " 'acquired by either spouse . . . during the course of the marriage and before the date of the separation' is marital property." *Bishop v. Bishop*, 113 N.C. App. 725, 729, 440 S.E.2d 591, 595 (1994). Thus, any retirement benefits acquired or earned after the date of separation are not properly classified as marital property. *See* Lawrence J. Golden, *Equitable Distribution of Property* § 6.16, at 212 (Brett R. Turner ed., Supp. 1993) [hereinafter *Golden*]; N.C.G.S. § 50-20(b)(1) (marital property includes only property acquired during marriage and before date of separation); N.C.G.S. § 50-20(b)(3) (award of retirement benefits must not include "contributions, years of service or compensation" accruing after the date of separation). Post-separation increases in retirement benefits that are passive in nature, that is, attributable to "market or other non-marital forces," *see Golden* at 212, are properly classified as marital property. N.C.G.S. § 50-20(b)(3) ("gains" are to be included in award).

The question is whether a method can be devised to distribute passive gains in a pension occurring after the date of separation and which does not distribute gains in the pension which are earned after the date of separation, when the employee spouse retires after the date of separation and a deferred distribution is selected by the trial court. Our courts have answered this question in the affirmative, *Seifert v. Seifert*, 319 N.C. 367, 370-71, 354 S.E.2d 506, 509, *reh'g denied*, 319 N.C. 678, 356 S.E.2d 790 (1987); *Workman v. Workman*, 106 N.C. App. 562, 570-71, 418 S.E.2d 269, 274 (1992), holding that application of the coverture fraction adopted by the legislature, N.C.G.S. § 50-20(b)(3), resolves the issue. This fraction consists of a numerator representing the time of employment during the marriage and a denominator representing the time between initial employment and retirement. Using the formula, the marital estate is awarded, as was done in this case, the resulting percentage of the employee spouse's retirement benefit received at the time of retirement.

Although I am bound by the previous decisions of our Court and the Supreme Court, I do not agree that application of the coverture fraction necessarily results in compliance with the legislative mandate that precludes the marital classification of post-separation *earned* increases in the retirement benefits and includes post-separation *passive* increases in the marital estate. In many instances, as in this case, the formula can result in the marital classification of a portion of the retirement benefits earned by the employee spouse after the date of separation. Some states, in an effort to prevent this

problem, have devised formulas utilizing a denominator representing the time of employment through the date of separation and then multiplying the fraction "by the value of the employee's retirement benefits if he stopped working on the *date of classification*." *Golden* at 315. This method solves the problem created by the North Carolina formula but creates a new problem in that the marital estate receives nothing for the passive increases in the benefits occurring after the date of separation. As recently noted by one author, in "pre-retirement cases," all of the various formulas devised to implement the deferred distribution of retirement benefits are "flawed" in that they fail to fairly allocate retirement benefits into marital and nonmarital portions. *Golden* at 317. In any event, North Carolina has adopted a formula which has been approved by our courts as fairly allocating the marital and nonmarital retirement benefits, and I am bound by these decisions.

Thus, although I agree with the defendant that the formula utilized by the trial court classifies as marital a portion of the retirement benefits earned after the date of separation and consequently violates the mandate of Section 50-20(b)(3), I am nonetheless compelled to join with the majority in affirming the judgment of the trial court. Furthermore, it may be that the complexity involved in fairly distributing a defined benefit pension requires the use of some formula, though it may be flawed. If so, it appears that we should acknowledge the deficiencies in the formula and make some effort to make appropriate adjustments. That could be done by treating the problem as a distributional factor under Section 50-20(c)(12), thus granting the trial court broad discretion to equitably adjust the parties' share of the marital estate. This argument has not been made in this case and therefore is not a basis for reversal.

NATIONSBANK OF NORTH CAROLINA, N.A. (FORMERLY NCNB), PLAINTIFF v. MAGGIE THOMPSON (JONES) BAINES, DEFENDANT

No. 939DC991

(Filed 6 September 1994)

1. Pleadings § 364 (NCI4th)— motion to amend—new counterclaims—denied—no abuse of discretion

The trial court did not abuse its discretion in an action for a deficiency on a note by denying defendant's motion to amend her

answer to assert new counterclaims where the court noted that granting the motion would materially prejudice plaintiff by requiring plaintiff to defend against claims for affirmative relief for the first time almost two years after plaintiff instituted the action.

Am Jur 2d, Pleading § 310.

Timeliness of amendments to pleadings made by leave of court under Federal Rule of Civil Procedure 15(a). 4 ALR Fed. 123.

2. Trial § 598 (NCI4th)— action on a note—findings of fact—competent evidence to support

There was no error in the trial court's findings of fact in an action in district court on a note where there was competent evidence before the court to support the trial court's findings.

Am Jur 2d, Trial §§ 1978 et seq.

3. Waiver § 1 (NCI4th)— action on a note—acceptance of late payments—no waiver

The trial court did not err in its conclusion that plaintiff had not waived its rights under a note by accepting late payments where the court found that plaintiff had notified defendant over one hundred times that prompt payment would be expected in the future and there was competent evidence in the record to support this finding.

Am Jur 2d, Estoppel and Waiver §§ 154 et seq.

4. Estoppel § 15 (NCI4th)— action on a note—acceptance of late payments—acceleration of debt not estopped

The trial court's conclusion in an action on a note that plaintiff was not estopped from invoking its acceleration rights under the agreement by previous acceptance of late payments was sufficiently supported by a finding of fact that plaintiff did not change her position in any way to her detriment in reliance on any action or inaction by plaintiff.

Am Jur 2d, Estoppel and Waiver §§ 26 et seq.

Comment Note.—Quantum or degree of evidence necessary to prove an equitable estoppel. 4 ALR3d 361.

Appeal by defendant from judgment and order signed 10 February 1993 and filed 13 February 1993 by Judge Charles W. Wilkinson, Jr. in Person County District Court. Heard in the Court of Appeals 23 May 1994.

NationsBank of North Carolina, N.A. ("plaintiff") sued Maggie Thompson Baines ("defendant") on 12 July 1990 to recover the amount owed under a purchase money security agreement defendant signed upon purchasing a new automobile. Defendant answered the complaint and filed counterclaims against plaintiff seeking to recover her equity in the contested automobile. Defendant also filed a Third Party Complaint, asserting cross-claims against her disability insurance company, Georgia International Life Insurance Company ("the insurance company"). On 4 November 1991, defendant took a voluntary dismissal of her Third Party Complaint against the insurance company. On 7 August 1992 defendant filed a motion for leave to amend her answer and assert additional counterclaims, in which she attempted to assert her alleged right to affirmative relief under various theories. Judge C.W. Allen, Jr. denied her motion to amend on 5 November 1992.

After a bench trial at the 11 January 1993 civil session of Person County District Court, Judge Charles W. Wilkinson entered judgment for plaintiff and dismissed defendant's counterclaims on 13 February 1993. Defendant appeals from the judgment entered by the trial court.

Smith Helms Mullis & Moore, L.L.P., by Leslie C. O'Toole and Paul K. Sun, Jr., for plaintiff-appellee.

Mark Galloway for defendant-appellant.

ORR, Judge.

Defendant entered a written purchase-money security agreement ("the agreement") with Uzzle Cadillac-Oldsmobile for the purchase of a new car on 10 June 1987. Defendant chose to purchase credit life insurance and accident and health insurance as part of the agreement. The agreement was assigned to plaintiff with defendant's consent. The terms of the agreement obligated defendant to pay sixty monthly payments of $339.31, with payments due on the tenth of each month, directly to plaintiff. The relevant portions of the agreement explained:

Late Charge . . . Acceptance by [plaintiff] of a late payment . . . does not excuse your late payment or mean that you can keep

making payments after they are due. [Plaintiff] may take any of the steps set out in this contract if you make any payments late.

Events of Default You will be in default under the contract if any of the following things happen (1) if you fail to pay any payment according to the payment schedule or if you break any of the agreements in this contract; or . . . (7) if you take or fail to take any action concerning the vehicle or this contract which reasonably causes [plaintiff] to deem itself or the vehicle insecure or [plaintiff's] prospects for payment impaired.

Entire Balance Due If you default in any of the above ways, [plaintiff] has the right to declare all of the debt secured by this contract immediately due and payable. If you make any payment on this debt after [plaintiff] has demanded payment of the balance due, your payment will be applied to the unpaid balance. Your debt will be the unpaid balance less the unearned portion of the Finance Charge after giving you credit for the prepayment refund.

Remedies on Default If you default under this contract, [plaintiff] shall also have the right to the immediate possession of the vehicle without notice or resort to legal process, the right to take the vehicle from you by entering your property, or the property where the vehicle is stored, so long as it is done peacefully, and if there is any personal property in the vehicle, [plaintiff] can take this property without liability and store it for you.

Other Provisions . . . This contract contains the entire agreement between the [defendant and plaintiff], and any waiver or change in the terms of this contract must be in writing and signed by [plaintiff].

Defendant failed to make timely payments as required under the agreement in: 1) August and September of 1987; 2) March, June, August, September, November and December of 1988; 3) February, June, September and December of 1989; and 4) February and March of 1990. Plaintiff utilized an account database in which it recorded its successful and unsuccessful attempts to contact defendant to demand that she meet her obligations under the agreement. Between June 1987 and March 1990, plaintiff's representatives contacted or attempted to contact defendant on over one hundred occasions.

In March 1989 defendant applied for benefits under her accident and health insurance policy, asserting disability since January 1989.

Defendant's insurance carrier paid the benefits, and continued to do so as defendant made additional claims on and off through January 1990. When the insurance carrier did make payments to plaintiff pursuant to claims filed by defendant, the payments were sometimes received after the due date under the agreement. On 16 January 1990, plaintiff received a payment from defendant's insurance carrier covering her period of disability through 20 December 1989. This was the last payment plaintiff received before accelerating the loan and repossessing the car in March 1990.

Plaintiff's representative reached defendant by telephone on 31 January 1990, and defendant indicated that she had not filed any more disability claim forms. Plaintiff's representatives attempted to contact defendant on 5 February 1990, but defendant's telephone was disconnected. Plaintiff sent defendant past due notices by mail on 5 February 1990 as well as on two other days in February. Plaintiff received neither payments from defendant in February and March 1990 nor any explanation from defendant that payments were forthcoming from either defendant or her disability insurance company.

The collections manager for plaintiff's Raleigh-area collections office reviewed defendant's account file and decided to repossess defendant's car. The decision to repossess was based upon the following factors: 1) defendant's overall poor payment record; 2) the burden shouldered by plaintiff in requiring its representatives to regularly and repeatedly contact defendant to demand payment under the terms of the agreement; 3) defendant's pattern of repeatedly breaking promises to make payments; 4) defendant's failure to ensure that her disability insurance company made her car payments during her periods of disability; 5) defendant's telephone was no longer in service and plaintiff was unable to contact her; 6) defendant's failure to respond to past due notices and failure to contact plaintiff to discuss payment of her obligation; and 7) no payments had been made for almost three months. On 12 March 1990, plaintiff mailed a letter to defendant offering to reinstate the agreement and to defer repossessing the vehicle if defendant paid all amounts past due under the agreement. Plaintiff received no consideration for its offer, and the offer was not requested by defendant. On 14 March 1990, before defendant received the letter, plaintiff repossessed the car. After defendant realized the car had been repossessed, she received plaintiff's 12 March 1990 letter.

After repossessing the car, plaintiff exercised its right to declare all of defendant's debt secured by the agreement immediately due and payable. Defendant neither paid nor offered to pay the entire unpaid debt. In April 1990 defendant's insurance company paid plaintiff for defendant's period of disability through 4 March 1990, which plaintiff applied to defendant's account. After notifying defendant of its intent to sell the repossessed automobile, plaintiff sold the automobile pursuant to the terms of the agreement. After crediting defendant's account with the amount of net proceeds from the sale of the automobile, plaintiff determined that defendant was still indebted to plaintiff in the amount of $7096.99, and plaintiff sued defendant to collect the deficiency amount along with interest and attorney fees, as allowed in the agreement. Defendant counterclaimed, claiming that plaintiff had waived its right to accelerate the loan by accepting late payments from defendant on numerous occasions, and seeking to recover defendant's equity in the repossessed car as well as attorney fees and lost disability payments.

I. Defendant's Motion to Amend

[1] Defendant contends that the trial court erred in denying her motion for leave to amend her answer and assert new counterclaims. We first note that "[a]lthough the spirit of the North Carolina Rules of Civil Procedure is to permit parties to proceed on the merits without the strict and technical pleadings rules of the past, the rules still provide some protection for parties who may be prejudiced by liberal amendments." *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984) (citations omitted). Our standard of review here is clear: "[a] motion to amend is addressed to the discretion of the trial court. Its decision will not be disturbed on appeal absent a showing of abuse of discretion." *Id.* If the trial court articulates a clear reason for denying the motion to amend, then our review ends. Acceptable reasons for which a motion to amend may be denied are "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment." *Coffey v. Coffey*, 94 N.C. App. 717, 722, 381 S.E.2d 467, 471 (1989).

In the case before us, the trial court articulated its reasons for denying defendant's motion to amend her answer: undue delay and undue prejudice. The trial court noted that granting the motion would "materially prejudice [plaintiff]" by requiring plaintiff to defend against claims for affirmative relief for the first time, almost two years after plaintiff instituted the action. *See Carolina Garage, Inc. v.*

Holston, 40 N.C. App. 400, 404, 253 S.E.2d 7, 10 (1979). We therefore find no abuse of discretion.

II. Findings of Fact

[2] Defendant assigns as error numerous findings of fact made by the trial court. Our careful review of the record reveals that there was competent evidence before the trial court to support the trial court's findings. Where a party contests findings of fact, this Court must "determine only if those findings to which exception was taken are supported by competent evidence of record." *Harris v. Walden*, 314 N.C. 284, 289, 333 S.E.2d 254, 257 (1985). Furthermore, "our appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, *even though the evidence might sustain findings to the contrary.*" *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) (emphasis added). As the finder of fact, the trial court "has the duty to pass upon the credibility of the witnesses who testify. He decides what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom. The appellate court cannot substitute itself for the trial court in this task." *General Specialties Co. v. Nello L. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979). We find no error in the trial court's findings of fact.

III. Conclusions of Law

Defendant asserts that the trial court erred in its conclusions of law that plaintiff was entitled to invoke its remedies under the agreement. Specifically, defendant contends that the trial court incorrectly concluded that there was no waiver or estoppel arising out of plaintiff's acceptance of numerous payments from defendant that were more than thirty days overdue. Defendant further contends that the trial court incorrectly concluded that usage of trade by consumer lenders could not modify the terms of the agreement and preclude plaintiff from exercising its rights under the agreement. We disagree.

A. Waiver and Estoppel

[3] The trial court concluded that: "Defendant could not reasonably rely upon any failure by plaintiff to invoke its remedies at any earlier time, and did not reasonably rely on any failure by plaintiff to provide additional written notice to defendant of an intent to invoke the remedies under the agreement." Defendant objects to the trial court's determination that there was neither waiver nor estoppel in the case at hand.

1. Waiver

The agreement specifically provided that "[a]cceptance by [plaintiff] of a late payment . . . does not excuse your late payment or mean that you can keep making payments after they are due." Defendant argues that in spite of this language and evidence that plaintiff consistently reminded defendant that payment should be timely, plaintiff waived its rights under the agreement, citing this Court's language in *Driftwood Manor Investors v. City Federal Savings & Loan*, 63 N.C. App. 459, 464, 305 S.E.2d 204, 207 (1983). We explained in *Driftwood* that a noteholder who repeatedly accepts late installments will be held to have waived the right to accelerate the debt on that ground *unless the payor is first notified that prompt payment will be required in the future. Id.* Therefore, repeated acceptance of late payments does not constitute waiver where the creditor makes clear to the debtor its intent to continue to hold the debtor to the terms of the agreement. The policy arguments for this limitation on waiver are manifest—to make acceptance of late payments automatic waiver would discourage creditors from allowing debtors an opportunity to bring themselves current, in the hope that the contract can be salvaged and the debt retired to everyone's satisfaction.

The trial court in this case found that plaintiff had notified defendant over one hundred times that prompt payment would be expected in the future. This is not a case where the creditor consistently accepted late payments without notifying the debtor that the acceptance did not indicate that future payments were still expected to be paid in a timely fashion. The trial court's findings of fact noted that "throughout the period of defendant's loan, plaintiff's collections personnel frequently contacted and attempted to contact defendant, by telephone, by correspondence, and by in[-]person 'field calls,' " and that "[p]laintiff's collections personnel repeatedly demanded that defendant meet her obligations under the agreement and consistently referred defendant to the agreement for the parties' rights and remedies." Having determined that there was competent evidence in the record to support these findings of fact, we hold that the trial court did not err in its conclusion that plaintiff had not waived its rights under the agreement.

2. Estoppel

[4] Defendant next contends the trial court erred in not concluding from its findings of fact that plaintiff was equitably estopped from accelerating the debt because of its previous acceptance of late pay-

ments. In order to prove estoppel, however, defendant must show that she reasonably relied upon plaintiff's acceptance of late payments to her detriment. *See Hill v. Town of Hillsborough*, 48 N.C. App. 553, 558, 269 S.E.2d 303, 306 (1980). The trial court specifically found that defendant did not "change her position in any way to her detriment in reliance on any action or inaction by plaintiff." We hold that this finding of fact sufficiently supports the trial court's conclusion of law that plaintiff was not estopped from invoking its rights under the agreement.

B. Usages of Trade

Finally, defendant asserts that the trial court erroneously concluded that "[u]nder the facts in this case, usages of trade by consumer lenders could not change, modify, supplement[,] or qualify the terms of the agreement." However, defendant did not address this contention in her brief. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. N.C.R. App. P. 28(b)(5).

IV. Conclusion

We note that there are assignments of error and cross-assignments of error asserted by both parties that are deemed abandoned pursuant to Rule 28(b)(5).

Accordingly, the decision of the trial court is affirmed.

Affirmed.

Judges JOHNSON and WYNN concur.

RUSSELL L. McLEAN, III, PLAINTIFF v. PHIL MECHANIC, DEFENDANT

No. 9330SC849

(Filed 6 September 1994)

1. Pleadings § 15 (NCI4th)— punitive damages in slander action—damage award properly set aside as sanction

The trial court did not err in setting aside an award for punitive damages in a slander action as a sanction where plaintiff prayed for punitive damages in excess of $100,000 in violation of N.C.G.S. § 1A-1, Rule 8(a)(2).

Am Jur 2d, Pleading §§ 28 et seq.

2. Husband and Wife § 61 (NCI4th)— criminal conversation claim proved—no award of nominal damages—setting aside punitive damages error

The trial court erred in setting aside a punitive damages award with respect to a criminal conversation claim where the jury found that defendant had committed criminal conversation, awarded zero compensatory or nominal damages, and awarded punitive damages, since plaintiff was entitled to at least nominal damages which would in turn support an award of punitive damages.

Am Jur 2d, Husband and Wife §§ 485, 486.

Punitive or exemplary damages in action by spouse for alienation of affections or criminal conversation. 31 ALR2d 713.

3. Evidence and Witnesses § 2211 (NCI4th)— criminal conversation—DNA testing of underwear stains—admissibility of results

The trial court in an action for criminal conversation did not err in admitting DNA test results into evidence, and defendant could not complain on appeal with regard to the foundation laid for the DNA evidence; furthermore, any issues with regard to chain of custody of plaintiff's wife's underwear on which DNA testing was performed were for the jury to decide.

Am Jur 2d, Expert and Opinion Evidence §§ 278 et seq.

Admissibility of DNA identification evidence. 84 ALR4th 313.

Appeal by plaintiff and defendant from judgment entered 31 March 1993 by Judge Robert M. Burroughs in Haywood County Superior Court. Heard in the Court of Appeals 20 April 1994.

Brown, Ward, Haynes, Griffin & Seago, by Randal Seago, for plaintiff appellant-appellee.

Patrick U. Smathers, P.A., by Patrick U. Smathers, for defendant appellant-appellee.

COZORT, Judge.

Plaintiff filed two causes of action against defendant: first, an action for criminal conversation, intentional infliction of emotional

distress, and punitive damages; second, a claim for slander and punitive damages. The two cases were consolidated for trial. The trial court entered a default against defendant in the action for slander and denied defendant's motion to set aside the default. Defendant subsequently filed a motion to dismiss plaintiff's complaint, or in the alternative, for sanctions against plaintiff for violating N.C.R. Civ. P. 8(a)(2) by pleading punitive damages in excess of $10,000.00. The trial court granted the motion and dismissed the claim for punitive damages as a sanction. The court submitted the issue to the jury for a determination on the matter in the event the dismissal was reversed on appeal. The jury awarded plaintiff $1,000.00 in compensatory damages and $20,000.00 in punitive damages in the slander action. The jury also found that defendant did not inflict severe emotional distress on plaintiff.

In the action for criminal conversation, the jury found the defendant had criminal conversation with plaintiff's spouse. The jury awarded zero compensatory or nominal damages and $10,000.00 in punitive damages in that action. The trial court set aside the punitive damages verdict. Both plaintiff and defendant appeal, raising various issues related to the trial and verdicts. We find no error in the main trial and affirm the dismissal of the punitive damages in the slander case. We reverse the trial court's ruling to set aside the punitive damages award in the criminal conversation action.

The underlying facts as presented at trial are as follows: The plaintiff, Russell L. McLean, III, an attorney in Waynesville, North Carolina, and his wife, Susie McLean, were experiencing marital difficulties following the birth of their daughter in April of 1990. Plaintiff and Mrs. McLean were introduced to defendant through a mutual friend. Defendant and Mrs. McLean became involved in real estate business dealings and became friends. Defendant thereafter convinced Mrs. McLean to accompany him on a group trip to Aruba. Mrs. McLean and a friend, Marsha Gilliland, travelled to Aruba with defendant and several others from 30 August to 4 September 1991. Mrs. McLean had told plaintiff she was going to Myrtle Beach for a week with a friend.

When Mrs. McLean returned from Aruba, she did not unpack her suitcase immediately. Plaintiff searched through the suitcase and discovered condoms and spermicide in her makeup bag. Having had a vasectomy in 1991, plaintiff suspected his wife was having sexual intercourse with another man. He collected four pair of women's

underwear from his wife's suitcase and eventually sent the panties to LIFECODES laboratory in Stamford, Connecticut, for DNA testing. The analysis revealed that some of the underpants were stained with semen. The LIFECODES laboratory compared the DNA pattern in the semen to the DNA pattern in a sample of defendant's blood. Experts concluded the semen in the panties was that of defendant to greater than a 99% level of certainty. Plaintiff thereupon filed the action for criminal conversation on 17 December 1991.

In response to plaintiff's institution of legal proceedings, defendant telephoned some of plaintiff's clients and told them plaintiff had been engaged in a homosexual affair with his best friend. Defendant additionally telephoned one of plaintiff's clients and told her that, due to a mistake by plaintiff, the mortgage on her home was being foreclosed. Plaintiff's clients began requesting new counsel, and the law partnership suffered financially. Based on these additional facts, plaintiff filed the slander action on 17 August 1992.

The trial court dismissed the punitive damages portion of the slander action because the plaintiff demanded more than $10,000.00 in punitive damages, in violation of Rule 8(a)(2) of the Rules of Civil Procedure. This dismissal negated the jury's contingent award of $20,000.00 in punitive damages in the slander action. In the criminal conversation action, the trial court struck the jury's award of $10,000.00 in punitive damages because the jury awarded nothing for nominal or compensatory damages. The result is that, having prevailed on both torts, plaintiff received only $1,000.00 in damages.

[1] We turn first to the issues raised by plaintiff on appeal. Plaintiff claims the trial court erred in setting aside the award of punitive damages in the slander action. The trial judge heard defendant's sanction motion prior to trial and ruled that he intended to strike the punitive damages claim if any were awarded in the slander case, as a sanction for violating N.C.R. Civ. P. 8(a)(2). When the jury returned a verdict awarding plaintiff $20,000.00 in punitive damages, the trial court set aside the recovery.

Plaintiff's complaint in the slander action prayed for "punative [*sic*] damages in excess of $100,000.00." Rule 8(a)(2) of the North Carolina Rules of Civil Procedure states in part:

> In all negligence actions and in all claims for punitive damages in any civil action, wherein the matter in controversy exceeds the sum or value of ten thousand ($10,000), the pleading shall not

> state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars ($10,000).

N.C. Gen. Stat. § 1A-1, Rule 8(a)(2) (1990). One of the permissible sanctions for violating N.C.R. Civ. P. 8(a)(2) is dismissal pursuant to N.C.R. Civ. P. 41(b). *Jones v. Boyce*, 60 N.C. App. 585, 586, 299 S.E.2d 298, 300 (1983). Although a dismissal with prejudice pursuant to Rule 41(b) is available as a sanction for a violation of Rule 8(a)(2), it is not the only available sanction and should be imposed only where the trial court determines that less drastic sanctions are insufficient. *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992). In the present case, the trial court had the authority to dismiss the entire case, not just the award of punitive damages. As a result, we conclude the trial court did not err in striking the punitive damages award in the slander case as a sanction.

[2] Next, plaintiff contends the trial court erred in setting aside the punitive damages award with respect to the criminal conversation claim. The trial court instructed the jury that if it found that defendant committed criminal conversation with plaintiff's wife, the jury could award plaintiff nominal or compensatory damages. The trial court also instructed on punitive damages and defined each type of damages for the jury. The jury returned a verdict (1) finding that defendant committed criminal conversation with Mrs. McLean; (2) awarding zero compensatory or nominal damages; and (3) awarding $10,000.00 in punitive damages. The trial court set aside the punitive damages award based on a finding that no punitive damages could be awarded where the jury determined the plaintiff was not entitled to compensatory or nominal damages despite having been instructed as to those damages. We reverse the trial court's action in setting aside the award of punitive damages in the criminal conversation claim.

In *Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992), our Supreme Court affirmed this Court's determination that " '[o]nce a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal damages, which in turn support an award of punitive damages.' " *Id.* (quoting *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474 (1991)). The jury in *Hawkins* found the defendant had committed an assault on the plaintiff; however, it failed to award compensatory damages. The jury awarded punitive damages in the amount of $25,000.00. The jury had been instructed on compensatory and punitive damages, but not nominal

damages. Plaintiff argued in *Hawkins* that, because she had proved all the elements of her cause of action, she was entitled to recover nominal damages "whether submitted or not," and should receive the punitive damages award. The Court held that, because the plaintiff was entitled to at least nominal damages, that fact was sufficient to support an award of punitive damages. *Id.*

Here, despite the plaintiff's success in proving his action for criminal conversation, the jury failed to follow the trial court's instructions by awarding at least nominal damages. Since the instruction given on nominal damages was not included in the record before us, we must invoke the presumption that the instruction was correct. "The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error." *Harvey v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985). Because we presume the instruction on nominal damages was given correctly and nominal damages were recoverable, it is apparent the jury merely failed to follow the judge's directions. Accordingly, the trial court erred in striking the punitive damages award in the criminal conversation action. We reverse that portion of the judgment and remand the cause for entry of punitive damages. We have reviewed the remaining issues plaintiff has raised on appeal and conclude they do not amount to reversible error.

Turning to the defendant's appeal, we first consider whether the trial court erred in denying his motion to set aside the default judgment in the slander and emotional distress action. Plaintiff obtained a default judgment from the trial court in the slander action on 22 September 1992. Defendant filed a motion to set aside the default on 28 September 1992, arguing the judgment should be set aside pursuant to N.C.R. Civ. P. 60(b) under subsections (1) for mistake, inadvertence, surprise or excusable neglect, or (6) for any other reason justifying relief from the operation of the judgment. Generally, a motion for setting aside a judgment pursuant to Rule 60(b) is addressed to the sound discretion of the trial court, and the standard of appellate review is limited to determining whether the court abused its discretion. *Brown v. Windhom*, 104 N.C. App. 219, 221, 408 S.E.2d 536, 537 (1991). The trial court summarily denied the motion to set aside the default judgment without making findings of fact. Although a better practice would be to make findings of fact when ruling on a Rule 60(b) motion, the trial court is not required to do so. *Nations v. Nations*, 111 N.C. App. 211, 214, 431 S.E.2d 852, 854

(1993). We have reviewed the record as well as defendant's arguments and find the trial court did not err in failing to set aside the default judgment in the slander action.

[3] Next, defendant complains the trial court committed error in its admission of the DNA test results into evidence. First, defendant argues the trial court erred in admitting into evidence the deposition testimony of certain lab technicians concerning the DNA evidence because of an improper foundation. Specifically, defendant claims the testimony read in court was too complicated for the jury to understand without some background information making it clear that DNA tests are "tests of exclusion, not inclusion."

This Court and our Supreme Court have recognized that, with the proper foundation, DNA profile testing is generally admissible as an established technique considered to be reliable within the scientific community. *See Batcheldor v. Boyd*, 108 N.C. App. 275, 281, 423 S.E.2d 810, 814, *disc. review denied*, 333 N.C. 254, 426 S.E.2d 700 (1992); *State v. Pennington*, 327 N.C. 89, 101, 393 S.E.2d 847, 854 (1990). Here, plaintiff read into evidence the depositions of Lauren Galbreath and Dr. Michael L. Baird from LIFECODES laboratory. Defendant opted not to attend the taking of either deposition held out of state, and no objections were made during the deposition proceeding. A review of the transcript also discloses that defendant failed to object to the foundation laid for the DNA evidence presented through the depositions. Defendant therefore has waived review of this issue on appeal. Furthermore, Tim Grooman from Roche Bio-Medical Laboratories, who drew the blood sample from defendant, stated on cross-examination that a DNA test is performed "[t]ypically . . . to rule out an individual," thus establishing the test's exclusivity. We therefore find no error with respect to the laying of the foundation for admission of the evidence concerning the DNA test.

Defendant additionally claims the trial court erred in allowing the deposition testimony on the DNA tests into evidence because there were conflicts in the testimony between the two experts regarding the procedure and interpretation of DNA testing.

> [W]here unfair prejudice is not clear and where there is merely conflicting expert testimony regarding interpretation of the DNA evidence or where two experts have reached differing results based on independent analyses of the DNA, the issue becomes one of credibility of the experts. In that situation the jury is obligated to determine what weight each expert's testimony should receive.

State v. Bruno, 108 N.C. App. 401, 409-10, 424 S.E.2d 440, 445, *disc. review denied, appeal dismissed*, 333 N.C. 464, 428 S.E.2d 185 (1993). As a result, it was for the jury to sort through any inconsistencies arising from the evidence presented, and to determine what weight to assign that evidence.

The final issue defendant raises in relation to the DNA evidence is a challenge to the chain of custody established for the underwear from which the semen samples were taken. Defendant argues the chain of custody was unreliable in that "[t]he testimony at the trial established that at least three different men touched and handled the underwear prior to its testing[.]" Defendant's argument is unsupported by authority in his brief and is technically deemed abandoned under N.C.R. App. P. 28(b)(5). We have nonetheless reviewed the issue and find no error.

Our Supreme Court has stated:

> "The admissibility of any such evidence remains subject to attack. Issues pertaining to relevancy or prejudice may be raised. For example, expert testimony may be presented to impeach the particular procedures used in a specific test or the reliability of the results obtained. In addition, traditional challenges to the admissibility of evidence such as the contamination of the sample or chain of custody questions may be presented. These issues relate to the weight of the evidence. The evidence may be found to be so tainted that it is totally unreliable and, therefore, must be excluded."

State v. Pennington, 327 N.C. 89, 101, 393 S.E.2d 847, 854 (1990) (quoting *State v. Ford*, 301 S.C. 485, 490, 392 S.E.2d 781, 784 (1990)). At trial, testimony by various witnesses indicated the plaintiff took the underwear from his wife's suitcase upon her return from Aruba. He displayed them to his law partner. His law partner kept the panties behind a television in his bedroom for several days until they were transferred to plaintiff's attorney. Plaintiff's attorney sent the underwear to LIFECODES for testing. Considering the nature and circumstances of plaintiff's cause of action and the use of the DNA test to offer proof that defendant's semen was in Mrs. McLean's underwear, we find it nearly impossible for any other individual to have "tainted" the evidence in such a manner as to alter the results of the DNA test. We therefore conclude any kinks in the chain of custody were for the jury's consideration. We find no prejudicial error.

We have reviewed defendant's remaining issues and find no reversible error. In sum, we reverse that part of the trial court's judgment setting aside the punitive damages award in the criminal conversation case, we remand for entry of $10,000.00 in punitive damages, and we affirm the remainder of the judgment.

Affirmed in part, reversed in part, and remanded.

Judges GREENE and MARTIN concur.

INTEGON INDEMNITY CORPORATION, PLAINTIFF v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, DEFENDANT

No. 9228SC1233

(Filed 6 September 1994)

Insurance § 549 (NCI4th)— loaner vehicle—driver's policy—garage liability—applicable policy

The trial court erred in a declaratory judgment action arising from an automobile accident by concluding that Ms. Gaddy was not insured under defendant Universal's policy and that Universal had no duty to provide coverage or indemnity to Ms. Gaddy or her parents where Brandy Dryman was injured when a vehicle driven by Ms. Gaddy overturned; that vehicle was owned by Meeker Lincoln Mercury, which was insured by defendant Universal; the vehicle had been loaned to Ms. Gaddy's parents while their vehicle was out of normal use needing repairs; Ms. Gaddy was using the vehicle with her parent's permission; Ms. Gaddy's parents were insured by plaintiff Integon; Ms. Gaddy was insured by Atlantic Casualty Co.; and plaintiff Integon settled the underlying action. Universal was required by N.C.G.S. § 20-279.21(b)(2) to insure persons operating the vehicle with Meeker's permission, as was Ms. Gaddy, but the policy provides that Universal will pay its pro rata share of the minimum limits if there is other applicable insurance, which Integon provided. The cause was remanded for entry of a judgment providing for defendant Universal to pay its pro rata share.

Am Jur 2d, Automobile Insurance §§ 217 et seq.

Appeal by plaintiff from judgment entered 1 October 1992 by Judge Loto Greenlee Caviness in Buncombe County Superior Court. Heard in the Court of Appeals 26 October 1993.

Blue, Fellerath, Cloninger & Barbour, P.A., by Frederick S. Barbour, for plaintiff appellant.

Petree Stockton, by James H. Kelly, Jr., for defendant appellee.

COZORT, Judge.

Plaintiff appeals from the trial court's order holding that plaintiff's insured was not an insured under defendant's insurance policy and that defendant had no obligation to indemnify plaintiff's insured and no duty to defend plaintiff's insured for claims arising out of a motor vehicle accident.

On 13 December 1991, plaintiff insurance company filed a declaratory judgment action seeking a determination of the rights of the parties with respect to policy coverage arising out of an automobile accident on 5 March 1989. On 1 October 1992, the trial court found facts which can be summarized as follows: On 5 March 1989, Brandy Dryman was injured when a vehicle driven by Lisa Gaddy overturned. The vehicle was a 1988 Peugeot owned by Meeker Lincoln-Mercury, Inc., loaned to Hope and Allen Bridges, Lisa Gaddy's parents, and driven with permission from the Bridges. Brandy Dryman and her parents filed suit seeking recovery for personal injury, medical bills, and other related expenses. The lawsuit was settled for $18,000.00 which plaintiff paid. At the time of the accident, Meeker Lincoln-Mercury was insured by defendant Universal Underwriters Insurance Company. The Bridges held an automobile liability policy with plaintiff Integon. The parties stipulated and the court found:

> 11. . . . "Meeker Lincoln Mercury, Inc. loaned the 1988 Peugeot to Hope and Allen Bridges because a Chevrolet automobile owned by Hope Bridges and insured by Plaintiff was out of its normal use because of the need for repairs due to damages sustained in a collision."
>
> 12. . . . "at the time of the accident, Plaintiff provided certain liability insurance coverage to Hope and Allen Bridges, under the terms of its insurance policy with Hope and Allen Bridges, with liability limits in the minimum amount required by the North Carolina General Statutes."

> 13. . . . "at the time of the accident involved herein, Atlantic Casualty Insurance Company provided a policy of automobile liability insurance covering Lisa Gaddy with liability limits in the minimum amount required by the North Carolina General Statutes."

The trial court concluded in pertinent part: Ms. Gaddy and her parents were insured under the Integon liability policy; Ms. Gaddy and her parents were insured under Ms. Gaddy's automobile liability policy issued by Atlantic Casualty Insurance Company; Ms. Gaddy was using the car within the scope of permission granted by Meeker; at the time of the accident, Ms. Gaddy was not an insured under the Universal policy because she was not "required by law to be an INSURED" under the Universal policy by virtue of the coverage provided by plaintiff and Atlantic Casualty Insurance Company, which satisfied N.C. Gen. Stat. § 20-279.21(b)(2) (1993); by the terms of Universal's policy, Universal had no obligation to indemnify Ms. Gaddy or her parents for claims arising out of Brandy Dryman's injuries; under the terms of Universal's policy, Universal had no duty to defend Ms. Gaddy and her parents; and Integon is not entitled to recover from Universal. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred in concluding that Ms. Gaddy was not an insured under the Universal policy and that Universal had no duty to provide coverage or indemnity to Ms. Gaddy or her parents. Plaintiff contends that the provisions of the Financial Responsibility Act, N.C. Gen. Stat. § 20-279.21.9(b)(2), and the terms of the Universal policy required Ms. Gaddy to be an insured under the policy and that Universal agreed to provide coverage under the terms of the policy. Defendant counters that Ms. Gaddy was not an insured under the Universal policy because she was not "required by law" to be an insured by virtue of her insurance with Integon and Atlantic Casualty. Since Ms. Gaddy was not an insured, defendant argues, Universal contracted for no liability.

Both parties rely upon *United Services Auto. Assn. v. Universal Underwriters Ins. Co.*, 332 N.C. 333, 420 S.E.2d 155 (1992), in which the North Carolina Supreme Court addressed almost identical policies as at issue here. In *United Services*, the plaintiff company insured the driver of a truck involved in a collision. At the time of the accident, the insured driver was driving the truck with permission of Warden Motors, Inc. (Warden), the owner of the vehicle. Warden held a garage owner's liability policy with defendant Universal Underwrit-

ers. The Supreme Court first noted the similarity between the case at bar and *Allstate Ins. Co. v. Shelby Mutual Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967), in which the Court held

> that an insurer by the terms of its policy could exclude liability coverage under a garage owner's liability policy if the driver of a vehicle owned by the garage was covered under his own policy for the minimum amount of liability coverage required by the Motor Vehicle Financial Responsibility Act, N.C.G.S. § 20-279.1 *et seq.* Whether such exclusion occurs depends on the terms of the policy.

United Services Auto Assn., 332 N.C. at 334, 420 S.E.2d at 156. The *Allstate Ins. Co.* Court found that the garage owner's policy did not provide coverage because of the excess coverage provision in the driver's policy. *Id.* at 335, 420 S.E.2d at 156.

After reviewing the holding of *Allstate Insurance Co.*, the *United Services* Court considered if either of the two policies at issue *excluded* coverage. The driver's United Services Automobile Association policy defined a "Covered person" as: "1. You or any **family member** for the ownership, maintenance or use of any auto or **trailer**." *Id.* at 335, 420 S.E.2d at 157. The policy contained the following "Other insurance" provision:

> If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

Id. The policy of defendant Universal identified "an insured" in part as

> 3. Any other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission.

Id. at 336, 420 S.E.2d at 157. The Universal policy provided for the following limits:

> Regardless of the number of INSUREDS or AUTOS insured by this Coverage Part, . . . the most WE will pay is:
>
> 1. With respect to GARAGE OPERATIONS and AUTO HAZARD, the limit shown in the declarations for any one OCCURRENCE.

> The portion of the limit applicable to persons or organizations required by law to be an INSURED is only the amount (or amount in excess of any other insurance available to them) needed to comply with the minimum limits provision of such law in the jurisdiction where the OCCURRENCE takes place.

Id. The "other insurance" provision stated:

> The insurance afforded by this Coverage Part is primary, except it is excess:
>
> * * * *
>
> 2. for any person or organization who becomes an INSURED under this Coverage Part as required by law.

Id.

The Court concluded that Universal provided no coverage to plaintiff, reasoning:

> It is apparent that in defining the limits for which it would be liable for an occurrence involving a person required by law to be insured, Universal agreed to cover only what was needed to comply with the financial responsibility law. In this case, nothing is needed because the plaintiff provides the required coverage. We held in *Insurance Co.*, that a garage owner's policy complies with the Motor Vehicle Safety and Financial Responsibility Act although it does not provide liability coverage for an occurrence if the operator of the vehicle involved in the occurrence is covered by another policy.
>
> * * * *
>
> . . . In this case, Universal has not contracted for any liability. The plaintiff's liability cannot be shared and it is not excess. Universal limited the amount it would pay so that it has no coverage.

Id. at 336-37, 420 S.E.2d at 157-58. The Court noted that the provisions of the auto hazard section were not applicable because the Universal policy did not provide coverage for the driver of the truck. The Court plainly stated that "Universal was required by law to insure persons who were operating the truck with Warden's permission. N.C.G.S. § 20-279.21(b)(2) (1989). The driver of the truck in this case falls within that class and makes the limitation in the policy applicable." *Id.* at 338, 420 S.E.2d at 158.

Applying the above analysis to the case below, we find that the trial court erred in finding that Ms. Gaddy was not an insured under the Universal policy and that defendant Universal was not required to indemnify Integon in any amount. Ms. Gaddy held her automobile liability policy with plaintiff Integon, which policy provides in pertinent part:

> OTHER INSURANCE
>
> If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

The defendant Universal policy provides in pertinent part:

> "WHO IS AN INSURED . . . .
>
> * * * *
>
> 3. Any other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission."
>
> UNICOVER COVERAGE PART 500
> GARAGE
>
> * * * *
>
> THE MOST WE WILL PAY—Regardless of the number of INSUREDS or AUTOS insured by this Coverage Part, persons or organizations who sustain INJURY, claims made or suit brought, the most WE will pay is:
>
> 1. With respect to GARAGE OPERATIONS and AUTO HAZARD, the limit shown in the declarations for any OCCURRENCE.
>
> With respect to persons or organizations required by law to be an INSURED, the most WE will pay, in the absence of any other applicable insurance, is the minimum limits required by the Motor Vehicle Laws of North Carolina. When there is other applicable insurance, WE will pay only OUR pro rata share of such minimum limits.
>
> * * * *

> OTHER INSURANCE—The insurance afforded by this Coverage Part is primary, except:
>
> * * * *
>
> (2) WE will pay only OUR pro rata share of the minimum limits required by the Motor Vehicle Laws of North Carolina when:
>
> (a) a person or organization required by law to be an INSURED is using an AUTO owned by YOU and insured under the AUTO HAZARD . . . .

Since the pertinent insurance provisions considered in *United Services* and the case below are almost identical except for the coverage limitation provisions, our analysis here is the same as the Court's in *United Services* up to the point of determining whether the Universal policy provides coverage. As in *United Services*, we must determine which of the two policies provides coverage. Although defendant contends that Ms. Gaddy is not an insured under the policy because she was "not required by law" to be an insured under the Universal policy, the *United Services* Court rejected this very argument. As quoted above, the *United Services* Court noted that Universal was required by law to insure the driver of the truck under the provisions of the Financial Responsibility Act. Although the driver was an insured, the limitation in the Universal policy precluded coverage by Universal because United Services Automobile Association provided coverage sufficient to satisfy the minimum financial requirements. Similarly, in the case below, N.C. Gen. Stat. § 20-279.21(b)(2) required Universal to insure persons operating the Peugeot with Meeker's permission. We find that Ms. Gaddy was an insured because she was operating the vehicle with Meeker's permission.

The question then is whether Universal agreed to provide coverage to Ms. Gaddy under the circumstances. In *United Services*, under the coverage limitation provisions, Universal agreed to insure persons "required by law to be an insured" only in the amount necessary to comply with the minimum provisions of North Carolina law. Since the driver's policy in *United Services* provided the minimum coverage, the Court reasoned that Universal had not agreed to provide coverage. In the case below, the parties stipulated that Ms. Gaddy and the Bridges held policies with Atlantic Casualty and Integon respectively, each with liability limits in the minimum amount required by North Carolina law. As in *United Services*, the Integon policy provided that coverage was excess over any other collectible insurance for vehicles

not owned by the insured. Following the reasoning in *United Services*, we find that Integon provided the minimum coverage required by the Financial Responsibility Act. As in *United Services*, "[t]here is nothing in the policy issued by the plaintiff which says it will not provide coverage if there is another policy which provides coverage." *United Services*, 332 N.C. App. at 337, 420 S.E.2d at 157.

Although the analysis and policies in *United Services* and the case below are almost identical, there is a significant difference in the Universal policy coverage provisions. Unlike *United Services*, in the case below, the Universal policy provides that, if there is other applicable insurance, Universal will pay its pro rata share of the minimum limits. Since Integon provides other applicable insurance, we find that by the terms of the policy Universal has agreed to pay a pro rata share of the minimum financial limits. Therefore, we find that the trial court erred in finding and concluding that Ms. Gaddy was not an insured under the Universal policy, Universal did not have an obligation to indemnify Ms. Gaddy or her parents, Universal had no duty to defend, and Integon was entitled to nothing from Universal.

The judgment below is reversed and the cause remanded for entry of a judgment providing for defendant Universal to pay its pro rata share.

Reversed and remanded.

Judges EAGLES and ORR concur.

LAWTON E. NICHOLS AND WIFE, ZILPHIA MARIE HIGH NICHOLS, GLENWOOD H. PERRY AND WIFE, JEAN F. PERRY, PLAINTIFFS v. SANFORD EARL WILSON AND WIFE, AGNES WILSON, DEFENDANTS

SANFORD EARL WILSON AND WIFE, AGNES WILSON, PLAINTIFFS v. LAWTON E. NICHOLS AND WIFE, ZILPHIA MARIE HIGH NICHOLS, GLENWOOD H. PERRY AND WIFE, JEAN F. PERRY, DEFENDANTS

No. 937SC391

(Filed 6 September 1994)

1. Easements § 30 (NCI4th)— prescriptive easement—adverse use—inadequate evidence

The trial court did not err by granting a directed verdict on the issue of a prescriptive easement on a cartway claim where

defendants Wilson, who were asserting the cartway claim as a part of a larger processioning proceeding, presented no evidence to rebut the presumption that any past use of the cartway was permissive; the testimony of a witness indicated that the owner of the property at the time the cartway was in use actually agreed to let people use the path; there was no evidence presented by the Wilsons to show that the cartway was used under a claim of right other than by the owners; and the Wilsons did not engage in upkeep and indicated that they had used the cartway with the permission of the owners and not because they thought they had a right to use it.

Am Jur 2d, Easements and Licenses §§ 51, 52.

2. **Boundaries § 25 (NCI4th)— processioning—location of boundary—court's determination of survey to be used**

There was no prejudice in a processioning proceeding where the trial court had earlier granted a motion for summary judgment on the issue of the legal determination of the boundary line, effectively directing that the jury base its determination of the location of the boundary line upon the Cauley map submitted by plaintiffs Nichols, but included both the Cauley map and the Manning map, submitted by defendants Wilson, as options for the jury. As the summary judgment order was not applied to the jury instructions, and the jury chose the Manning map, there was no prejudice to the Wilsons. The Nichols did not cross-assign as error the trial judge's failure to follow the summary judgment order.

Am Jur 2d, Boundaries § 100.

3. **Boundaries § 33 (NCI4th)— processioning proceeding—j.n.o.v.—improper**

A judgment notwithstanding the verdict, which is merely a renewal of the earlier motion for a directed verdict, is improper in a processioning proceeding. The trial judge in a processioning proceeding determines what the line is as a matter of law and then leaves to the jury where the lines are located on the earth's surface. The jury here was provided with maps from both parties and it was wholly within the jury's province to choose the Manning map.

Am Jur 2d, Boundaries §§ 117, 118.

Appeal by defendants (the Wilsons) from judgment entered 20 October 1992 by Judge W. Russell Duke, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 2 February 1994.

On 17 August 1984, Lawton E. Nichols ("Nichols") filed a petition for a processioning proceeding under N.C.G.S. § 38(1), naming Sanford Earl and Agnes Wilson ("Wilsons") as defendants, to determine the boundary line between contiguous property owned by the parties. N.C. Gen. Stat. § 38(1) (1984). The lines that Nichols sought to have adjudged as the boundary for the parties' property were later depicted in a survey map drawn by J. Charles Cauley ("the Cauley survey"), and based upon the description contained in the deed for their property. The petition further alleged that the Wilsons had trespassed on lands claimed by Nichols.

On 14 September 1984, the Wilsons filed their answer to Nichols's petition in which they denied Nichols's allegation of trespass and sought that the boundary lines be adjudged as represented in a survey map drawn by J.C. Manning ("the Manning survey") in 1983 and based upon the deed from which the Wilsons claim title. On 2 July 1985, the Clerk of Superior Court appointed Preston Lane, Registered Land Surveyor, as surveyor in the proceeding. Lane surveyed the area, made a map and filed his report with the court. On 23 February 1988, pursuant to a joint motion of the parties, the trial court entered an order allowing Glenwood H. and Jean F. Perry to join as petitioners to the processioning proceeding, and allowing all parties to file amended pleadings which would supersede all prior pleadings.

On 8 August 1988, the Wilsons initiated a separate action against Nichols, his wife Zilphia Marie High Nichols, Sarah A. Perry and the Perrys, asserting claims for: 1) quiet title pursuant to N.C.G.S. § 41-10; 2) forcible trespass against defendant Glenwood H. Perry; and 3) declaration of a right to the public use of a cart-way or a neighborhood road in the location shown on the Manning map. For the sake of convenience and clarity, the parties will be referred to hereinafter as "the Nichols/Perrys" and "the Wilsons." On 17 August 1988, the Wilsons filed a Notice of Dismissal pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, dismissing Sarah A. Perry from the case.

On 13 October 1988, the Wilsons sought consolidation of the processioning proceeding with the civil action filed by the Wilsons, and on 14 December 1988, the Clerk of Superior Court ordered the processioning proceeding transferred to the civil docket of the Superior Court for trial by jury on all issues raised by the pleadings. On 30 June

1989, the trial court granted the Nichols/Perrys' motion for summary judgment on the issue of the legal determination of the boundary line, ordering that "the boundary line between the parties is the high water mark of the pond referred to in the pleadings as it existed in June, 1948," effectively directing that the jury base its determination of the location of the boundary line upon the Cauley map. The Wilsons immediately appealed the order to this Court in case No. 897SC1071, which dismissed the appeal as interlocutory on 17 July 1990.

The consolidated cases first came to trial before Judge G.K. Butterfield, Jr. at the 24 February 1992 civil term; after the jury reached a verdict, the trial court ordered a new trial on all issues on 19 June 1992. The cases once again came to trial and a jury was empaneled, at the 31 August 1992 civil session, before Judge W. Russell Duke, Jr. On 9 September 1992, following a full jury trial, arguments of counsel and instructions from the trial court, the jury answered all issues submitted to them in favor of the Wilsons. The Nichols/Perrys then moved for judgment notwithstanding the verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure, and the trial court entered judgment n.o.v. on 22 October 1992. On 2 November 1992, the trial court denied the following motions by the Wilsons: 1) Motion to Alter or Amend Judgment; 2) Motion for Relief from Judgment of the Trial Court; and 3) Motion for Entry of Judgment. The Wilsons appeal from the judgment entered by the trial court.

Connor, Bunn, Rogerson & Woodard, P.A., by David M. Connor; and Narron, Holdford, Babb, Harrison & Rhodes, P.A., by C. David Williams, for plaintiff-appellees (the Nichols and Perrys).

Lee, Reece & Weaver, by Cyrus F. Lee and Rachel V. Lee, for defendant-appellants (the Wilsons).

ORR, Judge.

This case, which involves a property-line dispute, has seen two jury trials and one attempted appeal to this Court in its ten-year history. The property at issue, which includes an old mill pond and surrounding property in Old Fields Township in Wilson County, was once owned in its entirety by J.J. Wilson, who died in 1928. The mill pond was first created when J.J. Wilson built an earthen dam on the Mill Branch, as a source of water power for a grist mill and for other uses, before the turn of the century. During the period of time from about

1925, when the earthen dam washed out, to 1945, when the present dam was built, the pond site was used as fenced pasture, and remnants of the "wire hog-type fence" remain today. The Wilsons claim ownership of the mill pond and the mill site. The Wilsons' property is contiguous to the property of the Nichols and to the property of the Perrys. The dispute in the case is over the appropriate borders of the pond—the Nichols/Perrys claim that the Wilsons have raised the dam over the years and effectively trespassed upon their property by increasing the surface area of the pond. In addition, the Wilsons claim a right to a "cartway" leading from the dam site, crossing a portion of the Nichols' property, to a state road. The Wilsons base their claim to the "cartway" upon an alleged prescriptive easement acquired by their use of the path over the years.

I. Directed Verdict

[1] The Wilsons assign as error the trial court's directed verdict on the Wilsons' claim of a "cartway" across the property belonging to the Nichols. In considering a motion for directed verdict

> the trial court must review all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Drain v. United States Life Ins. Co., 85 N.C. App. 174, 177, 354 S.E.2d 269, 272 (1987) (quoting *Penley v. Penley*, 314 N.C. 1, 11, 332 S.E.2d 51, 57 (1985)). "A directed verdict is improper unless it appears as a matter of law that plaintiff cannot recover under any view of the facts which the evidence reasonably tends to establish." *Willoughby v. Wilkins*, 65 N.C App. 626, 631, 310 S.E.2d 90, 94 (1983), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 697 (1984).

The following elements are required to establish the existence of an easement by prescription: 1) use that is adverse, hostile or under claim of right; 2) use that has been open and notorious such that the true owner had notice of the claim; 3) use that has been continuous and uninterrupted for a period of at least twenty years; and 4) a substantial identity of the easement claimed throughout the twenty-year period. *Potts v. Burnette*, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981).

Taking all of the evidence in the light most favorable to the Wilsons, we find that as a matter of law there was inadequate evidence to take the issue of a prescriptive easement to the jury. The Wilsons had the burden of proving the elements necessary for a prescriptive easement, starting with the "use that is adverse, hostile or under claim of right," and failed to meet that burden.

> A "hostile" use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right. There must be some evidence accompanying the user which tends to repel the inference that it is permissive and with the owner's consent. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription.

Potts, 301 N.C. at 666, 273 S.E.2d at 288 (citations omitted). The Wilsons presented no evidence to rebut the presumption that any past use of the "cartway" was indeed permissive. In fact, testimony of one witness indicated that the owner of the property at the time the "cartway" was in use, J.S. Wilson, actually agreed to let people use the path.

Furthermore, there was no evidence presented by the Wilsons to show that the "cartway" was used under a "claim of right" by those other than the owners. The Wilsons did not engage in the upkeep of the "cartway" and furthermore indicated that they had used the "cartway" with the permission of the owners and not because they thought they had a right to use it. Therefore, even taking all of the evidence presented in the light most favorable to the Wilsons, we find that the trial judge's directed verdict on the issue of a prescriptive easement was not error.

II. Summary Judgment

[2] The Wilsons assign as error the trial court's entry of summary judgment on the issue of the means of determining the location of the boundary line. The Wilsons contend that the trial court erred in determining that the Cauley map's representation of the boundary line should be the guide for the jury's determination of the location of the boundary. However, we need not address the merits of the court's determination, as at trial the court included both the Manning and the Cauley maps as the options for the jury to select between in the jury instructions. As the summary judgment order was not applied to the jury instructions, and the jury actually chose the boundary as

described in the Manning map, we find that there was no prejudice to the Wilsons, and therefore no need for further review of the summary judgment.

We note that the Nichols/Perrys did not cross-assign as error either the trial judge's failure to follow the determinations in the summary judgment order or the content of the jury instruction. Rule 10(d) of the North Carolina Rules of Appellate Procedure provides that

> [w]ithout taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

N.C.R. App. P. 10(d).

III. The Judgment N.O.V.

[3] The Wilsons also assign as error the trial court's entry of judgment notwithstanding the verdict. Rule 50 of the North Carolina Rules of Civil Procedure is entitled "[m]otion for a directed verdict and for judgment notwithstanding the verdict." Rule 50 states that "a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict" and that "the motion shall be granted if it appears that the motion for directed verdict could properly have been granted . . . ." N.C.R. Civ. P. 50(b)(1). As our Supreme Court has explained, "if the motion for directed verdict *could have been properly granted*, then the subsequent motion for judgment notwithstanding the verdict should also be granted." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 337 (1985) (emphasis added). However, our Supreme Court has also held that "a motion for judgment notwithstanding the verdict is cautiously and sparingly granted." *Id.*

This case is effectively still a processioning proceeding, the "primary purpose of which is to establish the correct location of the disputed dividing line." *Sipe v. Blankenship*, 37 N.C. App. 499, 503, 246 S.E.2d 527, 530 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 470 (1979). This Court has held that "[a] directed verdict is *never* proper when the question is for the jury, and in processioning proceedings the determination of the boundary is for the jury." *Beal v. Dellinger*, 38 N.C. App. 732, 734, 248 S.E.2d 775, 776 (1978) (emphasis added).

In a processioning proceeding, the trial judge determines "what" the line is "as a matter of law" and then leaves to the jury "where these lines are located on the earth's surface." *Pruden v. Keemer*, 262 N.C. 212, 218, 136 S.E.2d 604, 608 (1964). Furthermore, "[i]t is the province of the jury to locate the line. It is for them to say, on the conflicting testimony and *under the instructions of the court*, where the line is." *Cornelison v. Hammond*, 225 N.C. 535, 536, 35 S.E.2d 633, 634 (1945) (emphasis added). The Nichols/Perrys' own Request for Jury Charge provided the jury with both the Cauley and Manning maps as options for determining where the line could be drawn. It was wholly within the province of the jury to choose the Manning map. Therefore, a judgment notwithstanding the verdict, which is, after all, merely a renewal of the earlier motion for directed verdict, is improper in a processioning proceeding and in this case.

Because of our determinations on the assignments of error discussed above, we need not address the Wilsons' remaining assignments of error. Accordingly, we reverse the trial court's entry of judgment notwithstanding the verdict and remand this case to the trial court for reinstatement of the jury verdict.

Reversed and remanded.

Judges COZORT and GREENE concur.

JOHN R. SEXTON & CO. PLAINTIFF v. BETSY Y. JUSTUS, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. 9318SC1127

(Filed 6 September 1994)

1. Taxation § 173 (NCI4th)— tax exemption—registration of product not retroactive

Registration of a product eligible for exemption from the soft drink tax does not operate retroactively.

Am Jur 2d, State and Local Taxation §§ 612, 613.

2. Taxation § 173 (NCI4th)— fruit and vegetable juice concentrates—registration not required—exemption from taxation

Plaintiff's fruit and vegetable juice concentrates were exempt from taxation, even though they were not registered, where the Soft Drink Tax Act, as it existed at the relevant time period, and caselaw did not clearly require registration.

Am Jur 2d, State and Local Taxation §§ 612, 613.

Appeal by defendant from order entered 23 July 1993 by Judge Russell G. Walker, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 8 June 1994.

Smith Helms Mulliss & Moore, L.L.P., by Mack D. Pridgen, III and Bruce P. Ashley, for plaintiff-appellee.

Attorney General Michael F. Easley, by Associate Attorney General Kay Linn Miller, for defendant-appellant.

LEWIS, Judge.

On 24 November 1992, plaintiff, a Delaware corporation doing business in North Carolina, filed this action against Betsy Y. Justus as the Secretary of the Department of Revenue (hereinafter "defendant"), seeking a refund of soft drink taxes it paid under protest in July 1992. We note that Janice H. Faulkner has since replaced Justus as Secretary of the Department of Revenue. The trial court granted summary judgment for plaintiff and denied summary judgment for defendant. Defendant now appeals, alleging that the court erred in ordering the refund.

The parties stipulated to the following:

Plaintiff is in the business of food service distribution, and distributes both ready-to-drink and concentrated drink products throughout North Carolina. The Department of Revenue (hereinafter "the department") performed a Soft Drink Excise Tax Audit of plaintiff covering the period from 1 May 1985 to 30 September 1988. As a result, the department issued a Notice of Tax Assessment, pursuant to the Soft Drink Tax Act (hereinafter "the Act"), to plaintiff on 30 November 1988, assessing a total of $57,620.91, which included additional soft drink excise taxes, interest and penalties.

On 5 June 1992 plaintiff filed an objection to the assessment and an application for a hearing with the department. Plaintiff claimed that its fruit and vegetable juice concentrated products were exempt from taxation, and that registration of these products was not required under the Act. Plaintiff's request for rescission of the assessment was denied, and plaintiff paid the tax under protest on 14 July 1992. On 10 August 1992 the department denied plaintiff's claim for a refund. On 24 November 1992 plaintiff filed the complaint in the present action in Guilford County Superior Court, seeking a refund of those taxes paid on the sale of concentrated products. On 23 July 1993 the trial court entered summary judgment for plaintiff and ordered a refund of all taxes, interest and penalties.

On appeal defendant contends that the trial court erred in ordering the refund, because the concentrated products did not qualify for exemption without proper registration as provided in the Act. Although the concentrated products were later registered, defendant contends that registration is not retroactive.

Plaintiff, on the other hand, contends that the concentrated products were either exempt from taxation *per se* or based on subsequent registration. Plaintiff argues that the statute, as interpreted by defendant, would be unconstitutionally vague.

[1] At the outset, we note that registration of a product eligible for exemption does not operate retroactively. *National Fruit Prod. Co. v. Justus*, 112 N.C. App. 495, 436 S.E.2d 156 (1993), *disc. review denied*, 335 N.C. 771, 442 S.E.2d 519 (1994). Plaintiff's subsequent registration of its concentrated products effected no exemption.

[2] In order to determine whether plaintiff's concentrated products were otherwise exempt from taxation we examine the provisions of the Soft Drink Tax Act as well as two cases, *Institutional Food House, Inc. v. Coble*, 289 N.C. 123, 221 S.E.2d 297 (1976), and *National Fruit Products Co. v. Justus*, 112 N.C. App. 495, 436 S.E.2d 156 (1993), *disc. review denied*, 335 N.C. 771, 442 S.E.2d 519 (1994). The Soft Drink Tax Act imposes an excise tax upon "the sale, use, handling and distribution of all soft drinks, soft drink syrups and powders, base products and other items." N.C.G.S. § 105-113.45 (1985) (amended 1992) (All references are to the 1985 version of the Act. The 1979 version was in effect until November 1985, and was therefore in effect for part of the period in question in this case. However, the relevant sections of the 1979 and 1985 versions are the same. We will therefore refer only to the 1985 version of the Act). Concentrated

products are included in the definition of base products and, as such, are taxable. § 105-113.44(1).

Certain drinks are exempt from the provisions of the Act. Section 105-113.47(a) provides that "[a]ll bottled soft drinks containing thirty-five percent (35%) or more of natural fruit or vegetable juice and all bottled natural liquid milk drinks containing thirty-five percent (35%) or more of natural liquid milk, are exempt from the excise tax." Part (b) of that statute provides that any bottled soft drink for which an exemption is claimed "must be registered with the Secretary. No bottled soft drink shall be entitled to the exemption until registration has been accomplished . . . ." § 105-113.47(b).

Noticeably absent from this version of the Act is a reference to concentrates in the exemption provision. Although the statute has been amended to clearly include concentrates in its exemption and registration provisions, *see* N.C.G.S. §§ 105-113.46, -113.47 (1992), under the former version only "bottled soft drinks" were entitled to an exemption. Concentrates were only mentioned as base products, which were taxable. §§ 105-113.44(1), -113.45(a). Thus, according to the statute, concentrates were not eligible for exemption during the period in question.

However, in addition to reading the statute, we must examine caselaw interpreting the statute. In *Institutional Food House, Inc. v. Coble*, 289 N.C. 123, 221 S.E.2d 297 (1976), the issue before the Supreme Court was whether the sale of frozen concentrated orange juice was a taxable event under the Act. *Id.* at 131, 221 S.E.2d at 302. The Court noted that the sale of natural orange juice and bottled fruit juice drink containing 35 percent or more natural orange juice is not a taxable event, and found that the legislature intended to exclude from taxation "the sale of all natural fruit juices, however packaged." *Id.* at 136-37, 221 S.E.2d at 305. The Court further stated that "[t]axation of frozen concentrated orange juice as a 'base product' is contrary to such intent and largely nullifies the exemption contained in [section 105-113.47(a)]." *Id.* at 137, 221 S.E.2d at 305. The Court determined that concentrates were not taxable as either base products or soft drink syrups, and concluded that base products were taxable only "when used to complete a soft drink which, if sold bottled, would be subject to the tax." *Id.* at 137, 221 S.E.2d at 306. According to the Court,

> Unless a soft drink is subject to taxation if sold bottled, its ingredients cannot be taxed. Since natural orange juice is exempt from

> taxation when sold bottled, it follows that frozen concentrated orange juice, as an ingredient of natural orange juice, cannot be taxed under the Act. Frozen concentrated orange juice . . . is exempt from taxation unless color, artificial flavoring or preservative has been added to it.

Id. at 138, 221 S.E.2d at 306. The Court did not indicate whether concentrated orange juice would have to be registered to qualify for exemption.

This Court recently addressed the registration requirement of the exemption provision in *National Fruit Product Co. v. Justus*, 112 N.C. App. 495, 436 S.E.2d 156 (1993), *disc. review denied*, 335 N.C. 771, 442 S.E.2d 519 (1994). In that case the taxpayer-plaintiff, relying upon *Institutional Food House*, asserted that certain of its fruit juices were exempt from taxation and did not have to be separately registered. *Id.* at 500, 436 S.E.2d at 159. The *National Fruit* Court noted that *Institutional Food House* stated that the sale of bottled fruit juice was not a taxable event. *Id.* at 501, 436 S.E.2d at 159. However, the *National Fruit* Court rejected the proposition that the sale of bottled fruit juice was not a taxable event *ab initio*, emphasizing that *Institutional Food House* did not address the registration requirement at all. *Id.* The *National Fruit* Court held that "the plain meaning of the statute is that a producer of allegedly exempt fruit juice is not entitled to the exemption *until* it registers its products." *Id.* The Court explained that registration is necessary because it enables the Secretary to analyze the contents of soft drinks in order to verify whether they qualify for exemption. *Id.* at 501, 436 S.E.2d at 159-60.

In the case at hand, plaintiff defends the trial court's decision to award it a refund by arguing that *Institutional Food House* created a blanket exemption for fruit juice concentrates from being taxed under the Act. Plaintiff emphasizes that *Institutional Food House* did not mention the registration requirement, and contends that *National Fruit* did not impose a registration requirement for concentrates, because it only dealt with the issue of registration of bottled fruit juices. Thus, neither the statute nor the relevant caselaw established a rule requiring registration of concentrates before exemption.

Defendant, on the other hand, argues that plaintiff is not entitled to the tax refund because, even if the concentrates qualified for exemption, plaintiff's failure to register them precluded that possibility. According to defendant, *Institutional Food House* merely provid-

ed that the exemption available for bottled soft drinks would also be available for concentrates, as long as they otherwise met the requirements for exemption. Concentrates not meeting the exemption criteria would still be taxable as base products. The test set forth in *Institutional Food House* is whether a base product or concentrate would be used to complete a drink which, if sold bottled, would be subject to the tax. If the bottled drink would be exempt, so would the base product. Defendant points out that a bottled drink would have to be registered to be exempted. Thus, a concentrate should have to be registered as well.

We agree with defendant that *Institutional Food House* did not provide a blanket exemption for fruit and vegetable juice concentrates. It is clear from that opinion that some concentrates would not qualify for the exemption. The Court gave an example when it stated that frozen concentrated orange juice would be exempt from taxation "*unless* color, artificial flavoring or preservative has been added to it." 289 N.C. at 138, 221 S.E.2d at 306 (emphasis added).

We cannot conclude, however, that the law clearly required registration of concentrates during the relevant time period. The statute did not mention concentrates in the exemption and registration provision. Although *Institutional Food House* provided that concentrates could qualify for exemption, the Court said nothing about requiring registration of concentrates. While *National Fruit* states the general rule that natural juice drinks must be registered in order to claim an exemption, it did not address concentrates. Thus, the taxpayer would have to draw an inference from the statute and caselaw that concentrates must be registered to qualify for exemption. We recognize that exemption provisions in taxing statutes are to be construed against the taxpayer if the intent of the legislature is not clear. *Institutional Food House*, 289 N.C. at 135, 221 S.E.2d at 304. Even so, we do not believe that this rule requires the taxpayer to divine a requirement not clearly stated.

We are not unmindful of the fact that our interpretation of the law permitting exemption without registration allows a taxpayer to take advantage of a loophole in the law by simply claiming an exemption for fruit or vegetable juice concentrates without having to prove the requisite natural juice content. We conclude, however, that it was up to the legislature to clarify any confusion created by *Institutional Food House*. Although the legislature did eventually amend the Act to

address exemption and registration of concentrates, such amendments had no effect on the period in question.

The decision of the trial court ordering a refund is hereby

Affirmed.

Judges EAGLES and COZORT concur.

CYDNEE C. SIMS, PLAINTIFF v. DAN GERNANDT, DAN GERNANDT D/B/A DAN'S FOREIGN CAR REPAIR, DEFENDANT

No. 9314DC892

(Filed 6 September 1994)

1. Torts § 12 (NCI4th)— release from liability—sufficiency of document

A document signed by plaintiff stating that she agreed "to relinquish [defendant automobile mechanic] of any responsibility whatsoever, of any kind for my 85 Honda-Civic & hearby receive a refund in full of $30.00 for welding of vehicle pedal" was effective as a release of defendant from liability for any claims arising out of the welding of the gas pedal of plaintiff's car.

Am Jur 2d, Release §§ 28 et seq.

2. Torts § 21 (NCI4th)— release from liability—no mutual mistake of fact

A release of defendant mechanic from liability for any claims arising from the welding of the gas pedal of plaintiff's car could not be set aside for mutual mistake of fact where plaintiff failed to assert that defendant was mistaken about the extent of the alleged damage from his welding, since any mistake by plaintiff cannot be said to be mutual.

Am Jur 2d, Release §§ 18-20.

3. Torts § 23 (NCI4th)— release from liability—failure to read release—no improper inducement

Plaintiff was not entitled to set aside a release of defendant automobile mechanic from liability for repairs to her car on the ground of improper inducement where plaintiff failed to allege

that defendant procured her signature on the release by fraud, and plaintiff admitted that she signed the release without reading it even though a cursory reading would have given plaintiff a sufficient understanding of what she was signing.

Am Jur 2d, Release § 15.

Judge WYNN dissenting.

Appeal by plaintiff from order filed 22 June 1993 by Judge William Y. Manson in Durham County District Court. Heard in the Court of Appeals 21 April 1994.

McGill & Noble, by Christa A. McGill, for plaintiff-appellant.

Browne, Flebotte, Wilson & Horn, by Daniel R. Flebotte, for defendant-appellee.

LEWIS, Judge.

Plaintiff took her car to defendant's repair shop for repairs. Plaintiff was dissatisfied with defendant's work because of a stain on the carpet and an odor. After discussions, the parties agreed that defendant would refund the $30.00 fee paid. Defendant then presented plaintiff with a one-sentence release, which plaintiff signed.

Plaintiff alleges that she later discovered that her gas line had been damaged while her car was being repaired by defendant, and that the damage resulted in the carpet stains and the odor. Plaintiff then brought this action against defendant claiming that he fraudulently concealed the dangerous condition of her car. Plaintiff admits that she did not read the document that defendant gave her to sign, and that she did not know that she was signing a "release." The document signed by plaintiff read as follows: "I Cydnee C. Sims [plaintiff's signature] AGREE TO RELINQUISH DAN GERNANDT OF ANY RESPONSIBILITY WHATSOEVER, OF ANY KIND FOR MY 85 HONDA-CIVIC & HEREBY RECEIVE A REFUND IN FULL OF $30.00 FOR WELDING OF VEHICLE PEDAL." Plaintiff stated in her affidavit that she believed that she was signing a receipt for the $30.00 refund.

Defendant moved for summary judgment relying on the alleged release, and after a hearing, the trial court granted defendant's motion. From that judgment, plaintiff appeals.

I.

[1] In her first assignment of error, plaintiff contends that the trial court erred in granting defendant's motion for summary judgment because the document signed by plaintiff did not release defendant from liability. Plaintiff argues that the language of the document renders it ineffective as a release. We disagree.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Bernick v. Jurden*, 306 N.C. 435, 440, 293 S.E.2d 405, 409 (1982). The moving party meets this burden by "proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). The papers of the moving party are carefully scrutinized while those of the opposing party are regarded with indulgence. *Stroup Sheet Metal Works, Inc. v. Heritage, Inc.*, 43 N.C. App. 27, 30, 258 S.E.2d 77, 79 (1979).

Plaintiff argues that the wording of the document should render it void. Plaintiff asserts that in applying a literal, dictionary sense, one cannot "relinquish" another "of any responsibility" because one can only relinquish something with which one has a personal connection. Plaintiff argues that contrary to the document, she is not claiming that defendant ever had responsibility for her car. Instead, she contends that defendant is liable for his alleged defective work. In essence, plaintiff argues that "responsibility" and "liability" do not have the same meaning. Therefore, since the document purports to release defendant from responsibility and not liability, it is not effective as a release. Finally, plaintiff asserts that the document is ambiguous if not nonsensical, and that it should therefore be read against the drafter.

We hold that the document, as written, is effective as a release. Read in its ordinary sense, the document clearly informs the reader of the drafter's intent to be released by the signor of any claims arising out of the welding of the car's pedal. Therefore, this assignment of error is overruled.

II.

[2] Plaintiff next argues that the trial court erred by granting defendant's motion for summary judgment because the release was signed under mutual mistake of fact. We disagree.

A release from liability may be set aside for mutual mistake of fact. *Wyatt v. Imes*, 36 N.C. App. 380, 381, 244 S.E.2d 207, 208, *disc. review denied*, 295 N.C. 557, 248 S.E.2d 735 (1978). The factors to be considered when determining whether a release has been executed under a mutual mistake are the following:

> [A]ll of the circumstances relating to the signing must be taken into consideration, including the sum paid for the release. A factor to be considered in cases of this kind is whether the question of liability was in dispute at the time of the settlement. The source or author of the mistake is of no consequence if the parties in good faith relied on it, or were misled by it, and the releasor was thereby induced to release a liability, which he would not otherwise have done.

Caudill v. Chatham Mfg. Co., 258 N.C. 99, 103, 128 S.E.2d 128, 131 (1962); *Wyatt v. Imes*, 36 N.C. App. at 381, 244 S.E.2d at 208.

In *Wyatt*, the plaintiff sought to recover from the defendant for personal injuries. The defendant raised a release signed by the plaintiff as a bar to the plaintiff's recovery. The plaintiff argued that when she signed a release with the defendant, she was mistaken as to the full extent of her injuries. *Wyatt*, 36 N.C. App. at 381, 244 S.E.2d at 207. This Court affirmed the trial court's summary judgment in favor of the defendant. The Court found that the plaintiff had presented no evidence to suggest any mistake on the part of the defendant, and therefore the mistake could not be said to be mutual. *Id.* at 381, 244 S.E.2d at 208.

Similarly, in *Beeson v. Moore*, 31 N.C. App. 507, 229 S.E.2d 703 (1976), *disc. review denied*, 291 N.C. 710, 232 S.E.2d 203 (1977), this Court affirmed the trial court's ruling of summary judgment in favor of the defendant. The plaintiff admitted executing a release with the defendant, but asserted that he did so believing it to cover only property damage and not personal injuries. The Court found that the plaintiff had failed to set forth specific facts showing that he was mistaken about what the release was intended to cover. *Id.* at 509, 229 S.E.2d at 705.

In the instant case, plaintiff's affidavit contains no allegation that defendant was mistaken about the extent of the alleged damage resulting from his welding. Therefore, any mistake by plaintiff cannot be said to be mutual and thus, this assignment of error is overruled.

III.

[3] Finally, plaintiff alleges that defendant induced her to sign the release. However, plaintiff never, at any time, alleges in her complaint that defendant procured her signature through fraud. Therefore, there is no question of fact as to whether defendant procured plaintiff's signature through fraud.

Plaintiff admits that she signed the release without reading it, but even a cursory reading of the one-sentence statement by plaintiff would have given plaintiff a sufficient understanding of what she was signing. The North Carolina Courts have long held that "[a] person signing a written instrument is under a duty to read it for his own protection, and ordinarily is charged with knowledge of its contents. Nor may he predicate an action for fraud on his ignorance of the legal effect of its terms." *Biesecker v. Biesecker*, 62 N.C. App. 282, 285, 302 S.E.2d 826, 828-29 (1983).

The Courts have also held that "[o]ne who signs a written contract without reading it, when he can do so understandingly, is bound thereby unless the failure to read is justified by some special circumstance. To escape the consequences of a failure to read because of special circumstances, complainant must have acted with reasonable prudence." *Davis v. Davis*, 256 N.C. 468, 472, 124 S.E.2d 130, 133 (1962) (citations omitted).

We find that plaintiff not only failed to allege fraud in defendant's obtaining her signature, but also failed to act with reasonable prudence in neglecting to read the one-line document.

Therefore, we conclude that there is no genuine issue of material fact as to whether defendant procured plaintiff's signature through fraud and that plaintiff should have read the statement before she signed it.

Affirmed.

Judge EAGLES concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I respectfully dissent from the majority's opinion because I conclude that the release does not bar plaintiff's claim. In *Travis v. Knob Creek, Inc.* our Supreme Court stated the general rule with respect to the scope of a release.

> A release ordinarily operates on the matters expressed therein which are already in existence at the time of the giving of the release. Accordingly, demands originating at the time a release is given or subsequently, and *demands subsequently maturing or accruing, are not as a rule discharged by the release unless expressly embraced therein or falling within the fair import of the terms employed.*

Travis v. Knob Creek, Inc., 321 N.C. 279, 282, 362 S.E.2d 277, 279 (1987), *reh'g denied*, 321 N.C. 481, 364 S.E.2d 672 (1988) (quoting 76 C.J.S. *Release* § 53 (1952)). *See also Moore v. Maryland Casualty Co.*, 150 N.C. 153, 155, 63 S.E. 675, 676 (1909) ("[T]he release shall be construed from the standpoint which the parties occupied at the time of its execution, and confined to the intention of the parties at the time of such execution.").

In *Travis*, the plaintiff signed a ten-year employment contract with his employer, Knob Creek, Inc. When Knob Creek was taken over by Ethan Allen, the new owner asked the plaintiff and all other principal stockholders to sign a release which released and discharged Knob Creek "from all claims, demands, actions, causes of action, on account of, connected with, or growing out of any matter or thing whatsoever." *Travis*, 321 N.C. at 281, 362 S.E.2d at 278. Five years later Ethan Allen fired the plaintiff and he sued for breach of his employment contract. Ethan Allen argued that the release barred plaintiff's claim. *Id.*

The Supreme Court held that, as a matter of law, since the release did not "specifically include future claims or existing non-asserted rights" and did not "contain any language implying that such claims or rights were being released" then the release did not bar the plaintiff's claim. *Id.* at 283, 362 S.E.2d at 279. The Court held that for the release to bar the plaintiff's claim it must "specifically refer to future claims or existing rights." *Id.*

In the instant case the release reads: "I Cyndee C. Sims [plaintiff's signature] AGREE TO RELINQUISH DAN GERNANDT OF ANY RESPONSIBILITY

WHATSOEVER, OF ANY KIND FOR MY 85 HONDA-CIVIC & HEREBY RECEIVE A REFUND IN FULL OF $30.00 FOR WELDING OF VEHICLE PEDAL." This release does not specifically refer to any future claims or existing rights of plaintiff. N.C. Gen. Stat. § 1-52(16) provides a three-year statute of limitations for personal injury or physical damage to the plaintiff's property and states that "the cause of action, . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant." N.C. Gen. Stat. § 1-52(16) (Cum. Supp. 1993). At the time she signed the release, plaintiff was not aware her gas line had been damaged. Therefore, plaintiff's negligence action against defendant for the damage to her gas line was a future claim that had not arisen when the parties signed the release. Since the release does not specifically refer to future claims, it does not bar plaintiff's claim. I would therefore reverse the trial court's entry of summary judgment against plaintiff and remand this matter for trial. I respectfully dissent.

HAMLET EPPS, ROBERT EPPS, MARY MONTGOMERY, JENNIFER DANIEL, AND HAZEL GADSON, PLAINTIFFS v. DUKE UNIVERSITY, INC., A NORTH CAROLINA CORPORATION, PRIVATE DISGNOSTIC [SIC] CLINIC, A NORTH CAROLINA PARTNERSHIP, JOHN PETER LONGABAUGH, M.D., NATHAN PULKINGHAM, M.D., RUSSELL HJELMSTAD, M.D., MICHAEL WILSON, M.D., AND KATHRYN LANE, M.D., DEFENDANTS

No. 9314SC971

(Filed 6 September 1994)

1. Coroners and Medical Examiners § 32 (NCI4th); Trial § 584 (NCI4th)— medical examiner—wrongful autopsy—motion to dismiss

A trial court erred when ruling on a motion to dismiss in a wrongful autopsy action by entering conclusions of law in his order denying defendant Hjelmstad's motion to dismiss without entering findings of fact and by concluding that Hjelmstad acted outside the scope of his duties as a medical examiner and was not entitled to immunity, which had the same effect as granting a motion for summary judgment on the issue of liability.

Am Jur 2d, Coroners or Medical Examiners § 5; Trial §§ 1967 et seq.

2. Coroners and Medical Examiners § 32 (NCI4th)— medical examiner—wrongful autopsy—scope of authority

The trial court correctly denied defendant Hjelmstad's motion to dismiss a wrongful autopsy action where the complaint contained allegations that Hjelmstad acted outside the scope of his official duties. Although defendant Hjelmstad contended that he was entitled to immunity as the medical examiner, the Court of Appeals could not conclude from the allegations in the complaint (Hjelmstad not having answered) that Hjelmstad was sued only in his capacity as medical examiner and allegations in the complaint gave notice that Hjelmstad may have acted beyond the scope of his official duties in authorizing and/or supervising an autopsy allegedly involving procedures not routinely performed and seemingly unrelated to the cause of death.

Am Jur 2d, Coroners or Medical Examiners § 5.

Liability for wrongful autopsy. 18 ALR4th 858.

Appeal by defendants from order signed 19 July 1993 *nunc pro tunc* for 25 June 1993 by Judge George R. Greene in Durham County Superior Court. Heard in the Court of Appeals 19 May 1994.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Adam Stein, for plaintiffs-appellees.

Attorney General Michael F. Easley, by Special Deputy Attorney General Mabel Y. Bullock, for defendant-appellant Russell Hjelmstad, M.D.

Newsom, Graham, Hedrick, Kennon & Cheek, P.A., by Lewis A. Cheek and Joel M. Craig, for defendants-appellants Duke University, Inc., Private Diagnostic Clinic, John Peter Longabaugh, M.D., Nathan Pulkingham, M.D., Michael Wilson, M.D. and Kathryn Lane, M.D.

LEWIS, Judge.

All defendants attempted to appeal from the trial court's denial of defendant Hjelmstad's motion to dismiss. On 3 November 1993 this Court dismissed the appeal of all defendants except Russell Hjelmstad (hereinafter "Hjelmstad").

On appeal, Hjelmstad asserts that (1) the trial court erred in entering an order which went beyond the permissible scope of a rul-

ing on a motion to dismiss, and (2) the court erred in denying the motion to dismiss, because Hjelmstad is entitled to immunity. An appeal from the denial of a motion to dismiss is interlocutory. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982). However, if the appeal involves questions of immunity, it affects a substantial right and becomes immediately appealable. *See* N.C.G.S. § 1-277 (1983); N.C.G.S. § 7A-27 (1989); *EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources*, 108 N.C. App. 24, 422 S.E.2d 338 (1992). We find the order to be immediately appealable.

Plaintiffs' action arises from the alleged wrongful autopsy of their decedent, Dora Epps McNair, who died at Duke University Hospital on 17 April 1990. Plaintiffs contend that defendants failed to advise them of the scope of the autopsy when they sought plaintiffs' consent and that defendants "mishandled and mutilated" the body of the decedent. They seek compensatory and punitive damages.

Hjelmstad filed a motion to dismiss on 18 March 1993, contending that he was immune from suit because he was acting in his capacity as Durham County Medical Examiner at the time of the autopsy. In his order denying the motion to dismiss, Judge Greene included several conclusions of law. He concluded that none of the defendants was entitled to the protection of statutes authorizing autopsies, and that Hjelmstad was not entitled to immunity because plaintiffs sued him in his individual capacity and because "it is sufficiently alleged that he acted outside of and beyond the scope of his duties as Durham County Medical Examiner."

I.

[1] Hjelmstad first argues that the trial court erred in entering an order which exceeded the scope of a ruling on a motion to dismiss. Hjelmstad objects to Judge Greene's entry of conclusions of law that Hjelmstad acted outside the scope of his authority and that he was not entitled to immunity. He asks that the statements be considered "gratuitous and surplusage," and that we vacate the order and remand for further proceedings. *See O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 252 S.E.2d 231 (1979) (stating that a court's findings of fact and conclusions of law entered in an interlocutory order of dismissal were "gratuitous" and "surplusage" and did not constitute a basis for an immediate appeal where the order was not otherwise appealable). Plaintiffs, on the other hand, contend that the court's order was "precisely responsive" to the arguments raised by defendant's memorandum in support of the motion.

A court is not required to make findings of fact and conclusions of law when ruling on preliminary motions, but it has the discretion to do so. *See* N.C.G.S. § 1A-1, Rule 52(a)(2) (1990); *Watkins v. Hellings*, 321 N.C. 78, 361 S.E.2d 568 (1987). If a court does enter conclusions of law, they must be supported by adequate findings. *See Appalachian Poster Advertising Co. v. Harrington*, 89 N.C. App. 476, 366 S.E.2d 705 (1988). However, in *State ex rel. Lewis v. Lewis*, 63 N.C. App. 98, 303 S.E.2d 627 (1983), *aff'd*, 311 N.C. 727, 319 S.E.2d 145 (1984), Judge Becton clearly stated that a ruling on the merits cannot be made on a motion to dismiss for failure to state a claim. *See Wilkes v. North Carolina State Bd. of Alcoholic Control*, 44 N.C. App. 495, 261 S.E.2d 205 (1980).

We agree with defendant that Judge Greene erred in entering conclusions of law in his order. Judge Greene's order contained no findings of fact and therefore did not comply with the requirement of Rule 52 that conclusions of law be supported by findings of fact. Furthermore, Judge Greene's order constituted a ruling on the merits. His conclusion that Hjelmstad acted outside the scope of the duties of a medical examiner and that he is not entitled to immunity established Hjelmstad's liability for any damages. *See Dickens v. Thorne*, 110 N.C. App. 39, 429 S.E.2d 176 (1993) (a public officer not entitled to governmental immunity is liable for damages if, among other things, he acted outside the scope of his official duties). This order had the same effect as granting a plaintiff's motion for summary judgment on the issue of liability. We therefore vacate the portions of Judge Greene's order containing conclusions of law, including the conclusions that (1) Hjelmstad and the other defendants acted outside and beyond the scope of their duties, and that (2) Hjelmstad is not entitled to immunity.

II.

[2] Hjelmstad also contends that the court erred in denying his motion to dismiss, because he believes he is entitled to immunity. At all relevant times, Hjelmstad was employed as a resident physician at Duke and also served as Durham County Medical Examiner pursuant to N.C.G.S. § 130A-382 (1992). Both parties conceded at oral argument that Hjelmstad is being sued for his activities as a medical examiner. At oral argument, plaintiffs' counsel stipulated that Hjelmstad ordered the autopsy while acting as the county medical examiner, and in their brief plaintiffs argued that Hjelmstad acted "outside of his authority as medical examiner."

A medical examiner is a public officer, *Cherry v. Harris*, 110 N.C. App. 478, 429 S.E.2d 771, *disc. review denied*, 335 N.C. 171, 436 S.E.2d 371 (1993), and is entitled to governmental immunity if sued in his official capacity. *Whitaker v. Clark*, 109 N.C. App. 379, 427 S.E.2d 142, *disc. review denied and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). Actions against officers of the State in their official capacities are actions against the State for the purposes of applying the doctrine of governmental immunity. *Dickens*, 110 N.C. App. at 45, 429 S.E.2d at 180. Governmental immunity is impossible to overcome absent consent or waiver. *Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). There are no allegations of waiver here. Thus, if plaintiffs sued Hjelmstad solely in his official capacity, the case should have been dismissed by the trial court. *See Whitaker*, 109 N.C. App. at 384, 427 S.E.2d at 145 (stating that failure to allege waiver of immunity results in a finding of failure to state a claim).

However, if a public officer is sued in his individual capacity, he is entitled to immunity for actions constituting mere negligence, *Cherry*, 110 N.C. App. at 480, 429 S.E.2d at 722, but may be subject to liability for actions which are corrupt, malicious or outside the scope of his official duties. *Dickens*, 110 N.C. App. at 45, 429 S.E.2d at 180. *See also Reid v. Roberts*, 112 N.C. App. 222, 435 S.E.2d 116 (listing bad faith and willful and deliberate conduct as additional bases for liability), *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993). On appeal, plaintiffs contend that Hjelmstad acted "far beyond the scope of that permitted by the [relevant] statute."

In order to determine whether or not the court correctly denied Hjelmstad's motion to dismiss, we must determine in what capacity he was sued. If Hjelmstad was sued solely in his official capacity, he was entitled to governmental immunity and a dismissal of the case. If he was sued in his individual capacity, we must determine whether the complaint sufficiently alleges corrupt or malicious conduct or that he acted outside the scope of his official duties.

Because plaintiffs made no distinction in their complaint as to the capacity in which they sued Hjelmstad, we must examine the allegations in the complaint. *Dickens*, 110 N.C. App. at 46, 429 S.E.2d at 180. In *Whitaker*, this Court examined the "overall tenor of the complaint" and found that the allegations "centered solely on the defendants' official duties." 109 N.C. App. at 383, 427 S.E.2d at 144. In the case at hand, plaintiffs allege that some of the examinations performed were

not "routinely part of a medical examiner's autopsy." They also allege that Hjelmstad "authorized" and "supervised" the autopsy. Hjelmstad contends that plaintiffs sued him in his official capacity only, because the allegations all relate to his official duties as medical examiner. We disagree.

Nowhere in the complaint is there any hint that Hjelmstad is being sued in his capacity as medical examiner. Plaintiffs only allege that "at all times relevant to this complaint, defendant Hjelmstad was acting on behalf of and as an agent, servant or employee of defendant Duke." We believe that if plaintiffs had intended to sue Hjelmstad in his official capacity as medical examiner, they would have at least included an allegation that Hjelmstad was the county medical examiner at all relevant times. *Cf. Whitaker*, 109 N.C. App. at 382, 427 S.E.2d at 144 (finding that defendants sued only in their official capacity where complaint contained allegations that defendants were employees of a state agency, they were performing their "official duties," and they were acting "in their official capacity"). We cannot conclude from the allegations in this complaint that Hjelmstad was sued only in his official capacity as medical examiner. We note that Hjelmstad has not yet answered. The only information before us is that contained in the complaint, the motion to dismiss, and the answer of the other defendants.

We must now determine whether the complaint states a cause of action against Hjelmstad in his individual capacity. Hjelmstad argues that plaintiffs have failed to state a claim because of the discretionary authority afforded a medical examiner under N.C.G.S. § 130A-389(a) (1992) in deciding whether or not to order an autopsy. We note that Hjelmstad has presented no arguments as to the extent of the autopsy performed. Hjelmstad argues that plaintiffs' allegations, taken as true, are insufficient to show that Hjelmstad acted with malice or corruption.

While it is true that plaintiffs did not contend malice or corruption on the part of Hjelmstad in ordering the autopsy, plaintiffs did include allegations in the complaint indicating that Hjelmstad and the other defendants exceeded the permissible scope of the autopsy. Plaintiffs contend that Hjelmstad "authorized and/or supervised the autopsy", and that Hjelmstad, along with the other defendants, performed an extensive autopsy. Plaintiffs allege that defendant Kathryn Lane performed the autopsy, and that Lane was "acting on behalf of and as an agent, servant, or employee of defendant Hjelmstad." Plain-

tiffs allege that the body was "excessively mutilated" and specifically set forth those aspects of the autopsy which they allege were unnecessary. We believe that these allegations give sufficient notice to defendants that Hjelmstad may have acted beyond the scope of his official duties in authorizing and/or supervising an autopsy allegedly involving procedures not routinely performed and seemingly unrelated to the cause of death.

We conclude that because plaintiffs' complaint contains allegations indicating that Hjelmstad acted outside the scope of his official duties, they have stated a valid claim against Hjelmstad in his individual capacity as a public officer. The trial court, at this early stage of the proceedings, correctly denied Hjelmstad's motion to dismiss. We vacate that part of the order of the trial court insofar as it contains conclusions of law, and remand for entry of the remainder of the order denying the motion to dismiss.

Vacated in part, affirmed in part, and remanded.

Judges EAGLES and WYNN concur.

STATE OF NORTH CAROLINA v. COLETTE MOSCITA BARNES

No. 938SC635

(Filed 6 September 1994)

1. Evidence and Witnesses § 1235 (NCI4th)— accessory to murder—incriminating statements—no custodial interrogation

The trial court in a prosecution in which defendant was convicted of being an accessory to murder correctly concluded that defendant's incriminating statement to officers was made voluntarily where she was never taken into custody or deprived of her freedom; she was not under arrest; officers had told her that she was free to leave at any time and that they were interviewing her as a witness; defendant went to the bathroom unescorted, indicating that she could have left the sheriff's office had she wanted to do so; after the interview, the officers told her that they wanted to talk to her again; although she later spoke to an attorney who advised her not to talk to the officers, she nevertheless drove to the sheriff's office by herself and spoke to the officers; at the con-

clusion of this interview, defendant left the sheriff's department unescorted; during neither interview did defendant, who has completed a couple of years of college, request an attorney or indicate that she did not want to talk to the officers; and there is no evidence that the officers made promises to defendant or coerced her in any way.

Am Jur 2d, Criminal Law §§ 793, 794; Evidence § 749.

What constitutes "custodial interrogation" within rule of *Miranda v. Arizona* that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

2. Homicide § 369 (NCI4th)— murder—accessory after the fact—evidence sufficient

There was sufficient evidence to deny defendant's motion to dismiss a charge of accessory after the fact to first-degree murder where the evidence showed that defendant assisted Vick in escaping detection and arrest and that she knew that Vick had committed the murders.

Am Jur 2d, Homicide § 445.

3. Evidence and Witnesses § 1357 (NCI4th)— accessory to murder—confession—introduced by defendant—admitted in part

The trial court did not err in a murder prosecution in which defendant was convicted of being an accessory by admitting only a portion of defendant's confession where defendant offered the statement into evidence rather than the State, the judge excluded portions of the statement which he found to be immaterial and irrelevant, and defendant made no showing to the contrary.

Am Jur 2d, Evidence § 712.

4. Criminal Law §§ 33,786 (NCI4th)— accessory to murder—compulsion, duress, and coercion—instructions—no error

The trial court properly instructed the jury as to compulsion in accordance with *State v. Kearns*, 27 N.C. App. 354, where the defense initially requested that the judge instruct the jury as to coercion or duress and counsel for defendant withdrew the request after the State asked the court to give the instruction in accordance with *Kearns*.

Am Jur 2d, Criminal Law § 148; Trial § 1259.

Coercion, compulsion, or duress as defense to criminal prosecution. 40 ALR2d 908.

5. Criminal Law § 1140 (NCI4th)— accessory after the fact to murder—aggravating factors—pecuniary gain—evidence insufficient

The evidence was not sufficient to support the nonstatutory aggravating factor of pecuniary gain where defendant was convicted of being an accessory after the fact to murder where, although defendant testified that Vick, the principal, had contributed to her household by buying food and helping pay for her car, insurance, gas, child care, rent, and bills, there was no evidence showing that defendant's reliance upon Vick caused her to assist Vick in his escape. N.C.G.S. § 15A-1340.4(a).

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 21 October 1992 by Judge W. Russell Duke, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 1 March 1994.

On 16 December 1991, defendant was indicted on two counts of first degree murder, violations of N.C. Gen. Stat. § 14-17 (1993), and two counts of accessory after the fact of first-degree murder, violations of N.C. Gen. Stat. § 14-7 (1993). A jury found her not guilty of the murder charges but convicted her of two counts of accessory after the fact to two murders, first, of Rasean Lamonte Rouse and, second, of Vanessa Rouse Craddock. Defendant appeals from judgments imposing two consecutive ten-year sentences.

Attorney General Michael F. Easley, by Assistant Attorney General Anita LeVeaux Quigless, for the State.

Louis Jordan for defendant-appellant.

McCRODDEN, Judge.

Defendant assigns error to the trial court's (1) denial of her motion to suppress statements she made to law enforcement officers, (2) denial of her motion to dismiss the accessory after the fact charges, (3) admission into evidence of only portions of one of her statements, (4) instructions concerning compulsion, and (5) use of pecuniary gain as an aggravating factor. We find that defendant's trial was free of prejudicial error but that there was error in sentencing for which we must remand the case.

The State's evidence tended to show that at about 9:00 p.m. on 24 June 1987, Officer Cary Aaron Winders, with the Goldsboro Police Department, received information that a child was bleeding severely on Fifth Street. Upon arriving at Fifth Street, Officer Winders found the body of a small boy (later identified as Rasean Rouse, a seven-year-old boy), lying on the steps to an apartment and covered in blood. The officer learned that the boy's mother, Vanessa Craddock, was inside the apartment. As he entered the apartment, he noticed bloody footprints on the sidewalk and the door steps. Inside, he found the body of Vanessa Craddock who had been shot.

Results of autopsies showed that Vanessa Craddock died as a result of four gunshot wounds to her head and that her son died as a result of a gunshot wound to his head. Both victims were shot at close range. Rasean appeared to have walked between 75 and 100 feet from his house to the sidewalk after he was shot.

Defendant provided statements to law enforcement officials on 27 June 1987, 5 June 1991, and 19 June 1991. At trial, she recanted her statements of 5 and 19 June, when she had stated that her boyfriend, Earl Vick, was the perpetrator of the murders. She described those statements as parts of a script that detectives had forced her to read, and she said that she read the scripts because she was afraid.

I.

[1] Defendant first contends that the lower court should have suppressed two incriminating statements because she made them during an improper custodial interrogation. She asserts that "[t]here is no credible evidence that [she] voluntarily gave any statement to law enforcement officials."

The interviews defendant challenges took place with the Goldsboro Police Department on 5 and 19 June 1991, when she told detectives that Earl Vick had killed the victims. At that time, she stated that she and Vick went to Vanessa Craddock's apartment on 24 June 1987, to find out whether Craddock wanted to play cards. Craddock did not want to play cards so she and Vick left Craddock's apartment between 8:35 p.m. and 8:45 p.m. to go to Joyce Loftin's house. However, they did not go directly to Loftin's house. When they reached the corner of Wayne Memorial Drive and Stronach Avenue, defendant, who was driving, turned around to go back to Craddock's apartment because Vick said that he had forgotten his hat.

Defendant reported that, after returning to Craddock's apartment, Vick told her to remain in her car and he went into Craddock's apartment. Defendant heard five or six loud "pops," and then Vick ran out of the apartment, got in the car, and ordered her to drive away. While backing out of the parking space, defendant saw a small child coming toward the car from the direction of Craddock's apartment. She also noticed blood on Vick's tennis shoes. Defendant ignored the child and drove away as quickly as possible. Vick warned her not to say anything about what had happened or he would kill her.

Defendant further recounted that as soon as they arrived at Joyce Loftin's house, Vick went into the bathroom, where he used the bathroom sink and shower.

Custodial interrogation is "questioning *initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom . . . ." *State v. Thomas*, 284 N.C. 212, 216, 200 S.E.2d 3, 7 (1973). We believe that defendant was not subjected to custodial interrogation because the record reveals that she was never taken into custody or deprived of her freedom. During the 5 and 19 June interviews, defendant was not under arrest; officers had told her that she was free to leave at any time and that they were interviewing her as a witness. During the 5 June interview, defendant went to the bathroom unescorted, indicating that she could have left the sheriff's office had she wanted to do so. After the interview, the officers told her that they wanted to talk to her again. Although she later spoke to an attorney, who advised her not to talk to the officers, she nevertheless drove to the sheriff's office by herself and spoke to the officers on 19 June. At the conclusion of this interview, defendant left the sheriff's department unescorted.

During neither interview did defendant, who has completed a couple of years of college, request an attorney or indicate that she did not want to talk to the officers. There is no evidence that the officers made promises to defendant or coerced her in any way. We consequently find that the evidence from the record supports the trial court's conclusion that defendant made the 5 and 19 June statements voluntarily and its denial of the motion to suppress. We overrule defendant's assignment of error.

II.

[2] Defendant next challenges the trial court's refusal to dismiss the charges of accessory after the fact to the first-degree murders of

Vanessa Craddock and her son, arguing that there was insufficient evidence to support the charges. In order to convict defendant of being an accessory after the fact to the murders, the State must prove that: (1) Vick, the principal, committed the murders; (2) defendant gave personal assistance to Vick to aid in his escaping detection, arrest, or punishment; and (3) defendant knew that Vick committed the felonies. *See* N.C.G.S. § 14-7; *State v. Duvall*, 50 N.C. App. 684, 275 S.E.2d 842, *rev'd on other grounds*, 304 N.C. 557, 284 S.E.2d 495 (1981).

"[W]here there is insufficient evidence to convict a specifically named principal defendant of the crime charged, another person may not be convicted of aiding and abetting him." *State v. Austin*, 31 N.C. App. 20, 24, 228 S.E.2d 507, 510 (1976). The evidence in the instant case, viewed in the light most favorable to the State, *State v. Turnage*, 328 N.C. 524, 530, 402 S.E.2d 568, 572, *cert. denied*, 330 N.C. 200, 412 S.E.2d 64 (1991), demonstrates that the State presented sufficient evidence of the remaining elements of accessory after the fact to withstand a motion to dismiss. The evidence as we have summarized it above shows that defendant assisted Vick in escaping detection and arrest and that she knew that Vick had committed the murders. From such evidence a jury could certainly infer that defendant was an accessory after the fact to the murders of Craddock and Rouse. Therefore, the trial court properly denied defendant's motion to dismiss.

III.

[3] Defendant next contends that the trial court erred in allowing into evidence only portions of her statement of 27 June 1987, rather than the entire statement. The record reflects that the trial court excluded a portion of her statement in which she referred to several men whom she had seen at Craddock's apartment prior to the day that Craddock was shot.

Defendant argues that a "confession should be considered in its entirety; and if the State introduces into evidence only part of an alleged confession, a defendant is entitled to introduce the remainder of what was said to and by him, including any exculpatory statements which would bear upon the matter in controversy." *State v. Kearns*, 25 N.C. App. 445, 447, 213 S.E.2d 358, 360 (1975). The facts in this case are distinguishable from those in *State v. Kearns*, however, because in that case, the State offered the defendant's confession into evi-

dence and the court ruled that the defendant was entitled to have her entire confession admitted into evidence.

In the case at hand, defendant, rather than the State, offered her statement into evidence. The judge excluded portions of the statement because he found them to be immaterial and irrelevant, and defendant makes no showing to the contrary. We hold that the court properly excluded the immaterial and irrelevant portions of defendant's statement.

IV.

[4] We also find that the trial court did not err in instructing the jury as to compulsion, duress, and coercion. At trial, the defense initially requested that the judge instruct the jury as to coercion or duress. After the State asked the court to give the instruction in accordance with *State v. Kearns*, 27 N.C. App. 354, 219 S.E.2d 228 (1975), *disc. review denied*, 289 N.C. 300, 222 S.E.2d 700 (1976), counsel for defendant withdrew the request for the instruction. We hold that the trial court properly instructed the jury as to compulsion in accordance with *State v. Kearns*.

V.

[5] Finally, defendant claims that the trial court erred in finding as an aggravating factor that defendant committed the offense of accessory after the fact for pecuniary gain. The sentencing judge may "consider any aggravating . . . factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing . . . ." N.C. Gen. Stat. § 15A-1340.4(a) (Supp. 1993). Although pecuniary gain is not a factor enumerated in N.C.G.S. § 15A-1340.4, this section does not limit a trial judge to the aggravating and mitigating factors enumerated therein. *State v. Church*, 99 N.C. App. 647, 394 S.E.2d 468 (1990). The question whether to increase the sentence above the presumptive term remains within the trial court's discretion, and the sentence will not be disturbed if the record supports the court's determination. *State v. Ruffin*, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

We determine, however, that the record does not support the court's conclusion that defendant committed the crimes for pecuniary gain. Although defendant testified that Vick had contributed to her household by buying food and helping pay for her car, insurance, gas, child care, rent, and bills, we find no evidence showing that defendant's reliance upon Vick caused her to assist Vick in his escape.

We conclude that the court erred in finding pecuniary gain as an aggravating factor.

In summary, we find no prejudicial error in defendant's trial. We remand the case for a new sentencing hearing.

No error in trial; remanded for resentencing.

Judges EAGLES and MARTIN concur.

STATE OF NORTH CAROLINA v. CANNADY M. WASHINGTON

No. 9314SC1244

(Filed 6 September 1994)

1. **Criminal Law § 1084 (NCI4th)— guilty plea according to plea arrangement—no right to appeal**

The trial court was not required to make findings of aggravating and mitigating factors because the term, though exceeding the total of the presumptive terms for the consolidated offenses, was imposed pursuant to a plea arrangement as to sentence; therefore, defendant had no appeal as of right pursuant to N.C.G.S. § 15A-1444(a1).

Am Jur 2d, Appeal and Error § 271; Criminal Law §§ 598, 599.

2. **Criminal Law § 1079 (NCI4th)— aggravating and mitigating factors—findings not required—findings as surplusage**

Where the sentencing court makes findings of aggravating and mitigating factors even though it is not required to do so, as in this case where the sentence was imposed pursuant to a plea agreement, the findings made may be disregarded as mere surplusage.

Am Jur 2d, Criminal Law §§ 598, 599.

3. **Criminal Law § 133 (NCI4th)— guilty plea—discrepancy between transcript and response in open court—investigation by court not required**

The trial court did not err by failing to acknowledge and investigate a discrepancy between one of defendant's answers on

his written transcript of plea and his response in open court where the trial court made the inquiry required by N.C.G.S. § 15A-1022 and determined that the guilty plea was the product of defendant's informed choice and that there was a factual basis for the plea.

Am Jur 2d, Criminal Law §§ 486 et seq.

Validity of guilty pleas—Supreme Court cases. 25 L. Ed. 2d 1025.

On writ of certiorari to review judgment entered 14 November 1989 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 25 July 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Richard L. Griffin, for the State.

Toni I. Monroe for defendant-appellant.

LEWIS, Judge.

In April 1989, defendant was indicted for first-degree arson and conspiracy to commit arson. In August 1989, defendant pled guilty pursuant to a plea arrangement as to sentence to the conspiracy charge and to second-degree arson. Among the terms of the plea arrangement were that the charges would be consolidated for judgment and that the maximum sentence imposed would be thirty years. The evidence offered in support of the plea showed that on 25 February 1989, defendant and another man threw a "Molotov cocktail" into the occupied apartment of a woman whose friend had sold them baking soda instead of cocaine as represented. A sentencing hearing was held on 14 November 1989 at which evidence was presented concerning aggravating and mitigating factors. The court found certain aggravating and mitigating factors to exist, entered judgment in accordance with the guilty plea, and sentenced defendant to a thirty year term of imprisonment. From the judgment entered, defendant gave notice of appeal.

[1] Before proceeding further, we note that defendant was not entitled to appeal as a matter of right from the judgment entered upon his guilty plea. *See* N.C. Gen. Stat. § 15A-1444(e) (1988); *State v. Hawkins*, 110 N.C. App. 837, 431 S.E.2d 503, *petition for disc. review dismissed*, 334 N.C. 624, 435 S.E.2d 345 (1993). N.C. Gen. Stat. § 15A-1444(e) provides in pertinent part that:

> Except as provided in subsection (a1) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

Defendant is not contesting the denial of a motion to suppress so as to trigger application of N.C. Gen. Stat. § 15A-979 (1988), nor has he moved to withdraw his guilty plea.

Subsection (a1) of N.C. Gen. Stat. § 15A-1444 provides:

> A defendant who has . . . entered a plea of guilty . . . to a felony, is entitled to appeal as a matter of right the issue of whether his sentence is supported by evidence introduced at the . . . sentencing hearing *only* if the prison term of the sentence exceeds the presumptive term set by G.S. 15A-1340.4, *and* if the judge was required to make findings as to aggravating or mitigating factors pursuant to this Article. Otherwise, he is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(Emphasis added). The term imposed in the present case exceeds the total of the presumptive terms for the offenses consolidated; however, the trial court was not required to make findings of aggravating and mitigating factors because the term was imposed pursuant to a plea arrangement as to sentence. *See* N.C. Gen. Stat. § 15A-1340.4(b) (1988) ("[A] judge need not make any findings regarding aggravating and mitigating factors if he imposes a prison term pursuant to any plea arrangement as to sentence . . . ."). An arrangement under which the parties agree upon a maximum sentence or a cap on the sentence to be imposed is a plea arrangement as to sentence within the meaning of N.C. Gen. Stat. § 15A-1340.4(b). *See State v. Hoover*, 89 N.C. App. 199, 365 S.E.2d 920, *cert. denied*, 323 N.C. 177, 373 S.E.2d 118 (1988); *State v. Simmons*, 64 N.C. App. 727, 308 S.E.2d 95 (1983), *disc. review denied*, 310 N.C. 310, 312 S.E.2d 654 (1984). Furthermore, where, as here, the sentencing court makes findings of aggravating and mitigating factors even though it is not required to do so, the findings made may be disregarded as mere surplusage. *Simmons*, 64 N.C. App. 727, 308 S.E.2d 95. Since the court here was not required to make findings of aggravating and mitigating factors to support the

sentence imposed, defendant had no appeal as of right pursuant to N.C. Gen. Stat. § 15A-1444(a1).

Throughout the history of this case, counsel for defendant and counsel for the State have failed to recognize that defendant had no right to a direct appeal from the judgment entered upon his guilty plea. After filing notice of appeal on defendant's behalf, defendant's original appellate counsel failed to do anything further towards perfecting the appeal. After repeated efforts to ascertain the status of his appeal, defendant was appointed new appellate counsel on 4 December 1992, over three years after notice of appeal was given. After perfecting the appeal, counsel for defendant filed an *Anders* brief on defendant's behalf with this Court on 18 May 1993. *See Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967). The State moved to dismiss the appeal based on its untimeliness. On 1 June 1993, this Court allowed the motion and dismissed the appeal without prejudice to defendant's right to file a petition for writ of certiorari.

On 15 June 1993, defendant filed a petition with this Court seeking a writ of certiorari to review the judgment entered upon his guilty plea. Defendant argued the petition should be allowed because he had lost his right to a direct appeal through no fault of his own but instead due to the neglect of his original appellate counsel. Defendant did not address the merit, if any, of his appeal. Given that defendant had no right of appeal in the first instance and had shown no merit to the appeal he wished to bring pursuant to the writ requested, this Court denied the petition.

Defendant gave notice of appeal from the order of this Court denying his petition for writ of certiorari and petitioned the Supreme Court for discretionary review. Once again, defendant argued that he had been wrongfully denied his right to appellate review of the judgment entered upon his guilty plea through no fault of his own but instead due to the neglect of his original appellate counsel. By order filed 17 September 1993, the Supreme Court treated defendant's petition as one for a writ of certiorari and allowed the petition "for the sole purpose of remanding to Court of Appeals for consideration of the merits." In accordance with this mandate, this Court then rescinded its order denying defendant's petition for writ of certiorari and allowed the petition.

In the present appeal brought pursuant to the writ of certiorari, counsel for defendant once again has filed an *Anders* brief on

defendant's behalf. Counsel states that she has been unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal and asks that this Court conduct its own review for possible prejudicial error. Counsel has also filed documentation with this Court showing that she has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985).

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom or whether the appeal is wholly frivolous. We conclude the appeal is wholly frivolous. Furthermore, we have examined the record for possible prejudicial error and have found none. To assist this Court with its review of the record, counsel has addressed defendant's four assignments of error, which counsel consolidates into two arguments. Particularly given the Supreme Court's direction that we consider the "merits" of this appeal, we shall review the arguable merit of defendant's assignments of error.

[2] By his first two assignments of error, defendant contends the trial court erred by admitting certain evidence offered by the State to show his prior convictions, which convictions formed the basis for the sole aggravating factor found by the court. The evidence consisted of index cards and excerpts from a docket book, which were identified by a deputy courtroom clerk as a record of the disposition of criminal matters in Durham County. The State contends that any error in admission of this evidence was harmless since defendant admitted these prior convictions when he testified at the sentencing hearing. We agree there was no prejudicial error in admission of this evidence. Not only did defendant admit his prior convictions, the aggravating factor found may be disregarded as mere surplusage since the court was not required to make any findings of aggravating and mitigating factors. *Simmons*, 64 N.C. App. 727, 308 S.E.2d 95. Accordingly, we conclude that these two assignments of error are wholly frivolous.

[3] By his next two assignments of error, defendant contends the trial court erred by failing to acknowledge and investigate a discrepancy between one of defendant's answers on his written transcript of plea and his response in open court. Question number thirteen on the transcript of plea asks, "[Other than the plea arrangement between you and the prosecutor] has anyone made any promises or threatened you in any way to cause you to enter this plea against your wishes?"

Defendant answered "yes" on the written transcript of plea but answered "no" when asked this same question in open court. Defendant contends it was error for the court to fail to acknowledge and investigate this discrepancy in his answers. Defendant further claims, for the first time in his brief, that his counsel assured him before he tendered the plea that he would receive a sentence no greater than twelve years, the sentence received by his co-conspirator. Defendant acknowledges that there is nothing in the present record that supports this claim but nevertheless suggests that an evidentiary hearing would be appropriate to explore further the discrepancy between his answers and the assurances allegedly made by counsel.

We find no prejudicial error arising from the discrepancy in defendant's answer to the question posed or from the court's failure, *ex mero motu*, to investigate this discrepancy, and we conclude that these two assignments of error are also frivolous. The transcript shows the trial court made the inquiry required by N.C. Gen. Stat. § 15A-1022 (1988) and determined that the guilty plea was the product of defendant's informed choice and that there was a factual basis for the plea. Furthermore, by his answer given in open court, defendant indicated that no one had made any promises or threatened him in any way to induce the plea. As for defendant's unsubstantiated assertion in his brief that his counsel assured him he would receive a sentence no greater than twelve years, that assertion was not made the basis of a motion for appropriate relief and is not now properly before this Court.

In sum, we find no issues of arguable merit and no prejudicial error appearing from the record and conclude the appeal is wholly frivolous and should never have been pursued.

No error.

Judges EAGLES and ORR concur.

WILLIAM JAMES ROBERTSON, JR., AND MONIKA ROSEWITHA ROBERTSON, PLAINTIFFS-APPELLANTS v. DANNY RAY NELSON, DEFENDANT-APPELLEE

No. 9312SC474

(Filed 6 September 1994)

1. Discovery and Depositions § 21 (NCI4th)— discovery and trial depositions—no distinction

There is no distinction between a discovery deposition and a trial deposition under N.C.G.S. § 1A-1, Rule 32.

Am Jur 2d, Depositions and Discovery §§ 130 et seq.

2. Evidence and Witnesses § 1987 (NCI4th)— exclusion of discovery deposition as cumulative evidence—error

In an action to recover for injuries sustained in an automobile accident, the trial court erred by excluding as cumulative a discovery deposition of plaintiff's treating physician where defendant stipulated to his negligence as the cause of the accident; the discovery deposition was different from the trial deposition in that it provided medical testimony that the collision caused plaintiff to suffer impotence as well as low back pain; and the exclusion of the deposition might have had a material effect on the jury's verdict on damages to plaintiff and the jury's finding of no loss of consortium for plaintiff's wife.

Am Jur 2d, Appeal and Error §§ 797 et seq.

Appeal by plaintiff William James Robertson, Jr., from judgment entered 17 December 1992 and order entered 7 January 1993 by Judge William C. Gore, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 8 February 1994.

Rand, Finch & Gregory, P.A., by Thomas Henry Finch, Jr., for plaintiff appellant William James Robertson, Jr.

Anderson, Broadfoot, Johnson, Pittman, Lawrence & Butler, by Steven C. Lawrence, for defendant appellee.

COZORT, Judge.

Plaintiff William Robertson, Jr., filed this action against defendant Danny Ray Nelson to recover damages for injuries he sustained in a motor vehicle accident which occurred on 28 September 1987. His

wife, Monika, joined in the suit claiming damages for loss of consortium. Defendant stipulated that his negligence was a proximate cause of the collision. A jury awarded damages in the amount of $62,500.00 to plaintiff William Robertson, Jr. The jury found no loss of consortium as to plaintiff Monika Robertson. Both plaintiffs made a motion for a new trial on 22 December 1992. The trial court granted a new trial to plaintiff Monika Robertson; it denied the motion as to plaintiff William Robertson, Jr. Plaintiff William Robertson, Jr., appeals. The sole issue presented on appeal is whether the trial court erred in excluding the "discovery" deposition of a physician from the evidence and in failing to order a new trial based on this ground. Defendant's counsel conducted a "discovery" deposition and a "trial" deposition of the male plaintiff's treating physician. We find the trial court's exclusion of the deposition was error, and we find sufficient potential prejudice to require a new trial. Pertinent facts and procedural history follow.

On 28 September 1987 a motor vehicle operated by plaintiff William J. Robertson, Jr., collided with a motor vehicle operated by defendant Danny Ray Nelson. The negligence of defendant Nelson was a proximate cause of the collision. Plaintiffs William J. Robertson and Monika R. Robertson were legally married on 15 September 1966 and have remained continuously married since that date and up to the time of trial. Plaintiffs filed suit on or about 21 September 1990 requesting damages for William J. Robertson for injuries suffered in the collision and damages for Monika R. Robertson for loss of William's society, companionship, sexual fulfillment and affection. Plaintiffs alleged William, as a result of the injuries sustained in the collision, was no longer able to function as Monika's marriage partner.

On 5 January 1991 as part of pre-trial discovery, defendant's counsel conducted two depositions of one of plaintiff's treating physicians, Dr. Thomas C. Leitner. Prior to the taking of the deposition, defendant's counsel sent letters to plaintiff and to plaintiff's counsel explaining that defendant's counsel would initially question Dr. Leitner on a "discovery basis" and "thereafter go through a direct examination for use in trial." Plaintiff's counsel did not object to the procedure of taking a "discovery" deposition separate and distinct from a "trial" deposition. Plaintiff's counsel cross-examined Dr. Leitner only during the "trial" deposition.

The first deposition, the discovery deposition, lasted approximately one hour and was conducted pursuant to the following stipulation: "Said deposition shall be taken for the purpose of discovery or for any other purpose allowed under the Rules of Civil Procedure." The second deposition (trial deposition) commenced immediately following the discovery deposition and was taken pursuant to this stipulation: "Said deposition shall be taken for the purpose of trial or for any other purpose allowed under the Rules of Civil Procedure."

At trial, the plaintiff attempted to introduce the discovery deposition into evidence. The trial court refused to admit the discovery deposition into evidence, ruling that, under N.C.R. Evid. 403, "to allow the same would be cumulative with the [trial] deposition of Dr. Leitner which has been read and that the same would be a waste of time in the court's opinion."

The issues submitted to the jury, and the jury's answers, are:

1. What amount, if any, is the plaintiff William J. Robertson entitled to recover for personal injury?

Answer: 62,500.00

(Answer issue number two regardless of how you answer issue number one.)

2. Did the negligence of the defendant proximately cause Monika R. Robertson to lose the consortium of her husband?

Answer: No

(You will answer issue number three, only if you answer issue number two "Yes".)

3. What amount, if any, is Monika R. Robertson entitled to recover for loss of consortium?

Answer: -0-

This the 17th day of December 1992.

After the verdict, both plaintiffs moved for a new trial, contending the exclusion of the "discovery" deposition prejudiced the plaintiffs. Plaintiffs contended below that Dr. Leitner's testimony in the "discovery" deposition was different from his testimony in the "trial" deposition. They argued that his "discovery" testimony would have been additional substantive evidence that the collision caused plaintiff Williams to suffer impotence as well as low back pain. Plaintiff

argued that the exclusion of the "discovery" deposition materially affected the jury's award of damages. On 7 January 1993 the trial court granted a new trial for plaintiff Monika R. Robertson. The trial court denied a new trial for plaintiff William J. Robertson, Jr. Plaintiff William J. Robertson, Jr. (hereinafter "plaintiff"), appeals.

On appeal plaintiff contends the trial court committed prejudicial error by summarily excluding the discovery deposition from evidence. Plaintiff argues: "It is a compelling inference that the jury's damage award to the plaintiff was based upon the jury having been convinced by the defendant that the plaintiff's impotence problem was not" proximately caused by the accident. Plaintiff argues that "a different result would have likely ensued" at trial had he been allowed to introduce the discovery deposition into evidence. We agree.

[1] We turn first to the issue of whether it was error to exclude the discovery deposition. Rule 32 of the North Carolina Rules of Civil Procedure, governing the use of depositions, states:

> (a) *Use of depositions.*—At the trial . . . any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> * * * *
>
> (4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . that the witness is at a greater distance than 100 miles from the place of trial . . . .

N.C. Gen. Stat. § 1A-1, Rule 32 (1990). This provision is identical to Federal Rule 32. North Carolina has not yet addressed the distinction between a "discovery" deposition and a "trial" deposition; however, federal cases state that no distinction exists for purposes of applying Rule 32: "The Federal Rules of Civil Procedure make no distinction for use of a deposition at trial between one taken for discovery purposes and one taken for use at trial . . . . Moreover, we are unaware of any authority which makes that distinction." *Tatman v. Collins*, 938 F.2d 509, 510 (4th Cir. 1991). Following the Fourth Circuit Court of Appeals, we hold there is no distinction between a discovery deposition and a trial deposition, under Rule 32.

Furthermore, the pre-trial order contained in the record below contains the following stipulation by the parties:

> 4. The following is a list of all known exhibits the plaintiff William James Robertson, Jr., may offer at the trial:
>
> A. *All discovery materials*, including video depositions and all demonstrative exhibits used during the depositions of any witness or party; (emphasis added).

By the parties' own agreement, the discovery deposition was admissible evidence at trial. Consequently, it was error for the trial court to exclude the discovery deposition from the evidence.

[2] We must now determine whether the exclusion of the discovery deposition was prejudicial error. The trial court reviewed both depositions and excluded the discovery deposition, finding it to be cumulative. Plaintiff contends the discovery deposition contained significant information which could have influenced the jury's decision regarding the cause of plaintiff's impotence. We agree.

With defendant stipulating to his negligence as the cause of the collision, this case went to trial on damages to the plaintiff and loss of consortium, and attendant damages thereto, for plaintiff's wife. Defendant contended plaintiff's impotence was due to pre-existing conditions, especially inguinal hernias, and not the collision. Our review of the two depositions leads us to the conclusion that the exclusion of the discovery deposition might have had a material effect on the jury's verdict on damages to the plaintiff and the jury's finding of no loss of consortium for plaintiff's wife. In the discovery deposition, Dr. Leitner states that "there is no neurological reason that inguinal hernia surgery would cause impotency." He also testified that a hernia does not usually affect sexual function.

Defendant contends these and other differences referenced by plaintiff are "negligible at best and could not reasonably be portrayed as having any significant effect on the outcome of the trial." We must disagree. Viewing all of the evidence, we are unable to conclude that the exclusion had no effect on the jury's considerations. A new trial is in order.

Finally, we turn to an issue raised by defendant concerning the need for separate discovery depositions and trial depositions. Defendant contends the need for separate depositions was brought

about by our Supreme Court's decision in *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990). In *Crist*, the Court concluded:

> In summary, the gravamen of the issue is not whether evidence of plaintiff's medical condition is subject to discovery, but by what methods the evidence may be discovered. We conclude that considerations of patient privacy, the confidential relationship between doctor and patient, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery. We thus hold that defense counsel may not interview plaintiff's nonparty treating physicians privately without plaintiff's express consent.

Id. at 336, 389 S.E.2d at 47. We recognize the holding in *Crist* has caused problems for the trial bar. We are not convinced that having separate "trial" depositions and "discovery" depositions is the answer. Perhaps our General Assembly should consider amending the Rules of Discovery to address these concerns.

New trial.

Judges ORR and GREENE concur.

IN THE MATTER OF THE ESTATE OF MELISSA GAIL BRYANT

No. 936SC685

(Filed 6 September 1994)

1. Executors and Administrators § 8 (NCI4th)— letters of administration—priorities in granting

The clerk and the trial court erred in determining that "next of kin" and "heir" are synonymous under N.C.G.S. § 28A-4-1, the statute establishing the priority for letters of administration. Although the two terms are synonymous in the construction of wills, deeds and other writings, that synonymity applies only in the construction of wills, deeds, and other writings, not in the interpretation of N.C.G.S. § 28A-4-1 because the General Assembly would not use two different terms to refer to the same class

of people in consecutive paragraphs of the same statute; interpreting "next of kin" as synonymous with "heirs" would reduce one of the phrases to redundancy; and the legislature would have amended paragraph three when it revised the statute in 1987 rather than inserting a whole new paragraph using a different class label if it had intended merely to provide a mechanism for distinguishing between heirs. The term "next of kin" must refer to the class of blood relatives of the decedent, without regard to their eligibility to take under the intestacy statute.

Am Jur 2d, Executors and Administrators §§ 157 et seq.

2. Executors and Administrators § 8 (NCI4th)— letters of administration—next of kin

The clerk and the court erred in failing to find that petitioner was the next of kin to the decedent where respondent admitted that petitioner is the mother of the decedent. Petitioner is thus next of kin and she has priority for letters of administration over respondent. N.C.G.S. § 28A-4-1.

Am Jur 2d, Executors and Administrators §§ 157 et seq.

Appeal by petitioner from order signed 3 May 1993 by Judge James R. Strickland in Halifax County Superior Court. Heard in the Court of Appeals 10 March 1994.

Following the death of Melissa Gail Bryant, the Halifax County Clerk of Superior Court granted letters of administration for the estate to the respondent, Wilbur Lee Cahoon, on 12 November 1992. Respondent is the father of the decedent's minor child, but was not married to the decedent. On 18 December 1992, petitioner, the decedent's mother, petitioned the clerk to revoke the letters granted to respondent and grant them to her instead. The clerk held a hearing on 8 January 1993 and entered an order allowing respondent to continue to serve as administrator of the estate. Petitioner appealed this order to the superior court. Following a hearing on 12 April 1993, the court entered an order affirming the decision of the clerk. From this order, petitioner appeals.

Mosely & Elliott, by Terry M. Sholar, for petitioner-appellant.

James, Wellman & White, by Lillian M. Neal Pruden and Thomas H. Wellman, for respondent-appellee.

McCRODDEN, Judge.

Petitioner makes two arguments supporting two assignments of error to the court's order: (I) that the clerk and the trial court erred in determining that under the statute establishing the order of priority for letters of administration, "next of kin" and "heir" are synonymous and, (II) that the clerk and the judge erred in failing to determine that petitioner was next of kin within the meaning of the statute. We find merit in both of petitioner's arguments and reverse the trial court.

[1] Since the decedent died intestate, N.C. Gen. Stat. § 28A-4-1 (Supp. 1993) specifies to whom letters of administration shall be granted. The statute provides that, unless he determines in his discretion that the best interests of the estate otherwise require, the Clerk of Superior Court shall grant letters to applicants in the following order:

> (1) The surviving spouse of the decedent;
>
> (2) Any devisee of the testator;
>
> (3) Any heir of the decedent;
>
> (3a) Any next of kin, with a person who is of a closer kinship as computed pursuant to G.S. 104A-1 having priority;
>
> (4) Any creditor to whom the decedent became obligated prior to his death;
>
> (5) Any person of good character residing in the county who applies therefor; and
>
> (6) Any other person of good character not disqualified under G.S. 28A-4-2.

N.C.G.S. § 28-4-1. When the persons applying for letters of administration are equally entitled to them, the clerk shall award them to the person who is most likely to administer the estate advantageously. *Id.*

In this case, the clerk found:

> 7. Melissa Gail Bryant died without a spouse and was survived by one heir, Wilson Lee Bryant, her minor child.
>
> 8. Respondent is the natural father and legal custodian of said minor child, Wilson Lee Bryant.
>
> 9. Pursuant to N.C.G.S. § 28A-4-1(3) and § 28A-1-1 the minor child, Wilson Lee Bryant is the "heir" of the decedent and therefore first in priority to serve as personal representative of the estate of the deceased.

10. Pursuant to N.C.G.S. § 28A-4-1(3a) the minor child is also the "next of kin" in that § 28A-4-1(3a) serves to define "heir[s]" under § 28A-4-1(3) in terms of priority or by placing in order those "heir[s]" entitled to serve as the personal representative. The minor child is the only "heir" and therefore the only "next of kin." Thus, in this case the terms "heir" and "next of kin" as used in N.C.G.S. § 28A-4-1(3) and § 28A-4-1(3a) are synonymous.

11. Pursuant to N.C.G.S. § 28A-4-2 the minor child is under 18 years of age and therefore disqualified to serve as personal representative.

12. Pursuant to N.C.G.S. § 28A-4-1(5) Petitioner and Respondent are persons of good character residing in Halifax County and are equally entitled to be granted letters.

13. This Order is in the best interests of the estate in that the Respondent, Leon Wilbur Cahoon, is most likely to administer the estate most advantageously.

Petitioner first argues that the trial court erred in finding that with respect to N.C.G.S. § 28A-4-1 "next of kin" is synonymous with "heirs." We agree.

The right to administer an estate is entirely statutory. *In re Estate of Edwards*, 234 N.C. 202, 203, 66 S.E.2d 675, 676 (1951). Until 1973, the direct predecessor to section 28A-4-1 provided that the right was to be granted to the surviving spouse, then to "the next of kin in the order of their degree, where they are of different degrees; if of equal degree, to one or more of them, at the discretion of the clerk," and then to a creditor or any other competent person. N.C. Gen. Stat. § 28-6 (1950) (repealed 1973). When it repealed Chapter 28 of the General Statutes and replaced it with Chapter 28A, the General Assembly amended former section 28-6, substituting the word "heirs" for "next of kin." In 1987, the legislature added subsection (b)(3a), containing the phrase "next of kin."

"Heir" is a technical term with a specific meaning. *Rawls v. Rideout*, 74 N.C. App. 368, 370, 328 S.E.2d 783, 785 (1985). It refers to "any person entitled to take real or personal property upon intestacy." N.C. Gen. Stat. § 29-2 (1984). The term "next of kin," however, has two meanings:

(1) nearest blood relations according to [the] law of consanguinity and (2) those entitled to take under statutory distribution of

> [the] intestate's estates, and [the] term is not necessarily confined to relatives by blood, but may include a relationship existing by reason of marriage, and may well embrace persons, who in [the] natural sense of [the] word, and in [the] contemplation of Roman law, bear no relation of kinship at all.

Black's Law Dictionary 1044 (6th ed. 1990).

Before the clerk, respondent argued that the "next of kin" should be given the second of these meanings, relying on N.C. Gen. Stat. § 41-6.1 (1984), and the clerk apparently agreed. Although this confusion is understandable, the clerk erred in using that definition.

N.C.G.S. § 41-6.1 provides that "[a] limitation by deed, will, or other writing, to the 'next of kin' of any person shall be construed to be to those persons who would take under the law of intestate succession, unless a contrary intention appears by the instrument." By enacting N.C.G.S. § 41-6.1, the legislature made "next of kin" synonymous with "heirs." *Rawls*, 74 N.C. App. at 371, 328 S.E.2d at 786. However, we believe this synonymity applies only in the construction of wills, deeds and other writings, not in the interpretation of N.C.G.S. § 28-4-1.

We have three bases for our interpretation. First, we believe that the General Assembly would not use two different terms to refer to the same class of people in consecutive paragraphs of the same statute. Second, to interpret "next of kin" to mean the same thing as "heirs" would violate one of the presumptions of statutory construction: that "no part of a statute is mere surplusage, but each provision adds something which would not otherwise be included in its terms." *Electric Service v. City of Rocky Mount*, 285 N.C. 135, 143, 203 S.E.2d 838, 843 (1974). Interpreting "next of kin" as synonymous with "heirs" for purposes of this statute would reduce one of the phrases to redundancy. Finally, we believe that if the legislature had intended merely to provide a mechanism for distinguishing between heirs when it revised the statute in 1987, it would have amended paragraph (3) rather than inserting a whole new paragraph using a different class label. Hence, with regard to section 28A-4-1, we cannot interpret "next of kin" as synonymous with "heirs".

In this instance, we believe that the term "next of kin" must refer to the class of blood relatives of the decedent, without regard to their eligibility to take under the intestacy statute.

Respondent asserts that the clerk found only that the terms were synonymous in this particular case where there was only one heir and that "next of kin" as used in paragraph (3a) refers to the single heir who is closest in degree of consanguinity. The statute, however, reads "*[a]ny* next of kin." (Emphasis added.) The use of the word "any" indicates that the phrase next of kin is meant to refer to the class of blood relatives, not the member of that class who is closest.

The guiding principle in all statutory construction, of course, is the intention of the legislature. *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978). Our interpretation of section 28A-4-1 is entirely consistent with the will of the General Assembly. The clear purpose behind establishing the priority list was to ensure that the person who will best preserve the estate administer the estate. It seems natural, then, that one with an economic stake in the estate would be likely to do more to preserve the assets of the estate than would one who had no interest in the estate. Thus, the person with the greatest fractional share of the estate, the surviving spouse, if any, receives top priority. Likewise, a devisee has priority over the general heirs and the heirs have priority over next of kin, who would not necessarily take under the intestate succession laws.

Respondent points out that next of kin, who might not have an economic interest in the estate, are given priority over creditors, who obviously have a stake in the estate. While this is true, we find it consistent with other concerns of the legislature. The General Assembly has long recognized that the winding up of a deceased person's affairs involves personal as well as financial matters. Indeed, one of the earliest versions of the statute provided that "if the person applying shall be deemed incompetent, the court may grant administration to any *discreet* person." 1854 Revised Code of North Carolina Ch. 46 § 3 (repealed 1868) (emphasis added). Thus, it is hardly surprising that the legislature provided that next of kin, who may have no economic interest but who would be more likely to be sensitive to personal matters, have priority over creditors, who are likely to be strangers.

We conclude that for purposes of N.C.G.S. § 28A-4-1, "next of kin" refers to the class of blood relatives of the decedent, and that the court erred in determining that that term was synonymous with "heirs."

[2] Petitioner next argues that the clerk, and therefore the court, erred in failing to find that petitioner was next of kin to the decedent. We agree. In his response to the petition to revoke letters of adminis-

tration, respondent admitted that petitioner is the mother of the decedent. Thus, petitioner is next of kin within the definition of that term and she has priority for the letters of administration over respondent, who falls in category (5) of N.C.G.S. § 28A-4-1.

For the foregoing reasons, we reverse the order of the trial court and remand the case to the Halifax County Superior Court for remand to the clerk. Unless the clerk determines that the best interests of the estate otherwise require, he should issue the letters of administration to petitioner forthwith.

Reversed.

Judges EAGLES and MARTIN concur.

J.A. WHITFIELD, PLAINTIFF v. R. FARRELL TODD, DEFENDANT

No. 9415SC212

(Filed 6 September 1994)

1. Jury § 10 (NCI4th)— jury trial—failure to make timely demand

Pursuant to N.C.G.S. § 1A-1, Rule 38(d), defendant's failure to timely demand a jury trial constituted a waiver by him of jury trial of right, and the denial of a belated demand for a jury trial is within the discretion of the trial court.

Am Jur 2d, Jury §§ 57 et seq.

2. Easements § 60 (NCI4th)— easement by necessity—sufficiency of evidence

The evidence was sufficient to support the trial court's findings that plaintiff's and defendant's tracts were once held in common ownership that was severed by conveyance and that, as a result of the conveyance, plaintiff had no access to a public highway except over defendant's property, and these findings in turn supported the trial court's conclusion that, despite the permissive use of a right-of-way by plaintiff over defendant's land, he was entitled to an easement by necessity.

Am Jur 2d, Easements and Licenses §§ 34 et seq.

Appeal by defendant from judgment entered 16 December 1993 by Judge Anthony M. Brannon in Alamance County Superior Court. Heard in the Court of Appeals 22 August 1994.

On 5 December 1991, plaintiff filed a complaint seeking an easement by necessity over the land of defendant. Defendant filed an answer on 14 February 1992. On 12 January 1993, plaintiff filed a request for a jury trial. On 13 January 1993, the trial court denied defendant's request for a jury trial. A subsequent request for a jury trial was also denied.

Following trial without jury held on 13 July 1993, the trial court entered judgment on 16 December 1993 finding as facts, *inter alia*, the following: that plaintiff and his wife sold to defendant approximately fourteen acres of a tract of land in 1978; that the tract of land retained by plaintiff was landlocked and had no access to a public road except over the tract owned by defendant; and that defendant had given plaintiff permission to use a road over his property for ingress and egress. Based upon the findings of fact, the trial court concluded as a matter of law that even though plaintiff has a permissive right-of-way over defendant's property, he is entitled to an easement by necessity in order to have access to a public highway and that plaintiff has established the required elements of such an easement. Based upon its conclusions of law, the trial court granted an easement by necessity to plaintiff. Defendant appeals.

Davis & Humbert, by Meg Scott Phipps, for plaintiff-appellee.

R. Farrell Todd, defendant-appellant, pro se.

MARTIN, Judge.

We note at the outset that plaintiff has filed in this Court a motion to dismiss defendant's appeal. As grounds for the motion, plaintiff contends the following: that defendant (1) failed to provide adequate security for the costs of the appeal; (2) failed to timely contract with the court reporter for production of a transcript; (3) failed to timely serve a properly constituted proposed record on appeal; (4) filed a record on appeal in this Court that violates the Rules of Appellate Procedure; and (5) filed a record on appeal in this Court that was not settled.

Plaintiff further notes that a motion to dismiss defendant's appeal was filed in the trial court on 18 February 1994. On 25 February 1994,

defendant filed a record on appeal in this Court. By order dated 24 March 1994, the trial court purported to dismiss defendant's appeal.

Our courts have consistently held that "[t]he general rule is that an appeal takes the case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the trial judge is *functus officio*." *Estrada v. Jaques*, 70 N.C. App. 627, 637, 321 S.E.2d 240, 247 (1984). Our Supreme Court has stated that this "longstanding general rule" in civil cases is subject to two exceptions and one qualification:

> The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that "the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned" and thereby regain jurisdiction of the cause.

Bowen v. Motor Co., 292 N.C. 633, 635-36, 234 S.E.2d 748, 749 (1977), quoting *Machine Co. v. Dixon*, 260 N.C. 732, 735-36, 133 S.E.2d 659, 662 (1963). Neither of the exceptions noted in *Bowen* are applicable in this case.

The qualification that an appeal may be dismissed when adjudged abandoned has been further codified by N.C.R. App. P. 25(a) which provides that after notice of appeal has been given but prior to the "filing of an appeal in an appellate court" a trial court may dismiss an appeal on motion of any party if "the appellant shall fail within the times allowed . . . to take any action required to present the appeal for decision . . . ." Rule 25(a) further provides that "after an appeal has been docketed in an appellate court motions to dismiss are made to that court."

Plaintiff in this case properly filed a motion to dismiss the appeal in the trial court pursuant to Rule 25(a) prior to the filing of a record on appeal in this Court. Because the trial court had not ruled upon that motion to dismiss, plaintiff also properly filed a motion to dismiss in this Court pursuant to Rule 25(a) after the record on appeal was docketed. This Court then had jurisdiction to rule upon the motion to dismiss, and the trial court could not have concurrent jurisdiction over the matter. Because the trial court lacked jurisdiction to rule upon the motion to dismiss, the trial court's order entered 24 March 1994 is null and void and has no bearing on this Court's disposition of the motion to dismiss filed in this Court.

It appears from an examination of this Court's file that defendant has provided adequate security for the costs of this appeal. Defendant disputes plaintiff's assertions that he failed to timely contract with the court reporter for production of the transcript, that he failed to timely serve a properly constituted proposed record on appeal, and that he filed a record on appeal in this Court that was not settled.

However, defendant cannot dispute that the record on appeal and the brief filed by him in this Court violate numerous Rules of Appellate Procedure. Because of these violations, defendant's appeal is subject to dismissal. *See Wiseman v. Wiseman*, 68 N.C. App. 252, 314 S.E.2d 566 (1984). Rather than dismiss the appeal, we have, in our discretion, considered defendant's arguments pursuant to N.C.R. App. P. 2.

[1] Defendant argues that the trial court erred by denying his request for a jury trial. N.C. Gen. Stat. § 1A-1, Rule 38(b) addresses jury trial of right:

> (b) *Demand.*—Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be made in the pleading of the party or endorsed on the pleading.

On 12 January 1993, defendant first requested a jury trial. The request was filed almost eleven months after defendant served his answer, the last pleading filed in this case. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 38(d), defendant's failure to timely demand a jury trial constituted a waiver by him of jury trial of right. Furthermore, the denial of a belated demand for a jury trial is within the discretion of the trial court. *Arney v. Arney*, 71 N.C. App. 218, 321 S.E.2d 472 (1984), *disc. review denied*, 313 N.C. 173, 326 S.E.2d 31 (1985). Defendant has failed to show that the trial court abused its discretion in any way by denying his belated requests for a jury trial.

[2] Defendant also argues that the trial court erred by entering an order granting plaintiff an easement by necessity. Where the trial court sits as trier of facts, the trial court must (1) find the facts on all issues joined in the pleadings, (2) declare the conclusions of law arising on the facts found, and (3) enter judgment accordingly. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971). The trial court's findings of fact are conclusive on appeal if they are supported

by competent evidence. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). If the findings of fact are supported by competent evidence, they must in turn support the conclusions of law made by the trial court. *See Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980).

The law of this State will imply an easement by necessity in favor of a grantor under appropriate circumstances. *Cieszko v. Clark*, 92 N.C. App. 290, 374 S.E.2d 456 (1988). Such an implied easement arises when the party seeking the easement proves the essential elements of an easement by necessity: "(i) the claimed dominant tract and the claimed subservient tract were once held in common ownership that was severed by a conveyance and (ii) the necessity for the easement arose out of the conveyance." *Id.* at 296, 374 S.E.2d at 460. Although a plaintiff may have a permissive right-of-way to a public highway, a plaintiff who has no legally enforceable right-of-way to a public highway may be entitled to an easement by necessity. *Wilson v. Smith*, 18 N.C. App. 414, 197 S.E.2d 23, *cert. denied*, 284 N.C. 125, 199 S.E.2d 664 (1973).

In this case, the evidence presented supports the trial court's findings that plaintiff's and defendant's tracts were once held in common ownership that was severed by conveyance and that as a result of the conveyance, plaintiff has no access to a public highway except over defendant's property. These findings in turn support the trial court's conclusion that despite the permissive use of the right-of-way by plaintiff, he is entitled to an easement by necessity. The conclusion supports the trial court's entry of a judgment granting plaintiff an easement by necessity.

We have examined defendant's remaining arguments, and find them all to be without merit. The judgment of the trial court is affirmed.

Affirmed.

Chief Judge ARNOLD and Judge GREENE concur.

RAINTREE REALTY AND CONSTRUCTION, INC., (SUBSTITUTE) TRUSTEE, PETITIONER v. FRANK W. KASEY AND ZELDA KASEY, RESPONDENTS

No. 9328SC879

(Filed 6 September 1994)

Mortgages and Deeds of Trust § 17 (NCI4th)— foreclosure—home equity line of credit—deed of trust not cancelled by payment by prior owner

The trial court did not err by allowing a foreclosure where respondents, the Wrights, are the present owners of a residence previously owned by the Kaseys; the Kaseys had executed an agreement for a line of credit of $30,000 secured by a deed of trust on the residence; the attorney at the closing when the Wrights purchased the property withheld $30,238.11, the payoff amount obtained in a telephone conversation with the bank; that amount was tendered to the bank through a teller line with "pay off Frank Kasey 437598998" written on the "for" line of the check; the check was not processed until three days later; a balance of $24.34 remained because of interest charges posted in the interim and the account was not closed; Frank Kasey subsequently obtained $13,433.06 from the account at the suggestion of a bank officer to prevent repossession of an automobile and thereafter obtained additional monies from the account until the amount reached $29,090.41; and Kasey subsequently filed bankruptcy. NationsBank was under no statutory obligation to cancel the deed of trust upon payment of the $30,238.11 at the closing and the court correctly applied the law in allowing NationsBank to foreclose through the trustee because the plain statutory language of N.C.G.S. § 45-81(c) reveals that the balance of all outstanding sums must be zero and the borrower must request that the lender make written entry upon the security instrument showing payment and satisfaction. Even though an amount in excess of the maximum line of credit was paid, later loans are also secured by the deed of trust even if all previous debts or obligations have been paid in full until such time as the original security agreement is cancelled. The language on the check may arguably constitute an application for full payment, but can in no way be interpreted as seeking cancellation of the deed of trust.

Am Jur 2d, Mortgages §§ 137 et seq.

RAINTREE REALTY AND CONSTRUCTION v. KASEY

[116 N.C. App. 340 (1994)]

Appeal by respondents Giles Wright, Jr. and wife Bren N. Wright and Lincoln Service Corporation from judgment and order entered 20 April 1993 by Judge Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 20 April 1994.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed, Jr., for petitioner-appellee.

Leonard & Biggers, P.A., by William T. Biggers, for respondents-appellants.

JOHN, Judge.

In this action, respondents Giles Wright, Jr. and wife Bren N. Wright (the Wrights), present owners of a personal residence (the residence) previously owned by initial respondents Frank W. and Zelda Kasey (the Kaseys), challenge the trial court's order allowing foreclosure under a power of sale on the residence by Rainbow Realty and Construction, Inc. as trustee. While we are sympathetic with the predicament of the Wrights, we are constrained to conclude their contentions cannot be sustained.

The material facts of this case are not in dispute. On 17 July 1987, the Kaseys executed a LineOne Equity Agreement (the Agreement) for a line of credit in the amount of $30,000, secured by a deed of trust on the residence. The Agreement was delivered to North Carolina National Bank (subsequently converted to NationsBank and hereinafter referred to as "NationsBank"), which remains the owner and holder thereof.

On 15 March 1991, the Kaseys conveyed the residence (secured by the Nationsbank deed of trust) to the Wrights. The closing attorney, who represented the Wrights and the Kaseys as well as the lender Lincoln Service Corp, withheld $30,238.11 (the Agreement payoff amount obtained in a telephone conversation with NationsBank) and tendered this amount to NationsBank by check dated 15 March 1991. On the "for" line of the check was written "pay off Frank Kasey 437598998." The closing attorney also certified to the title insurance company that all liens had been cancelled. However, the check was delivered through a Nationsbank teller line and was not processed until 18 March 1991. Consequently, a balance of $24.34 remained because of interest charges posted in the interim. As a result, the LineOne account was not closed by reason of the outstanding balance, and remained open until 17 September 1992.

Approximately one month following sale of the residence to the Wrights and apparently upon advice from a NationsBank loan officer, Frank Kasey obtained a cash advance of $13,433.06 from the LineOne account to prevent repossession of his automobile under a separate loan with NationsBank. He thereafter obtained additional monies from the account until the outstanding balance reached $29,090.41. Kasey subsequently filed bankruptcy, and the Bankruptcy Court authorized foreclosure proceedings in state court.

On 20 April 1993, the trial court by order allowed substitute trustee Raintree Realty and Construction, Inc., to proceed with foreclosure against the residence.

The Wrights contend the obligation (debt) secured by the deed of trust could not by terms of the Agreement exceed $30,000, and further that upon payment of $30,238.11, the debt was satisfied. The debt having been satisfied, they continue, the deed of trust was no longer valid. This argument fails for several reasons.

Chapter 45, Article 9, of the General Statutes, entitled "Instruments to Secure Equity Lines of Credit," governs the circumstance *sub judice*. *See* N.C.G.S. § 45-81 to -84 (1991). Article 9 requires a lender to cancel a deed of trust securing a line of credit only upon fulfillment of two conditions. *First*, when "the balance of all outstanding sums secured by a mortgage or deed of trust . . . is zero, and *second*, upon request by the borrower that the lender "make written entry upon the security instrument showing payment and satisfaction . . . ." G.S. § 45-81(c) (1991). The section further provides that "such security instrument shall remain in full force and effect for the term set forth therein absent the borrower's request for such written entry." *Id.* Thus the plain statutory language reveals *both* conditions must be met before cancellation by a lender is mandated. Unfortunately for the Wrights, neither condition was satisfied in the instant case. We must conclude, therefore, that NationsBank was under no statutory obligation to cancel the deed of trust upon payment of $30,238.11 on 18 March 1991. Consequently, the trial court correctly applied the law in allowing NationsBank, through the trustee, to foreclose upon the residence.

Concerning the first statutory prong, the trial court's order recited as a finding of fact that the balance secured by the deed of trust was not reduced to zero at any time after 15 March 1991. The Wrights' attempt to avoid this difficulty by the argument that although the balance may never have reached zero, payment of an amount in excess

of the maximum line of credit allowed under the Agreement ($30,000) sufficed. To buttress this contention, they point to the principle that the mortgage must "identify the obligation secured," and nothing which is not therein stipulated will be included. *Walston v. Twiford*, 248 N.C. 691, 693, 105 S.E.2d 62, 64 (1958). However, even were we to decide that payment of the obligation amount had the effect of creating a zero balance and satisfying the first statutory requirement, the Wrights' position nonetheless could not be sustained.

The common law rule restated in *Walston* must yield to Article 9 under which a deed of trust securing an equity line of credit possesses:

> the same priority to the extent of all advances secured by it as if the advances had been made at the time of the execution of the . . . deed of trust, *notwithstanding the fact that from time to time during the term of the loan no balance is outstanding.*

G.S. § 45-82 (1991) (emphasis added). The statute therefore unambiguously directs that subsequent advancements, made pursuant to an original agreement establishing a line of credit, must be treated as if made and identified on the date of execution of that original agreement. Consequently, until such time as the original security agreement is cancelled pursuant to G.S. § 45-81(c), later loans are also secured by the deed of trust even if all previous debts or obligations have been paid in full.

Moreover, before NationsBank was required to cancel the deed of trust, the Kaseys (as "borrowers") must also have satisfied the second statutory prong by requesting NationsBank to cancel the deed of trust by means of "written entry upon the security instrument showing payment and satisfaction." G.S. § 45-81(c). The Wrights point to no evidence in the record that any such action was sought. Accordingly, the deed of trust "remain[ed] in full force and effect . . . ." G.S. § 45-81(c). The language "payoff Frank Kasey 437598998" written on the face of the check, while arguably constituting the borrower's application for full payment of the account balance, can in no way be interpreted as seeking cancellation of the deed of trust. Simple payment of an entire existing account balance does not constitute under the statute either notice of a request for cancellation or a request for cancellation itself.

Based on the foregoing, the order of the trial court allowing foreclosure is affirmed.

Affirmed.

Judges WELLS and JOHNSON concur.

Judge WELLS concurred prior to 30 June 1994.

CHERYL DENISE LOGAN, PLAINTIFF v. JAMES ARCHIE LOGAN, DEFENDANT

No. 9329DC509

(Filed 6 September 1994)

Pleadings § 65 (NCI4th)— Rule 11 sanctions—findings—insufficient

An order imposing Rule 11 sanctions against an attorney was reversed and remanded where the judge failed to identify the motions and pleadings which were misleading or incorrect, plaintiff's motion for sanctions also failed to identify the motions and pleadings which allegedly violated Rule 11, and the trial court's order could not be reviewed under the standard set out in *Turner v. Duke University*, 325 N.C. 152. N.C.G.S. § 1A-1, Rule 11(a).

Am Jur 2d, Pleading § 339.

Comment Note.—General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 95 ALR Fed. 107.

Appeal by defendant from order and judgment entered 5 February 1993 by Judge Robert S. Cilley in Rutherford County District Court. Heard in the Court of Appeals 1 March 1994.

J.H. Burwell, Jr., for plaintiff appellee.

Stephen T. Daniel & Associates, P.A., by Stephen T. Daniel; and Daniel A. Kuehnert for appellant, Daniel A. Kuehnert, counsel for defendant.

COZORT, Judge.

In this case the trial court imposed Rule 11 sanctions against defendant's counsel after finding that counsel "filed numerous Motions and pleadings . . . which contained material which was not

well grounded in either fact or law, and which specifically contained statements and information which was misleading and incorrect . . . ." We reverse the order because the trial court failed to specify which motions and pleadings were sanctionable, and we remand the cause for reconsideration of plaintiff's motion for sanctions.

The facts of the underlying matter are not pertinent to the resolution of this appeal and need not be set out here. The issue of sanctions arose on 22 January 1992, when plaintiff filed a motion for sanctions, alleging that "since November 3, 1992, Mr. Daniel A. Kuehnert in his capacity as counsel for the defendant has filed numerous pleadings and other Motions containing false allegations" and that "Daniel A. Kuehnert, Attorney at Law, well knows that many of his Motions and Affidavits are unfounded in law . . . and the conduct of the said Daniel A. Kuehnert has been intended to prevent the plaintiff from obtaining the relief to which she is rightfully entitled and which has been ordered by this Court, and that said conduct has been oppressive to the plaintiff and without just cause or excuse, and has resulted in great and unnecessary expense being incurred by the plaintiff." The motion did not specify which of the motions and affidavits filed by Mr. Kuehnert after November 3 were allegedly in violation of Rule 11.

The motion was heard before Judge Robert S. Cilley on 5 February 1993. An order and judgment granting plaintiff's motion for Rule 11 sanctions against defendant's attorney was entered in open court on 5 February 1993. In the order, the trial court found:

> 9. That at approximately 3 o'clock P.M. on November 3, 1992, Mr. Daniel A. Kuehnert delivered a Notice to Counsel for the plaintiff and filed a copy of said Notice with the Court indicating that he would appear on November 3, 1992, and seek relief as set out in a Motion; the said Notice did not set forth a time for any appearance and did not set forth the substance of any Motion. The said Daniel A. Kuehnert also filed Motions stated to be pursuant to Rules 59 and 60(b) of the Rules of Civil Procedure.
>
> * * * *
>
> 12. That thereafter on November 25, 1992, Daniel A. Kuehnert obtained an Order of Continuance over the objection of Counsel for the plaintiff from the Honorable Samuel Tate, with instructions to make certain changes in said Order, but that Mr. Daniel A. Kuehnert did not change the Order as instructed but filed the

same unchanged. That thereafter, said Order was called to the attention of Judge Tate who in effect deleted the entire Order except the continuance.

* * * *

14. That thereafter, Mr. Daniel A. Kuehnert filed a Motion to Withdraw as Counsel for the defendant, which motion can best be described as self-serving.

15. That Mr. Daniel A. Kuehnert as Attorney for the defendant filed numerous Motions and pleadings over his signature which contained material which was not well grounded in either fact or law, and which specifically contained statements and information which was misleading and incorrect and which the said Daniel A. Kuehnert knew or should have known to be misleading and incorrect, and that the misleading and incorrect material submitted over the signature of the said Daniel A. Kuehnert compelled Counsel for the plaintiff to expend substantial time at considerable expense to the plaintiff.

16. That the misleading and incorrect information knowingly submitted by Attorney Daniel A. Kuehnert constitutes a willful violation of the provisions of Rule 11 of the North Carolina Rules of Civil Procedure, and that the said Daniel A. Kuehnert is subject to sanctions for his said conduct.

* * * *

23. That Counsel for the plaintiff has been required to spend approximately fifteen (15) billable hours chargeable to the plaintiff in dealing with the incorrect and misleading pleadings knowingly filed by Attorney, Daniel A. Kuehnert, and the plaintiff has thereby been damaged by the said pleadings.

24. That Attorney Daniel A. Kuehnert is properly subject to sanctions pursuant to the provisions of Rule 11 of the North Carolina Rules of Civil Procedure based upon his knowingly signing and filing the incorrect and misleading pleadings which he filed in this cause.

25. That Attorney Daniel A. Kuehnert should be required to pay the sum of $750.00 into the office of the Clerk of Superior Court to be disbursed by the Clerk to the plaintiff to reimburse her for her legal expenses caused by the aforesaid conduct of the said Attorney, Daniel A. Kuehnert.

The trial court concluded:

1. That Attorney Daniel A. Kuehnert is subject to sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure for his conduct in knowingly filing incorrect and misleading pleadings in this action.

2. That the improper conduct occurring in this action is the fault of the Attorney, Daniel A. Kuehnert, and is not the fault of his client, the defendant, James Archie Logan.

The trial court ordered:

(A) That Daniel A. Kuehnert, Attorney at Law of Morganton, North Carolina, is hereby declared and adjudged to be subject to sanctions by this Court for the incorrect and misleading pleadings knowingly filed by him and for his conduct in this cause.

(B) That the said Attorney, Daniel A. Kuehnert, of Morganton, North Carolina, shall pay into the office of the Clerk of this Court the sum of $750.00 to be disbursed by the Clerk to the plaintiff and her Counsel of record as reimbursement for the unnecessary legal expenses occasioned by the improper conduct in this action by the said Attorney, Daniel A. Kuehnert.

Attorney Kuehnert appeals.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (1990) provides, in part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

A decision by the trial court to impose or not to impose sanctions under Rule 11 is reviewable de novo by this court. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). "In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Id.* at 165, 381 S.E.2d at 714. "If the

appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a)." *Id.*

Having reviewed Judge Cilley's order, we find the conclusions of law support the judgment and the conclusions of law are supported by the findings of fact. However, we are unable to determine whether the findings of fact are supported by sufficient evidence because the judge failed to identify the motions and pleadings which were misleading or incorrect. Since plaintiff's motion for sanction also fails to identify which motions and pleadings allegedly violated Rule 11, we cannot even infer which motions and pleadings the judge found to be in violation. Thus, we cannot review the trial court's order imposing sanctions on Mr. Kuehnert under the standard set out in *Turner v. Duke University*. The order must be remanded to the trial court for specification as to which motions and pleadings were misleading and incorrect.

The order imposing Rule 11 sanctions is reversed, and the cause is remanded for reconsideration, wherein the trial court is to make detailed findings of fact on plaintiff's motion for sanctions.

Reversed and remanded.

Chief Judge ARNOLD and Judge LEWIS concur.

AETNA CASUALTY AND SURETY COMPANY, PLAINTIFF v. ANNETTE J. ANDERS, DEFENDANT

No. 9328DC379

(Filed 6 September 1994)

Limitations, Repose, and Laches § 60 (NCI4th)— statute of limitations—subrogation—embezzlement

The trial court did not err by entering judgment on the pleadings in defendant's favor based on the statute of limitations where the complaint alleged that defendant embezzled money from her employer for eighteen months; the business was insured by plaintiff against employee theft; defendant's acts were discovered in November 1988; plaintiff reimbursed the business in August of 1989; and plaintiff filed this action against defendant in 1992.

Although plaintiff contended that the statute did not begin to run until it paid the loss, plaintiff's complaint sets out facts amounting to a claim of subrogation in which plaintiff took the place of the insured business. Because the statute of limitations would have run in November of 1991, plaintiff lost its right to file the suit after that date. N.C.G.S. § 1-52(16).

Am Jur 2d, Limitation of Actions §§ 98, 126.

Appeal by plaintiff from order entered 1 February 1993 by Judge Earl J. Fowler, Jr., in Buncombe County District Court. Heard in the Court of Appeals 2 February 1994.

Roberts Stevens & Cogburn, P.A., by William O. Brazil, III, and Vernon S. Pulliam, for plaintiff appellant.

Carol B. Andres for defendant appellee.

COZORT, Judge.

Plaintiff insurance company appeals the trial court's entry of judgment on the pleadings in defendant's favor on the basis that plaintiff's claim was barred by the statute of limitations. We affirm.

Plaintiff Aetna Casualty and Surety Company (Aetna) filed this action against defendant Annette J. Anders on 13 August 1992. The complaint alleged that defendant, while an employee of Swannanoa Laundry, Inc., (laundry) embezzled money from the business for eighteen months. The laundry was insured by a policy issued by Aetna covering business losses from employee theft. Defendant's acts were discovered in November 1988 and the laundry filed a claim with Aetna. Aetna reimbursed the laundry for the stolen money in August of 1989 and in turn filed suit in August of 1992 against defendant to recover the amount taken.

The sole issue raised by this appeal is whether the trial court properly granted defendant's motion for judgment on the pleadings based on the three-year statute of limitations codified in N.C. Gen. Stat. § 1-52(16) (Cum. Supp. 1993). A motion for judgment on the pleadings is properly entered where all material allegations of fact are admitted in the pleadings and only questions of law remain. *Watson v. American Nat'l Fire Ins. Co.*, 106 N.C. App. 681, 683, 417 S.E.2d 814, 816, *cert. allowed*, 332 N.C. 486, 421 S.E.2d 359 (1992), *aff'd*, 333 N.C. 338, 425 S.E.2d 696 (1993) (citing *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)). The moving party must demonstrate

that no material issue of fact exists and the party is entitled to judgment as a matter of law. *Id.*

The applicable statute provides for a three-year statute of limitations:

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. § 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1-52(16). Plaintiff claims the statute did not start to run until 15 August 1989, when Aetna paid the loss caused by defendant's actions to the laundry. Conversely, defendant argues the last date on which defendant could have committed a tortious act giving rise to the cause of action was 11 November 1988, making the statute of limitations' expiration date 11 November 1991.

A review of plaintiff's complaint reveals that plaintiff sets out facts amounting to a claim of subrogation.

> [I]t is well-settled law that an insurance company paying a loss under the obligations of its policy to its insured for insured property damaged by the tortious act of another is entitled to subrogation to the rights of the insured against the person whose tortious act caused damage to the insured property to the extent of the loss paid by the insurance company.
>
> Where insured property is damaged by the tortious act of another *and the insurance paid the owner of the property covers the loss in full,* the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation of the owner's indivisible cause of action against the tort-feasor.

Safeguard Ins. Co. v. Wilmington Cold Storage Co., 267 N.C. 679, 685-86, 149 S.E.2d 27, 33 (1966) (citations omitted). Plaintiff had the right to assert any claim which the laundry could have brought against defendant. Plaintiff took the place of the laundry and took on the same rights and responsibilities as the laundry would have had in a tort action. Because the statute of limitations would have run on the laundry's right to file the cause of action on 11 November 1991, plain-

tiff lost its right to file the suit after that date. The trial court's order is

Affirmed.

Judges ORR and GREENE concur.

FIELDCREST CANNON EMPLOYEES CREDIT UNION, PLAINTIFF v. KATHY M. MABES, DEFENDANT

No. 9317DC244

(Filed 6 September 1994)

1. **Judgments § 157 (NCI4th)— late answer—motion for default after answer—no prejudice from late answer—default judgment reversed**

A default judgment was reversed and the matter remanded where plaintiff filed a complaint requesting a deficiency judgment on a repossessed car on 23 July 1991; defendant requested and was given an enlargement of time to answer to 25 September 1991; the answer and counterclaim were not filed until 30 September 1991; plaintiff filed a motion to strike the answer and counterclaim and for entry of default judgment on 11 August 1992; defendant's attorney filed an affidavit in opposition to plaintiff's motion for default stating that he had typed the document into his word processor and believed that it had been filed before he left town for a week, and was surprised to discover that the answer had not been served; and the trial court determined that the failure to file was not the result of excusable neglect and granted plaintiff's motion to strike. Plaintiff lost its right to an entry of default by failing to take action until defendant's answer and counterclaim were filed and there was no prejudice from the late filing.

Am Jur 2d, Judgments § 1169.

2. **Evidence and Witnesses § 2118 (NCI4th)— repossession of automobile—evidence of value—admissible**

Evidence of the value of a repossessed car should have been admissible as a factor to be considered in determining if the sale of the automobile was in a commercially reasonable manner.

Am Jur 2d, Expert and Opinion Evidence §§ 317 et seq.

Appeal by defendant from orders entered 31 August 1992 and 21 October 1992, by Judge Janeice B. Williams in Rockingham County District Court. Heard in the Court of Appeals 6 January 1994.

C. Orville Light for defendant appellant.

No brief filed for plaintiff appellee.

COZORT, Judge.

Plaintiff Fieldcrest Cannon Employees Credit Union repossessed and sold the car of defendant Kathy M. Mabes. Plaintiff filed a complaint asking for a deficiency judgment on 23 July 1991. Defendant filed a motion for enlargement of time to answer on 23 August 1991; the motion was granted that same day. On 30 September 1991, defendant filed an answer with a counterclaim demanding a jury trial. On 11 August 1992, plaintiff made a motion to strike defendant's answer and counterclaim. That same day, plaintiff filed a motion for entry of default judgment. On 31 August 1992, the trial court entered an order striking defendant's answer and counterclaim. A separate order was entered granting an entry of default and default judgment. Defendant appeals, arguing the trial court erred in granting plaintiff's motion to strike defendant's answer and counterclaim. We agree with defendant and reverse the trial court's order.

[1] In the case below, the defendant received an enlargement of time for which to file her answer extending the time to 25 September 1991. The answer and counterclaim were not filed until 30 September 1991, five days past the due date. Defendant's attorney filed an affidavit on 14 August 1992 in opposition to plaintiff's motion for the default judgment, stating that defendant had typed the document into his word processor and believed the answer had been filed before he left town for a week. He was surprised to discover the answer had not been served. Defendant did not file a motion alleging that failure to timely file the answer or otherwise plead was the result of excusable neglect. The trial court determined the failure to file was not the result of excusable neglect and granted plaintiff's motion to strike.

In *Newton v. Tull*, 75 N.C. App. 325, 328, 330 S.E.2d 664, 666 (1985), this Court determined the plaintiff had waived its rights to entry of default pursuant to N.C. Gen. Stat. § 1A-1, Rule 55(a), since plaintiff had waited until after the defendant had tardily filed an answer to make a motion for entry of default. The defendants in *Newton* sought, and were granted, an extension of time to file an

answer until 6 September. On 19 September, defendants filed an answer and counterclaim. Plaintiff had not moved for entry of default prior to the filing of the answer and counterclaim, but on 12 October, plaintiff moved that the answer be stricken because it was "untimely" filed. On 31 October, the defendants filed a motion for summary judgment. This Court held the plaintiff had waived the right to an entry of default by waiting until the answer had been filed before seeking to obtain an entry of default. "Default may not be entered after an answer has been filed, even if the answer is tardily filed." *Id.* at 328, 330 N.C. at 666 (citing *Peebles v. Moore*, 302 N.C. 351, 275 S.E.2d 883 (1981)).

Our decision reversing the trial court's order is supported by *Peebles v. Moore*, 302 N.C. 351, 275 S.E.2d 883 (1981). In *Peebles*, the North Carolina Supreme Court stated:

> The portion of G.S. 1A-1, Rule 55, applicable to the facts of the case before us, requires a clerk to make an entry of default "when a party . . . has failed to plead . . . ." When a party has answered, it cannot be said that he "has failed to plead . . . ." We are unable to perceive anything in this language or in the language of the entire rule, G.S. 1A-1, Rule 55, which alters the established law that defaults may not be entered after answer has been filed, even though the answer be late.
>
> We believe that the better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise.

Id. at 356, 275 S.E.2d at 836 (citing McIntosh, North Carolina Practice and Procedure (1970, Phillips Supp.) § 1670; 3 Barron and Holtzoff, Federal Practice and Procedure (Wright ed., 1961) § 1216).

As in *Newton* and *Peebles*, we find the plaintiff lost its right to an entry of default, by failing to take action until defendant's answer and counterclaim were filed. Furthermore, we find no prejudice resulting from the late filing. As such, we find justice will be better served in this case by allowing the parties to fully litigate their claims. We therefore reverse the trial court's order and remand for a trial on the matter.

[2] Turning now to an issue which may arise on remand, we address whether the trial court erred in denying defendant the right to offer evidence as to the value of the repossessed car. The trial court

refused to allow defendant to put on any evidence as to the value of the car at the time of repossession. Defendant contends the price received for the collateral is a factor to be considered in determining if the sale of an item was in a commercially reasonable manner. We agree. At trial, the court should permit defendant the opportunity to present evidence of the value of the car at the time it was repossessed to aid in the determination of damages.

Reversed and remanded for trial.

Judges GREENE and WYNN concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER LUKE WILLIAMS

No. 9318SC1182

(Filed 6 September 1994)

Criminal Law § 1084 (NCI4th)— robbery—sentencing—greater than presumptive term—findings not required —no appeal as of right

The defendant was not entitled to appeal as a matter of right and his appeal was dismissed where defendant had pled guilty pursuant to a plea arrangement in which his exposure would be limited to 40 years on condition that he testify truthfully if necessary against other defendants and the trial court imposed a sentence in excess of the presumptive term. Because defendant pled guilty, did not move to withdraw his guilty plea, and did not move to suppress evidence, he is entitled to appeal as a matter of right whether the evidence supported the sentence only if the prison term exceeds the presumptive and the trial court was required to make findings as to aggravating or mitigating factors. The trial court need not make findings as to aggravating or mitigating factors if it imposes a prison term pursuant to any plea arrangement as to sentence, and defendant's guilty plea limiting exposure to 40 years amounts to a plea arrangement as to sentence. N.C.G.S. § 15A-979(b).

Am Jur 2d, Appeal and Error § 271; Criminal Law §§ 598, 599.

STATE v. WILLIAMS

[116 N.C. App. 354 (1994)]

Appeal by defendant from judgment entered 23 April 1992 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 25 July 1994.

Defendant was charged with robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87 and conspiracy to commit robbery. Defendant pled guilty to the charges pursuant to a plea arrangement with the State. The terms of the arrangement were that defendant would plead guilty and that the charges would be consolidated for sentencing with his "exposure . . . limited to 40 years" on condition that he testify truthfully if necessary against other defendants.

At the sentencing hearing, the trial court found as an aggravating factor that defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement. The trial court found as mitigating factors that defendant aided in the apprehension of another felon and that he voluntarily acknowledged wrongdoing at an early stage in the criminal process. The trial court found that the aggravating factor outweighed the mitigating factors and imposed a prison sentence of eighteen years for the consolidated offenses. Defendant appeals.

Attorney General Michael F. Easley, by Associate Attorney General Jill A. Bryan, for the State.

Geoffrey C. Mangum for defendant-appellant.

LEWIS, Judge.

Defendant presents four questions on appeal concerning his sentencing. Because defendant was not entitled to appellate review as a matter of right, we dismiss his appeal.

N.C. Gen. Stat. § 15A-1444(e) (1988) provides in pertinent part:

> Except as provided in subsection (a1) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1) provides in pertinent part:

> A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of

right the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing only if the prison term of the sentence exceeds the presumptive term set by G.S. 15A-1340.4, and if the judge was required to make findings as to aggravating or mitigating factors pursuant to this Article.

N.C. Gen. Stat. § 15A-979(b) (1988) provides that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty."

In this case, defendant pled guilty. He did not move to withdraw his guilty plea nor did he move to suppress evidence. Therefore, he is entitled to appeal as a matter of right whether his sentence is supported by evidence introduced at his sentencing hearing only if (1) the prison term of his sentence exceeds the presumptive term set by N.C. Gen. Stat. § 15A-1340.4 (1988) and (2) the trial court was required to make findings as to aggravating or mitigating factors.

If the trial court imposes a prison term different from the presumptive, it must ordinarily make appropriate findings as to aggravating or mitigating factors. N.C. Gen. Stat. § 15A-1340.4(b). However, the trial court need not make findings as to aggravating or mitigating factors if it "imposes a prison term pursuant to any plea arrangement as to sentence." *Id.*

Here, defendant's eighteen-year prison sentence is in excess of the combined presumptive terms of the offenses and would ordinarily require the trial court to make findings as to aggravating and mitigating factors. *See State v. Kamtsiklis*, 94 N.C. App. 250, 380 S.E.2d 400, *appeal dismissed and disc. review denied*, 325 N.C. 711, 388 S.E.2d 466 (1989). However, defendant pled guilty pursuant to a plea arrangement which provided "exposure . . . limited to 40 years," and the arrangement amounts to a plea arrangement "as to sentence." *See State v. Simmons*, 64 N.C. App. 727, 308 S.E.2d 95 (1983), *disc. review denied*, 310 N.C. 310, 312 S.E.2d 654 (1984). Therefore, the trial court was not required to make finding as to aggravating or mitigating factors. The findings made by the trial court may be disregarded as surplusage. *See Simmons*, 64 N.C. App. 727, 308 S.E.2d 95.

Because the trial court was not required to make findings as to aggravating or mitigating factors, defendant was not entitled to appeal as a matter of right. His appeal must be dismissed.

Appeal dismissed.

Judges EAGLES and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 SEPTEMBER 1994

ANDERSON v. ANDERSON No. 9322DC843	Davidson (90CVD1122)	Affirmed
BAZEMORE v. BAZEMORE No. 936DC1201	Bertie (92CVD261)	Affirmed
BELTON v. BELTON No. 9329DC1308	McDowell (92CVD624)	Affirmed
BERRY v. SOUTHEAST FOAM No. 9310IC840	Ind. Comm. (914457)	Reversed & Remanded
BYERS v. FOOD LION No. 9222SC1259	Iredell (91CVS02262)	Reversed & Remanded
CARR v. STOKER No. 9228SC1202	Buncombe (91CVS1250)	No Error
CITY OF GOLDSBORO v. HOLLOWAY No. 948SC94	Wayne (93CVS517)	Affirmed
COWAN v. COWAN TOOLING No. 9410IC291	Ind. Comm. (959183)	Affirmed
FEARRINGTON v. UNIVERSITY OF NORTH CAROLINA No. 9310SC1281	Wake (92CVS10050)	Appeal Dismissed
FOYE v. HAMPTON No. 9311SC851	Johnston (91CVS1472)	Affirmed part & Remanded in part
GULLEY v. ELIZABETH MEADE HOSIERY MILLS No. 9410IC350	Ind. Comm. (113140)	Affirmed
HALIFAX COUNTY DSS v. EVANS No. 936DC566	Halifax (90CVD581)	Reversed
HARRELL v. McMINN No. 9418SC277	Guilford (92CVS7474)	As to the judgment entered 24 June 1993, No Error; as to the order entered 18 August 1993, Affirmed

HOME HEALTH AND HOSPICE CARE, INC. v. KELLY No. 948SC224	Wayne (91CVS1323)	Dismissed in part; Affirmed in part
HUTCHINS v. HUTCHINS No. 9329DC983	Rutherford (90CVD193)	Reversed
IN RE BERRYMAN No. 9411DC269	Harnett (93J91)	Vacated & Remanded
IN RE DENNIS v. DUKE POWER CO. No. 9310UC646	Utilities Comm. (E-7, Sub 474) (EC-10, Sub 37) (E-13, Sub 151)	Affirmed
IN RE KAFTON No. 948DC208	Lenoir (93J89)	Affirmed
JONES v. CAROLINA-VIRGINIA FOREST No. 946SC206	Northampton (93CVS109)	Dismissed
JONES v. HODGES No. 9310SC1233	Wake (92CVS10113)	Affirmed
JONES COUNTY DSS v. GREEN No. 934DC1207	Jones (92CVD27)	Affirmed
JOYNER v. DEANS No. 937SC844	Nash (91CVS1740)	Affirmed
KARNS v. GOSNEY No. 9326DC1171	Mecklenburg (90CVD15575)	Affirmed
MASON v. RUSSELL No. 933SC1015	Carteret (91CVS207)	Affirmed
MATTHEWS v. MATTHEWS No. 9420DC86	Moore (78CVD150)	Reversed & Remanded
MID-CAROLINA CORP. v. LIND No. 9318DC1181	Guilford (93CVD6879)	Plaintiff's direct appeal, No Error. Defendant's cross-assignment of error, Dismissed
MOODY v. McELRATH No. 9328DC531	Buncombe (91CVD2099)	Dismissed
NELLIS v. SHEETS No. 9422DC193	Iredell (93CVD332)	Affirmed
PEACE v. REEVES BROTHERS No. 9310IC1003	Ind. Comm. (857122)	Affirmed

PEPPER v. PEPPER No. 9328DC525	Buncombe (86CVD335)	Affirmed
POWELL v. POWELL No. 9315SC535	Alamance (93CVS2)	Affirmed
RIVES v. DAVIDSON COUNTY No. 9322SC149	Davidson (92CVS317)	Affirmed
ROANOKE CONST. v. NEW HANOVER WATER & SEWER No. 935SC457	New Hanover (91CVS4131)	Affirmed
ROBINSON v. KLUTTZ No. 9313SC1199	Bladen (91CVS0090)	No Error
ROWLAND v. FOOD LION No. 9319SC464	Rowan (92CVS1153)	Affirmed
SPURLOCK v. ALEXANDER No. 9326SC1057	Mecklenburg (93CVS6108)	Dismissed
STATE v. BLUE No. 9312SC1205	Cumberland (93CRS1577)	No Error
STATE v. BLUE No. 948SC217	Wayne (93CRS2364) (93CRS2365)	No Error
STATE v. BROWN No. 9430SC168	Cherokee (93CRS1040) (93CRS1179) (93CRS1320) (93CRS1322) (93CRS1324) (93CRS1325) (93CRS1326) (93CRS1327) (93CRS1328) (93CRS1329) (93CRS1330) (93CRS1331) (93CRS1332) (93CRS1333) (93CRS1334) (93CRS1335) (93CRS1337) (93CRS1338) (93CRS1339) (93CRS1340) (93CRS1375) (93CRS1390) (93CRS1945) (93CRS1946)	Affirmed in part, Vacated in part & Remanded

STATE v. BROWN No. 938SC1292	Wayne (92CRS10282)	No Error
STATE v. BURRIS No. 9429SC254	Rutherford (93CRS1252)	No Error
STATE v. BURT No. 9326SC1222	Mecklenburg (92CRS54222) (92CRS54224) (92CRS54227) (92CRS54398)	No Error
STATE v. COLVIN No. 941SC215	Perquimans (92CRS1191)	No Error
STATE v. DARWIN No. 948SC343	Wayne (92CRS34)	Affirmed
STATE v. EMERY No. 9424SC210	Wilkes (93CRS4117) (93CRS7982)	No Error
STATE v. FUSSELL No. 9310SC521	Wake (92CRS21803)	No Error
STATE v. GAHREN No. 9426SC149	Mecklenburg (93CR9628)	Appeal dismissed; Motion for appropriate relief remanded to trial division
STATE v. HARPER No. 9418SC4	Guilford (93CRS31261)	No Error
STATE v. HARRELL No. 937SC1017	Wilson (93CRS1055) (93CRS1056) (93CRS1057) (93CRS1058)	No Error
STATE v. HERNANDEZ No. 9312SC1284	Cumberland (91CRS27009)	Appeal Dismissed
STATE v. HUDSON No. 9326SC1266	Mecklenburg (93CRS4516)	No Error
STATE v. JACKSON No. 9318SC1255	Guilford (93CRS30140) (93CRS41447)	No Error
STATE v. JACKSON No. 9429SC163	Rutherford (93CRS2759)	No Error

STATE v. JACOBS No. 946SC305	Hertford (94CRS4353) (94CRS4354) (94CRS4355) (94CRS4357)	No Error
STATE v. JOSEPH No. 9418SC126	Guilford (93CRS48193)	No Error
STATE v. KENNEDY No. 9319SC1270	Randolph (92CRS7374) (92CRS74) (92CRS75)	92CRS7374— No Error 93CRS75— No Error 93CRS74— Remanded for correction
STATE v. KING No. 9412SC322	Cumberland (92CRS44924) (92CRS44925) (92CRS44926)	No Error
STATE v. KURTZ No. 946SC77	Halifax (92CRS7755)	No Error
STATE v. LOCKHART No. 9326SC1283	Mecklenburg (92CRS80463)	Affirmed
STATE v. MASTROLIA No. 9410SC259	Wake (92CRS24448)	No Error
STATE v. McCONEYHEAD No. 9426SC166	Mecklenburg (92CRS65496) (92CRS65497) (92CRS65498)	No Error
STATE v. McFALLS No. 9329SC1288	Polk (92CRS87)	Affirmed
STATE v. McLEOD No. 9416SC139	Scotland (92CRS1028)	No Error
STATE v. MILLER No. 9326SC1212	Mecklenburg (93CRS5249) (93CRS5250)	Affirmed
STATE v. PENNIX No. 9418SC147	Guilford (92CRS21381)	No Error
STATE v. QUICK No. 9318SC956	Guilford (92CRS11942) (92CRS11943) (92CRS11944) (92CRS11945) (92CRS11946) (92CRS20101) (92CRS20098)	Remand for *Batson* hearing; otherwise, no error

STATE v. ROBINSON No. 9326SC253	Mecklenburg (92CRS15724)	No Error
STATE v. SPELLMAN No. 943SC236	Craven (92CRS14004)	No Error
STATE v. STALLINGS No. 934SC218	Duplin (91CRS6118) (91CRS6119)	No Error
STATE v. STANBACK No. 9321SC861	Forsyth (92CRS32426)	Affirmed
STATE v. TICE No. 938SC890	Lenoir (92CRS0119)	No Error
STATE v. WHITE No. 9421SC232	Forsyth (93CRS20895) (93CRS21583)	No Error
STATE v. WILSON No. 9320SC1185	Moore (93CRS129) (93CRS131) (93CRS132) (93CRS133) (93CRS134)	No Error
STROUD v. FIELDCREST CANNON INC. No. 9410IC191	Ind. Comm. (049103)	Affirmed
SWEATMAN v. BENSON No. 9221SC1195	Forsyth (92CVS2359)	Affirmed
THATCH v. ETHERIDGE No. 9310SC896	Wake (92CVS09436)	Affirmed
WOODY v. WRENN No. 949DC10	Person (93CVD306)	Vacated & Remanded

CYNTHIA L. ECHOLS, PLAINTIFF-APPELLANT v. ZARN, INC. AND EDITH BARNETT, DEFENDANTS-APPELLEES

No. 9317SC325

(Filed 20 September 1994)

1. **Workers' Compensation § 69 (NCI4th)— civil action against co-employee—willful, wanton, or reckless conduct required**

The threshold question in determining whether an employee may maintain a common law action against a co-employee for injuries arising out of and in the course of the employee's employment is whether the co-employee's injurious conduct was willful, wanton, or reckless. This standard requires conduct that manifests a reckless disregard for the rights and safety of others with an element of willfulness, either the intentional failure to carry out a duty imposed by law or contract that is necessary to the safety of the person or property to whom it is owed, or the intentional committing of the negligent conduct that caused the injury.

Am Jur 2d, Workers' Compensation §§ 100, 101.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Willful, wanton, or reckless conduct of co-employee as ground of liability despite bar of workers' compensation law. 57 ALR4th 888.

2. **Workers' Compensation § 69 (NCI4th)— civil action against co-employee—summary judgment for co-employee proper**

The trial court properly granted summary judgment for defendant co-employee in plaintiff's action to recover for injuries to her hand sustained when she reached under a safety gate into a molding machine allegedly at the instruction of defendant supervisor, since the actions of defendant failed to rise to the level of willful conduct necessary to maintain a civil action against her, especially in light of the undisputed evidence that defendant worked the machine herself by reaching under the safety gate; defendant did not tell plaintiff to put her hand in the mold area; in fifteen years of reaching under the gate no employee had ever been injured; and reaching under the safety gate

to pull a molded part down by the tail of the product or by the product was considered acceptable by defendant employer.

Am Jur 2d, Workers' Compensation §§ 100, 101.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Willful, wanton, or reckless conduct of co-employee as ground of liability despite bar of workers' compensation law. 57 ALR4th 888.

3. Workers' Compensation § 62 (NCI4th)— employer not intentionally engaged in injurious conduct—no civil action by employee against employer

Plaintiff could not maintain a civil action against her employer for injuries arising out of and in the course of her employment because the evidence was insufficient to show that defendant intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death where defendant had a safety rule which allowed only mechanics and maintenance personnel to bypass safety guards when working on equipment; defendant knew of the practice of supervisors training employees to reach under the safety gate to retrieve products which had fallen out of the mold; plaintiff's supervisor told plaintiff to reach under the safety gate to pull the part out; reaching below the safety gate was not considered a violation of safety rules or unsafe; no one instructed plaintiff to place her hand in the mold area; and machine operators had been reaching under the gate for fifteen years without injury.

Am Jur 2d, Workers' Compensation §§ 75 et seq.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Judge GREENE concurring in part and dissenting in part.

Appeal by plaintiff from order entered 26 January 1993 by Judge W. Douglas Albright in Rockingham County Superior Court. Heard in the Court of Appeals 14 January 1994.

This action arises out of an accident in which plaintiff, Cynthia Echols, received serious injury when her hand was caught in a molding machine that she was operating as an employee of Defendant Zarn, Inc. As operator of the molding machine, plaintiff was required to remove plastic parts from the machine. The injury occurred when plaintiff reached under the safety gate of the molding machine to remove a plastic part and the molding machine closed on and crushed plaintiff's right hand.

On 23 January 1992, plaintiff filed her complaint against Zarn, Inc. and a co-employee, Edith Barnett, in Rockingham County Superior Court. In her complaint, plaintiff alleged that Defendant Edith Barnett, a supervisory employee of Zarn, Inc., directed plaintiff to remove the plastic parts from the molding machine by reaching under the safety gate and that Zarn, Inc. knowingly allowed its employees to use the molding machine without the necessary guarding and safety device. Further, plaintiff alleged that these acts of defendants constituted "willful, reckless and wanton" conduct which directly and proximately caused plaintiff's injuries. Defendants filed an answer denying plaintiff's allegations of willful, reckless and wanton conduct, and in January 1993, defendants filed a motion for summary judgment.

On 26 January 1993, Judge W. Douglas Albright entered an order granting defendants' motion for summary judgment. From this order, plaintiff appeals.

Patterson, Harkavy & Lawrence, by Donnell Van Noppen III, Melinda Lawrence and Maxine Eichner, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Reid C. Adams, Jr. and James P. Hutcherson, for defendant-appellees.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in granting defendants' motion for summary judgment. Defendants contend that the trial court properly granted summary judgment in their favor because plaintiff's sole remedy for this cause of action is found in the Workers' Compensation Act. Plaintiff contends, on the other hand, that she may maintain this action against her co-employee, Edith Barnett, pursuant to the holding in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985) and against her employer, Zarn, Inc., pursuant to the holding in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

For the reasons stated below, we conclude that the plaintiff may not maintain her action against her co-employee, Edith Barnett, or her employer, Zarn, Inc., and that the trial court properly granted defendants' motion for summary judgment.

At the outset, we note our standard of review for summary judgment. Summary judgment is the device whereby judgment is rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). "Summary judgment is proper when it appears that even if the facts as claimed by plaintiff are taken as true, there can be no recovery." *Hudson v. All Star Mills, Inc.*, 68 N.C. App. 447, 450, 315 S.E.2d 514, 516, *disc. review denied*, 311 N.C. 755, 321 S.E.2d 134 (1984). " 'In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party.' " *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 276, 432 S.E.2d 428, 433 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 517, *motion to dismiss appeal denied*, 335 N.C. 770, 442 S.E.2d 517 (1994) (citation omitted).

In the present case, the undisputed evidence shows that Defendant Edith Barnett was a supervisory employee of Defendant Zarn, Inc. On the date of the accident, Barnett assigned plaintiff to operate a S-2 molding machine, which operation included removing plastic parts as they were produced by the machine. The molding machine was equipped with a safety gate, and when the gate was opened by the operator, the machine would shut off, thereby preventing the mold from closing. When the safety gate was closed, the machine would not shut off.

Plaintiff testified in her deposition that on the day of the accident, Barnett sent her to work on the S-2 molding machine to relieve another employee named Geraldine. When plaintiff arrived, Geraldine was still working at the machine. Plaintiff told Geraldine that she did not know how to run the machine, and Geraldine told her to open the safety gate and take the parts out. Plaintiff testified:

> I kept telling Geraldine I didn't know how to run the machine. And she was trying to tell me how to do it. And I just couldn't comprehend it, you know. I just couldn't do it. And Edith [Barnett] come [sic] up. And there was [sic] parts everywhere because I would take them out, but I couldn't—you know, I couldn't do it as fast as everybody else could do it.

Plaintiff testified that when Barnett came over to the machine she told Geraldine that if she did not leave, she would be put back to work. Geraldine left, and Barnett started showing plaintiff how to work the machine. Plaintiff testified that Barnett removed the parts by opening the safety gate and then she let plaintiff work the machine. Plaintiff testified that she had trouble getting the part out of the machine and that parts were backing up. Plaintiff testified that she told Barnett that she did not know how to work the machine but that Barnett told her that she was going to learn how to work the machine.

Plaintiff testified that Barnett started running the machine again to show plaintiff how to work it. Plaintiff further testified that Barnett told plaintiff "there would be a quick and easy way if [plaintiff] stuck [her] hand under the gate and pulled the part out." Barnett then showed plaintiff how to reach underneath the safety gate and remove the parts. In her affidavit, plaintiff testified that "[i]n demonstrating how she operated the machine and instructing how [plaintiff] was to operate it, Ms. Barnett reached under the gate and appeared to reach into the area of the mold to pull the part from the machine."

Plaintiff further testified in her deposition that after showing plaintiff how to reach under the safety gate, Barnett "told [plaintiff] to reach up under the [safety] gate and pull the part out . . . ." Plaintiff testified that the "main reason" she reached under the safety gate pursuant to Barnett's instruction was because plaintiff was "afraid of losing [her] job . . . ." Plaintiff testified that the first time she tried to reach under the safety gate, the machine caught and smashed her hand.

Barnett testified, on the other hand, that she told plaintiff that she could reach under the gate and grab the excess "flashing" or "tail" of the part to pull it out of the machine. When asked how she showed plaintiff to operate the machine on the day of the injury, Barnett stated that she started off opening the safety gate to pull the molded part out but that on about the third or fourth time she began reaching under the safety gate because the parts were falling out of the mold. Barnett testified, "Reaching under [the safety gate] was easier for me because the gate was heavy[,] and I have always done it that way."

Barnett testified that she showed plaintiff how to open the safety gate and that she also showed plaintiff the way she removed parts by reaching under the gate and said, "this is the way I do it, . . . you can do whichever way you want." Barnett testified that she did not tell

plaintiff to reach under the safety gate. Further, Barnett testified that at no time did she tell plaintiff to operate the machine and that at the time of the injury, Barnett thought that plaintiff was cutting one of the parts Barnett had laid on the table. Barnett heard plaintiff scream and did not remember anything after that point.

Additionally, the Vice President of Human Resources for Zarn, Linda Marlowe, who was the head of Zarn's safety committee in 1989, also testified in a deposition. When asked whether Zarn had safety rules regarding bypassing the safety mechanisms, Marlowe read one of Zarn's safety rules into her deposition which rule states:

> "Never place hands into any moving machine unless all safety devices are operating properly and it is safe to do so. Only authorized mechanics and maintenance personnel may reach around or otherwise bypass a safety guard when working on machinery or equipment."

Further, when asked whether it would be a violation of Zarn's safety rules to bypass guards or gates Marlowe answered:

> A. It would be a violation of this rule that I just stated. However, reaching down and—at the bottom of the gate to pull out something by a tail or by the product—pulling the product out—was not considered a violation. It was—The gate was there to protect someone from getting injured from the mold or the pinch off part. So it was not ever considered that down below that gate—reaching under there—was a violation or that it was unsafe.

Further, Marlowe testified that when the tail of the part had come out of the mold, it was not a violation of the safety rules to reach under the machine to pull the part out because the employee would not be putting her hand into a hazardous area in that case. Marlowe also testified, however, that reaching into the mold would be a violation of Zarn's safety rules, as would instructing an employee to reach into a mold because putting your hand into a mold would be placing it into a hazardous area.

Edgar French, the Plant Superintendent for Zarn, testified as to the purpose of the safety gate on the S-2 machine. French testified that the purpose of the safety gate was to prevent people from walking into the molds and to stop the machines if the product needed to be run on a "non-automatic" cycle. French testified that an automatic cycle is where the safety gate stays closed, the machine continues to operate automatically, and the parts come out by themselves, and a

non-automatic cycle is where the employee opens the safety gate, which stops the machine, to remove the part. The following testimony is reflected in French's deposition on the issue of what cycle the S-2 machine was on the day plaintiff was injured:

> Q. This X-frame that was being manufactured on the S-2 at the time of this injury would be a non-automatic cycle; is that right?
>
> A. Or an automatic if it was falling out and they were pulling it out from under the bottom. It would be an automatic at that point. If they open the gate, it's not automatic. If they keep the gate closed, it's automatic.
>
> Q. Is it automatic if its sort of the operator's option, as you've described? . . .
>
> A. Yes.
>
> . . .
>
> Q. Do you have an understanding, one way or the other, about these X-frames—whether they were dropping completely free down onto the floor and being picked up from under the gate, or whether Ms. Barnett was reaching under the gate and pulling the thing out from the mold?
>
> A. It's my opinion that if she was pulling it out from the bottom, then it was coming out of the mold. So it was just laying there, basically, and you're pulling it out—because if it was hanging in the mold, you couldn't pull it out from underneath the bottom.
>
> Q. Why is that?
>
> A. You just couldn't. I mean, you've got to prize [sic] it out or jerk it out of the mold in [sic] a different angle. . . . If it was hung in the mold, you couldn't pull it from the bottom and pull it out of the mold. There's no way. That's why, at times, this product is automatic or non-automatic. If it's hanging in the mold, you've got to open the door to get it out. If it's fallen free of the molds, then you can pull it out from the bottom.

Additionally, in his affidavit, French testified:

> During my entire 22 years with Zarn, our shift supervisors have allowed the operators of the machine in question, and other similar machines, to remove the completed product from the mold by

> reaching under the safety gate. . . . Prior to plaintiff's accident, Zarn had never had an employee injured while removing a completed product from the press mold in question, or from any other machine, by reaching under the safety gate.

Similarly, in her affidavit, Barnett testified that "[m]achine operators at Zarn have been reaching under safety gates on the various machines at Zarn, including the S-2 machine, to remove finished products for over 15 years, and no operator has ever been injured by closing molds or pre-pinch bars while reaching under a safety gate."

I.

First, we will address whether plaintiff may maintain this action against her co-employee, Edith Barnett. The Workers' Compensation Act bars an employee subject to the Act whose injuries arise out of and in the course of his employment from maintaining a common law action against a co-employee for mere negligent conduct. *Strickland v. King*, 293 N.C. 731, 239 S.E.2d 243 (1977); N.C. Gen. Stat. §§ 97-9, 97-10.1. In *Pleasant*, 312 N.C. 710, 325 S.E.2d 244, however, our Supreme Court determined that the Workers' Compensation Act does not bar an employee from maintaining a common law action against a co-employee for willful, wanton, and reckless negligence.

In *Pleasant*, plaintiff and defendant were co-employees. On 13 May 1980, plaintiff returned from lunch to the work site. As plaintiff was walking across the parking lot he was struck by a truck driven by defendant, and his right knee was seriously injured. Plaintiff sued defendant in a civil action alleging defendant's actions were willful, reckless, and wanton in that he operated the motor vehicle in an attempt to see how close he could operate the vehicle to the plaintiff. At trial, defendant testified that he "intended to scare the plaintiff by blowing the horn and by operating the truck close to him." *Id.* at 711, 325 S.E.2d at 246.

Subsequently, defendant moved for a directed verdict, which motion the trial court granted. Plaintiff appealed, and this Court affirmed by a divided panel. On appeal, the Supreme Court held "that the North Carolina Workers' Compensation Act does not insulate a co-employee from the effects of his willful, wanton and reckless negligence." *Id.* at 717, 325 S.E.2d at 250. Based on this holding, the Court in *Pleasant* concluded, "[s]ince the plaintiff's complaint did allege that the defendant had been willfully, wantonly and recklessly negli-

gent, the decision of the Court of Appeals affirming a directed verdict in favor of the defendant is reversed." *Id.* at 718, 325 S.E.2d at 250.

[1] The threshold question in determining whether an employee may maintain a common law action against a co-employee for injuries arising out of and in the course of the employee's employment is, therefore, whether the co-employee's injurious conduct was willful, wanton and reckless. Thus, in the present case we must first determine whether the summary judgment evidence viewed in the light most favorable to plaintiff shows that Barnett's alleged actions constituted willful, wanton, and reckless negligence. Before making this determination, we must look to prior law in order to define what conduct constitutes willful, wanton, and reckless negligence.

In *Pleasant*, our Supreme Court defined " 'wanton' conduct as an act manifesting a reckless disregard for the rights and safety of others" and defined "reckless" as a synonym for "wanton" when used in this context. *Id.* at 714, 325 S.E.2d at 248 (citations omitted). As for "willful negligence" the Court stated:

> Defining "willful negligence" has been more difficult. At first glance the phrase appears to be a contradiction in terms. The term "willful negligence" has been defined as the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed. . . . A breach of duty may be willful while the resulting injury is still negligent. Only when the injury is intentional does the concept of negligence cease to play a part. . . . We have noted the distinction between the willfulness which refers to a breach of duty and the willfulness which refers to the injury. In the former only the negligence is willful, while in the latter the injury is intentional.
>
> Even in cases involving "willful injury," however, the intent to inflict injury need not be actual. Constructive intent to injure may also provide the mental state necessary for an intentional tort. . . . Constructive intent to injure exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified. . . . Wanton and reckless negligence gives rise to constructive intent.

Id. at 714-15, 325 S.E.2d at 248 (citations omitted).

In *Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, 416 S.E.2d 193, *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992), this Court applied the willful, wanton, and reckless standard to determine whether an employee could maintain a civil action against a co-employee for injuries arising out of and in the course of the employee's employment. In *Dunleavy*, plaintiffs' intestate, Johnny Glenn Cobb, II ("Cobb") was a member of an inexperienced pipe crew that was employed by Yates Construction Company, an independent contractor. Yates Construction Company was hired by Springfield Properties to construct, among other things, sewer lines. On 18 October 1985, the pipe crew, of which Cobb was a member, began digging the first leg of the trench work at the construction site while Donald Baynes, the crew foreman, was present.

During the afternoon, the crew began digging the second leg of the trench work when Baynes was called away to another part of the work site.

> At this point, the trench had not exceeded five feet in depth and was not to exceed five feet during the second leg of the work, and no one in the crew was working in any part of the trench that exceeded a depth of five feet. While Baynes was gone, however, the backhoe operator made more progress than had been expected and began digging the trench deeper than five feet. Some time later, Cobb was killed when a small portion of the trench where the depth exceeded five feet collapsed.

Id. at 155-56, 416 S.E.2d at 198-99. Plaintiffs' intestate filed a complaint against Baynes, Yates Construction Company, Springfield Properties, and two other defendants associated with Yates Construction Company, alleging "that Cobb's death was the result of a deliberate and intentional assault and willful, wanton, and reckless negligence." *Id.* at 150, 416 S.E.2d at 195.

As to Defendant Baynes, the trial court granted Baynes' motion for summary judgment, which action this Court affirmed in an unpublished opinion. Subsequently, after our Supreme Court filed *Woodson*, 329 N.C. 330, 407 S.E.2d 222 (1991) (discussed in the second portion of this opinion), the Court allowed 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*. *Dunleavy*, 106 N.C. App. at 151, 416 S.E.2d at 196.

Upon reconsideration, this Court applied the "willful, wanton, and reckless negligence" standard of *Pleasant* to determine whether plaintiffs' intestate could maintain the action against Baynes, Cobb's co-employee. This Court reviewed the evidence and concluded that it showed "that Baynes' conduct, although arguably negligent, was not willful, wanton, and reckless." *Dunleavy*, 106 N.C. App. at 156, 416 S.E.2d at 199. Further, this Court concluded that "Baynes' conduct did not manifest reckless disregard for the rights and safety of the pipe crew, nor did it amount to the intentional failure to carry out a duty of care owed to the crew." *Id.* Based on these conclusions, this Court held that the trial court did not err in granting Baynes' motion for summary judgment.

In *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993), our Supreme Court again applied the willful, wanton, and reckless standard outlined in *Pleasant* to another common law action brought by an employee against a co-employee for injuries arising out of the employee's employment. In *Pendergrass*, plaintiff, Donald Pendergrass, was injured when his arm was caught in a final inspection machine that he was operating as an employee of Texfi. Plaintiff filed a common law action against his employer and two co-employees. He alleged the co-employees were grossly and wantonly negligent in that they directed him "to work at the final inspection machine when they knew that certain dangerous parts of the machine were unguarded, in violation of OSHA regulations and industry standards." *Pendergrass*, 333 N.C. at 238, 424 S.E.2d at 394. The co-employees filed a motion to dismiss the action, which motion the trial court granted. Plaintiff appealed to this Court, and we affirmed the order of the trial court dismissing plaintiff's complaint against his co-employees. The Supreme Court granted plaintiff's application for discretionary review.

In determining whether plaintiff could maintain his action against the co-employees, our Supreme Court stated:

> In *Pleasant*, we defined willful, wanton and reckless negligence, which will support a claim independently of the Workers' Compensation Act. . . . In defining such negligence, we said a constructive intent to injure may be inferred when the conduct of the defendant is manifestly indifferent to the consequences of the act. . . .
>
> The negligence alleged as to [the co-employees] [did] not rise to the level of the negligence in *Pleasant*. Although they may have

> known certain dangerous parts of the machine were unguarded when they instructed Mr. Pendergrass to work at the machine, we do not believe this supports an inference that they intended that Mr. Pendergrass be injured or that they were manifestly indifferent to the consequences of his doing so.

Id. Based on these conclusions, the Court held that the motion to dismiss was properly allowed as to plaintiff's co-employees.

Our review of these cases shows that the willful, wanton and reckless standard requires conduct that manifests a reckless disregard for the rights and safety of others with an element of willfulness. The willfulness standard does not require, however, that the acts be committed with the intent to *injure*, but it does appear to require some sort of intent, whether it is the intentional failure to carry out a duty imposed by law or contract that is necessary to the safety of the person or property to whom it is owed or it is the intentional committing of the negligent conduct that caused the injury.

Constructive intent can also be used to show willfulness. Constructive intent arises when the conduct that threatens the safety of others is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness, equivalent in spirit to actual intent, is justified.

[2] With these standards in mind, we now address plaintiff's claim against her co-employee, Edith Barnett. The evidence viewed in the light most favorable to plaintiff in support of plaintiff's contention that Barnett's conduct was willful, wanton, and reckless is as follows: Barnett was a supervisory employee over plaintiff who was familiar with the S-2 machine and knew of the tremendous force exerted by the machine. Further, Barnett knew plaintiff was unfamiliar with the S-2 machine and that plaintiff was also unfamiliar with the manual removal of the products from the machine. In addition, Barnett was in charge of enforcing Zarn's safety rules, and at the time of the accident, Zarn had a safety rule which stated:

> "Never place hands into any moving machine unless all safety devices are operating properly and it is safe to do so. Only authorized mechanics and maintenance personnel may reach around or otherwise bypass a safety guard when working on machinery or equipment."

Even with this knowledge, plaintiff testified that Barnett "told [her] to reach up under the [safety] gate and pull the part out . . . ." Plaintiff

also testified that when Barnett demonstrated how to reach underneath the safety gate to remove the parts, "Ms. Barnett reached under the gate and appeared to reach into the area of the mold to pull the part from the machine."

However, if the actions of the co-employees in *Pendergrass* who instructed an employee to work on an unguarded, dangerous machine, did not rise to the level of negligence necessary to maintain a civil action against the co-employees as defined under *Pleasant*, the actions of Barnett alleged in the present action also fail to rise to the level of negligence necessary to maintain a civil action against her. Even if we assume that Barnett knew that reaching under the safety gate could be dangerous, we do not believe this supports an inference that Barnett intended that plaintiff be injured or that she was manifestly indifferent to the consequences of plaintiff reaching under the safety gate. This is true, especially in light of the undisputed evidence that Barnett worked the machine herself by reaching under the safety gate and that, although machine operators had been reaching under the safety gates at Zarn to operate machines, in over fifteen years, no operator had ever been injured by closing molds or pre-pinch bars while reaching under a safety gate.

Thus, the fundamental problem with this case lies with the instructions and demonstration given by Barnett to plaintiff in reaching beneath the safety gate. The exhibits in this case reflect that the S-2 machine is a sizable machine with a large frontal gate that makes visibility behind the machine virtually impossible. The bottom edge of the gate appears to be approximately four inches below the bottom edge of the mold. The testimony reflects that when the safety gate is closed, the plastic X-frame is released from the mold after being molded and drops down from the machine but may occasionally still be attached by flashing to the mold.

The undisputed testimony given by Zarn's Vice President of Human Resources was that "[t]he [safety] gate was there to protect someone from getting injured from the mold or the pinch off part. So it was not ever considered that down below that gate—reaching under there—was a violation [of Zarn's safety rules] or that it was unsafe." Further, the Vice President testified, "reaching down . . . at the bottom of the [safety] gate—to pull out something by a tail or by the product—pulling the product out [of the machine] was not considered a violation" of Zarn's safety rules. Thus, according to the tes-

timony, reaching under the gate to pull the part down by the tail of the product or by the product, was considered acceptable.

Even under the most favorable reading of plaintiff's testimony, no one ever encouraged her to reach into the mold area, but at most, while demonstrating the machine's use, Barnett "appeared to reach into the area of the mold to pull the part from the machine." Although such a flawed demonstration or request that plaintiff "reach up under the [safety] gate and pull the part out" might well be negligent, it does not rise to the level of conduct necessary to create personal liability over and above the Workers' Compensation Act. Accordingly, we conclude that the trial court did not err in granting Barnett's motion for summary judgment.

II.

[3] Next, we will address whether plaintiff may maintain this action against her employer, Zarn, Inc. In addition to the prohibition of civil actions against negligent co-employees, the Workers' Compensation Act also bars an employee subject to the Act from maintaining a common law negligence action against his employer. *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247. In *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228, however, our Supreme Court recognized that an employee may maintain a civil action against his employer when the 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 . . . ."

Thus, the question we must answer in addressing whether plaintiff may maintain this action against her employer, Zarn, Inc., is whether the evidence, viewed in the light most favorable to plaintiff, would tend to show that Zarn intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death to employees and plaintiff was injured by that misconduct.

The "substantial certainty" threshold for civil recovery against employers is higher than the "willful, wanton and reckless" threshold for civil recovery against co-employees. *Id.* at 342, 407 S.E.2d at 229. "The conduct must be so egregious as to be tantamount to an intentional tort." *Pendergrass*, 333 N.C. at 239, 424 S.E.2d at 395.

This Court recently addressed the issue of what constitutes a "substantial certainty" in *Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 442 S.E.2d 143 (1994). In *Powell*, Timothy Powell was employed by S & G Prestress Company ("Prestress"), a manufacturer of rein-

forced concrete elements used in the construction of bridges and foundations, as a temporary employee. "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." *Id.* at 321, 442 S.E.2d at 144.

On 29 November 1989, Powell was a 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 [ran] parallel to one another, and an overhead crane straddle[d] the forming beds." *Id.* Subsequently, on this date, the crane moved backward, past Powell, to pick up a tarp and began moving forward at full speed toward him. "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." *Id.* at 322, 442 S.E.2d at 145.

Plaintiff's intestate sued Prestress, among other defendants, in superior court for wrongful death to recover damages. Prestress moved for summary judgment, which motion the trial court granted. Plaintiff appealed to this Court. On appeal, this Court stated, "[t]he 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" pursuant to *Woodson. Powell*, 114 N.C. App. at 324, 442 S.E.2d at 146. On this issue, this Court stated:

> The misconduct which satisfies the substantial certainty standard is best demonstrated by the following illustration . . . .
>
> > 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.

Id. at 325, 442 S.E.2d at 147 (citation omitted). Further, "[s]ubstantial certainty requires more than a mere possibility or substantial probability of serious injury or death." *Id.* In light of these rules, this Court concluded:

> 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.

Id. at 325-26, 442 S.E.2d at 147 (emphasis by underline added).

Based on these conclusions, this Court held:

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.

Id. at 326, 442 S.E.2d at 147.

In the present case, plaintiff's evidence in its most favorable light tends to show that Zarn adopted the safety rule that "[o]nly authorized mechanics and maintenance personnel may reach around or otherwise bypass a safety guard when working on machinery or equipment" and that Zarn knew of the practice of supervisors training employees to reach under the safety gate to retrieve the products that had fallen out of the mold. Plaintiff's evidence viewed in its most favorable light also tends to show that the S-2 machine had no visible or audible signals to warn of the impending closing of the mold plates and that Barnett, acting for Zarn, specifically told plaintiff "to reach up under the [safety] gate and pull the part out" when she knew plain-

tiff had never operated the S-2 machine for the particular product they were making on the day of the injury.

The undisputed evidence also shows, however, that the safety gate was in place to protect workers from the mold and pinch off mechanism that were positioned above the safety gate and that reaching below the safety gate to retrieve a part was not considered a violation of Zarn's safety rules or unsafe. Additionally, there is no evidence that shows that anyone employed by Zarn directed plaintiff to place her hand into the mold area. At best the demonstration given by Barnett to show plaintiff how to retrieve the X-frame from under the safety gate was unclear.

Further, although the evidence shows that the S-2 machine had no visible or audible signals to warn of the impending closing of the mold plates, like in *Powell*, there were no regulations requiring Zarn to have such signals. Finally, machine operators at Zarn had been reaching under safety gates on the various machines, including the S-2 machine, to remove finished products for over 15 years, and, like in *Powell*, there was evidence that no operator had ever been injured by closing molds or pre-pinch bars while reaching under a safety gate.

Thus, we conclude that as in *Powell*, the forecast of evidence in this case is not sufficient to show that Zarn intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death. Although the circumstances surrounding plaintiff's injury show that Zarn could have taken further steps to ensure the safety of its employees working on the S-2 machine, we do not find that Zarn's conduct was so "egregious" as to be tantamount to an intentional tort.

Accordingly, we affirm the order of the trial court granting defendants' motion for summary judgment as to Zarn.

Affirmed.

Judge COZORT concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

For the reasons given by the majority, I agree that summary judgment for Zarn must be affirmed. I do not agree, however, that summary judgment for Barnett is appropriate.

As a fellow employee, Barnett is liable for injuries sustained by plaintiff if those injuries are proximately caused by Barnett's conduct and if the conduct "threatens the safety" of the plaintiff and is "reckless or manifestly indifferent to [its] consequences." *Pleasant v. Johnson*, 312 N.C. 710, 715, 325 S.E.2d 244, 248 (1985). I believe the evidence presented at the summary judgment hearing, when considered in the light most favorable to the plaintiff, presents a genuine issue of fact with regard to whether Barnett's conduct threatened the safety of plaintiff and was manifestly indifferent to the consequences.

The evidence, in the light most favorable to the plaintiff, reveals that Barnett, while demonstrating to the plaintiff the proper use of the machine, "reached under the gate and appeared to reach *into the area of the mold*[1] to pull the part from the machine [emphasis added]." The evidence of Barnett is that although she told plaintiff she could reach under the safety gate and "grab the excess flashing . . . to pull it out of the machine," she never instructed plaintiff to reach *into the area of the mold.* There thus exists a factual dispute as to the instructions Barnett gave to the plaintiff. If the instructions were as contended by plaintiff, they threatened her safety and were manifestly indifferent to the likelihood of harm to her. This is so because there is no dispute in the evidence that the mold of the machine regularly opened and closed and that a hand caught in the mold would be seriously injured. In this case, plaintiff's hand was caught in the mold and seriously injured.

For the reasons given, I would reverse the entry of summary judgment for Barnett and remand for trial.

1. Because the mold is located behind the safety gate, which is closed during the operation of the machine, the mold was not visible to plaintiff when Barnett instructed plaintiff on the use of the machine.

[116 N.C. App. 382 (1994)]

IN RE: ANNE M. LAMM, RESPONDENT

No. 9327SC951

(Filed 20 September 1994)

Attorneys at Law § 80 (NCI4th)— suspension of license for use of alcohol or mood-altering drugs—no predeprivation notice or hearing—rule not violative of due process or law of land clauses

The application of Article VI, Section 5.i.(6) of the Rules of the North Carolina State Bar to the facts in this case did not violate respondent's rights under the Due Process clause of the Fourteenth Amendment of the United States Constitution or the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution, since it was not required that respondent receive notice and an opportunity to be heard prior to the entry of an order suspending her law license for using alcohol or mood-altering drugs in sufficient amount to impair her ability to practice law; though respondent's continued possession and use of her law license was a substantial interest, and any hardship suffered during delay between erroneous deprivation and postsuspension restoration could not be undone, the 180-day revocation period could be shortened based upon respondent's actions; the rule provided for prompt postsuspension review which could occur at any time upon petition of the suspended attorney; the predeprivation procedure set forth in the rule provided a reasonably reliable basis for determining that the facts justifying suspension were as alleged by the petitioning PALS members; and the proceeding provided for in the rule promotes the State's compelling interest in preventing an impaired lawyer from engaging in conduct detrimental to the public, the courts, or the legal profession.

Am Jur 2d, Attorneys at Law §§ 36-39, 90, 91, 96.

Misconduct involving intoxication as ground for disciplinary action against attorney. 1 ALR5th 874.

Judge ORR concurring in part and dissenting in part.

Appeal by respondent from order entered 17 June 1993 by Judge Robert W. Kirby in Gaston County Superior Court. Heard in the Court of Appeals 11 May 1994.

The North Carolina State Bar, by Carolin Bakewell, for petitioner-appellee.

George Daly and Sharon Sameck for respondent-appellant.

MARTIN, Judge.

The Positive Action for Lawyers Committee of the North Carolina State Bar was created in 1979 pursuant to an amendment to Article VI, Section 5.i. of the Rules, Regulations and Certificate of Organization of the North Carolina State Bar ("State Bar Rules") "for the purpose of implementing a program of intervention for lawyers with a substance abuse problem which affects their professional conduct . . . ." *See* 302 N.C. 637 (1979). In 1989, Article VI, Section 5.i. was amended to add a new subsection (6) as follows, in pertinent part:

> (6) If in the opinion of no less than two (2) members of the Positive Action for Lawyers Committee of the North Carolina State Bar and with the concurrence of the Executive Director of the State Bar and either the Chairman or Director of PALS, a lawyer is drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, said members of the Positive Action Committee may petition any Superior Court Judge, based upon the affidavit of at least two (2) persons attesting to such impairment of the lawyer, requesting an order of the Court, in its inherent power, suspending the lawyer's license to practice law in the State of North Carolina for a period of time not to exceed 180 days, or in the alternative, transferring the lawyer to inactive status, for a like period of time.
>
> By petition in the cause and upon a satisfactory showing, said license to practice law may be reinstated, or the transfer to inactive status may be rescinded, at an earlier date upon a finding by the Court that the lawyer is no longer drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law.

See 325 N.C. 750 (1989).

On 30 April 1993, two members of the Positive Action for Lawyers Committee ("PALS Committee"), Rachel Pickard and Robert L. Bradley, filed a verified petition pursuant to Article VI, Section 5.i.(6) requesting entry of an order suspending the law license of respondent on the ground that she was using alcohol and mood altering drugs in sufficient amounts to impair her ability to practice law. In support of

the petition, Pickard filed her own affidavit and the affidavit of the Clerk of Superior Court for Gaston County. The petition also recited that the Executive Director of the State Bar and the Director of the PALS Committee concurred in petitioners' opinion. After considering the petition and affidavits in an *ex parte* hearing without notice to respondent or any opportunity for her to be heard, Judge Robert Kirby, Resident Superior Court Judge of Gaston County, entered an order the same day suspending respondent's license to practice law for 180 days "or until such earlier date as this Court shall find that [respondent] is no longer drinking alcohol or using mood altering drugs in sufficient amounts to impair her ability to practice law." Respondent was served with a copy of the affidavits and order on 3 May 1993. On 11 June 1993, respondent filed a motion requesting that the proceeding against her be declared void and be expunged and, alternatively, that the 30 April 1993 order be set aside and that she be allowed to file an answer and be heard before action was taken against her. After a hearing, Judge Kirby denied respondent's motions, but proceeded to hear evidence and determined that respondent had entered into a contract for treatment and was no longer drinking alcohol or using mood altering drugs in sufficient amounts to impair her ability to practice law. Judge Kirby ordered, pursuant to Article VI, Section 5.i.(6), that respondent's license be reinstated. Respondent appealed.

Respondent contends that the proceeding pursuant to Article VI, Section 5.i.(6) of the State Bar Rules, suspending her license to practice law without providing her with presuspension notice or opportunity to be heard, deprived her of her right to due process under the Fourteenth Amendment to the United States Constitution and under Article I, § 19 of the North Carolina Constitution. "The Fifth and Fourteenth Amendments to the United States Constitution, together with the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution, provide that no person shall be deprived of life, liberty or property without due process of law." *State v. McCleary*, 65 N.C. App. 174, 180, 308 S.E.2d 883, 888 (1983), *affirmed*, 311 N.C. 397, 316 S.E.2d 870 (1984). Article I, § 19 of the North Carolina Constitution is synonymous with "due process of law" as that term is applied under the Fourteenth Amendment to the federal Constitution. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976); *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990), and United States Supreme Court interpretations of the latter, though not binding, are highly persuasive in construing the former. *Watch Co. v. Brand Distributors*, 285 N.C.

467, 206 S.E.2d 141 (1974). However, in deciding what procedural safeguards are due under Article I, § 19 of the North Carolina Constitution, the North Carolina Supreme Court has employed a somewhat different method of decision than that employed by the United States Supreme Court for deciding similar questions under the due process clause of the federal constitution. *Henry v. Edmisten*, 315 N.C. 474, 340 S.E.2d 720 (1986). Accordingly we must examine the procedures prescribed by the State Bar Rule at issue, and particularly as applied to respondent in this case, to determine whether they comport with the requirements of due process under both constitutions.

The parties agree that respondent's license to practice law constitutes a property interest which cannot be taken away without due process of law. *See Barry v. Barchi*, 443 U.S. 55, 61 L.Ed.2d 365 (1979); *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962). However, the parties disagree as to the requirements of due process in this situation. Respondent contends that due process required that she receive notice and opportunity to be heard prior to the entry of the 30 April 1993 order suspending her law license. The North Carolina State Bar contends that both Article VI, § 5.i.(6), and due process permit the order to be entered *ex parte* and provide the respondent with a sufficient immediate post deprivation remedy. We agree with the State Bar and affirm the order of the trial court.

Due process of law formulates a flexible concept, to insure fundamental fairness in judicial or administrative proceedings which may adversely affect the protected rights of an individual. *Baugh v. Woodard*, 604 F. Supp. 1529 (E.D.N.C. 1985), *affirmed in part, vacated in part*, 808 F.2d 333 (4th Cir. 1987); *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976). Due process means simply a procedure which is fair and does not mandate a single, required set of procedures for all occasions; it is necessary to consider the specific factual context and the type of proceeding involved. *Wilson v. Swing*, 463 F.Supp. 555 (M.D.N.C. 1978); *Poe v. Charlotte Memorial Hospital, Inc.*, 374 F.Supp. 1302 (W.D.N.C. 1974). In resolving any claimed violation of procedural due process, a balance must be struck between the respective interests of the individual and the governmental entity seeking a remedy. *Town of Hudson v. Martin-Kahill Ford*, 54 N.C. App. 272, 283 S.E.2d 417 (1981), *disc. review denied*, 304 N.C. 733, 288 S.E.2d 804 (1982). "[E]ntitlement to a hearing does not automatically flow from a finding that procedural due process is applicable." *Bowens v. Board of Law Examiners*, 57 N.C. App. 78, 83, 291 S.E.2d 170, 173 (1982) *quoting Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975),

cert. denied, 426 U.S 940, 49 L.Ed.2d 393 (1976). (Due process afforded by opportunity for failing bar applicants to be reexamined.) At a minimum, due process requires adequate notice of the charges and a fair opportunity to meet them, and the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard. *Bowens v. N.C. Dept. of Human Resources*, 710 F.2d 1015 (4th Cir. 1983).

Where a predeprivation hearing is impractical and a postdeprivation hearing is meaningful, a State satisfies its due process obligation by providing the latter. *Giglio v. Dunn*, 732 F.2d 1133 (2d Cir. 1984), *cert. denied*, 469 U.S. 932, 83 L.Ed.2d 265 (1984); *See Waltz v. Herlihy*, 682 F.Supp. 501 (S.D.Ala. 1988), *affirmed*, 871 F.2d 123 (11th Cir. 1989). (Denial of presuspension hearing pursuant to statutes authorizing suspension of license to practice medicine because of dispensing controlled substances other than for legitimate medical purpose and because of inability to practice medicine with reasonable skill and safety due to use of chemicals did not constitute denial of due process.) Where the State has an important interest to protect and probable cause to believe that plaintiff poses a real and immediate danger to that interest, interim or temporary emergency deprivation of a property right pending a prompt judicial or administrative hearing is constitutional. *Barry v. Barchi, supra; Gershenfeld v. Justices of the Supreme Court of Pa.*, 641 F.Supp 1419 (E.D.Pa. 1986).

The United States Supreme Court has established a three-factor balancing test to resolve the due process issue in this context:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safe-guards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319, 335, 47 L.Ed.2d 18, 53 (1976). Thus, we must first weigh the private interest affected by the challenged action. In this case, the private interest affected is respondent's interest in continued possession and use of her law license pending the outcome of a postsuspension hearing. The State Bar agrees that this is a substantial interest, and we recognize that any hardship suffered during delay between erroneous deprivation and postsuspension restoration cannot be undone. *See Henry v.*

Edmisten, supra. Factors bearing on the weight of respondent's interest in continuous use of her law license include the maximum revocation period and the timeliness of postsuspension review. *Id.*

Under Article VI, § 5.i.(6), these factors operate conjunctively. Although the maximum revocation period is 180 days, the rule provides for an abbreviated period depending upon the actions of the suspended attorney. The rule provides for reinstatement of the license as soon as the suspended attorney demonstrates that he or she is no longer drinking alcohol or using mood-altering drugs in a sufficient amount to impair the ability to practice law. Thus, the length of the revocation period is ostensibly within the immediate control of the suspended attorney.

Similarly, the rule provides for prompt postsuspension review, which may occur at any time upon petition of the suspended attorney. In this case, although respondent waited over a month to file her motions, the motions were heard and ruled upon within six days of filing. The availability of prompt postsuspension review, along with a relatively brief suspension period, reduces the weight of the private interest in a suspended attorney's continued use of his or her law license pending the outcome of the postsuspension hearing. *See Mackey v. Montrym*, 443 U.S. 1, 61 L.Ed.2d 321 (1979); *Henry, supra.*

Second, the balancing test requires us to weigh the risk of erroneous deprivation of respondent's private interest as a result of the procedures used and the probable value of additional procedural safeguards. However:

> Due process does not mean that governmental decision making must comply with standards that assure error-free determinations . . . . When . . . prompt post deprivation review is available, what is generally required is no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for determining that the facts justifying the official action are as a responsible government official warrants them to be.

Henry, 315 N.C. at 484, 340 S.E.2d at 727-8. We believe that the predeprivation procedure set forth in Article VI, Section 5.i.(6) provides a reasonably reliable basis for determining that the facts justifying suspension are as alleged by the petitioning PALS members. The rule requires that at least two members of the PALS Committee have the opinion that a lawyer is drinking alcohol or using mood-altering drugs in sufficient amount to impair his ability to practice law. This opinion

must be concurred in by **either** the Chairman **or** Director of PALS **and** the Executive Director of the North Carolina State Bar. Additionally, the rule requires that the affidavit of at least two persons attesting to such impairment must accompany the petition. The petition and affidavits are then reviewed by a superior court judge who makes the final determination as to whether the facts require suspension of the lawyer's license to practice law.

Finally, we must weigh the State's interest served by the summary suspension procedure. The proceeding prescribed by Article VI, Section 5.i.(6) promotes the State's compelling interest in preventing an impaired lawyer from engaging in conduct detrimental to the public, the courts, or the legal profession. *See* State Bar Rules, Article VI, Section 5.i.(4). The summary and automatic character of the suspension is reasonably related to the purpose of the rule, i.e., to protect the public from lawyers whose ability to practice has been impaired by substance abuse. Presuspension hearings requiring notice and opportunity to be heard would encourage dilatory tactics on the part of impaired lawyers to try to maintain their privilege to license, frustrating the purpose of the rule and creating a further risk of damage to his or her clients and the proper administration of justice.

A recitation here of the evidence presented to Judge Kirby in the present case would serve no useful purpose, although we must review it to insure that appellant's rights were not violated by the rule as it was applied to her. It is sufficient to say that the evidence was substantial and is strikingly illustrative of the need for providing the State Bar's PALS program with an ability to move quickly to carry out the purposes of the rule.

In *Henry v. Edmisten*, *supra*, our North Carolina Supreme Court expressed dissatisfaction with the use of the "balancing test" to determine what due process is required under the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution. *Id.* at 490, 340 S.E.2d at 731. The Court promulgated the following principle as to the minimal requirements of due process required by the Law of the Land Clause:

> When the furtherance of a legitimate state interest requires the state to engage in prompt remedial action adverse to an individual interest protected by law and the action proposed by the state is reasonably related to furthering the state interest, the law of the land ordinarily requires no more than that before such action is undertaken, a judicial officer determine there is probable cause

> to believe that the conditions which would justify the action exist.

Id. at 494, 340 S.E.2d at 733. As we have discussed, after it has been demonstrated that an attorney is drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, the State has a legitimate interest in prompt remedial action to prevent the present and future danger which such person poses to the proper operation of our legal system and those who rely upon it. The State Bar PALS procedure, as contained in the rule, provides for independent judicial review by a superior court judge, who must determine if the affidavits and petition establish a sufficient showing to justify a suspension. This procedure satisfies the requirements for sufficient process under the Law of the Land Clause of the North Carolina Constitution.

We note with approval that the Council of the North Carolina State Bar has, apparently as a result of the concerns raised by appellant in this case, proposed that Article VI, Section 5.i. of the State Bar Rules be revised to provide for presuspension notice and hearing except in emergency circumstances. *See The North Carolina State Bar Newsletter*, Vol. 19, No. 3, p. 9. While we hold that the procedures prescribed by the current rule, and employed in this case, meet the minimal requirements of due process under our State and federal constitutions, we commend the State Bar for providing increased safeguards for the rights of attorneys while continuing its efforts to protect the public from, and provide assistance to, practitioners impaired by alcoholism or other substance addictive illness.

In summary, the application of Article VI, Section 5.i.(6) of the Rules of the North Carolina State Bar to the facts before us does not violate respondent's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution or the Law of the Land Clause of Article I, § 19 of the North Carolina State Constitution.

Affirmed.

Judge COZORT concurs.

Judge ORR concurs in part, and dissents in part.

Judge ORR concurring in part and dissenting in part.

While I do not disagree with the analysis employed by the majority as it applies to the issues dealing with pre-deprivation hearings and a meaningful post-deprivation hearing, I find the Rule at issue in this case constitutionally infirm in one respect. Although there is a post-deprivation process by which an attorney can have his or her license reinstated, there is no provision or procedure to determine if the initial unilateral action of suspension was in fact appropriate. A post-deprivation hearing that merely reinstates a suspended license, upon a finding that at the time of the hearing the attorney involved is not impaired, provides no meaningful opportunity to contest the results of the original process and the resulting suspension. There should at a minimum be an opportunity for the affected party to challenge the initial action and the resulting suspension. For this reason, I concur in part and dissent in part.

STATE OF NORTH CAROLINA v. HASHIM O'NEAL

No. 939SC1045

(Filed 20 September 1994)

1. Criminal Law § 1123 (NCI4th)— premeditation and deliberation as aggravating factor—defendant's testimony at separate trial as basis—no error

The trial court did not err when it found premeditation and deliberation as a nonstatutory aggravating factor for second-degree murder where the only evidence in support of such factor was defendant's own testimony at a separate trial of his codefendants, since the parties in effect stipulated to the use of the testimony of defendant in the Transcript of Plea where the Transcript of Plea provided that the district attorney would report to the court any substantial assistance by defendant in the prosecution of his codefendants for consideration in imposing sentence, and the trial court had to examine defendant's testimony in the codefendant's trial in order to determine defendant's substantial assistance.

Am Jur 2d, Criminal Law §§ 598, 599.

2. Criminal Law § 172 (NCI4th)— further mental evaluation of defendant denied—no error

The trial court did not err in denying defendant's motion for further mental evaluation and a continuance, since the trial court granted defendant a hearing on capacity; the judge then found that defendant was competent to stand trial and denied defendant's motion for further evaluation; denial of this motion was within the discretion of the trial court; and while there was evidence to support defendant's contention that he was not competent and needed further evaluation, the record also contained competent evidence to support the trial court's ruling.

Am Jur 2d, Criminal Law §§ 95 et seq.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition. 32 ALR2d 434.

Appeal by defendant from judgment entered on 29 January 1993 by Judge Henry W. Hight, Jr., in Warren County Superior Court. Heard in the Court of Appeals 23 August 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General Hal F. Askins, for the State.

Appellate Defender Malcolm Ray Hunter Jr., by Assistant Appellate Defender Charles R. Alston Jr., for defendant appellant.

COZORT, Judge.

Defendant pled guilty to second degree murder and received a life sentence. He presents two arguments on appeal: (1) May the trial court find the aggravating factor of premeditation and deliberation where the only evidence in support of such factor is defendant's own testimony at a separate trial of his codefendants? and (2) Did the trial court err by denying defendant's motion for further mental evaluation and a continuance? We affirm the trial court on both issues.

Defendant was indicted on 15 July 1991 for the first degree murder of Calvin Hargrove. On 13 November 1992, defendant's counsel filed a motion for commitment to determine defendant's competence to stand trial. Defendant was admitted to Dorothea Dix Hospital on 20 November 1992 where he was examined by Dr. Clabe Lynn. Dr. Lynn noted that defendant was hearing voices and wanted the vents

checked because he saw three little red men. Thus, it was difficult to assess defendant's concentration, orientation, and memory due to defendant's "guardedness." Dr. Lynn found defendant to be competent to stand trial; however, he recommended that defendant be examined further for competency to stand trial when he was more cooperative.

On 28 December 1992, defendant filed a motion for further mental evaluation and for a continuance based on Dr. Lynn's recommendation and further incidents involving defendant. In one incident, a deputy observed defendant tremble in fear, scream and howl like a wolf, pace the floor, run in his cell as if being pursued, crawl under his bed refusing to come out, and appear unable to utter a coherent word or sentence. In a second incident, defendant defecated and urinated on his cell floor, appeared to suffer from delusions and hallucinations, sweated and shook violently, and was completely unresponsive to questions for a period of twelve hours. Defense counsel also presented an affidavit from a forensic pathologist, who, after reading Dr. Lynn's report and considering other evidence mentioned, stated that defendant's actions were consistent with many mental disorders requiring further evaluation. Defense counsel made an oral motion for the appointment of a psychiatric expert to assist defendant. This motion was denied.

On 9 January 1993, defendant's motion for further evaluation was denied. Defendant entered a plea of guilty to the charge of second degree murder on the condition that the charges of conspiracy to commit murder and first degree burglary would be dismissed and that judgment would be continued pending disposition of charges against codefendants. The district attorney agreed to report to the court any substantial assistance provided during the prosecution of the codefendants for consideration in imposing a sentence.

On 29 January 1993, Judge Hight held a sentencing hearing. The State submitted as a non-statutory aggravating factor that the crime was committed with premeditation and deliberation. Defense counsel requested the court to consider as mitigating factors that defendant had no criminal record and that he suffered from a mental condition. The court incorporated into the sentencing hearing the testimony of defendant given during the trial of the codefendants. During that trial, defense counsel was present, and the court allowed defendant an opportunity to confer with his attorneys while under oath and on the witness stand. The court found as a non-statutory aggravating factor

that the crime was committed with premeditation and deliberation. The court found as a mitigating factor that defendant had no criminal record. The court found the aggravating factor outweighed the mitigating and sentenced defendant to life imprisonment.

[1] Defendant contends the trial court erred when it found premeditation and deliberation as a non-statutory aggravating factor based on testimonial evidence outside the record. We find that the trial court did not err because the parties stipulated to the use of the testimony of the defendant in the Transcript of Plea.

Generally, a defendant who has entered a plea of guilty to a felony is not entitled to appellate review as a matter of right. *State v. Ahearn*, 307 N.C. 584, 605, 300 S.E.2d 689, 702 (1983); N.C. Gen. Stat. § 15A-1444 (1988). However, N.C. Gen. Stat. § 15A-1444(a1) provides in pertinent part:

> (a1) A defendant who has . . . entered a plea of guilty . . . to a felony, is entitled to appeal as a matter of right the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing only if the prison term of the sentence exceeds the presumptive term set by G.S. 15A-1340.4, and if the judge was required to make findings as to aggravating or mitigating factors . . . .

The State bears the burden of proof to establish the existence of aggravating factors by a preponderance of the evidence where it seeks a sentence in excess of the presumptive term. *State v. Thompson*, 314 N.C. 618, 622, 336 S.E.2d 78, 80 (1985). The trial judge may consider non-statutory aggravating factors which are reasonably related to the purposes of sentencing and are proved by a preponderance of the evidence. *State v. Thompson*, 328 N.C. 477, 492, 402 S.E.2d 386, 394 (1991); N.C. Gen. Stat. § 15A-1340.4(a) (1988). With respect to second degree murder, premeditation and deliberation is a non-statutory aggravating factor which is reasonably related to the purposes of sentencing. *State v. Vandiver*, 326 N.C 348, 351, 389 S.E.2d 30, 33 (1990). Furthermore, if a defendant charged with first degree murder pleads guilty to second degree murder, the sentencing judge may find premeditation and deliberation to be reasonably related to the purposes of sentencing. *State v. Melton*, 307 N.C. 370, 376, 298 S.E.2d 673, 678 (1983); *State v. Brewer*, 321 N.C. 284, 286, 362 S.E.2d 261, 262 (1987). It is within the sole discretion of the trial court to determine the weight given to each aggravating or mitigating factor and the extent to which the sentence may exceed the presumptive

term. *State v. Canty*, 321 N.C. 520, 527, 364 S.E.2d 410, 415 (1988). In order to reverse, the defendant must show there is no support in the record for the court's decision. *Id.*

At sentencing, reliance on evidence from the trials of others connected with the same offense is improper absent a stipulation. *State v. Benbow*, 309 N.C. 538, 549, 308 S.E.2d 647, 654 (1983); *Thompson*, 314 N.C. at 623, 336 S.E.2d at 81. Furthermore, "[e]ven with such a stipulation reliance exclusively on such record evidence from other trials (in which the defendant being sentenced had no opportunity to examine the witnesses) as a basis for a finding of an aggravating circumstance may constitute prejudicial error." *Benbow*, 309 N.C. at 549, 308 S.E.2d at 654. The policy behind this ruling is that the focus at the previous trial is on the culpability of others and not the defendant being sentenced here. *Id.*

In the case at hand, while the trial judge acknowledged that there was no actual stipulation, the trial judge concluded that the parties contemplated a stipulation. The Transcript of Plea provided that the district attorney was to report to the court any substantial assistance provided during the prosecution of the codefendants for consideration in imposing a sentence. In order to determine defendant's substantial assistance, the trial judge had to examine defendant's testimony from the trial of the codefendants. Thus, the Transcript of Plea served as a stipulation.

Furthermore, the trial judge did not consider the testimony of third parties to determine premeditation and deliberation of defendant. To the contrary, the court relied on defendant's own testimony at the codefendants' trial. Also, defense counsel was present at that trial, and the court there allowed defendant an opportunity to confer with his attorneys while under oath and on the witness stand during the trial of codefendants. Accordingly, *Benbow* is not applicable with respect to defendant's testimony. We find the trial court did not err in considering defendant's testimony from the trial of his codefendants.

[2] Defendant next contends that the trial court erred in denying defendant's pretrial motion for further mental evaluation where defendant had shown a particularized need for the expert. Before reaching the merits on this assignment of error, we must first examine this Court's jurisdiction to hear this assignment of error.

Generally, a defendant who has entered a plea of guilty to a felony is not entitled to appellate review as a matter of right. *Ahearn*, 307

N.C. at 605, 300 S.E.2d at 702; N.C. Gen. Stat. § 15A-1444. However, N.C. Gen. Stat. § 15A-1444(e) provides the following:

> (e) Except as provided in subsection (a1) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

Hence, in the present case where defendant pled guilty, we may not consider this assignment of error unless we treat his appeal as a writ of certiorari with respect to this assignment of error. Given the life sentence imposed upon defendant, we elect to treat the appeal as a petition for a writ of certiorari. We hereby grant the writ and proceed to review defendant's argument.

A defendant has the burden of proof to show incapacity or that he is not competent to stand trial. *State v. Gates,* 65 N.C. App. 277, 283, 309 S.E.2d 498, 502 (1983). Once defendant's capacity to proceed is questioned, the court must hold a hearing to determine this issue. N.C. Gen. Stat. § 15A-1002(b) (1988). The test in determining competency to stand trial is whether the defendant has the capacity to understand the nature and object of the proceedings against him, comprehend his position, assist in his defense in a rational manner, and cooperate with counsel to interpose any defenses. *State v. Shytle,* 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989); N.C. Gen. Stat. § 15A-1001(a) (1988).

A defendant has a right to a hearing on capacity. *State v. McGuire,* 297 N.C. 69, 85, 254 S.E.2d 165, 175 (1979), *cert. denied,* 444 U.S. 943, 62 L.Ed.2d 310 (1979); N.C. Gen. Stat. § 15A-1002(b). Nevertheless, the question of whether the defendant is to be examined by a psychiatric expert is within the sole discretion of the trial court. *McGuire,* 297 N.C. at 85, 254 S.E.2d at 175; N.C. Gen. Stat. § 15A-1002(b)(1). The trial court may determine the question of capacity with or without a jury. *State v. Jackson,* 302 N.C. 101, 104, 273 S.E.2d 666, 669 (1981). When proceeding without a jury, the trial court's findings of fact are conclusive on appeal when there is competent evidence to support them, even if there is evidence to the contrary. *State v. Heptinstall,* 309 N.C. 231, 234, 306 S.E.2d 109, 111 (1983). The trial court has not erred if it does not make findings of fact where the evidence would compel the ruling made, but the better

practice is to make findings and conclusions. *Gates*, 65 N.C. App. at 283, 309 S.E.2d at 502. In order to reverse, the defendant must show the trial court abused its discretion. *Id.*

The trial court below granted defendant a hearing on capacity. After the hearing, the trial judge found that the defendant was competent to stand trial. Judge Hight denied defendant's motion for further evaluation. Denial of this motion is within the discretion of the trial court. There is evidence to support the decision of the trial court that defendant was competent to stand trial and that no further evaluation was required. While there was other evidence to support defendant's contention that he was not competent and needed further evaluation, the record also contained competent evidence to support the trial court's ruling. Therefore, we find no abuse of discretion.

Defendant also argues in his brief that an independent expert was needed to assist in developing the defenses of insanity or diminished capacity. Those issues were not presented to the trial court and will not be considered here.

Affirmed.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. DAVID LEWIS NETCLIFF

No. 9312SC1084

(Filed 20 September 1994)

1. Constitutional Law § 331 (NCI4th)— pre-indictment delay—no denial of speedy trial

The trial court did not err in denying defendant's motion to dismiss for denial of a speedy trial in violation of N.C.G.S. § 15A-954(a)(3), since the delay in this case was a pre-indictment delay which protected an undercover investigation; defendant failed to show both actual and substantial prejudice from the pre-indictment delay; the only prejudice defendant alleged related to the passage of time, but prejudice is not presumed simply upon a showing of a lengthy delay; and defendant failed to show that the delay was intentional on the part of the State in order to impair

defendant's ability to defend himself or to gain tactical advantage over defendant.

Am Jur 2d, Criminal Law §§ 654 et seq.

2. Criminal Law § 1284 (NCI4th)— habitual felon—sufficiency of indictments

The trial court properly denied defendant's motion to dismiss habitual felon counts where the indictments charging defendant as an habitual felon were separate from the indictment charging defendant with the principal felony; the indictments set forth the date that the prior felony offenses were committed, the name of the state or other sovereign against whom the felony offenses were committed, the dates that the pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place; and defendant had previously been found guilty of three distinct felonies. Convictions for felony murder and for two escapes while serving the sentence for murder could properly serve as the underlying felonies supporting defendant's conviction as an habitual felon.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2d 1196.

3. Evidence and Witnesses § 1782 (NCI4th)— requiring defendant to exhibit tatoo to juror—admissibility to corroborate identification testimony

The trial court did not err in forcing defendant to exhibit to the jury a tatoo on his arm, since the trial judge was simply allowing the exhibition of the tatoo for the purpose of corroborating a witness's identification of defendant.

Am Jur 2d, Evidence § 951.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury. 3 ALR4th 374.

Appeal by defendant from judgments entered 10 June 1993 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 30 August 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Julia F. Renfrow, for the State.

Walter T. Johnson, Jr. for defendant-appellant.

JOHNSON, Judge.

Four cases against defendant, David Lewis Netcliff, were consolidated for trial at the 7 June 1993 session of Cumberland County Superior Court. In case Nos. 92CRS27793 and 92CRS27794, defendant was indicted and charged for conspiracy to traffic a controlled substance. In case No. 92CRS27795, defendant was indicted and charged with the offense of trafficking in a controlled substance by possession, sale and delivery of cocaine. In case No. 92CRS27796, defendant was indicted and charged with a second count of trafficking in a controlled substance by possession, sale and delivery of cocaine. Defendant was also charged in each of four special indictments as an habitual felon pursuant to North Carolina General Statutes § 14-7.1 (1993).

Evidence for the State presented at trial tended to show the following: From approximately May 1988 until November 1990, the Investigative Grand Jury Task Force of Cumberland County conducted undercover narcotics operations in the Fayetteville, North Carolina area. On 19 July 1989, Special Agent Phil Sweatt was working undercover as a drug dealer, and agreed to meet Jorge Segarra at the A & H Cleaners on Murchison Road in Fayetteville around 6:00 p.m. to purchase two ounces of cocaine. When Agent Sweatt arrived at the cleaners, Segarra introduced him to defendant, a person named David. Agent Sweatt did not know defendant's last name, but saw that defendant had the word "Margaret" tattooed on his left arm. Agent Sweatt and defendant briefly discussed details of a cocaine deal. The men then drove to an apartment complex to pick up the cocaine. When they arrived at the apartment complex, Jerry Johnny Brown drove up in a Saab; defendant and Agent Sweatt stepped into the car with Brown where they exchanged money and two clear plastic bags containing cocaine. Brown handed the cocaine to Agent Sweatt and defendant confirmed the price. Agent Sweatt gave $2,200.00 to defendant who then gave $1,850.00 to Brown. Before leaving, defend-

ant gave Agent Sweatt a phone number where he could be reached in case Agent Sweatt wanted to make another purchase.

On the afternoon of 28 July 1989, Agent Sweatt called the phone number and arranged with defendant to purchase three ounces of cocaine. A meeting was scheduled for 4:00 or 4:30 p.m. later that day at the Barbeque House on Murchison Road in Fayetteville. When Agent Sweatt arrived at the Barbeque House, defendant was standing outside and motioned for Agent Sweatt to pull over into the Kemplate Beauty Shop parking lot. Defendant approached Agent Sweatt's car and sat down in the front seat before telling Agent Sweatt that he had to go inside the beauty shop to find out when the cocaine would arrive. While defendant was inside, Agent Sweatt saw a truck drive up and saw Jerry Johnny Brown step out of the truck and go inside the beauty shop. Agent Sweatt noticed that the Saab which Brown had driven on 19 July 1989 was in the parking lot. Defendant came out of the beauty shop and told Agent Sweatt to follow Brown and defendant, who were now in the Saab, to Bain Drive. When they arrived at Bain Drive, Agent Sweatt got out of his car and got into the Saab with Brown and defendant. Brown then handed Agent Sweatt a clear plastic bag with three plastic bags of cocaine inside. Defendant took $3,000.00 from Agent Sweatt as payment for the cocaine. The bags of cocaine which Agent Sweatt obtained during these transactions were later analyzed by Special Agent J. D. Sparks, a forensic chemist with the State Bureau of Investigation, and found to be seventy to seventy-five percent cocaine in hydrochloride form.

The Investigative Grand Jury did not identify defendant by his full name until the summer of 1991 when Jerry Johnny Brown was apprehended. On 20 August 1991, Agent Sweatt, now employed by the Richmond County Sheriff's Department, first identified defendant as the person from whom he purchased cocaine on 19 July 1989 and 28 July 1989; Agent Sweatt recognized defendant from a photographic lineup arranged by Special Agent Mark Francisco. Defendant was apprehended in New Jersey and extradited to North Carolina.

The jury returned a guilty verdict in each case and the trial judge adjudicated defendant as an habitual felon and consolidated the convictions for judgment, sentencing defendant to two consecutive life terms and ordering defendant to pay fines. Defendant appealed to our Court.

[1] Defendant first argues on appeal that the trial court committed reversible error in denying defendant's motion to dismiss pursuant to North Carolina General Statutes § 15A-954(a)(3) (1988).

North Carolina General Statutes § 15A-954(a)(3) states:

> (a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> . . .
>
> (3) The defendant has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina.

Defendant argues that "[d]efendant Netcliff was not actually served with [the warrants against defendant issued December 1991] until July of 1992, three years after the alleged illegal drug transactions." Defendant further contends "that the State intentionally delayed issuing the indictment in order to impair his ability to prepare a formidable defense and [in order] to gain an advantage in the prosecution of their case against him."

We note initially that the case *sub judice* deals with a *preindictment* delay. *United States v. Lovasco*, 431 U.S. 783, 52 L.Ed.2d 752, *reh'g denied*, 434 U.S. 881, 54 L.Ed.2d 164 (1977) involved a preindictment delay of eighteen months, and "[t]he Court held the Speedy Trial Clause of the Sixth Amendment was not applicable, as it applied only to delay following indictment, information or arrest. [The remedy for the defendant in *Lovasco* was] pursuant to the due process clause of the Fifth and Fourteenth Amendments." *State v. Davis*, 46 N.C. App. 778, 781, 266 S.E.2d 20, 22 (1980). The United States Supreme Court in *Lovasco* noted that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." 431 U.S. at 790, 52 L.Ed.2d at 759. The preindictment delay in *Lovasco* was because of investigation by the government before seeking indictments. The Court held that "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused[.]' " 431 U.S. at 795, 52 L.Ed.2d at 762, *quoting United States v. Marion*, 404 U.S. 307, 324, 30 L.Ed.2d 468, 481 (1971). The Court further held that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." 431 U.S. at 796, 52 L.Ed.2d at 763.

Based on *Lovasco*, our Court in *State v. Davis*, 46 N.C. App. 778, 266 S.E.2d 20, *disc. review denied*, 301 N.C. 97 (1980) held that for a defendant "to carry the burden on his motion to dismiss for prein-

dictment delay violating his due process rights pursuant to the Fifth and Fourteenth Amendments, he must show both actual and substantial prejudice from the preindictment delay *and* that the delay was intentional on the part of the state in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant." *Davis*, 46 N.C. App. at 782, 266 S.E.2d at 23. Defendant has not carried his burden on the motion to dismiss on either of these showings. Defendant has failed to show both actual and substantial prejudice from the preindictment delay; the only prejudice defendant has alleged relates to the passage of time. The passage of time is inherent in any preindictment delay situation, and we note that prejudice is not presumed simply upon a showing of a lengthy preindictment delay. *See State v. McKoy*, 303 N.C. 1, 277 S.E.2d 515 (1981). Further, defendant has failed to show that delay was intentional on the part of the State in order to impair defendant's ability to defend himself or to gain tactical advantage over defendant. Defendant states only that "[t]he State contends that the delay was necessary in order to protect the identity of the undercover operatives and to maintain the integrity of their ongoing undercover operation. . . . [T]here is no indication that the investigation continued beyond the alleged purchases which took place in July of 1989[.]" To the contrary, we note that the trial judge found that the undercover investigation continued through the end of 1990. As such, we find that the trial court properly denied defendant's motion to dismiss as to this assignment of error.

[2] Defendant next argues that the trial court committed reversible error in overturning defendant's motion to dismiss the felon counts. Defendant notes that he had a 1983 felony murder conviction, and then had two escape convictions which are ordinarily misdemeanor offenses but became felony offenses pursuant to statute because at the time of the escape, defendant was serving a sentence for a felony conviction. *See* North Carolina General Statutes § 14-256 (1993). Defendant claims that using these three convictions as prior "felony" convictions is a violation of the double jeopardy clause of the United States Constitution and the North Carolina Constitution because the State "used the same conviction to convert the two escape offenses into felonies in order that they might satisfy the two additional felony convictions needed to charge [d]efendant . . . with being a habitual felon." We disagree.

We first note that North Carolina General Statutes § 14-7.1 *et seq.*, our habitual felon statute, is clearly constitutional. *See State v. Todd*,

313 N.C. 110, 326 S.E.2d 249 (1985). North Carolina General Statutes § 14-7.3 (1993) reads in pertinent part:

> An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony. An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place. . . .

In the instant case, the indictments charging defendant as an habitual felon were separate from the indictment charging defendant with the principal felony. These indictments set forth the date that the prior felony offenses were committed, the name of the state or other sovereign against whom the felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place. Defendant had previously been found guilty of three distinct felonies. One felony was for second degree murder, and two felonies were for his two escape convictions pursuant to North Carolina General Statutes § 14-256. We find the trial court properly overturned defendant's motion to dismiss these habitual felon counts.

Defendant next contends the trial court erred by overruling defendant's motion in limine regarding statements made by defendant during his transportation from New Jersey to North Carolina. We have reviewed these statements and find that they were not prejudicial to defendant. N.C.R. Evid. 403.

[3] Defendant next argues the trial court committed reversible error in forcing defendant to exhibit to the jury a tatoo on his arm, but not scars on his hand. We note that the trial judge was simply allowing the exhibition of the tatoo for the purpose of corroborating witness Agent Sweatt's identification of defendant. Defendant's argument is meritless.

Defendant next assigns that the trial court committed reversible error in allowing witness Agent Sweatt and witness April Sweatt to testify about the out of court identification of defendant. After a review of the testimony presented at trial, we find that this argument is without merit.

Finally, defendant asserts the trial court committed reversible error in allowing witness Van Parker to testify about why he did not take a picture of the person identified as the defendant. We agree with the trial judge and find this was relevant, non-prejudicial evidence. *See* N.C.R. Evid. 402 and 403.

No error.

Judges GREENE and LEWIS concur.

IN THE MATTER OF DYRON CARR

No. 9314DC914

(Filed 20 September 1994)

1. Parent and Child § 121 (NCI4th)— termination of parental rights—two-stage hearing—two stages improperly combined by court

In a proceeding for termination of parental rights, the trial court erred in improperly combining the two stages of the termination hearing by exercising its discretion during the adjudicatory stage instead of in the dispositional stage, since N.C.G.S. §§ 7A-289.30 and 7A-289.31 provide that the court exercises its discretion in the dispositional stage only after the court has found that there is clear and convincing evidence of one of the statutory grounds for terminating parental rights during the adjudicatory stage.

Am Jur 2d, Parent and Child §§ 7, 11.

2. Parent and Child § 125 (NCI4th)— termination of parental rights—failure to consider expert testimony—no error

In a proceeding for termination of parental rights, the trial court did not err in not allowing the guardian ad litem's expert witness to testify regarding the mother's mental health and capacity to parent her minor child, since the witness was only qualified

as an expert in clinical social work, and there was no evidence that she was an expert in mental health issues.

Am Jur 2d, Parent and Child §§ 33, 385, 386.

Admissibility of social worker's expert testimony on child custody issues. 1 ALR4th 837.

Appeal by appellant Guardian Ad Litem from order entered 20 July 1993 by Judge William Y. Manson in Durham County District Court. Heard in the Court of Appeals 23 August 1994.

This is an appeal from an order denying a petition to terminate the parental rights of a mother with respect to her minor child.

On 4 April 1989, Dyron Carr (Dyron), was admitted to Duke University Medical Center (Duke) for evaluation and treatment of seizures. Dyron was one month old at the time. Dyron's eighteen-year-old mother, Tammy Yarborough (appellee), told hospital personnel that she had noticed Dyron shaking and trembling for periods of approximately five minutes at a time during the previous night and that she had finally decided to take him to the emergency room when his eyes rolled back in his head.

Appellee was living with her boyfriend, Tyrone Kelly (Tyrone), and Dyron at the time Dyron was admitted to the hospital. Dyron's biological father, Richard Carr, had little contact with Dyron. Tyrone and appellee had conflicting stories as to exactly how and when Dyron was hurt. Appellee told hospital personnel that Dyron had bruised his face by hitting the frame of a sofa bed approximately one week prior to his admission to Duke. Tyrone claimed that Dyron had wedged his head between the frame and the bed and that the seizures began on the afternoon as opposed to the night before appellee took Dyron to the hospital. After Dyron was in the hospital for a few days, doctors determined that he had suffered a lineal skull fracture and that the injury was a result of trauma. The hospital referred the case to the Duke Child Protection Team which determined that Dyron might be an abused and neglected child. The case was then referred to DSS. Duke discharged Dyron on 18 April 1989 and DSS placed him in foster care.

After a 15 June 1989 hearing, the trial court found that the delay in appellee's taking Dyron to the hospital "led to medical neglect and a lack of proper care and supervision." Although the court adjudicated Dyron a neglected juvenile, the court returned physical custody

of Dyron to appellee with DSS overseeing the living situation. In its order, the court stated that it would hold a further hearing on 2 August 1989 to determine whether Dyron was an abused child. At the August hearing, DSS recommended that Tyrone Kelly have no contact with Dyron and that appellee attend parenting classes. The court enjoined Tyrone from seeing Dyron and ordered appellee to take all steps to assure that Tyrone would not be in the presence of Dyron. The court then adjudicated Dyron as an abused juvenile.

On 10 August 1989, Duke Hospital called DSS and reported that Dyron had been admitted for being lethargic. The hospital discovered Dalamane in his system, although appellee insisted that she did not know how the drug could have gotten into his system. During the course of a subsequent investigation, DSS discovered that appellee had continued to live with Tyrone in violation of the court order directing her to stay away from him. The court ordered appellee to attend parenting classes and DSS placed Dyron in foster care.

At the April 1990 hearing, the court again ordered appellee to attend parenting classes, to undergo a substance abuse evaluation and a psychological evaluation, and to follow any other DSS recommendations. DSS supervised visitation between appellee and Dyron, but there were several months when appellee did not attend scheduled visitations. In August 1990, DSS filed a petition to terminate appellee's parental rights because appellee had not attended parenting classes, had not obtained a substance abuse evaluation or psychological evaluation, and had not visited with Dyron since the preceding April.

After the August 1990 petition and after the court once again ordered appellee to attend parenting classes and undergo psychological and substance abuse evaluations, appellee made some improvements. Therefore, DSS voluntarily dismissed the petition to terminate appellee's parental rights in July 1991. The original Guardian Ad Litem (Guardian) disagreed with DSS's recommendation to continue to seek reunification between appellee and Dyron. The Guardian pointed out that Dyron had been in foster care for twenty-two months, he was thriving in that environment with his foster mother, and appellee had only expressed a sincere interest in improving her condition in the last two months of that twenty-two month period. Appellee had no stable living situation or employment and she had undergone several miscarriages. The Guardian favored termination but a new Guardian Ad Litem was appointed. The new Guardian did

not have standing to petition for termination because he had not served for one continuous year as required by G.S. 7A-289.24(6).

At the February 1992 hearing, the new Guardian supported the foster mother's motion to intervene and adopt Dyron. Dyron had been with his foster mother for most of his life and had become an integral part of the foster mother's family. Despite the strong bond between the foster mother and Dyron, the court denied the foster mother's motion. DSS filed another petition to terminate appellee's parental rights with respect to Dyron.

In July 1993, the trial court declined to terminate appellee's parental rights. The court stated that, although appellee had made foolish decisions and there was evidence of neglect, appellee was young. The court also remarked that appellee's fiance, Edward Weatherspoon, who was the father of appellee's infant son, seemed to be a stable and responsible person. The court stated that it was not willing to find that there was clear and convincing evidence to support any of the statutory grounds for terminating appellee's parental rights. Appellant Guardian Ad Litem appeals.

Jane Elizabeth Volland for appellant Guardian Ad Litem.

Durham County Attorney's Office, by Assistant County Attorney Wendy Sotolongo, for appellant Durham County Department of Social Services. (No brief was filed on behalf of Durham County Department of Social Services.)

Eagen, Eagen & Ellinger, by Jeffrey R. Ellinger, for appellee Tammy Yarborough.

EAGLES, Judge.

Appellant Guardian Ad Litem (appellant) brings forth several assignments of error. After careful review, we reverse and remand.

I.

[1] Appellant first argues that the trial court erred by not properly following the two-stage process set out in G.S. 7A-289.30 and 7A-289.31 for terminating parental rights. G.S. 7A-289.30 provides that in the adjudicatory stage, the petitioner must prove by clear and convincing evidence that one or more of the statutory grounds for terminating parental rights exists. *Matter of Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). Once the petitioner meets this burden, G.S. 7A-289.31 provides that the trial court move to the disposi-

tional stage where the court has the discretion to terminate parental rights. *Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252. Because the decision is discretionary, the trial court can refuse to terminate parental rights even when the petitioner has proven its case by clear and convincing evidence. Although there are two separate stages involved in a termination of parental rights proceeding, the court does not have to conduct two separate hearings. *Matter of White*, 81 N.C. App. 82, 344 S.E.2d 36, *cert. denied*, 318 N.C. 283, 347 S.E.2d 470 (1986).

Appellant contends that the trial court erred in this case because the trial court did not fulfill its duties in the adjudicatory stage before proceeding to the dispositional stage. Appellant asserts that the trial court used its own discretion in the adjudicatory stage, thus improperly combining the two stages into one. Appellant points to the court's language to support its assertion that the trial court improperly combined the two stages:

> [T]he Court, at this time, is not willing to conclude or find that there is clear, cogent and convincing evidence that the mother's parental rights should be terminated, but that the matter should be continued with a new plan of visitation with the mother and child after she becomes married to Mr. Weatherspoon.

We agree with appellant that this language shows that the trial court improperly combined the two stages of the termination hearing. By stating that it was "not willing to conclude" that there was clear and convincing evidence, the trial court showed that it was improperly exercising its discretion in the adjudicatory stage. G.S. 7A-289.30 and 7A-289.31 provide that the court exercises its discretion in the dispositional stage only **after** the court has found that there is clear and convincing evidence of one of the statutory grounds for terminating parental rights during the adjudicatory stage. Accordingly, we reverse the trial court's decision and remand for a rehearing on the termination of parental rights petition.

II.

Appellant also argues that the trial court erred by not terminating the parental rights of appellee because it was in the best interest of Dyron for the court to terminate appellee's rights. Here, we do not address appellant's assignment of error because we have already determined that the trial court improperly omitted making an adjudication during the first stage of the termination proceeding.

III.

[2] Finally, appellant contends that the trial court erred by not allowing appellant's expert witness Susan Sweeney to testify regarding appellee's mental health and appellee's capacity to parent her minor child, Dyron. G.S. 8C-702 provides that "[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." North Carolina courts "construe this rule to admit expert testimony when it will assist the [factfinder] 'in drawing certain inferences from the facts, and the expert is better qualified than the [factfinder] to draw such inferences.' " *North Carolina v. Parks*, 96 N.C. App. 589, 591, 386 S.E.2d 748, 750 (1989) (citing *State v. Anderson*, 322 N.C. 22, 366 S.E.2d 459 (1988), *cert. denied*, 488 U.S. 975, 102 L.Ed.2d 548 (1988)). The trial court has wide discretion in applying this rule and will only be reversed for an abuse of discretion. *Id.*

Here, the trial court said that Ms. Sweeney qualified as an expert witness in clinical social work, specifically dealing with adolescents. However, the court would not allow her to testify concerning her opinion of appellee's mental status and how appellee would be prepared to take care of Dyron if the court returned him to her care. Our Supreme Court has stated that in determining the best interest of the child, the trial court should hear and consider any evidence which is competent, relevant, and is not cumulative. *Matter of Shue*, 311 N.C. 586, 598, 319 S.E.2d 567, 574 (1984). Appellant asserts that Ms. Sweeney's testimony regarding the mental status of the appellee would have assisted the trial court in making an informed decision and that, in light of *Shue*, the trial court erred in excluding her testimony on this subject. While Ms. Sweeney's testimony may have been enlightening, Ms. Sweeney was only qualified as an expert in clinical social work. There is no evidence here that she was an expert in mental health issues. Therefore, the trial court did not err in excluding her testimony concerning appellee's mental status.

Reversed and remanded for rehearing on the termination of parental rights hearing.

Judges COZORT and LEWIS concur.

IN RE DAVIS

[116 N.C. App. 409 (1994)]

IN THE MATTER OF: BRITTANY MICHELLE DAVIS

No. 935DC1012

(Filed 20 September 1994)

1. **Parent and Child § 125 (NCI4th)— proceeding to terminate parental rights—mother compelled to testify—subpoena not required**

In a proceeding to terminate parental rights, respondent mother could be compelled to testify even in the absence of a subpoena.

Am Jur 2d, Parent and Child §§ 7, 11.

2. **Parent and Child § 101 (NCI4th)— termination of parental rights—evidence of neglect**

There was clear, cogent, and convincing evidence that neglect authorizing termination of respondents' parental rights existed at the time of the termination hearing where respondents did not attempt to correct the conditions which led to findings of neglect on four earlier occasions by obtaining continued counseling, a stable home, stable employment, and parenting classes until DSS informed them termination proceedings were being pursued.

Am Jur 2d, Parent and Child §§ 7, 11.

Appeal by respondents from order filed 26 March 1993 in New Hanover District Court by Judge Shelly Sveda Holt. Heard in the Court of Appeals 23 August 1994.

Julia Talbutt for petitioner-appellee New Hanover County Department of Social Services.

William Norton Mason for appellee Guardian ad Litem.

Nora Henry Hargrove for respondent-appellants.

GREENE, Judge.

James F. Davis, Jr. and Dena Davis (respondents) appeal from an order filed 26 March 1993 in New Hanover County District Court, terminating respondents' parental rights to Brittany Michelle Davis (Brittany).

On 28 October 1992, the New Hanover County Department of Social Services (DSS) filed a petition to terminate respondents' parental rights because, among other reasons, Brittany is a neglected juvenile due to respondents' failure "to provide adequate care, supervision or discipline throughout Brittany's life." At the hearing on DSS's petition to terminate respondents' parental rights, evidence was introduced showing that Brittany had been adjudicated a neglected juvenile by order dated 8 November 1990. By subsequent orders dated 21 March 1991, 9 January 1992, and 9 July 1992, custody of Brittany remained with DSS. Each order provided that James F. Davis, Jr. (Mr. Davis) was to receive counseling on issues of domestic violence, that Dena Davis (Mrs. Davis) was to take empowerment classes, and that both were to take parenting classes and take advantage of mental health services and psychological counseling services.

Mary Southerland (Ms. Southerland), a social worker for DSS, testified at the hearing that she became involved with Brittany's case after Brittany had been in foster care approximately ten months, to help respondents "correct the conditions that led to Brittany being placed in foster care to begin with." She told respondents they needed "to attend and complete parenting classes," have a "stable house," have "stable job[s]," and "be engaged in regular long-term counseling, which they had not." Before Ms. Southerland received Brittany's case, two other workers "had tried to get [respondents] involved in parenting classes" but could not get them to attend. "Only when [DSS] gave notice to [respondents] [in the spring of 1992] of the change of the permanent plans—change from reunification to termination, that they did finally begin to show an interest in possibly attending classes." Mrs. Davis then completed a parenting class in the summer of 1992, but Mr. Davis has failed to do so. Ms. Southerland testified that although respondents have been in their current residence since November 1992, "[f]rom October of '90 and July of '92," "there were approximately twenty changes of residence."

In addition, Ms. Southerland testified that respondents' employment history has been nonexistent or sporadic at best. As to counseling, she has "over the past year and a half encouraged counseling many times due [to] their history [and] there has been very, very little. . . . Even after psychiatric hospitalization, they did not follow up with regular, consistent, ongoing, long-term counseling." As to visitation, respondents attended the majority of scheduled visitations but overnight visitations ceased after "during both visits there had been loud parties and drinking and so forth while Brittany was in the home

to the point where [respondents] were evicted from this park." Ms. Southerland also testified that since respondents were informed that termination proceedings were being considered, they missed two scheduled visits with Brittany and a scheduled conference with Ms. Southerland. Furthermore, she has "not been made aware of any substantial progress in the last few months."

The attorney for DSS called Mrs. Davis to testify; however, respondents' attorney objected because there was no subpoena issued calling Mrs. Davis as a witness and because Mrs. Davis might incriminate herself. The court overruled the objection and stated that asserting the 5th Amendment privilege against self-incrimination "would be done on a question by question basis." Mrs. Davis then took the stand and testified that since Brittany was placed in custody of DSS, she has a stable job, she and Mr. Davis have obtained a stable home, they "talk about [their] problems instead of fighting them out," and she completed a parenting class.

After the hearing, Judge Shelly Sveda Holt made the following findings of fact in an order dated 26 March 1993:

> 2. . . . That Brittany Michelle Davis has been continuously placed in foster care since 4 October 1990.
>
> . . . .
>
> 13. That the order of 9 January 1992, provided that there has been an absolute failure on the part of Mr. and Mrs. Davis to resolve marital conflicts, such that the environment which would be provided the child Brittany Davis was perpetuated as a high risk environment. . . . in July 1992, the Court found that there had been no change of circumstances in regard to attendance at Empowerment course, in regard to counseling or attendance at a parenting course. The order of 9 July 1992, found significant Mr. and [Mrs.] Davis's failure to attend counseling as the issues of domestic violence had been central to the elements of neglect previously adjudicated.
>
> . . . .
>
> 15. . . . Mr. and [Mrs.] Davis made no attempts at compliance with the clear and consistent provisions of the Court orders until sometime in October when Mr. and [Mrs.] Davis enrolled in a parenting course in October 1992, the same month the termination of parental rights action was filed. That the order of 9 July 1992,

found that Mr. and [Mrs.] Davis had attended on 7 July 1992, the first class of a parenting course. That this parenting course was not completed by Mr. nor [Mrs.] Davis.

Based on these findings, the court concluded that Brittany "has been and continues to be a neglected juvenile within the meaning of G.S. 7A-517(21)" in that respondents have not acknowledged the need for counseling nor participated in counseling since February 1991 despite court orders to do so, and respondents "have wilfully left Brittany Davis in foster care without showing a positive response under all the circumstances to the diligent efforts of [DSS] to correct those conditions which led to the original removal of Brittany." The court also concluded that, from clear, cogent and convincing evidence, there has been "no substantial change in circumstances which led to the removal of [Brittany] and . . . no compliance on the part of [respondents] with provisions of four previous Court orders, such that this Court could find any likelihood of improved conditions . . . suitable to meet the needs of [Brittany]." Based on these findings and conclusions, the trial court ordered that the parental rights of respondents be terminated.

The issues presented are whether: (I) Mrs. Davis was properly compelled to testify when she was not under subpoena nor otherwise summoned to court; and (II) there was clear, cogent and convincing evidence to support the court's findings and conclusions that Brittany remained a neglected juvenile.

I

[1] Respondents argue that Mrs. Davis should not have been forced to testify "absent being summoned to court by either subpoena, summons to appear, bench subpoena or discretionary decision by the court to call a witness." We disagree. Mrs. Davis, as a respondent in a proceeding to terminate her parental rights, is a party to the proceeding. N.C.G.S. § 7A-289.27(a)(1) (1989) (upon filing of petition to terminate parental rights, court shall issue summons to child's parents who shall be named as respondents). DSS was therefore free to call Mrs. Davis to testify as an adverse party when she appeared at the proceeding, and a subpoena was not required. N.C.G.S. § 1A-1, Rule 43(b) (1990) (party may call an adverse party and interrogate him). We acknowledge that in this civil proceeding, Mrs. Davis may have been asked questions subjecting her to criminal prosecution, and in that event, she had the right to refuse to answer those questions.

Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964) (constitutional privilege against self-incrimination applies in both civil and criminal proceedings whenever a person's answer might tend to subject him to criminal responsibility). Because, however, there were no objections at trial to any of the questions tendered, we need not address this issue. N.C.R. App. P. 10(b)(1).

II

[2] N.C. Gen. Stat. § 7A-289.32 provides several grounds for termination of parental rights; however, if findings of fact support the conclusion that grounds for termination exist under one subdivision in Section 7A-289.32, we need not address whether termination was proper under the other subdivisions. *In re Parker*, 90 N.C. App. 423, 424, 368 S.E.2d 879, 880 (1988). In this case, one basis for terminating respondents' parental rights was neglect. A trial court may terminate parental rights if it finds clear, cogent and convincing evidence that the parent has neglected the child within the meaning of N.C. Gen. Stat. § 7A-517(21). N.C.G.S. § 7A-289.32(2) (1993); *see In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) (in termination proceeding, neglect must be proven by clear, cogent and convincing evidence). Under Section 7A-517(21), a neglected juvenile is one who "does not receive proper care, supervision, or discipline . . . or who has been abandoned . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7A-517(21) (1993).

Although Brittany was adjudicated a neglected juvenile prior to the proceeding to terminate respondents' parental rights, "a prior adjudication of neglect, standing alone, is insufficient to support termination when the parents have been deprived of custody for a significant period of time before the proceeding," *In re Bluebird*, 105 N.C. App. 42, 48, 411 S.E.2d 820, 823 (1992), and the trial court must "make an independent determination of whether neglect authorizing termination of the respondent's parental rights existed at the time of the termination hearing." *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 233 (1984). "The trial court must consider evidence of changed conditions . . . 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 (*quoting In re Wardship of Bender*, 352 N.E.2d 797, 804 (Ind. App. 1976)).

In this case, there is clear, cogent and convincing evidence that "neglect authorizing termination of the respondent[s'] parental rights existed at the time of the termination hearing." Respondents did not

attempt to correct the conditions that led to findings of neglect on 8 November 1990, 21 March 1991, 9 January 1992, and 9 July 1992 by obtaining continued counseling, a stable home, stable employment, and parenting classes until DSS informed them termination proceedings were being pursued in 1992. In failing to take steps to correct the circumstances leading to Brittany's adjudication as a neglected juvenile and placement in foster care, despite having approximately two years to do so before the petition for termination of parental rights was filed, respondents have not provided "proper care, supervision, or discipline" and have not corrected the environment that is "injurious to [Brittany]'s welfare." Therefore, in light of the history of neglect by respondents, the lack of changed conditions, and the probability of a repetition of neglect, there is clear, cogent and convincing evidence that Brittany remains a neglected juvenile, thereby supporting termination of respondents' parental rights. For these reasons, the decision of the trial court is

Affirmed.

Judges JOHN and McCRODDEN concur.

LAYMON L. LEWIS, PLAINTIFF-APPELLANT v. CARL F. BLACKMAN AND WIFE, GLADYS H. BLACKMAN; CARL FRANKLIN BLACKMAN, JR., AND WIFE, PAT BLACKMAN; GARY D. BLACKMAN AND WIFE, DEBRA BLACKMAN; AND SHARON B. STRICKLAND AND HUSBAND, DALLAS FLOYD STRICKLAND, DEFENDANT-APPELLEES

No. 9311SC1002

(Filed 20 September 1994)

1. Fraudulent Conveyances § 20 (NCI4th)— fraudulent conveyance of property—improper statute alleged in complaint—complaint adequate to give notice

Plaintiff's complaint adequately stated a claim under N.C.G.S. § 39-15, which provides that conveyances of property may be voided upon showing an intent to defraud creditors and others, though the complaint actually alleged N.C.G.S. § 39-17, which requires that plaintiff be a "creditor" on the date property was transferred, since the complaint gave sufficient notice of plaintiff's claim to enable defendants to answer and prepare for trial.

Am Jur 2d, Fraudulent Conveyances §§ 209 et seq.

2. Fraudulent Conveyances § 30 (NCI4th)— fraudulent conveyance of property—summary judgment improper

The trial court erred in entering summary judgment for defendants because a genuine issue of material fact existed as to whether defendants' transfer of property was a fraudulent conveyance under N.C.G.S. § 39-15 where plaintiff claimed that defendants transferred their property to their children, reserving a life estate for themselves, in order to avoid having sufficient assets to pay plaintiff for injuries sustained in an automobile accident caused by defendant wife, but defendants offered depositions and affidavits to show that the transfers were made as a part of an ongoing estate plan of defendants to equalize distribution of their estate among their children.

Am Jur 2d, Fraudulent Conveyances § 228.

3. Fraud, Deceit, and Misrepresentation § 38 (NCI4th)— defendant's fraud in obtaining husband's signature on deed—summary judgment for defendant's error

The trial court properly granted summary judgment for defendant on plaintiff's claims of lack of mental capacity, duress, and undue influence, but erred in granting summary judgment on plaintiff's claim of fraud where plaintiff forecast sufficient evidence that defendant wife withheld infomation from defendant husband, fraudulently obtaining his signature on a deed.

Am Jur 2d, Fraud and Deceit §§ 481 et seq.

Appeal by plaintiff from order entered 12 July 1993 by Judge B. Craig Ellis in Johnston County Superior Court. Heard in the Court of Appeals 24 May 1994.

Mast, Morris, Schulz & Mast, P.A., by George B. Mast, Bradley N. Schulz and Christi C. Stem, for plaintiff appellant.

Thomas S. Berkau for defendant appellees.

COZORT, Judge.

On 10 February 1992, Carl F. Blackman, Sr., suffered a brain aneurysm and was admitted to the cardiac unit of Wake Medical Center in Raleigh, North Carolina. Nine days later, plaintiff Laymon L. Lewis was injured when the vehicle he was driving was struck by an automobile owned by Carl F. Blackman and driven by his wife, Gladys

H. Blackman. Mrs. Blackman did not tell her husband about the automobile accident. On 29 February 1992, while Mr. Blackman was still in the hospital cardiac unit, Mr. and Mrs. Blackman executed deeds conveying all of their real estate to their children, reserving a life estate. Shortly thereafter, alleging several claims, plaintiff Lewis filed an action to have the deeds executed by Mr. and Mrs. Blackman declared null and void and requesting the court to declare a resulting trust for the benefit of the plaintiff on the property conveyed in the deeds. Defendants answered and on 13 May 1993, defendants moved for summary judgment. Plaintiff moved for summary judgment on 24 May 1993. In an order entered 9 July 1993, the trial court granted defendants' motion for summary judgment. We find defendants were not entitled to summary judgment on plaintiff's claim of fraudulent conveyance and fraud. We reverse that portion of the trial court's order and remand for further proceedings.

We first observe that the record on appeal filed in this case is incomplete. The record includes copies of unsigned pleadings and does not include the responses to pleadings which ordinarily compel a response. The parties do not disagree on the essential elements of the procedural history of the case, and we will proceed as if the record had been properly compiled.

The original complaint which initiated this action was not made a part of the record on appeal. An amended complaint was filed on 13 July 1992. In that amended complaint, plaintiff alleged that defendants Carl F. Blackman and Gladys H. Blackman did not have sufficient assets or property to pay plaintiff for his injuries and failed to retain sufficient assets or property to pay plaintiff. Plaintiff alleged the transfers to family members were a violation of N.C. Gen. Stat. § 39-17. It appears plaintiff filed, sometime thereafter, an amended complaint where, in addition to his claim under N.C. Gen. Stat. § 39-17, plaintiff alleged claims for (1) lack of consideration, (2) undue influence, (3) duress, (4) mental incapacity, and (5) fraud. Defendants' answer to that amended complaint does not appear in the record. It appears the trial court considered all of the claims alleged in the amended complaint and granted summary judgment for defendants on all claims. In his brief, plaintiff contends the trial court erred in entering summary judgment on all claims set forth in the amended complaint. We first address plaintiff's claim of fraudulent conveyance under Chapter 39 of the General Statutes.

[1] Plaintiff first contends that he has sufficiently alleged and presented evidence of a claim under N.C. Gen. Stat. § 39-15 (1984). That section provides, in pertinent part, that transfers of property may be voided upon showing an "intent to delay, hinder, and defraud creditors and others of their just and lawful actions and debts . . . ." Plaintiff contends that he is one of the "others" intended to be protected by that statute. Defendants respond that plaintiff's complaint listed only N.C. Gen. Stat. § 39-17, and that plaintiff should be bound by his pleadings and must make out a case under § 39-17, which requires that plaintiff be a "creditor" on the date the property was transferred. Plaintiff responds that, under the notice pleading requirements of N.C. Gen. Stat. § 1A-1, Rule 8(a) (1990), his complaint adequately states a claim under N.C. Gen. Stat. § 39-15 because it gave sufficient notice of the claim to enable the defendants to answer and prepare for trial. We agree with plaintiff. We hold that the complaint was sufficient to put defendants on notice of plaintiff's claim, and the plaintiff will not be held to the more stringent requirements found under N.C. Gen. Stat. § 39-17.

[2] We now turn to considering whether plaintiff has offered sufficient evidence of a claim under § 39-15 to withstand defendants' motion for summary judgment. Summary judgment is properly rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). The papers of the party moving for summary judgment are carefully scrutinized, and all inferences are resolved against him. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). A defendant who moves for summary judgment assumes the burden of positively and clearly showing there is no genuine issue as to any material fact and he or she is entitled to judgment as a matter of law. A defendant may meet this burden by (1) proving that an essential element of the plaintiff's case is nonexistent; or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim; or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim. *Watts v. Cumberland Co. Hospital System*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986).

Plaintiffs alleged that defendants Carl F. and Gladys H. Blackman transferred their real property to their children in an effort to prevent

their property from being subject to any judgment plaintiff might obtain against them by reason of his claim against Gladys for personal injuries. Plaintiff alleged that the transfer was made with the intent to defraud plaintiff, as well as other creditors, and that the defendants did not retain sufficient assets or property to pay plaintiff for his injuries.

The defendants contend that the facts do not rise to the level of a fraudulent conveyance on the part of the defendants. The defendants offered depositions and affidavits to show that the transfers were made as a part of an ongoing estate plan of the Blackmans to equalize the distribution of their estate among their children. Their evidence indicates that for a number of years prior to 1992, Carl and Gladys Blackman had talked between themselves and on several occasions to their attorney, Donald A. Parker, about making a division of property among their three children, treating their oldest son the same as they had treated their other two children, to whom they had already given a house and lot and a restaurant. To effectuate this equitable division, the Blackmans planned to make a gift of their homeplace and the surrounding land to their oldest son, with the remaining property going to their three children equally under their will, reserving a life estate. The defendants contend that the property had to be surveyed first, and that Carl Blackman did not contact a surveyor until early February 1992. He suffered the aneurysm and was hospitalized before the deeds were completed. After the automobile accident with plaintiff, Gladys Blackman asked the defendants' attorney to prepare the deeds. She had Mr. Blackman sign the deeds before a notary public while he was still in the hospital. Gladys Blackman averred that she did not tell her husband about the accident because he was still in intensive care, and she was afraid the news might cause him to suffer another aneurysm.

We find this evidence falls short of compelling entry of judgment for the defendants. We hold there was a genuine issue of material fact as to whether defendants' transfer was a fraudulent conveyance under N.C. Gen. Stat. § 39-15. The defendants' affidavits and depositions, though uncontradicted by plaintiff, do not resolve the issue of whether defendants' transfer was made with fraudulent intent. Instead, they raise an issue of fact as to whether defendants transferred the property with fraudulent intent. Defendants' affidavits and depositions raise an issue of credibility, which the court should not resolve at a hearing on a motion for summary judgment. The fact that a witness is interested in the result of the litigation has been held to

be sufficient to require the credibility of his testimony to be submitted to the jury. *Lee v. Shor*, 10 N.C. App. 231, 235, 178 S.E.2d 101, 104 (1970). Although defendants' affidavits and depositions were uncontradicted by the opposing party, this evidence does not automatically import veracity. A trial court is not required to assign credibility to a party's affidavits merely because they are uncontradicted. *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976). In holding, we also note that summary judgment is generally inappropriate in an action for fraud. The existence of fraud necessarily involves a question concerning the existence of fraudulent intent, and the intent of a party is a state of mind generally within the exclusive knowledge of the party. That state of mind must, by necessity, be proved by circumstantial evidence. *Girard Trust Bank v. Belk*, 41 N.C. App. 328, 339, 255 S.E.2d 430, 437, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 299 (1979). We thus hold that the trial court erred in granting summary judgment for defendants on the issue of fraudulent conveyance.

[3] We next consider whether summary judgment was properly granted for defendants on plaintiff's claims of lack of mental capacity, fraud, duress, and undue influence. We find plaintiff's claim for fraud should not have been dismissed. Plaintiff forecast sufficient evidence that defendant Gladys Blackman withheld information from defendant Carl F. Blackman, fraudulently obtaining his signature on the deed. For the reasons stated above regarding the claim of fraudulent conveyance, we find the trial court erred in granting summary judgment for defendants on the fraud claim. As to the remaining claims, we find it sufficient to state here that we have reviewed the record in its entirety and that we find no genuine issue of material fact as to each of the remaining claims. Defendants are entitled to summary judgment as a matter of law on these issues, and we affirm summary judgment on these claims.

In summary, we affirm summary judgment for defendants on plaintiff's claims of lack of mental capacity, duress, and undue influence. We reverse summary judgment on the claims of fraudulent conveyance and fraud, and we remand the cause for further proceedings on those claims.

Affirmed in part, reversed in part, and remanded.

Judges EAGLES and LEWIS concur.

THOMAS B. RIERSON, PLAINTIFF-EMPLOYEE v. COMMERCIAL SERVICE, INC., DEFENDANT-EMPLOYER; SHELBY INSURANCE COMPANY, DEFENDANT-INSURANCE CARRIER

No. 9310IC1186

(Filed 20 September 1994)

Workers' Compensation § 405 (NCI4th)— findings and conclusions drafted by defendant's attorney—independent decision made by deputy commissioner

The Industrial Commission did not err in adopting the findings of fact and conclusions of law of the deputy commissioner which were adopted from a proposed opinion and award written by defendant's attorney, since the evidence showed that the findings of fact were clearly supported by competent evidence and supported the conclusions of law made; it is acceptable for the deputy commissioner to request one side or the other to prepare the proposed opinion and award so long as the deputy commissioner has made his own decision and is free to ignore, amend, or modify the draft; and the record in this case indicated that the deputy commissioner independently made necessary findings of fact.

Am Jur 2d, Workers' Compensation §§ 611 et seq.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission filed 23 June 1993. Heard in the Court of Appeals 1 September 1994.

Harris & Iorio, by Douglas S. Harris, for plaintiff-appellant.

Carruthers & Roth, P.A., by Barbara L. Curry and Thomas B. Kobrin for defendants-appellees.

JOHNSON, Judge.

This appeal is from an opinion and award entered 23 June 1993 by the Full Commission of the North Carolina Industrial Commission, in which the deputy commissioner's findings of fact and conclusions of law of 10 November 1992 were fully adopted by the Full Commission.

The facts are as follows: On 18 May 1990, plaintiff, a service contractor for Commercial Service, Inc., while moving a shelf, slipped and fell sustaining a back injury. Plaintiff sought treatment from Dr. Cobb, a chiropractor, who had previously treated plaintiff on a regular basis since 1981.

On 11 July 1990, plaintiff was sent to Dr. Paul Long, M.D., an orthopedic surgeon at Piedmont Orthopedic Associates for lower back pain. Dr. Long examined plaintiff and found no physical abnormalities, diagnosed him with acute low back muscle strain, and recommended physical therapy. After undergoing physical therapy, plaintiff was re-evaluated by Dr. Long on 27 July 1990. Dr. Long found no abnormalities, and opined that there was no permanent disability, that plaintiff had reached maximum medical improvement, and that plaintiff could return to regular employment.

On 2 August 1990, Dr. Cobb referred plaintiff to a second orthopedic surgeon, Dr. Maultsby, who diagnosed him with myofascial pain syndrome. Dr. Maultsby recommended physical therapy. On 3 January 1991, Dr. Maultsby recommended that plaintiff had reached maximum medical improvement with no permanent impairment. On 25 February 1991, plaintiff sought another opinion from Dr. Nitka who determined that plaintiff had a zero to five percent permanent impairment to his lower back.

Plaintiff continued to seek treatment on a regular basis from Dr. Cobb for both the injury to his lower back and for previous injuries. On 12 August 1991, Dr. Cobb referred plaintiff to Dr. Holmberg, M.D., who referred plaintiff to Dr. Vincent E. Paul, M.D. Dr. Paul treated plaintiff for an injury that occurred in April of 1990 and for the 18 May 1990 injury. Plaintiff's major source of pain was his shoulder and neck, and not his lower back. Plaintiff received therapy until 10 February 1992 at which time he was released to go back to his full work. Plaintiff was given a five percent permanent impairment rating to the neck and a five percent permanent impairment rating to the lower back.

Plaintiff claims that he was unable to engage in employment from the time of the injury until March 1992, except for the three months from April to June 1991. However, evidence shows that plaintiff worked for R.H. Barringer and for Perlick installing draft beer systems for several weeks. Plaintiff also continued to engage in other physical activities such as drag-racing and washing his car.

Based on these facts, Deputy Commissioner Roger L. Dillard, Jr. found that plaintiff had completely recovered from his 18 May 1990 injury by 27 July 1990 with no permanent-partial injury and that this injury did not affect plaintiff's ability to earn wages after that date. The Full Commission of the North Carolina Industrial Commission

adopted the deputy commissioner's findings of fact and conclusions of law. From this opinion and award, plaintiff appeals.

Plaintiff's first assignment of error was whether the North Carolina Industrial Commission erred in adopting the findings of fact and conclusions of law of the deputy commissioner which were adopted from a proposed opinion and award written by defendant's attorney.

The standard of review for a decision of the Industrial Commission is twofold: "(1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether . . . the findings of fact of the Commission justify its legal conclusions and decisions." *Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990) (*quoting Dolbow v. Holland Industrial*, 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984)). *See also Gilbert v. Entenmann's Inc.*, 113 N.C. App. 619, 623, 440 S.E.2d 115, 118 (1994). Defendant in the case *sub judice* contends that the deputy commissioner's findings of fact and conclusions of law are insufficient because the deputy commissioner did not make the findings of fact himself and instead adopted the findings of fact of the opposing party.

The evidence shows that the findings of fact are clearly supported by competent evidence and support the conclusions of law made. Plaintiff argues that because the deputy commissioner asked defendant to draft the opinion, the deputy commissioner failed to make his own specific findings of fact. We disagree. This argument fails to take into account the fact that Deputy Commissioner Dillard reached his own independent decisions regarding the findings of fact and conclusions of law.

It is acceptable for the deputy commissioner to request one side or the other to prepare the proposed opinion and award so long as the deputy commissioner has made his own decision and is free to ignore, amend, modify, etc., the draft. It is also common practice for a trial court judge, or as in the case *sub judice* the deputy commissioner, to request one of the parties to prepare proposed findings of fact and conclusions of law so long as the findings and conclusions are supported by competent evidence. *See Weston v. Carolina Medicorp, Inc.*, 102 N.C. App. 370, 403 S.E.2d 653, *dismissal allowed, disc. review denied*, 330 N.C. 123, 409 S.E.2d 611 (1991) (verbatim adoption of party's findings of fact set aside only if there is no competent evidence in the record to support); *Johnson v. Johnson*, 67

N.C. App. 250, 313 S.E.2d 162 (1984) (proper for court to direct party to prepare proposed findings of fact and conclusions).

In the referenced letter to defendant's attorney requesting submission of a proposed opinion and award, Deputy Commissioner Dillard stated:

> I have reviewed the evidence and the contentions of the parties in the above referenced file and have decided to enter an Opinion and Award awarding the plaintiff temporary total disability benefits through July 27, 1990 as suggested in the contentions which you filed and otherwise denying the plaintiff's claim.

This suggests that Deputy Commissioner Dillard made the following findings of fact independently: the amount of temporary-total disability plaintiff was entitled to; that plaintiff had reached the maximum medical improvement on 27 July 1990; that plaintiff suffered from no permanent-partial disability; and that the findings of fact submitted by defendants in their memorandum of contentions were supported by competent evidence. Thus, plaintiff's first assignment of error is without merit.

Plaintiff's second and third assignments of error question whether the Industrial Commission erred in adopting the deputy commissioner's findings of fact numbers 3, 4, 7, 8, 9, and 10 as being unsupported by the evidence and insufficient as a matter of law.

"The Commission's findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding." *Gilbert*, 113 N.C. App. at 624, 440 S.E.2d at 118. The Industrial Commission is the sole judge of a witness' credibility and the weight to be given to the witness' testimony. *Id.* "The Industrial Commission has authority to review, modify, adopt, or reject findings of a hearing commissioner . . . ." *Garmon v. Tridair Industries*, 14 N.C. App. 574, 576, 188 S.E.2d 523, 524 (1972). Thus, in the case *sub judice*, the Full Commission did not err in adopting Deputy Commissioner Dillard's opinion and award.

Plaintiff alleges that the Industrial Commission did not address the issue of the witnesses' credibility and therefore, the findings of fact are unsupported by the evidence and insufficient as a matter of law. Plaintiff's allegation fails to consider finding of fact no. 6. Findings of fact no. 6 from which plaintiff did not object states: "Plaintiff's testimony and his other evidence of complaints and conditions on

and after July 27, 1990 are not accepted as credible." Thus, this allegation is without merit.

Plaintiff next argues that findings of fact nos. 3, 7, 8, and 9 are unsupported by the evidence as Dr. Long "never saw the patient again after 17 July 1990, and, therefore could have no opinion as to his current condition . . . ." The opinion and award reveal that the deputy commissioner and the Full Commission accepted Dr. Long's testimony that in his expert medical opinion, plaintiff had fully recovered from his 18 May 1990 injury by 27 July 1990. The findings of fact are also supported by evidence of the medical records of Dr. Maultsby which do not relate the five percent permanent-partial disability rating he awarded to plaintiff on 11 March 1991 to the 18 May 1990 injury; and of Dr. Paul who did not relate his permanent-partial disability rating to the plaintiff's 18 May 1990 injury.

In fact other evidence suggests that plaintiff was not unable to earn wages due to the 18 May 1990 injury after 27 July 1990. Evidence presented reveals that plaintiff engaged in physical labor for R.H. Barringer and Perlick, and that plaintiff frequently engaged in physical activities such as drag-racing and washing his van.

Plaintiff's final assignment of error was that the Industrial Commission erred in adopting the conclusions of law of the deputy commissioner. Plaintiff objects to the conclusions of law on the basis that they are findings of fact which are insufficient to support the conclusions. This argument is without merit. The Full Commission in reviewing Deputy Commissioner Dillard's opinion and award has authority "to determine the case from the written transcript of the hearing before the deputy commissioner and the record before it." *Crump* v. *Independence Nissan*, 112 N.C. App. 587, 589, 436 S.E.2d 589, 592 (1993); *Gilbert*, 113 N.C. App. at 625, 440 S.E.2d at 119.

The three conclusions of the deputy commissioner were adopted by the Full Commission. Thus, they are in fact the conclusions of the Industrial Commission. The Industrial Commission applied the law to its findings of fact and concluded that plaintiff was temporarily disabled from 18 May 1990 to 27 July 1990 and entitled to compensation at the rate of $390.00 per week which has already been paid; that plaintiff had reached maximum medical improvement on 27 July 1990; and that defendants were not liable for medical treatment and expenses after 27 July 1990. Therefore, this assignment of error is without merit.

In conclusion, the Industrial Commission has made explicit findings of fact and conclusions of law regarding the credibility of plaintiff's witnesses. Having made their decision based on competent evidence, the decision of the Full Commission is

Affirmed.

Judges GREENE and LEWIS concur.

IN THE MATTER OF: DAVID LARRY WOODIE

No. 9325DC1149

(Filed 20 September 1994)

1. **Hospitals and Medical Facilities or Institutions § 58 (NCI4th)— involuntary commitment—no form in file—no error**

The trial court did not err in not dismissing the involuntary commitment proceeding and hearing the matter without having a petition for an order to take appellant into custody in the court file as required by N.C.G.S. § 122C-261, since appellant's involuntary commitment was performed pursuant to N.C.G.S. § 122C-262 which provides for a special emergency procedure for individuals needing immediate hospitalization, and the evidence indicated that, immediately prior to being hospitalized, appellant abruptly left the doctor's office saying he was going to kill himself.

Am Jur 2d, Hospitals and Asylums § 12.

2. **Hospitals and Medical Facilities or Institutions § 58 (NCI4th)— involuntary commitment—failure of doctor to check appropriate box**

The trial court did not err in failing to dismiss the involuntary commitment against appellant because the report of examination and recommendation to determine the necessity for involuntary commitment signed by one of the examining physicians failed to include an "x" in the box beside "dangerous to self," since that physician wrote a description of appellant on the form which clearly indicated that he was dangerous to himself.

Am Jur 2d, Hospitals and Asylums § 12.

3. Hospitals and Medical Facilities or Institutions § 59 (NCI4th)— involuntary commitment—sufficiency of findings and conclusions

The trial court's order contained sufficient findings of fact to support a conclusion of law that appellant was mentally ill or mentally retarded with an accompanying behavior disorder and dangerous to himself or others, and failure of the court to check the box "mentally ill" or "mentally retarded" supporting his conclusions of law did not constitute reversible error.

Am Jur 2d, Hospitals and Asylums § 12.

Appeal by respondent from order entered 14 June 1993 by Judge Jonathan L. Jones in Catawba County District Court. Heard in the Court of Appeals 30 August 1994.

Attorney General Michael F. Easley, by Associate Attorney General Rebecca R. Phifer, for petitioner-appellee.

E. X. de Torres for respondent-appellant.

JOHNSON, Judge.

A hearing on the involuntary commitment of appellant David Larry Woodie was held on 14 June 1993 at Catawba Memorial Hospital. Evidence presented at the hearing for the State showed the following: Appellant's wife, Angela Woodie, testified that on 1 June 1993, appellant took an overdose of medicine around 10:30 p.m.; that she got up and noticed appellant's medicine bottles were empty and she called 911 for help; that the 911 officers arrived and convinced appellant to go with them to the hospital; that they went to Lincoln County Hospital where appellant was treated from 1 June 1993 until 7 June 1993; and that appellant was in the intensive care unit for three days. She testified further that before appellant was released from the hospital on 7 June 1993, Dr. Robert Reed scheduled an appointment for appellant with Dr. Tong Su Kim; that she, appellant's mother and appellant went to see Dr. Kim; that appellant left Dr. Kim's office after being told he needed to be hospitalized; that appellant's mother said when appellant left the office, "[H]e said they were going to lock him up and he was going to kill hisself"; that appellant had also tried to harm himself on 7 July 1992; and that "off and on" he had made statements about harming himself and that "sometimes when you'd think everything was okay . . . he would just, you know, make the statement he wanted to die."

On cross-examination, Mrs. Woodie testified that appellant had not expressed any thoughts of killing himself since his Lincoln County hospitalization; that in July 1992, when appellant had tried to harm himself, he had taken an overdose of medicine and was hospitalized in Lincoln County Hospital and Frye Medical Center; that while at Frye Medical Center, appellant just "walked out on the streets" one day, "barefooted" and without money and that the next day they admitted appellant to Catawba Memorial Hospital; and that appellant had been seeing Dr. Kim since 7 July 1992 and had been treated for his psychiatric condition by another doctor since 4 January 1993. She also testified that appellant had a back condition and previously had an operation for two herniated discs and is on pain medication; that appellant has carpel tunnel syndrome in both hands; that appellant had been working with her uncle but was told or believed that her uncle was going to terminate his employment; that on 1 June 1993, appellant was not picked up by her uncle for work; and that appellant talked to her uncle later in the afternoon and was upset by the conversation. She testified also that appellant first had back problems on 23 September 1991; that after his back surgery, appellant told his treating physician that "something was different about his mind" and that "nothing meant anything anymore"; and that appellant kept getting worse mentally and slept a lot.

Next to testify for the State was Dr. Kim. Dr. Kim testified that he saw appellant in his office on 7 June 1993 and while talking to Mrs. Woodie, appellant left his office; that Dr. Kim talked to a magistrate and contacted the police; that about 1:30 p.m., appellant was brought into the emergency room at Catawba Memorial Hospital and that Dr. Kim examined appellant the next day; that Dr. Kim had treated appellant the previous summer for severe depression which included shock treatment; that Dr. Kim had seen appellant in April 1993 and appellant was in a good mood, smiling and happy, and appellant felt like he was doing quite well. Dr. Kim further testified that appellant was rather argumentative, at times angry, at times calm; that he believed appellant "represents a pretty high risk of suicide if we permit him to do so"; that appellant has a tendency to be obsessive/compulsive; and that Dr. Kim recommended at least a thirty day inpatient commitment for appellant. On cross-examination, Dr. Kim testified that he signed the form necessary for the involuntary commitment on 7 June 1993, and that in order to commit someone, you have to make a finding that he is mentally ill and then whether he is dangerous to himself or dangerous to others; that on the form he

filled out for appellant, he did not mark the box beside danger to self or danger to others, and that it was his mistake to not originally mark that and that finding as such was necessary to commit appellant involuntarily; that on previous occasions, appellant had discussed with him his frustration or his anger at his inability to work; that the trigger mechanism which caused the overdose incident on 1 June 1993 was the problem with the loss of his employment; and that Dr. Kim had seen appellant since 8 June 1993 and that they had

> engaged in a hot argument about his saying society doesn't allow its members to commit suicide, insisting he has a right to do away with himself. And also he was unable to see that, you know, it's not his own private affair. That should he succeed, his wife, his mother would suffer. . . . And he said in his own words that they'll suffer for a while, but they'll get over it.

At the conclusion of petitioner's evidence, petitioner offered into evidence certified copies of appellant's medical records.

Respondent testified on his own behalf. Respondent testified that in late May 1993, he was working for his wife's uncle; that after an incident at work over a concrete mixture, he thought he was going to be no longer working; that on 1 June 1993, he had a phone conversation with his wife's uncle and was told he would no longer be needed to work; that after he heard that, he "felt like the world had just opened up and dropped all their problems on me. I mean, I just felt I didn't have a chance"; that later that same evening, he took an overdose of pills and that "this time I planned to succeed"; that previously he had an operation on his neck vertebrae for a herniated disc and was disabled after the operation; that he had worked at the same job for fourteen years at J. P. Stevens as a field technician prior to his injury which included training other workers, and that because of economic reasons, they asked to demote him to a warehouseman, pushing a hand truck; that on 7 June 1993, after a discussion with Dr. Reed in Lincoln County, he agreed to talk to Dr. Kim; that he did not expect Dr. Kim to recommend he be involuntarily committed; that he has talked with Dr. Kim while at Catawba Memorial Hospital on several occasions about killing himself; that since his admission here, things have changed for appellant and that he knows he has a purpose in life and that he has to go back out there and make an effort to try; that he would be willing to see Dr. Kim or some other doctor on an outpatient basis; that he knows he "done a mistake when I done the overdose and I should have went before somebody and tried to talk it

out"; that since his back surgery, he has felt like his mind was different and that it was like "when I come to they had took my mind out and transplanted somebody else's mind."

The trial court found that appellant met the criteria for continuing court ordered treatment as an inpatient up to thirty days followed by outpatient treatment up to sixty days. Appellant appealed to this Court.

Initially, we note that this appeal is one which is certainly moot because appellant was involuntarily committed for a thirty day period over a year ago. Nonetheless, we choose to address appellant's arguments.

[1] Appellant first argues on appeal that the trial court erred in not dismissing the involuntary commitment, and hearing the matter, without having a petition for an order to take appellant into custody in the court file as required by North Carolina General Statutes § 122C-261 (1993). The State contends that appellant's involuntary commitment was performed pursuant to North Carolina General Statutes § 122C-262 (1993), which provides for a "[s]pecial emergency procedure for individuals needing immediate hospitalization." We agree with the State in that defendant required "immediate hospitalization to prevent harm to himself," pursuant to North Carolina General Statutes § 122C-262, evidenced by the testimony that when appellant abruptly left the doctor's office, he said he was going to kill himself. We overrule this assignment of error.

[2] Defendant next argues that the trial court erred in not dismissing the involuntary commitment against appellant as the report of examination and recommendation to determine the necessity for involuntary commitment signed by Dr. Kim, the examining physician, failed to state that appellant was a danger to himself or to others.

It is true that under North Carolina General Statutes § 122C-262 two physicians are required to examine a respondent received at a 24-hour facility under the provisions of that section; if a physician finds that a respondent is mentally ill, the physician must also find that the respondent is dangerous to himself or dangerous to others. North Carolina General Statutes § 122C-266 (1993). Appellant argues that because Dr. Kim, as a second physician, failed to check one of the boxes on the examination report that appellant was "dangerous to self" or "dangerous to others," Dr. Kim failed to state in the examina-

tion report that appellant was a danger to himself or a danger to others. We disagree.

The space on the bottom of the first page of the examination report asks for a clear description of findings. In this space, Dr. Kim wrote "[m]arkedly explosive personality. Very serious suicidal idea [sic] persist. He took O.D. prior to his admission here. He bolted out of the office when he was told of his need for hospitalization. He has been quite depressed. At this time he has no insight." Dr. Kim's findings describe a person who is dangerous to himself. Further, Dr. Kim explained at the hearing that he made a mistake by not checking the box in front of "dangerous to self" on the examination report. Dr. Kim's findings on the examination report and testimony at the involuntary commitment hearing are sufficient proof that appellant fit the category of one who was "dangerous to self."

[3] Appellant next argues that the trial court erred in not making a conclusion of law that appellant was either mentally ill or mentally retarded with an accompanying behavior disorder, as required by North Carolina General Statutes § 122C-268 (1993) so as to support the involuntary commitment of appellant. Appellant points out that the trial judge did not check the box "mentally ill" or "mentally retarded" supporting his conclusions of law. Further, appellant argues that the trial court's order did not contain sufficient findings of fact to support a conclusion of law that appellant was mentally ill or mentally retarded with an accompanying behavior disorder and dangerous to himself and others.

We have reviewed the testimony of Mrs. Woodie and Dr. Kim. Using the appropriate standard of review, we find there was competent evidence to support the factual findings made by the trial judge. *See In re Jackson*, 60 N.C. App. 581, 299 S.E.2d 677 (1983). We also note that the trial judge concluded that appellant was dangerous to himself and to others and found that the criteria was met for continuing court ordered treatment as an inpatient. While the better practice would have been for Dr. Kim to check the appropriate box on the examination report, his failure to do so, under the circumstances, does not constitute reversible error. For this Court to hold otherwise would elevate form over substance. We reject appellant's arguments as to these assignments of error.

Appellant last argues that the trial court's order of 14 June 1993 involuntarily committing appellant to a treating facility was in error and not supported by the evidence presented. We find the testimony

and evidence presented herein clearly supported the involuntary commitment of appellant. *In re Medlin*, 59 N.C. App. 33, 295 S.E.2d 604 (1982).

No error.

Judges GREENE and LEWIS concur.

CHARLES E. McLEAN, PETITIONER v. MECKLENBURG COUNTY, NORTH CAROLINA, RESPONDENT

JACK M. KERLEY, PETITIONER v. MECKLENBURG COUNTY, NORTH CAROLINA, RESPONDENT.

No. 9326SC1067

(Filed 20 September 1994)

Sheriffs, Police, and Other Law Enforcement Officers § 2 (NCI4th)—disciplinary hearing—testimony not under oath—failure to follow required procedures—new hearing

Where the Mecklenburg County Civil Service Board failed to follow the Police Civil Service Rules and Regulations which required the taking of testimony under oath at a disciplinary hearing for two police officers, the case is remanded for a new hearing in accordance with the Police Civil Service Rules requiring that the witnesses against the officers be present, testify under oath, and be subject to cross-examination by counsel for the accused officers.

Am Jur 2d, Sheriffs, Police, and Constables §§ 26 et seq.

Appeal by plaintiffs from orders entered 2 August 1993 by Judge Charles C. Lamm, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 May 1994.

Lesesne & Connette, by Louis L. Lesesne, Jr., for Charles E. McLean; and Goodman Carr Nixon & Laughrun, by George V. Laughrun, II, for Jack M. Kerley, plaintiff appellants.

Dozier, Miller, Pollard & Murphy by W. Joseph Dozier, Jr., for defendant appellee.

COZORT, Judge.

Two Mecklenburg County police officers were dismissed from their employment for failing to investigate a criminal situation in which the suspect was a fellow police officer. The dismissal of the officers was upheld by the Superior Court of Mecklenburg County. On appeal, we find the Mecklenburg County Civil Service Board failed to follow the Police Civil Service Rules and Regulations which required the taking of testimony under oath at the disciplinary hearing for the officers. We therefore reverse the trial court's ruling and remand the case for a new hearing in accordance with the Police Civil Service Rules.

This case involves an incident which occurred on 17 May 1992. On that day, Mecklenburg County Police Officer Karen Sherrill was dispatched to respond to a call, which occurred after 9:00 p.m., concerning a suspicious vehicle in a landfill which adjoined a lumberyard in Mecklenburg County. Officer Charles E. McLean, Officer Jack M. Kerley, and Officer K. J. Worthy also responded to the call, driving their vehicles towards the landfill to back up Officer Sherrill. Officer Sherrill and Officer Worthy stopped a flat-bed truck several miles from the landfill. The front of the truck had been damaged, and twelve large pieces of lumber were in the back of the truck. The truck was being driven by Kenneth Helms, an off-duty Mecklenburg County police sergeant. When Officers McLean and Kerley arrived, they recognized Helms as a police officer. According to Officers McLean and Kerley, they were satisfied with Officer Helms' explanation for possessing the lumber. Officers McLean and Kerley left the scene without conducting any further investigation of possible criminal activity on Sergeant Helms' part.

Later that evening, Officer Helms persuaded Officer Sherrill to conceal Helms' involvement in the incident. Officer Sherrill did not file a report of the incident. It was learned by the Mecklenburg County Police that Sergeant Helms had stolen the lumber from the lumberyard which adjoined the landfill. Both Helms and Sherrill were charged with criminal offenses and resigned from the Mecklenburg County Police Department.

On 5 June 1992 Mecklenburg County Police Department Chief V. H. Orr, Jr., notified Officer McLean and Officer Kerley that each was being cited to appear at a hearing before the Mecklenburg County Civil Service Board to consider a recommendation that each be terminated. Each was charged with violating four departmental rules and regulations:

1. 1.02 STANDARD OF CONDUCT. Members of the Police Department shall conduct themselves in a manner which is exemplary of professional conduct and which will encourage trust and respect.

2. 1.08 UNLAWFUL COMPROMISE. Members of the Police Department shall not participate directly or indirectly in any unethical or unlawful compromise, arrangement, or settlement.

3. 1.23.2 DETRIMENTAL ACTIONS. Members of the Police Department shall not initiate or engage in any conduct, either within the department or in public, which is detrimental to good order and discipline.

4. 2.05.2 INITIATE ACTION. Members of the Police Department (police personnel only) shall initiate police action in any criminal situation that they may come upon or that comes to their attention.

The matter came before the Civil Service Board on 23 June 1992. At that hearing, the Mecklenburg County Police Department received a report from Captain D. R. McCrary, the Director of the Police Department's Internal Affairs Section. Captain McCrary was the officer in charge of the investigation of Officers McLean and Kerley. Captain McCrary was the only witness to testify on behalf of the department. He presented the results of his investigation, including statements he had received and interviews he had conducted during the course of the investigation. None of the statements was under oath and none of the persons making the statements was available for cross-examination by counsel for Officers McLean and Kerley at the hearing. Counsel for Officer McLean and counsel for Officer Kerley objected to receiving the statement of any witness who was not present and available to be cross-examined. The objections were overruled and the Board proceeded with the hearing. In orders filed on or about 27 June 1992, the Mecklenburg County Police Civil Service Board determined that both officers should be terminated.

Each officer filed a complaint in Mecklenburg County Superior Court requesting judicial review of the final order of the Mecklenburg County Police Civil Service Board. On 22 March 1993, the Superior Court of Mecklenburg County entered orders finding that the Civil Service Board failed to make adequate findings of fact to support its orders of dismissal. The trial court remanded both cases to the Civil Service Board to make findings of fact and conclusions of law supported by the evidence in the record. On 21 May 1993, the Civil Serv-

ice Board entered orders reaffirming the termination of Officer McLean and Officer Kerley. On 26 May 1993, the Mecklenburg County Police Department filed motions for summary judgment. In orders filed 2 August 1993, the Superior Court of Mecklenburg County granted the county's motions for summary judgment, affirming the decision of the Civil Service Board to terminate Officer McLean and Officer Kerley. Both officers filed timely notice of appeal to this Court.

While plaintiffs McLean and Kerley have argued five assignments of error on appeal, we find their second argument, that the Board's action violated its own procedures, is dispositive. For reasons which follow, we find the Board's violation of its own procedures entitles the plaintiffs to a new hearing.

Pursuant to authority granted by the North Carolina General Assembly, the Mecklenburg Board of County Commissioners adopted Civil Service Rules and Regulations governing the Mecklenburg County Police. Included among those rules and regulations are rules governing the conduct of the Civil Service Board Hearing considering disciplinary action against an officer of the Mecklenburg County Police Department. Rule V.A.1. provides that "[n]o officer shall be dismissed, removed, or discharged until said officer has been given the opportunity to be heard by the Civil Service Board." Rule V.C.1. provides that "[t]he hearing shall be by taking testimony, under oath, for and against the accused and reducing the substance thereof to writing." Rule V.C.2. provides "[t]he testimony shall be taken by and before the Civil Service Board, who shall hear and determine the validity of the charges according to the Civil Service Rules and Regulations." Rule V.C.3. provides "[t]he accused will be present at the hearing and shall have the right to be heard in his own behalf, with legal counsel if he so desires." Reading these rules together, we find the rules require that the witnesses against an officer must be present at the hearing, that the witnesses must testify under oath, and that they must be subject to cross-examination by counsel for the accused officer.

The Civil Service Board Hearing concerning the charges against Officer McLean and Officer Kerley did not comply with these rules. The only evidence against these officers consisted of Captain McCrary's testimony concerning the evidence he compiled during his investigation. This evidence was comprised largely of unsworn statements from witnesses. None of the witnesses who gave statements to

Captain McCrary testified in person at the hearing. This procedure violated the requirement of the Rules that the Board hear witnesses under oath.

In *Burwell v. Griffin*, 67 N.C. App. 198, 312 S.E.2d 917, *disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984), we recognized the principle that a police chief and a city must follow its own rules when considering whether to take disciplinary action against a police officer. In that case, we found the City of Oxford substantially complied with its own procedures. *Id.* at 209, 312 S.E.2d at 924.

More recently, in *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 417 S.E.2d 277 (1992), we found the fired police officer had properly stated a due process claim when the Town failed to follow its own grievance policy or disciplinary policy. *Id.* at 418-19, 417 S.E.2d at 282. We find *Burwell* and *Howell* controlling here. The orders of the superior court affirming the decisions of the Civil Service Board must be reversed. The case is remanded to the Superior Court of Mecklenburg County for further remand to the Civil Service Board of Mecklenburg County for a new hearing in accordance with the Civil Service Rules and Regulations of Mecklenburg County.

Reversed and remanded.

Judges EAGLES and LEWIS concur.

NATHANIA T. POOLE, PLAINTIFF v. GENEANE RENEE MILLER, DEFENDANT

No. 9314SC947

(Filed 20 September 1994)

Judgments § 115 (NCI4th)— offer of judgment higher than jury verdict—award of costs to plaintiff error

Where defendant tendered an offer of judgment of $6,000.00, and the jury awarded plaintiff $5,721.73, the "judgment finally obtained" was the jury verdict, not the jury verdict plus prejudgment interest; therefore, the trial court erred in awarding plaintiff court costs, including attorney's fees, expert witness fees, and interest, all incurred by plaintiff subsequent to defendant's offer

of judgment, and the court erred in denying defendant's motion to tax costs incurred after the making of the offer to the plaintiff.

Am Jur 2d, Costs §§ 23, 24.

Appeal by defendant from order entered 12 July 1993 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 11 May 1994.

Michaels Jones Martin & Parris Law Offices, P.A., by E. Spencer Parris, for plaintiff appellee.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by John J. Padilla, for defendant appellant.

COZORT, Judge.

Plaintiff sued defendant alleging defendant's negligence damaged plaintiff in an automobile collision. Defendant filed an answer denying negligence. After initial discovery was conducted, defendant tendered an Offer of Judgment of $6,000.00 to plaintiff, pursuant to Rule 68 of the North Carolina Rules of Civil Procedure. Plaintiff refused the offer of judgment, and the case was tried in Durham County before Judge Henry W. Hight, Jr., on 24 May 1993. The jury rendered a verdict against defendant for $5,721.73. After trial and prior to judgment being entered, plaintiff filed a motion for attorney's fees and submitted a bill of costs to be paid by defendant, which included in part, attorney's fees, expert witness fees incurred after the filing of the offer, and interest from the date of the filing of the complaint. Defendant filed a motion to tax costs to plaintiff. Judge Hight granted plaintiff's motion for attorney's fees in the amount of $2,000.00 to be taxed against defendant, which sum included a portion of attorney's fees incurred by plaintiff subsequent to defendant's Offer of Judgment. The court denied defendant's motion to tax costs to plaintiff on the grounds that the final judgment obtained by plaintiff was greater than the amount offered by defendant under Rule 68.

Judge Hight subsequently signed a Judgment on 15 June 1993 assessing $9,058.21 against defendant. That sum included the jury's verdict of $5,721.73 and the taxing of $3,336.48 in costs and interest against defendant. Defendant appeals from the order granting plaintiff's motion for attorney's fees and denying defendant's motion to tax costs to plaintiff, and from entry of the final judgment and bill of costs entered on 12 July 1993.

Defendant contends that the trial court erred in (1) entering an order and judgment awarding plaintiff court costs, including attorney's fees, expert witness fees and interest incurred by plaintiff subsequent to defendant's offer of judgment; and (2) denying defendant's motion to tax costs to plaintiff. We agree and reverse.

Rule 68 of the North Carolina Rules of Civil Procedure provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . If the *judgment finally obtained* by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

N.C. Gen. Stat. § 1A-1, Rule 68(a) (1990) (emphasis added). Defendant argues that "judgment finally obtained" means the jury verdict, without costs, attorney's fees, expert fees, and interest incurred after defendant's offer of judgment. Since the jury verdict of $5,721.75 was less than defendant's offer of judgment for $6,000.00, defendant contends that the trial court should not have awarded plaintiff any costs incurred after defendant's offer and that the trial court was required to grant defendant's motion for costs incurred after the making of the offer. Because we find that "final judgment" under Rule 68 means the jury verdict, we reverse that portion of the judgment which awards plaintiff costs incurred after defendant's offer and the trial court's denial of defendant's motion to tax costs to plaintiff.

This case is controlled by *Purdy v. Brown*, 307 N.C. 93, 296 S.E.2d 459 (1982). In *Brown*, defendant filed an offer of judgment pursuant to Rule 68 to allow judgment to be taken against him for the sum of $5,001.00, including costs accrued, except attorney's fees. *Id.* at 97, 296 S.E.2d at 462. Plaintiff received only $3,500.00 from the jury, but the trial court nonetheless ordered defendant to pay $1,200.00 in attorney's fees and $325.00 in expert witness fees. *Id.* at 98, 296 S.E.2d at 463. The Supreme Court concluded that plaintiff was required to bear the costs incurred after the offer of judgment was made because the plaintiff's recovery of $3,500.00 was not more favorable than the offer. The Court thus held that the expert witness fees and attorney's fees which were incurred after the offer of judgment was made must be borne by the plaintiff. Since "Rule 68 sanctions only provide protection against the costs incurred *after* the offer has been made[,]" the Court further held that it remained within the trial judge's discre-

tion under Rule 6-21.1 to award an attorney's fee for that portion of time not excluded under Rule 68. *Id.*

Thus, pursuant to Rule 68 the "judgment finally obtained" in the instant case was the jury verdict of $5,721.73. Since this was less than defendant's offer of judgment, under Rule 68, attorney's fees, expert fees, and interest incurred after the offer on 13 April 1992 should have been borne by plaintiff. We thus hold that the trial court erred in awarding plaintiff court costs, including attorney's fees, expert witness fees and interest, all incurred by plaintiff subsequent to defendant's offer of judgment. Since Rule 68 requires the trial court to tax the costs incurred by defendant after the making of the offer to the plaintiff where the final judgment is less than the offer of judgment, we further hold that the trial court erred in denying defendant's motion to tax costs incurred after the making of the offer to the plaintiff. In *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 113 (1979), the court held: "If the offer of judgment exceeds the 'judgment finally obtained by the offeree' then the offeree, even if the prevailing party, must pay the offeror's costs incurred after the offer and is precluded from recovering its own costs for that time." We find that reasoning persuasive and adopt it.

Plaintiff argues that prejudgment interest is part of the final judgment and thus the trial court did not err in awarding interest on the jury verdict incurred after defendant's offer of judgment. Plaintiff cites N.C. Gen. Stat. § 24-5(b) (1991), and *Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993), for support. Plaintiff's argument fails. Under *Purdy v. Brown*, final judgment is the jury verdict; it does not include costs such as expert witness fees, attorney's fees, and interest incurred after the offer of judgment. *Brown*, 307 N.C. at 98, 296 S.E.2d at 463. Moreover, N.C. Gen. Stat. § 24-5(b), which states "[i]n an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied" indicates that interest is separate from, and not part of, the judgment. In *Baxley*, the Court held that prejudgment interest is an element of damages and thus plaintiff-insured was entitled to recover prejudgment interest on a judgment in a negligence case under a UIM contract that provided coverage to plaintiff insured for all the "damages" awarded to her. *Baxley*, 334 N.C. at 7-8, 430 S.E.2d at 899-900. *Baxley* was not a Rule 68 case, and its holding does not effect the interpretation of "final judgment."

The portion of the judgment awarding plaintiff costs incurred after the making of the offer and the trial court's denial of defendant's motion to tax costs incurred after the offer to plaintiff is reversed. The case is remanded for entry of judgment consistent with this opinion.

Reversed and remanded.

Judges ORR and MARTIN concur.

DAISY K. NICHOLSON, PLAINTIFF v. COUNTY OF ONSLOW AND CITY OF JACKSONVILLE, DEFENDANTS

No. 934SC1092

(Filed 20 September 1994)

Negligence § 150 (NCI4th)— slip and fall—twig on sidewalk—no defective conditions—defendants not on notice

The trial court properly granted summary judgment for defendants (city and county) in plaintiff's action to recover for personal injuries sustained when she fell on a sidewalk at a county courthouse where plaintiff alleged that a twig was on the sidewalk and she thought it caused her fall, but plaintiff offered no evidence that the twig was a dangerous condition upon the walkway; furthermore, plaintiff failed to allege that either of defendants was on notice of the condition.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 675 et seq.; Negligence §§ 458 et seq., 502, 503; Premises Liability § 29.

Necessity and sufficiency of plaintiff's pleading of having given requisite notice or presented claim to municipality or other public body. 83 ALR2d 1178

Appeal by plaintiff from orders entered 30 August 1993 by Judge D. Jack Hooks, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 24 August 1994.

Lanier & Fountain, by Keith E. Fountain and Farra D. Shaw, for plaintiff appellant.

Strader and Ballard, by Ann B. Strader, for Onslow County, defendant appellee.

Crossley McIntosh Prior & Collier, by Clay A. Collier and Sharon J. Stovall; and Warlick, Milsted, Dotson & Carter, by Marshall F. Dotson, Jr., for City of Jacksonville, defendant appellee.

COZORT, Judge.

Plaintiff commenced this action against Onslow County on 30 April 1992 seeking recovery of damages for personal injuries. The City of Jacksonville was joined as a defendant on 22 January 1993. Both defendants filed motions for summary judgment which were granted on 30 August 1993. Plaintiff appeals, contending that the trial court erred in granting summary judgment. We affirm on the basis that the plaintiff was not able to show that she would be able to prove two essential elements of her case: (1) that there was a defect which caused her fall; and (2) that either defendant was put on notice of a dangerous condition upon the walkway.

On 11 February 1991, plaintiff went to the Onslow County Courthouse Complex, accompanied by Eva Bennett, in order to pay her taxes and check property records at the Register of Deeds. As they departed the courthouse, neither the plaintiff nor Ms. Bennett noticed any debris on the walkway. The plaintiff slipped and fell, breaking her wrist. Immediately following the fall, Ms. Bennett noticed a twig in the walkway that she assumed caused plaintiff's fall. Ms. Bennett described the twig as being "larger than a cigarette and smaller than a cigar." The plaintiff did not observe the twig until after the fall. She stated later that the twig was between six and eight inches long. Neither the plaintiff nor Ms. Bennett could state conclusively that the twig caused the plaintiff to fall. Plaintiff brought this suit seeking damages from both the city and the county.

Rule 56 of the North Carolina Rules of Civil Procedure provides that summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The rule further states that,

when a motion for summary judgment is made, an adverse party may not rest upon the mere allegations of its pleadings. A response, by affidavits or as otherwise provided by Rule 56, must set forth specific facts showing that there is a genuine issue for trial. N.C. Gen. Stat. § 1A-1, Rule 56(e) (1990).

To withstand a motion for summary judgment in this slip and fall case, the plaintiff must prove: (1) she fell and sustained injuries; (2) the proximate cause of the fall was a defect in or condition upon the sidewalk; (3) the condition was of such nature that a reasonable person, knowing of its existence, should have foreseen that if it continued, some person using the sidewalk in a proper manner would be likely to be injured by reason of such condition; and (4) the defendant had actual or constructive notice of the existence of the condition for a sufficient time prior to the plaintiff's fall to remedy the defect or guard against injury therefrom. *Cook v. Burke Co.*, 272 N.C. 94, 97, 157 S.E.2d 611, 613 (1967). In the present case, plaintiff failed to offer evidence that her injury was caused by a defect or that the city and county were on notice of any defective condition upon the walkway.

While we have recognized that summary judgment is a drastic remedy, a defendant can prevail on a motion for summary judgment by showing that the plaintiff will not be able to prove an essential element of her claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992). In *Roumillat*, the plaintiff slipped on a greasy substance and fell in a restaurant parking lot. The defendant moved for summary judgment when the plaintiff offered no evidence that the defendant was on notice of the condition. The plaintiff offered no affidavits nor any other material in response to the summary judgment motion. In upholding the order of summary judgment, the Supreme Court held that once the defendant shows the plaintiff's inability to prove an element, the burden shifts to the plaintiff for a contrary showing. *Roumillat*, 331 N.C. at 64, 414 S.E.2d at 342. Pleadings alone do not meet the burden for the plaintiff. *Id.* If the plaintiff does not meet this burden, summary judgment is proper.

In the present case, the plaintiff alleged only that the twig was on the sidewalk and that she thought it caused her fall. The plaintiff offered no evidence that the twig was a dangerous condition upon the walkway. One cigar-sized stick is not a defect or a dangerous condition. To require a municipality or county to police all of its sidewalks for cigar-sized twigs is too great a burden to impose. When viewed in

the light most favorable to the plaintiff, her evidence regarding the defect element cannot overcome the summary judgment motion.

Even if a twig could be considered a defect or dangerous condition, the plaintiff has failed to allege that either of the defendants was on notice of the condition. Plaintiff's counsel admitted to the trial court that he was unable to find any evidence to prove this essential element. Plaintiff's mere allegation in her pleadings that the defendants were on notice of any defect is not enough to overcome the summary judgment motion. Allegations contained in pleadings must be supported by affidavits or other evidence in order to amount to the contrary showing required by *Roumillat*. Because the plaintiff could not forecast any proof of notice, summary judgment was proper. The trial court is

Affirmed.

Judges EAGLES and LEWIS concur.

SENTRY BUILDING SYSTEMS, INC., PLAINTIFF v. ONSLOW COUNTY BOARD OF EDUCATION, FRED HARGETT, IN HIS OFFICIAL CAPACITY, PAUL A. HARDISON, IN HIS OFFICIAL CAPACITY, STEVE BARTLEY, IN HIS OFFICIAL CAPACITY, HOWARD AMAN, IN HIS OFFICIAL CAPACITY, FLETCHER B. BAKER, IN HIS OFFICIAL CAPACITY, LOIS C. MEADOWS, IN HER OFFICIAL CAPACITY, AND THOMAS J. PITMAN, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. 934SC1211

(Filed 20 September 1994)

Arbitration and Award § 42 (NCI4th)— arbitration award reviewed and modified—no proper application for review—error

The trial court erred by concluding that N.C.G.S. § 1-567.14 did not apply in this case, by reviewing the arbitration award when plaintiff had not made a proper application as required by statute, and by awarding plaintiff interest on the arbitration award.

Am Jur 2d, Arbitration and Award §§ 143, 145.

Appeal by defendant from order entered 12 July 1993 by Judge James R. Strickland in Onslow County Superior Court. Heard in the Court of Appeals 2 September 1994.

E. Alex Erwin, III, for defendant-appellant Onslow County Board of Education.

Wallace, Morris, Barwick, & Rochelle, P.A., by Paul A. Rodgman and Martha B. Beam, for plaintiff-appellee.

WYNN, Judge.

Plaintiff, Sentry Building Systems, Inc., and defendant, Onslow County Board of Education, entered into a contract on 7 November 1988 for the construction of additions to two schools in Onslow County. The contract contained an agreement to arbitrate any disputes arising under the contract. On 29 August 1991 the parties agreed to submit their dispute over compensation for arbitration. An arbitration hearing was held and the arbitrator entered an award for plaintiff in the amount of $63,907.36. Defendant asked the arbitrator whether the award included interest from the date of the contract breach and the arbitrator indicated that the award did not include interest. Plaintiff then made a motion for interest on the arbitration award in Onslow County Superior Court and the court granted plaintiff's motion and awarded interest in the amount of $11,513.83. From that order, defendant appeals.

Defendant argues that the trial court erred by granting plaintiff's motion for interest because the trial court did not have the authority to modify the arbitrator's award and because plaintiff had not made an application to modify or correct the award as required by N.C. Gen. Stat. § 1-567.14. We agree.

Judicial review of an arbitration award is limited to the determination of whether there exists one of the specific grounds for vacating the award under the arbitration statute. *Cyclone Roofing Co., Inc. v. David M. LaFave Co., Inc.*, 312 N.C. 224, 321 S.E.2d 872 (1984); *Carolina Virginia Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 255 S.E.2d 414 (1979). "[O]nly awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts." *Gunter*, 41 N.C. App. at 414, 255 S.E.2d at 419. N.C. Gen. Stat. § 1-567.14 provides the exclusive grounds and procedure for modifying or correcting an arbitration award. *J.M. Owen Bldg. Contractors, Inc. v. College Walk, Ltd.*, 101 N.C. App. 483, 400 S.E.2d 468 (1991). N.C. Gen. Stat. § 1-567.14 provides in pertinent part:

(a) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

N.C. Gen. Stat. § 1-567.14 (1983).

The statute requires that an application for modifying the award must be made within 90 days after the delivery of a copy of the award to the applicant. *J.M. Owen Bldg. Contractors*, 101 N.C. App. at 487, 400 S.E.2d at 470. *See also Crutchley v. Crutchley*, 53 N.C. App. 732, 738, 281 S.E.2d 744, 747-8 (1981), *rev'd on other grounds*, 306 N.C. 518, 293 S.E.2d 793 (1982) (A party who did not attempt to seek a modification of the arbitration award within the required time period waived her challenge that the award was imperfect in a matter of form).

In the instant case, the trial court found that although plaintiff did not make an application for modifying the award as required by N.C. Gen. Stat. § 1-567.14, the parties had engaged in negotiations regarding the amount of interest due. The trial court concluded that the provisions of N.C. Gen. Stat. § 1-567.14 did not apply because the trial court's order would not modify or correct the arbitrator's award but rather just address the interest question which was not included in the award. The trial court then awarded interest to plaintiff in the amount of $11,513.83.

N.C. Gen. Stat. §§ 1-567.13 and 1-567.14 provide the exclusive grounds and procedure for vacating, modifying, or correcting an arbitration award. *Crutchley v. Crutchley*, 306 N.C. 518, 523, 293 S.E.2d 793, 797 n.2 (1982). Therefore, the trial court erred by concluding that N.C. Gen. Stat. § 1-567.14 did not apply to the instant case and by reviewing the arbitration award when the plaintiff had not made a

proper application as provided by the statute. As the Court noted in *Gunter*:

> If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal and the Court has no power to revise the decisions of "judges who are of the parties' own choosing."

Gunter, 41 N.C. App. at 415, 255 S.E.2d at 420 (quoting *T.W. Poe & Sons, Inc. v. University of North Carolina*, 248 N.C. 617, 625, 104 S.E.2d 189, 195 (1958)). Accordingly, the trial court's order is

Reversed.

Judges COZORT and McCRODDEN concur.

STATE OF NORTH CAROLINA v. TONYA BROWN

No. 9319SC968

(Filed 20 September 1994)

Appeal and Error § 147 (NCI4th)— offer of proof not allowed—error—remand for taking of testimony—transcript to be certified to Court of Appeals

The trial court erred by not allowing defendant to make an offer of proof and depriving her from preserving the proposed testimony in the record for the purpose of appellate review; therefore, the case is remanded for the taking of the proposed testimony of the witness and the certification of the transcript of that testimony to the Court of Appeals.

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

Appeal by defendant from a judgment entered 2 April 1993 by Judge Russell G. Walker, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 7 June 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General Daniel F. McLawhorn and Thomas F. Moffitt, for the State.

Davis Law Firm, by Robert M. Davis, for defendant appellant.

COZORT, Judge.

Defendant Tonya Brown appeals from a judgment imposing a sentence of life imprisonment for the second degree murder of her husband. While defendant brings forth numerous assignments of error, we shall consider only whether the trial court erred by refusing to allow her to make an offer of proof regarding the testimony of Gina Russell and thereby depriving the defendant from preserving the proposed testimony in the record for the purpose of appellate review. We find the trial court erred by not allowing the defendant to make an offer of proof and depriving her from preserving the proposed testimony in the record for the purpose of appellate review. We remand for an evidentiary hearing on the testimony of Gina Russell.

The State presented evidence tending to show that on 2 May 1992 defendant shot her husband from a range of less than six inches as he was kneeling beside their car. At trial, defendant testified that she fired her gun because she thought her husband was "going to raise his gun and shoot me." Defendant also described an abusive marriage where her husband regularly threatened to kill her if they separated.

Defendant attempted to call Gina Russell, a former girlfriend of defendant's husband, as a witness. Ms. Russell lived with defendant's husband for three years, from 1983 to 1986. According to defendant's counsel, Gina Russell would testify as to the manner in which the defendant's husband treated her while the two were living together. The State objected, arguing that Ms. Russell's testimony would be irrelevant as improper character evidence, and not probative since six years had passed since defendant's husband and Gina Russell lived together. The trial court sustained the State's objection.

On two separate occasions the trial court ruled that defendant would be allowed to voir dire Gina Russell out of the presence of the jury. However, when defendant attempted to call Gina Russell to the stand, the trial court did not allow defendant to make an offer of proof regarding Ms. Russell's proposed testimony.

On appeal the defendant contends the trial court erred when it refused to allow her to make an offer of proof regarding the testimony of Gina Russell, thus depriving her of preserving the proposed testimony in the record for the purpose of appellate review. Defendant contends the evidence would have been relevant to defendant's knowledge of her husband's violence and to her apprehension or fear of him.

It is fundamental that trial counsel be allowed to make a trial record sufficient for appellate review. *State v. Rudd*, 60 N.C. App. 425, 427, 299 S.E.2d 251, 253 (1983). In *State v. Chapman*, our Supreme Court stated:

> [W]e regard the trial judge's refusal to allow counsel to complete the record as a regrettable judicial mistake. A judge should be loath to deny an attorney his right to have the record show the answer a witness would have made when an objection to the question is sustained. In refusing such a request the judge incurs the risk (1) that the Appellate Division may not concur in his judgment that the answer would have been immaterial or was already sufficiently disclosed by the record, and (2) that he may leave with the bench and bar the impression that he acted arbitrarily.

294 N.C. 407, 415, 241 S.E.2d 667, 672 (1978). Counsel here was prevented from making a sufficient record because the trial court refused to allow the defendant to make an offer of proof regarding the testimony of Ms. Russell.

Without having the substance of Ms. Russell's proposed testimony, we cannot determine whether the defendant was prejudiced by the trial court's refusal to allow Ms. Russell to testify. The record must be complete in order that the defendant have meaningful appellate review.

We are reluctant to order a new trial where we are unable to determine whether the trial court's error was prejudicial. Instead, we believe the appropriate procedure here is to remand the case to the trial court for the sole purpose of an evidentiary hearing to record the proposed testimony of Ms. Russell. Precedent for this procedure was established by our Supreme Court in *State v. Thomas*, 327 N.C. 630, 397 S.E.2d 79 (1990). There, the question was whether the defendant had consented to his counsel's jury argument that defendant was guilty of a lesser included crime. Since the record did not resolve the issue, the Supreme Court remanded the case to the trial court for an evidentiary hearing to determine whether defendant consented. The Supreme Court directed the trial court to certify its findings and conclusions and the transcript to the Supreme Court. *Id.* at 631, 397 S.E.2d at 80. After the trial court held the hearing and certified those items to the Supreme Court, the Supreme Court considered that issue and the other issues presented by the appeal. *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991).

We find the procedure employed by the Supreme Court in *Thomas* is appropriate for this case, with the exception of the necessity for the trial court to make findings and conclusions. All that is necessary here is the taking of Ms. Russell's proposed testimony and the certification of the transcript of that testimony to this Court. This Court will then consider all issues presented by the appeal.

Remanded.

Judges EAGLES and LEWIS concur.

REX ALAN BRYANT, HENRY A. BRYANT, AND HILDA BRYANT, PLAINTIFFS v. ANDY W. ADAMS, DOING BUSINESS AS ANDY'S SALE & RENTAL, ANDY'S SALE & RENTAL, INC., ASR MANUFACTURING COMPANY, ADTEC CORPORATION, AND ADTEC SALES, INC.; ASR MANUFACTURING COMPANY, FORMERLY KNOWN AS ANDY'S SALE & RENTAL AND ANDY'S SALE & RENTAL, INC.; ADTEC SALES, INC., FORMERLY KNOWN AS ADTEC CORPORATION, AND A SUCCESSOR CORPORATION TO CERTAIN ASSETS OF ANDY'S SALE & RENTAL, AND ANDY'S SALE & RENTAL, INC., NOW KNOWN AS ASR MANUFACTURING COMPANY; CARL WICKER AND SHIRLEY WICKER, DOING BUSINESS AS WESTERN AUTO ASSOC., DEFENDANTS

No. 9317SC57
No. 9317SC780
No. 9317SC1113

(Filed 4 October 1994)

1. Limitations, Repose, and Laches § 119 (NCI4th)— statute of repose—products liability—minor

The statute of repose for a products liability action, N.C.G.S. § 1-50(6), is tolled by the operation of N.C.G.S. § 1-17, the statutory provision which allows a minor to bring suit within three years of the date upon which the minor reaches majority. The express intent of the legislature is to provide minors and others with disabilities a longer time in which to file suit for injuries caused by a defective product.

Am Jur 2d, Limitation of Actions §§ 182 et seq.

2. Limitations, Repose, and Laches § 119 (NCI4th)— products liability action—statute of repose—tolled

The statute of limitation and repose was tolled for plaintiff Rex Bryant and the trial court erred by granting defendant Andy Adams' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6), where Rex Bryant was fourteen years old on 27 November, 1986,

when he was injured on a trampoline manufactured by defendant; a guardian ad litem was appointed on 27 November 1989; and suit was filed on 11 March 1992, less than two and a half years after the appointment of the guardian ad litem. As a minor, Rex was required to file suit within three years after the earlier of attaining majority or the appointment of a guardian ad litem.

Am Jur 2d, Limitation of Actions §§ 182 et seq.

Appointment of guardian for incompetent or infant as affecting running of statute of limitations against ward. 86 ALR2d 965.

3. Limitations, Repose, and Laches § 10 (NCI4th)— statute of repose—estoppel—pleadings—sufficiently stated

In an action for injuries sustained on a trampoline, the trial court erred by granting defendant Andy Adams' motion to dismiss the claim of the victim's parents under N.C.G.S. § 1A-1, Rule 12(b)(6) based on the statute of limitations where plaintiffs' pleadings sufficiently stated a claim for equitable estoppel in that they alleged that Adams thwarted discovery efforts regarding specific facts and refused to answer questions or provide documentation and that Adams was the only individual who possessed the information plaintiffs sought. Plaintiffs arguably did not file suit against Adams sooner because of Adams' refusal to answer plaintiffs' request for discovery and plaintiffs were obviously prejudiced.

Am Jur 2d, Limitation of Actions §§ 422 et seq.

Tolling of statute of limitations, on account of minority of injured child, as applicable to parent's or guardian's right of action arising out of same injury. 49 ALR4th 216.

4. Trial § 19 (NCI4th)— motion to continue—discovery—discretion of court

The trial court did not abuse its discretion by denying plaintiffs' motion under N.C.G.S. § 1A-1, Rule 56(f) to continue the discovery period where, although there was outstanding discovery, it was unrelated to the grounds on which summary judgment was granted, and the discovery period provided by local rules had expired.

Am Jur 2d, Continuance §§ 8 et seq.

5. Corporations § 208 (NCI4th)— trampoline—manufacturer—successor corporation—mere continuation

The trial court erred when it granted summary judgment for defendant ADtec Sales, Inc. in a products liability action involving a trampoline where ADtec contended that it had not manufactured the trampoline but plaintiffs forecast evidence that ADtec was a mere continuation of the manufacturer in that ADtec received assets from the manufacturer for questionable consideration and has the same shareholder, as well as common directors and officers.

Am Jur 2d, Corporations §§ 2862 et seq.

Products liability: liability of successor corporation for injury or damage caused by product issued by predecessor. 66 ALR3d 824.

Successor products liability: form of business organization of successor or predecessor as affecting successor liability. 32 ALR4th 196.

6. Pleadings § 398 (NCI4th)— products liability—trampoline—statute of limitations—addition of party—no relation back

The trial court did not err in a products liability action involving a trampoline by granting summary judgment for defendant ASR Manufacturing against the victim's parents based on the statute of limitations, but erred by granting the motion against the victim, where the trampoline was sold to Herbert and Annie Bryant, the uncle and aunt of the victim, on 2 July 1984; the injury occurred on 27 November 1986; a guardian ad litem was appointed on 27 November 1989; suit was filed that same day against ADtec; plaintiffs were allowed to amend their complaint to add ASR as an additional defendant on 16 July 1990; and plaintiffs took a voluntary dismissal on 11 March 1992 and refiled one year later. The victim's (Rex Bryant's) claims are not time barred because of the tolling of the statute of limitation and the statute of repose pursuant to N.C.G.S. § 1-17. However, Rex's parents cannot meet the fourth element of the test in *Ring Drug Co. v. Medicorp Enterprises*, 96 N.C. App. 277, for determining when a new party may be added after the limitations period has run in that ASR could not have had notice through ADtec before the statute of limitations expired because, while suit was filed against

ADtec on the last day of the limitations period, ADtec was not served prior to the expiration of the period.

Am Jur 2d, Pleading §§ 337 et seq.

7. Products Liability § 13 (NCI4th); Negligence § 98 (NCI4th)— trampoline—duty of seller to warn

The trial court erred by granting summary judgment dismissing plaintiffs' negligence claims against the sellers of a trampoline, the Wickers, where questions of fact existed in that the Wickers contend that the dangers of which they were aware are open and obvious dangers to users exercising reasonable care resulting in no duty on the part of the Wickers to warn, while plaintiffs submitted an affidavit from an expert witness that the dangers were not apparent, and the Wickers contend that oral warnings were given to the purchaser of the trampoline while the purchaser disputed whether the warnings had been given. Finally, while the sellers contended that failure to warn was not the proximate cause of the injuries, the victim stated that he would have followed instructions if he had been aware of the dangers.

Am Jur 2d, Negligence § 21; Products Liability §§ 294, 313 et seq.

Manufacturer's or seller's duty to give warning regarding product as affecting his liability for product-caused injury. 76 ALR2d 9.

Products liability: trampolines and similar devices. 76 ALR4th 171.

8. Sales § 144 (NCI4th)— trampoline—breach of warranty claim—summary judgment—no warranty

The trial court did not err in an action arising from an injury suffered on a trampoline by granting summary judgment for the sellers on plaintiffs' breach of warranty claims where the only express warranties which plaintiffs claim were made were printed on sales literature which applied only to round trampolines. The oval trampoline, upon which plaintiff was injured, contained no such warranties.

Am Jur 2d, Sales §§ 787-789.

9. Sales § 145 (NCI4th)— trampoline—breach of implied warranty of merchantability—summary judgment

The trial court erred in an action arising from an injury suffered on a trampoline by granting summary judgment for the sellers on plaintiffs' claim for breach of the implied warranty of merchantability where plaintiffs alleged that the warranty was breached because the trampoline was sold with no instructions for proper use, no warnings of potential hazards, virtually no safety instructions, and was not fit for foreseeable users. North Carolina law allows an action for breach of the implied warranty of merchantability for failure to warn. While plaintiffs argue that the warnings were not sufficient because they had faded from exposure to weather, they were there at the time of sale. However, the victim's deposition testimony that he would have heeded any warnings and safety recommendations had they been adequately provided raises a question of fact as to whether the injuries were proximately caused by the failure to warn.

Am Jur 2d, Sales §§ 787-789.

10. Sales § 138 (NCI4th)— trampoline—breach of implied warranty of merchantability—privity—guest

The trial court erred in an action arising from an injury suffered on a trampoline by granting summary judgment for the sellers on the implied warranty of merchantability where the trampoline was owned by the victim's uncle; it is undisputed that the victim was not part of his uncle's household; and an issue of fact exists as to whether the victim was a guest of his uncle such that he would be in privity to sue the sellers for breach of implied warranty of merchantability.

Am jur 2d, Sales § 708.

Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury. 75 ALR2d 39.

11. Sales § 106 (NCI4th)— trampoline—breach of implied warranty of merchantability—notice

The trial court erred in an action arising from an injury suffered on a trampoline by granting summary judgment for the sellers on the implied warranty of merchantability where the sellers assert that plaintiffs failed to give notice as required by N.C.G.S.

§ 25-2-607(3)(a), but there was an issue of fact as to whether the notice was seasonable. What constitutes a reasonable time depends upon the facts of each case and the policies underlying the notice requirement.

Am Jur 2d, Sales §§ 1207 et seq.

Requirement of notice, by buyer of goods, of breach of warranty as applicable to actions for personal injury. 6 ALR3D 1371.

12. Products Liability § 17 (NCI4th)— trampoline—contributory negligence—summary judgment—not appropriate

The issue of contributory negligence was properly for the jury in an action arising from an injury suffered on a trampoline. N.C.G.S. § 99B-4.

Am Jur 2d, Products Liability §§ 924 et seq.

Contributory negligence or assumption of risk as defense to action for personal injury, death, or property damage resulting from alleged breach of implied warranty. 4 ALR3d 501.

Products liability: contributory negligence or assumption of risk as defense in negligence action based on failure to provide safety device for product causing injury. 75 ALR4th 443.

13. Products Liability § 5 (NCI4th)— trampoline—strict liability—summary judgment for seller

Summary judgment was properly granted for the seller on the issue of strict liability arising from an injury suffered on a trampoline. North Carolina expressly rejects strict liability in products liability actions.

Am Jur 2d, Products Liability §§ 5 et seq., 528 et seq.

Appeal by plaintiffs from orders and judgments entered 17 June 1992, 5 January 1993, 30 January 1993, and 3 August 1993 by Judge James M. Long in Surry County Superior Court. Heard in the Court of Appeals 30 November 1993 and 15 April 1994.

Max D. Ballinger for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by Dewey W. Wells, Nathanael K. Pendley, and Mary S. Pollard, for defendant-appellees.

MARTIN, Judge.

Plaintiffs seek to recover damages as compensation for injuries sustained by Rex Bryant allegedly due to negligence and breach of express and implied warranties by defendants. A summary of the factual allegations and procedural history of this case, as gleaned from the record before us, follows: In the late 1970's and early 1980's Andy Adams operated a small equipment rental shop in Georgia. In 1980 he began manufacturing and selling trampolines under the name "Andy's Sales," later incorporated as "Andy's Sale and Rental, Inc." The business operated under the name "Andy's Sales" or "Andy's Sale and Rental."

In 1987, Adams changed the marketing portion of "Andy's Sale and Rental, Inc." to ADtec Corp., but continued to manufacture the trampolines under the name "Andy's Sale and Rental, Inc." In 1989, Adams changed the name of ADtec Corp. to ADtec Sales, Inc., and the name of "Andy's Sale and Rental, Inc." was changed to ASR Manufacturing Co.

In 1984, Adams, doing business as either "Andy's Sales" or "Andy's Sale and Rental, Inc.," manufactured and sold a "Well-Built" trampoline to Carl and Shirley Wicker, d/b/a Western Auto Associates in Mocksville, North Carolina. On 2 July 1984, the Wickers sold the "Well-Built" trampoline to Rex Bryant's uncle, Herbert Bryant. On 27 November 1986, Rex Bryant, who was fourteen years old at the time, was using the trampoline when he sustained injuries which left him a virtual quadriplegic. On 27 November 1989, a guardian ad litem was appointed for Rex for the purpose of bringing suit against the manufacturer and seller of the trampoline. That same day suit was filed by Rex Bryant and his parents, Henry A. and Hilda Bryant against defendants ADtec Sales, Inc., and the Wickers.

On 16 July 1990, plaintiffs were allowed to amend their complaint to add ASR Manufacturing Co. as an additional defendant. ADtec moved for summary judgment on the grounds that it did not manufacture or sell the trampoline. ASR moved for summary judgment on the grounds that plaintiffs' claim was barred by the three year statute of limitations in G.S. § 1-52(5) and the six year statute of repose in G.S. § 1-50(6). Prior to a hearing on these motions, plaintiffs submitted to a voluntary dismissal. On 11 March 1992, within a year of the voluntary dismissal, plaintiffs refiled their claims against ADtec, ASR and the Wickers. The complaint also named, for the first time, Andy W. Adams. All of plaintiffs' claims against defendants were based on

negligent failure to properly or sufficiently warn of the dangers involved in the use of a trampoline, breach of express and implied warranties, and strict liability. All defendants moved for summary judgment.

On 17 June 1992, the trial court allowed Andy Adams' motion to dismiss, denying plaintiffs' motion to extend time for discovery and to postpone a hearing on Adams' motion for summary judgment until discovery could be completed. On 5 January 1993, the trial court denied plaintiffs' motion to extend time for discovery and to postpone a hearing of ADtec's and ASR's motions for summary judgment until discovery could be completed. Motions by ADtec and ASR for summary judgment were granted on 30 January 1993. The trial court granted defendants Carl and Shirley Wicker's motion for summary judgment on 3 August 1993. Plaintiffs appealed from each of the above mentioned rulings of the trial court and the appeals have been consolidated for disposition.

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[1] The first issue which we must decide is whether the statute of repose for a products liability action, G.S. § 1-50(6), is tolled by the operation of G.S. § 1-17, the statutory provision which allows a minor to bring suit within three years of the date upon which the minor reaches majority. The question appears to be an issue of first impression for our courts. We hold that the clear and explicit intent of the legislature, as evidenced by the statutory language of the Products Liability Act itself, is to allow the statute of repose to be tolled if G.S. § 1-17 applies.

The statute of repose for a products liability action as found in G.S. § 1-50(6) provides:

> (6) No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

Statutes of repose operate differently than statutes of limitations. "The term 'statute of repose' is used to distinguish ordinary statutes of limitation from those that begin to run at a time unrelated to the traditional accrual of the cause of action." *Boudreau v. Baughman*, 322 N.C. 331, 339-40, 368 S.E.2d 849, 856 (1988). A statute of repose "serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue,"

Black v. Littlejohn, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985), and functions to give a defendant a vested right not to be sued if the plaintiff fails to file within the prescribed period. *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 320 S.E.2d 273 (1984), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 485 (1985). G.S. § 1-50(6) is intended to be a substantive definition of rights which sets a fixed limit after the time of the product's manufacture beyond which the seller will not be held liable. *See Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982). Whether a statute of repose has expired is strictly a legal issue. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983).

Plaintiffs do not deny that the operative effect of the statute of repose in this case is to foreclose suit against defendants six years after the sale of the product. However, plaintiffs contend that G.S. § 1-17 effects a grace period in which the statute of repose can be tolled. G.S. § 1-17, entitled Disabilities, provides, in pertinent part:

> (a) A person entitled to commence an action who is **at the time the cause of action accrued** either
>
> (1) Within the age of 18 years; . . .
>
> (3) . . . may bring his action within the time herein limited, after the disability is removed, . . . within three years next after the removal of the disability, and at no time thereafter.

(Emphasis added.) G.S. § 1-17 provides for the tolling of most limitations periods during a person's minority. Where a guardian ad litem is appointed for a minor, the limitation period begins to run from the time of the appointment. *Jefferys v. Tolin*, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

While these two statutory provisions are seemingly in conflict, the 1979 Sess. Laws ch. 654, entitled "An Act Relating to Civil Actions for Damages for Personal Injury, Death or Damage to Property Resulting From the Use of Products," (the Act) provides a clear answer. The Act enacted as law both Chapter 99B, governing products liability suits, and G.S. § 1-50(6), the statute of repose applicable to Chapter 99B. Section 6, which is application language governing the effect and scope of the Act, states that **"[t]he provisions of this act shall not be construed to amend or repeal the provisions of G.S. 1-17."** 1979 Sess. Laws ch. 654 Sec. 6. (Emphasis added.)

In construing a statute, we must first ascertain the legislative intent to ensure that the purpose and intent of the legislation are satisfied. In making this determination, we look first to the language of the statute itself. If the language used is clear and unambiguous, this Court must not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language. *Fowler v. Valencourt*, 334 N.C. 345, 435 S.E.2d 530 (1993). "A fundamental rule of statutory construction is that when the legislature has erected within the statute itself a guide to its interpretation, that guide must be considered by the courts in the construction of other provisions of the act which, in themselves, are not clear and explicit." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980). On its face, the Act instructs us, in Section 6, that G.S. § 1-17 may operate to toll the statute of repose provision.

Defendants argue that it would be impossible to conclude that the language concerning G.S. § 1-17 was intended to control over the provisions of G.S. § 1-50(6) because if the legislature had so intended, such intent could have been stated expressly as "the provisions of G.S. § 1-50(6) shall be governed by the tolling provisions of G.S. § 1-17." We reject this argument. The application language of the Act states clearly that Chapter 99B "shall not be construed to amend or repeal" G.S. § 1-17. Defendants' interpretation that tolling of the statute of repose under G.S. § 1-17 cannot occur would result in amending G.S. § 1-17 to provide that a person entitled to commence an action who is, at the time the cause of action accrued, under one of the listed disabilities may bring an action within three years after the removal of the disability **unless the statute of repose operates to bar that action**. In our view, such an interpretation would directly contravene the intent of our legislature.

Defendants further argue that the more specific statute of repose in a products liability action controls over the more general tolling provision for persons under disability. Defendants cite to rules of statutory construction which state "that where one statute deals with certain subject matter in particular terms and another deals with the same subject matter in more general terms, the particular statute will be viewed as controlling in the particular circumstances absent clear legislative intent to the contrary." *State Ex Rel. Utilities Comm. v. Thornburg*, 84 N.C. App. 482, 353 S.E.2d 413, *disc. review denied*, 320 N.C. 517, 358 S.E.2d 533 (1987). (Citation omitted.) We reject defendants' argument because we find legislative intent to the contrary as

expressed in section 6 which explicitly provides that the tolling provision for disabilities will apply under the Products Liability Act.

Defendants also argue that tolling the products liability statute of repose for disabilities negates the entire purpose of the statute of repose. If the legislative intent is to place a greater value upon the right of a person under certain disabilities to have an extended time in which to bring suit than upon the right of a manufacturer to be free from suit after six years, the courts must defer to that intent. As the Supreme Court recognized in *Tetteron v. Long Manufacturing Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985), if the legislature chooses to make economic policy determination into law then that intention should be respected by the courts.

Moreover, G.S. § 1-17 does not completely eviscerate the statute of repose in the case of minors and others under disability. If a product is over six years old at the time of injury, which would be the time that the claim accrues, then the statute of repose operates as a total bar on that claim. However, if a claim accrues before the six year statute of repose has expired, G.S. § 1-17 simply operates to extend the time period within which a minor or other with disability may bring suit under Chapter 99B. Therefore, claims **accruing** after six years will still be barred.

Finally, defendants argue that the statute of repose cannot be tolled under G.S. § 1-17 because once a limitations period has begun to run, then no subsequent disability may toll the running of the limitations period. Defendants rely on the case of *Davis v. E.I. DuPont DeNemours & Co., Inc.*, 400 F.Supp 1347 (W.D.N.C. 1974), for the proposition that "once a period of limitations begins to run nothing stops it, and that . . . the subsequent accession of a minor to a right of action cannot toll its running." *Davis* was not decided under G.S. § 1-50(6), but rather under an earlier statute, G.S. § 1-52(5), which set the limitations period for an action to recover damages caused by a defective product at three years. We reject the analysis employed by the *Davis* court as inapplicable to G.S. § 1-50(6) because the express intent of the legislature is to provide minors and others with disabilities a longer time in which to file suit for injuries caused by a defective product.

Defendant Andy W. Adams

[2] The court's order dated 17 June 1992 granted defendant Andy W. Adams' (hereinafter "Adams") Rule 12(b)(6) motion to dismiss.

Defendant Adams contends that the trial court properly dismissed plaintiffs' claims because the claims were time barred on their face by G.S. § 1-52(16) and G.S. § 1-50(6). "When the complaint discloses on its face that plaintiff's claim is barred by the statute of limitations, such defect may be taken advantage of by a motion to dismiss under Rule 12(b)(6)." *Fleet Real Estate Funding Corp. v. Blackwelder*, 83 N.C. App. 27, 31, 348 S.E.2d 611, 614 (1986), *disc. review denied*, 319 N.C. 104, 353 S.E.2d 109 (1987), *quoting F.D.I.C. v. Loft Apts.* 39 N.C. App. 473, 250 S.E.2d 693, *disc. review denied*, 297 N.C. 176, 254 S.E.2d 39 (1979).

Plaintiffs argue that Rex Bryant's claim is tolled under G.S. § 1-17. As we have determined, the operation of the products liability statute of repose may be tolled under G.S. § 1-17 for a plaintiff's disability. Therefore, the issue is whether Rex Bryant's claims against Adams can be tolled under G.S. § 1-17.

> In North Carolina the rule is that the statute of limitations begins to run against an infant or an insane person who is represented by a guardian at the time the cause of action accrues. If he has no guardian at that time, then the statute begins to run upon the appointment of a guardian or upon the removal of his disability as provided by G.S. § 1-17, whichever shall occur first.

Trust Co. v. Willis, 257 N.C. 59, 62, 125 S.E.2d 359, 361 (1962). (Citations omitted.) Rex Bryant was fourteen years old at the time of his accident. As a minor, Rex was required to file suit within three years after the earlier of his attaining the age of majority or the appointment of a guardian ad litem for him. A guardian ad litem was appointed for Rex on 27 November 1989. Suit was filed against Andy W. Adams on 11 March 1992 which is less than two and a half years after the appointment of Rex's guardian ad litem. Consequently, Rex Bryant may rely on G.S. § 1-17 to toll the statute of repose and statute of limitation against defendant Andy W. Adams.

[3] However, plaintiffs Henry A. Bryant and Hilda Bryant were under no disability at the time their claims accrued, and the operation of the statute of repose as to their claims cannot be tolled by G.S. § 1-17. They argue, however, that Adams should be equitably estopped from relying on the statute of limitation and statute of repose because of representations by defendant Adams and his counsel which had the effect of misleading plaintiffs. A party may be estopped to plead and rely on a statute of limitations defense when delay has been induced by acts, representations, or conduct which would amount to a breach

of good faith. *Nowell v. Tea Co.*, 250 N.C. 575, 108 S.E.2d 889 (1959). Equitable estoppel may also defeat a defendant's statute of repose defense. *One North McDowell Assn. v. McDowell Development*, 98 N.C. App. 125, 389 S.E.2d 834, *disc. review denied*, 327 N.C. 432, 395 S.E.2d 686 (1990).

The trial court dismissed this case under Rule 12(b)(6). The issue is whether the complaint on its face sufficiently states a claim for relief to equitably estop defendant Adams from pleading the statute of limitations and statute of repose. If so, dismissal under Rule 12(b)(6) was improper. Our Court in *Hensell v. Winslow*, 106 N.C. App. 285, 416 S.E.2d 426, *disc. review denied*, 332 N.C. 344, 421 S.E.2d 148 (1992), set forth the essential elements for equitably estopping a party from asserting the statute of limitations:

> The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Id. at 290-91, 416 S.E.2d at 430. Plaintiffs' complaint provides the essential elements for equitable estoppel. Plaintiffs allege that Adams thwarted discovery efforts regarding specific facts and refused to answer questions or provide documentation; and that Adams, as president, director and sole stockholder of both ASR and ADtec, was the only individual who possessed the information plaintiffs sought. Plaintiffs arguably did not file suit against Adams sooner because of Adams' refusal to answer plaintiffs' request for discovery, and were obviously prejudiced, as evidenced by the claims being subject to dismissal based on the statute of limitation and statute of repose if defendants are not equitably estopped from relying on these defenses. Therefore, since plaintiffs' pleadings sufficiently state a claim for equitable estoppel, we remand to the trial court for a factual determination of whether Adams should be estopped from relying on the statute of limitation and statute of repose.

Defendants ADtec Sales, Inc. & ASR Manufacturing Co.

The trial court denied plaintiffs' motion to extend the discovery period, overruled plaintiffs' objection to the court's hearing motions

for summary judgment made by defendants ADtec Sales, Inc. and ASR Manufacturing Co., and granted those motions for summary judgment. Plaintiffs appeal those rulings.

[4] First, plaintiffs argue that the trial court erred by failing to extend the discovery period and by hearing defendants' summary judgment motion prior to plaintiffs completing discovery. Plaintiffs sought a continuance of the discovery period pursuant to N.C.R. Civ. P. 56(f) which provides that a court may order a continuance to permit discovery to enable the party opposing summary judgment to justify his opposition. However, a decision to grant a continuance under Rule 56(f) rests in the discretion of the trial court. *Brown v. Greene*, 98 N.C. App. 377, 390 S.E.2d 695 (1990). Defendants point to *Florida National Bank v. Satterfield*, 90 N.C. App. 105, 367 S.E.2d 358 (1988), where the complaint had been filed in excess of fourteen months and summary judgment hearing occurred two months later, as support for its position that the trial court did not abuse its discretion in this case. We note that all of the outstanding discovery was completed in *Florida National Bank* when the court denied the continuance. In this case, although there existed outstanding discovery, it was unrelated to the grounds on which summary judgment was granted. Furthermore, the discovery period provided for by the local rules had expired prior to plaintiffs' request for a continuance. We find no abuse of the trial court's discretion in denying plaintiffs' Rule 56(f) motion.

ADtec Sales, Inc.

[5] Plaintiffs contend the trial court erred when it granted summary judgment in favor of defendant ADtec Sales, Inc. A party seeking summary judgment has the burden of showing, based on pleadings, depositions, answers, admissions, and affidavits, that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The evidence must be viewed in the light most favorable to the non-movant. *Clark v. Brown*, 99 N.C. App. 255, 393 S.E.2d 134 *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). The movant may meet its summary judgment burden by showing either (1) an essential element of the non-movant's claim is nonexistent, or (2) the non-movant cannot produce evidence to support an essential element of his claim. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980).

ADtec contends that summary judgment was properly entered because ADtec did not manufacture the trampoline which injured Rex Bryant. Plaintiffs respond that ADtec was a successor corporation to a portion of Andy's Sale and Rental, Inc., the company that manufactured the trampoline in question. In North Carolina, "[a] corporation which purchases all, or substantially all, of the assets of another corporation is generally not liable for the old corporation's debts or liabilities." *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 687, 370 S.E.2d 267, 269 (1988). The purchasing corporation may become liable, however, for the old corporation's debts where the transfer of assets was done for the purpose of defrauding the corporation's creditors or where the purchasing corporation is a "mere continuation" of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers. In determining whether the purchasing corporation is a "mere continuation" of the old corporation, factors such as inadequate consideration for the purchase, or a lack of some of the elements of a good faith purchaser for value may be considered.

Plaintiffs' claims against ADtec were properly dismissed only if the pleadings, affidavits and other materials of record establish as a matter of law that ADtec is not a "mere continuation" of Andy's Sale and Rental, Inc. *See Heather Hills Home Owners v. Carolina Cust. Dev.*, 100 N.C. App. 263, 395 S.E.2d 154, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 327 (1990). Plaintiffs' evidence forecasts that the manufacturer, Andy's Sale and Rental, Inc., sold to Andy Adams sales lists, inventory, and equipment for the price of $627,667.00; that Adams then sold the sales lists, inventory, and equipment to ADtec, a corporation newly formed by Adams to market trampolines; and that ASR, the successor to Andy's Sale and Rental, Inc., has less than $20,000.00 in property on the property tax listing for that corporation. Furthermore, while evidence exists that Adams paid some consideration for the sale to Andy's Sale and Rental, Inc., plaintiffs point out that there is no evidence before the trial court to show ADtec ever paid anything for the customer lists, inventory, and equipment. Drawing all inferences against defendant ADtec as movant and in favor of plaintiffs as non-movant, as we are required to do, we conclude that defendant ADtec has failed to show that no genuine issue of material fact exists because plaintiffs have forecast evidence that ADtec is a "mere continuation" of Andy's Sale and Rental, Inc., in that ADtec received assets from Andy's Sale and Rental, Inc., for questionable considera-

tion and has the same sole shareholder, as well as common directors and officers. Accordingly, we remand this issue for trial.

ASR Manufacturing Co.

[6] Plaintiffs contend that the trial court erred by granting ASR Manufacturing Co.'s motion for summary judgment. Defendant ASR moved for summary judgment on the basis that plaintiffs' claims against ASR are time barred by the six year statute of repose. The trampoline was sold to Herbert and Annie Bryant on 2 July 1984. At a hearing for summary judgment, ASR argued that since it was not sued until 16 July 1990, plaintiffs' claims are barred.

As determined above, Rex Bryant, as a minor can toll the statute of repose until three years after he reached majority or a guardian ad litem was appointed for him. A guardian was appointed for Rex Bryant on 27 November 1989. Less than one year later, suit was filed against ASR. Plaintiffs submitted to a voluntary dismissal on 11 March 1991 and refiled one year later on 11 March 1992, as permitted by N.C.R. Civ. P. 41(a)(1). Thus, we conclude that Rex Bryant's claims against ASR are not time barred because of the tolling of the statute of limitation and statute of repose pursuant to G.S. § 1-17, and summary judgment for ASR was improper as to the claims of Rex Bryant.

However, Rex's parents were under no disability which would toll the statute of repose. Consequently, their claims are not time barred only if their claims relate back to the original filing against ADtec under N.C.R. Civ. P. 15(c). There is no question that all claims against ADtec were filed within the applicable time limits. Rex and his parents' claims accrued on 27 November 1986, the date Rex was injured. The statute of limitations in this case is three years. N.C. Gen. Stat. § 1-52(16). Thus, the claim against ADtec, which was filed on 27 November 1989, was filed before the expiration of the statute of limitations. The statute of repose expired six years after the date of the sale of the product, on 2 July 1990. Therefore, if Rex's parents' claims against ASR can relate back to the original filing against ADtec, summary judgment for ASR on Rex's parents' claims was not proper. Rule 15(c) of the North Carolina Rules of Civil Procedure, which governs a party's ability to add a new defendant after the statute of limitations or repose has expired, provides:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the

> transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

Under the rule, the trial court may allow the addition of a party defendant regardless of the expiration of the applicable limitations period if that defendant had notice of the claim so as not to be prejudiced by the untimely amendment. *Ring Drug Co. v. Medicorp Enterprises*, 96 N.C. App. 277, 283, 385 S.E.2d 801, 806 (1989). The court in *Ring Drug* set forth the following test for determining when a new party defendant may be added after the limitations period has run:

> 1) the basic claim arises out of the conduct set forth in the original pleading, 2) the party to be brought in receives such notice that it will not be prejudiced in maintaining its defense, 3) the party knows or should have known that, but for a mistake concerning identity, the action would have been brought against it, and 4) the second and third requirements are fulfilled within the prescribed limitations period.

Id. (Citations omitted.) In this case, Rex's parents cannot meet the fourth element of the *Ring Drug* test which requires that the party to be added must have notice of the institution of the civil action before the statute of limitation expires.

Plaintiffs filed suit against ADtec on the last day of the three year statute of limitations period, 27 November 1989. However, ADtec was not served until 23 December 1989 which is beyond the three year period. Thus, we conclude that plaintiffs have not satisfied Rule 15(c) since ADtec was not served with the summons and complaint prior to the expiration of the statute of limitations; ASR could not have had notice through ADtec before the statute of limitations expired. Therefore, the amendment of the complaint to add ASR as a party does not relate back to the original complaint since notice was received after the expiration of the statute of limitations.

Defendants Carl and Shirley Wicker

[7] The trial court granted summary judgment in favor of defendants Wicker as to all of plaintiffs' claims. Plaintiffs contend genuine issues of fact exist, precluding summary judgment with respect to plaintiffs' claims for negligence and based on failure to warn and breach of express and implied warranties.

Summary judgment is proper only if the moving party can establish as a matter of law that plaintiffs cannot make out the *prima facie*

elements for the claims which they assert or that defendants can establish a defense as a matter of law. *See discussion supra.* Summary judgment is rarely appropriate for negligence issues. *City of Thomasville v. Lease-Afex, Inc., supra.* As with other negligence actions, the essential elements of a products liability action based upon negligence are (1) duty, (2) breach, (3) causation, and (4) damages. *Morgan v. Cavalier Acquisition Corp.*, 111 N.C. App. 520, 432 S.E.2d 915, *disc. review denied*, 335 N.C. 238, 439 S.E.2d 149 (1993). In the case of a seller of goods which cause injury, the seller's duty to warn arises as follows:

> [T]he non-manufacturing seller has the duty to warn of hazards attendant to the assembled and installed product's use but only when the seller "has actual or constructive knowledge of a particular threatening characteristic of the product" and simultaneously "has reason to know that the purchaser will not realize the product's menacing propensities for himself." *Ziglar v. E. I. DuPont De Nemours & Co.*, 53 N.C. App. 147, 151, 280 S.E.2d 510, 513, *disc. rev. denied*, 304 N.C. 393, 285 S.E.2d 838 (1981).

Crews v. W. A. Brown & Son, 106 N.C. App. 324, 330, 416 S.E.2d 924, 928 (1992). *See generally* Annot., "Manufacturer's or seller's duty to give warning regarding product as affecting his liability for product-caused injury," 76 A.L.R.2d 9 (1961).

Although the legislature did not undertake to define what "products" are covered by Chapter 99B, G.S. § 99B-1(3) anticipates that a products liability action may include an action for personal injuries caused by or resulting from the "warning or instructing" of any product. *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 430 S.E.2d 476 (1993). Furthermore, in *Buck v. Railroad*, 44 N.C. App. 588, 261 S.E.2d 517 (1980), *disc. review denied*, 299 N.C. 735, 267 S.E.2d 659 (1980), this Court held that a seller may be held liable for injury to a person when the seller fails to provide adequate information about the dangerous propensities of a trampolining device.

Plaintiffs allege that the Wickers were under a duty to warn about the dangerous propensities of the trampoline of which they were aware and which the Wickers knew that Herbert Bryant did not have reason to know. In answer to plaintiffs' interrogatories, the Wickers acknowledged that they were aware of the following dangers associated with a trampoline when they sold the trampoline at issue in this case: falling from the edge of the trampoline to the ground, using without adult supervision, using the trampoline with more than one

person at a time, using with defective parts, improper assembly, jumping or bouncing from the trampoline to the ground, landing improperly on the bed of the trampoline, and landing on the springs or frame of the trampoline. The Wickers contend that the above dangers of which they were aware are open and obvious dangers to users exercising reasonable care resulting in no duty on the part of the Wickers to warn.

In opposition to the Wickers' motion for summary judgment, plaintiffs submitted the affidavit of Thomas L. Thrailkill, a career YMCA administrator, physical education director, and trampoline instructor who also served as an expert witness in *Buck v. Railroad, supra*. Mr. Thrailkill's affidavit states that "[t]rampolines are deceptive to the extent that they appear to be a rather harmless toy, when in fact, any object which can cause a person to be up in the air or to move through or approach an inverted position are [sic] dangerous. From my experience, I have found that these dangers are not apparent to children or adults in the absence of instruction by a qualified instructor." Whether or not these dangers were open and obvious is disputed and should have been an issue for the jury.

The Wickers contend that Carl Wicker gave oral warnings to Herbert Bryant when he purchased the trampoline, advising him to assemble the trampoline properly, that only one person should jump at a time and that persons should not jump from the trampoline to the ground. However, Carl Wicker testified by deposition that he remembers giving his safety lecture to someone from Booneville who would set up the trampoline himself, and their records disclose two individual buyers from Booneville who set up their own trampolines, one of whom was Herbert Bryant. However, Mr. Wicker had no independent recollection that he gave the instructions to Herbert Bryant. Herbert Bryant disputed, by his affidavits, that the warnings were given. Thus, there is an issue of fact as to whether Herbert Bryant received the warnings which Mr. Wicker claims to have given. Consequently, we find that factual issues exist as to whether the Wickers had a duty to warn of the trampoline's dangers and whether such duty was breached.

The Wickers contend that even if they were under a duty to warn and breached that duty, plaintiffs cannot recover because the failure to warn was not the proximate cause of Rex Bryant's injuries. In his deposition, Rex Bryant stated that if he had been aware of the dangers associated with using a trampoline and that the manufacturer

recommended using the trampoline with adult supervision, jumping only one person at a time, and never dismounting by jumping off the trampoline, then he would have followed those instructions. He sustained his injuries while attempting to jump off the trampoline. Although a warning label was attached to the mat, according to plaintiffs' evidence it had faded from exposure to the weather. As we have noted, a question exists as to whether the sellers delivered any warnings at all. Thus, a question of fact exists as to whether Rex's injuries were proximately caused by the seller's failure to warn. Summary judgment dismissing plaintiffs' negligence claims against the Wickers was error.

[8] Next, plaintiffs claim that the Wickers were not entitled to summary judgment on plaintiffs' breach of warranty claims. An express warranty arises if a statement of the manufacturer or seller induces the purchase of the product. According to G.S. § 25-2-313(1)(a), an express warranty is created when a seller makes "[a]ny affirmation of fact or promise . . . which relates to the goods and becomes part of the basis of the bargain . . . ." *Riley v. Ken Wilson Ford, Inc.*, 109 N.C. App. 163, 426 S.E.2d 717 (1993). The only express warranties which plaintiffs claim were made were that the trampoline was "safe" because it had a "Natural Tendency to Work [the] Jumper Toward the Center" and that it had a "uniform bounce." These warranties which were printed on sales literature applied only to the round trampolines made by the manufacturer. The oval trampoline, upon which plaintiff was injured, contained no such warranties. Plaintiffs cannot show a breach of express warranty by the Wickers and summary judgment was proper as to that claim.

[9] Plaintiffs also assert that the Wickers breached implied warranties. Because plaintiffs do not allege that the trampoline was purchased for anything other than general use, there is no implied warranty of fitness for a particular purpose. Plaintiffs' claim, if any, must be for breach of implied warranty of merchantability. In order to recover for breach of implied warranty of merchantability, plaintiff must establish:

> (1) a merchant sold goods, (2) the goods were not "merchantable" at the time of sale, (3) the plaintiff (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.

Wright v. Auto Sales, Inc., 72 N.C. App. 449, 454, 325 S.E.2d 493, 496 (1985). Plaintiffs allege that the warranty of merchantability was breached by the Wickers because the trampoline was sold with no instructions for proper use, no warnings of potential hazards, virtually no safety instructions and it was not fit for foreseeable users. Plaintiffs do not suggest that the trampoline itself was defective; rather plaintiffs contend that the propensity for danger associated with use of a trampoline was not disclosed and complete instructions for safe use were not provided.

Defendants argue that because the trampoline itself was not defective, plaintiffs cannot recover for breach of implied warranty of merchantability. *See Cockerham v. Ward*, 44 N.C. App. 615, 262 S.E.2d 651, *disc. review denied*, 300 N.C. 195, 296 S.E.2d 622 (1980). However, we have held that a failure to warn of dangerous propensities concerning a product may create an action of breach of implied warranty of merchantability. In *Reid v. Eckerds Drugs*, 40 N.C. App. 476, 253 S.E.2d 344, *disc. review denied*, 297 N.C. 612, 257 S.E.2d 219 (1979), we found that a failure to adequately warn of dangerous propensities may, in a proper case, render a product unmerchantable under G.S. § 25-2-314(2)(c), (e) and (f) and provide grounds for an action to recover damages for a breach of implied warranty of merchantability embodied in G.S. § 25-2-314(1). *See* Blanchard, Charles F. and Doug B. Abrams, "*North Carolina's New Product Liability Act: A Critical Analysis*," 16 WAKE FOREST LAW REVIEW 171, 180-81 (1980).

Since North Carolina case law allows an action for breach of implied warranty of merchantability for failure to warn, we must examine the warnings in this case to see if they were sufficient. The warnings attached to the trampoline warned of the danger of jumping more than one at a time and of jumping off the trampoline. Plaintiffs pursue two arguments. First, plaintiffs argue that warnings were not sufficient because they had faded from exposure to the weather by the time plaintiff Rex Bryant jumped on the trampoline. The problem with this argument is that the warnings were there at the time of sale and for recovery under implied warranty of merchantability the product must be unmerchantable at the time of sale. *See Cockerham v. Ward*, *supra*.

Plaintiffs' second argument asserts that the warnings given were inadequate because the warnings did not include warnings that the trampoline should only be used under trained adult supervision, that four spotters should be present at the center of each side of the tram-

poline, that the trampoline should be stored under lock and key, and that bouncing near the edge is dangerous. Although, the failure to include these warnings might have rendered the trampoline unmerchantable, plaintiffs must prove, to recover for breach of implied warranty of merchantability, that the failure to include these warnings proximately caused Rex Bryant's injuries.

In our opinion, Rex Bryant's deposition testimony to the effect that he would have heeded any warnings and safety recommendations had they been adequately provided raises a question of fact as to whether Rex's injuries were proximately caused by the seller's failure to warn. The issue of proximate cause is usually a question for the jury, *see Lamm v. Bissette Realty*, 327 N.C. 412, 395 S.E.2d 112 (1990), and the question of inadequate warning as proximate cause has been specifically found by this Court to be legally sufficient to reach the jury. *Buck v. Railroad, supra.*

The Wickers argue, however, that they are entitled to summary judgment on plaintiffs' claims for breach of implied warranty of merchantability because (1) plaintiffs failed to establish that the trampoline was unmerchantable at the time of sale; (2) Rex's misuse rather than lack of proper warnings was the proximate cause of his injuries; (3) Rex was not in privity with the seller such that Rex cannot be viewed as a person to whom any implied warranties extended; and (4) plaintiffs failed to give adequate notice, a condition precedent to recovery.

We have already determined that failure to warn of dangerous propensities of a product may render a product unmerchantable and that whether the failure to warn proximately caused Rex's injuries is a question of fact for the jury. Thus, we must consider the privity and notice issues.

[10] Our legislature has relaxed the privity requirement to recover under a theory of implied warranty of merchantability.

> Where . . . the products liability action is brought against the seller for breach of either express or implied warranty, the privity barrier has been removed legislatively to the same extent as it has been removed in actions against manufacturers for breach of express warranty. N.C.G.S. 25-2-318. Accordingly, assuming the existence of express and implied warranties, N.C.G.S. 25-2-318 extends those warranties beyond the buyer but only to natural persons suffering personal injury who are in the buyer's family or

> household or who are guests in the buyer's home and only if it is reasonable to expect such persons may use, consume, or be affected by the goods.

Crews v. W. A. Brown & Son, 106 N.C. App. at 332, 416 S.E.2d at 930. (Citations omitted.) It is undisputed that Rex Bryant was not part of his uncle's household. However, the statute extends privity to members of the buyer's "family" and to "guests" in the buyer's household. The terms "family" or "guest" are not otherwise defined, thus these words must be given their natural and ordinary meanings. *Hyler v. GTE Products Co.*, 333 N.C. 258, 425 S.E.2d 698 (1993).

Herbert Bryant was not aware that Rex was using the trampoline at the time of his injuries. However, the evidence suggests that Herbert Bryant allowed other children who were friends of his daughter to jump on the trampoline, that Rex accompanied some of these friends to Herbert Bryant's house to jump on the trampoline, and permits an inference that Herbert Bryant would have permitted Rex Bryant to jump on his trampoline on the day that he was injured. Thus, we find that an issue of fact exists as to whether Rex Bryant was a guest of Herbert Bryant such that he would be in privity to sue the Wickers for breach of implied warranty of merchantability.

[11] Finally, the Wickers assert that plaintiffs failed to give notice as required under Article 2 to recover for breach of warranty. G.S. § 25-2-607(3)(a) provides that the buyer must notify the seller within a reasonable time of the breach. What constitutes a reasonable time depends upon the facts of each case and the policies underlying the notice requirement. *Maybank v. Kresge Co.*, 302 N.C. 129, 273 S.E.2d 681 (1981). According to our Supreme Court:

> [w]hen the plaintiff is a lay consumer and notification is given to the defendant by the filing of an action within the period of the statute of limitations, and when the applicable policies behind the notice requirement have been fulfilled, . . . the plaintiff is entitled to go to the jury on the issue of seasonable notice.

Id. at 136, 273 S.E.2d at 685. Additionally,

> Whether a prima facie showing that the notice was given "within a reasonable time" has been made can be determined only by examining the particular facts and circumstances of each case and the policies behind the notice requirement. If plaintiff's evidence shows that the policies behind the requirement have not

> been frustrated and, instead, have been fulfilled, the evidence is sufficient to withstand a directed verdict motion.

Id. at 134, 273 S.E.2d at 684. The policies behind the notice provision are (1) to enable the seller to make efforts to cure the breach by making adjustments or replacements in order to minimize the buyer's damages and the seller's liability; (2) to afford the seller a reasonable opportunity to learn the facts so that he may adequately prepare for negotiation and defend himself in a suit; and (3) to provide a seller with a terminal point in time for liability. *Id.* Equally important as the above policies is the proposition that " '[a] reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." *Id.* at 135, 273 S.E.2d at 684-85. The issue becomes a question of law only when the facts are undisputed and only one inference can be drawn as to the reasonableness of the notice. *Id.* at 136, 273 S.E.2d at 684, n.1.

Examining the evidence in the light most favorable to plaintiffs, there is a question of fact as to whether notice was seasonable. Plaintiffs contend that the Wickers received notice from the insurance agent representing Herbert Bryant's homeowner's insurance carrier, the same company as the Wicker's insurance carrier. Furthermore, the policy reasons support a finding that notice was seasonable. It is not alleged that the trampoline was defective; rather, at issue are the warnings attendant to its use. The photographs of the trampoline taken by Herbert Bryant's insurance company, the same company which represents the Wickers, provide the Wickers with the information necessary for their defense. It is not alleged that a visual inspection would help the defense in this case. Thus, we find that the question of whether notice was seasonable in this case is properly a jury issue.

[12] Next, the Wickers contend that Rex Bryant was contributorily negligent as a matter of law entitling the Wickers to summary judgment on both plaintiffs' negligence and warranty claims. The issue of contributory negligence is ordinarily a question for the jury rather than an issue to be decided as a matter of law. *Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 406 S.E.2d 856 (1991).

G.S. § 99B-4 of the Products Liability Act, which codifies contributory negligence as a bar in products liability actions, provides in part:

> No manufacturer or seller shall be held liable in any product liability action if:
>
> (1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; . . .
>
> . . .
>
> (3) The claimant failed to exercise reasonable care under the circumstances in his use of the product, and such failure was a proximate cause of the occurrence that caused the injury or damage to the claimant.

N.C. Gen. Stat. § 99B-4 (1989). G.S. § 99B-4 "appears to codify a particular form of contributory negligence and makes little change in prior law. The determination of knowledge is a question for the trier of fact." (Citations omitted.) Blanchard, *"North Carolina's New Product Liability Act"*, *supra* at 175. However, if the instructions themselves were not adequate or if the plaintiff did not read the instructions but the jury determined that the plaintiff still exercised reasonable care, a plaintiff should not be found contributorily negligent. *Champs Convenience Stores v. United Chemical Co.*, *supra.*

Upon the evidence in this case, the issue of contributory negligence is properly for the jury. "Issues of contributory negligence, like those of ordinary negligence, are rarely appropriate for summary judgment. Only where plaintiff's own evidence discloses contributory negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted." (Citations omitted.) *Branks v. Kern*, 83 N.C. App. 32, 36, 348 S.E.2d 815, 818 (1986), *rev'd on other grounds*, 320 N.C. 621, 359 S.E.2d 780 (1987).

[13] Finally, plaintiffs assert that the trial court erred when it granted the Wickers summary judgment on plaintiffs' strict liability claims. This Court has previously addressed the issue of whether the General Assembly, in enacting Chapter 99B, adopted the doctrine of strict liability in products liability actions in this State, and we concluded that Chapter 99B was not a strict liability statute. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980). *See Driver v. Burlington Aviation, Inc.*, *supra.* Nor have the courts of this State adopted a general rule of strict liability for manufacturers of products

introduced into the stream of commerce. *Fowler v. General Electric Co.*, 40 N.C. App. 301, 252 S.E.2d 862 (1979). Therefore, since it is clear that North Carolina expressly rejects strict liability in products liability actions, summary judgment was properly granted on plaintiffs' strict liability claims.

In summary, we reverse the trial court's orders dismissing plaintiffs' claims against defendants Adams and ADtec, and the minor plaintiff's claims against ASR. We affirm summary judgment in favor of defendant ASR as to the claims of Henry Bryant and Hilda Bryant. We also affirm summary judgment in favor of defendants Wicker as to plaintiffs' claims for breach of express warranty and for strict liability. Summary judgment in favor of the Wickers as to plaintiffs' claims for negligence and breach of implied warranty is reversed. This case is remanded to the Superior Court of Surry County for trial upon all claims not dismissed.

Affirmed in part; reversed and remanded in part.

Judges JOHNSON and McCRODDEN concur.

WADELL NICHOLSON, PETITIONER/APPELLEE v. ALEXANDER KILLENS, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT/APPELLANT

No. 937SC969

(Filed 4 October 1994)

Automobiles and Other Vehicles § 93 (NCI4th)— refusal of breathalyzer test—notification of rights—failure to take before second officer—rescission of mandatory license revocation

Where the charging officer designated that a chemical analysis of petitioner's breath was to be performed, and petitioner refused a breathalyzer test, the charging officer's failure to take petitioner before another officer to inform petitioner both orally and in writing of the rights enumerated in N.C.G.S. § 20-16.2(a) required that the trial court rescind the DMV's mandatory twelve-month revocation of petitioner's driver's license under N.C.G.S. § 20-16.2(d) for willful failure to submit to breath analysis.

Am Jur 2d, Automobiles and Highway Traffic § 130.

Suspension or revocation of driver's license for refusal to take sobriety test. 88 ALR2d 1064.

Appeal by respondent from order entered 28 June 1993 by Judge Richard B. Allsbrook in Nash County Superior Court. Heard in the Court of Appeals 12 May 1993. Reheard upon motion in the Court of Appeals on 7 September 1994.

This appeal arises from a proceeding in Superior Court contesting the mandatory revocation of petitioner's driver's license pursuant to G.S. 20-16.2(d) for his willful failure to submit to chemical analysis of his breath.

Here, the parties stipulated in writing to the following facts:

1. Petitioner was arrested on January 8, 1993, at 11:30 P.M. by Trooper R. C. Wilder for an implied consent offense.

2. Trooper Wilder had reasonable grounds to believe that petitioner had committed an implied consent offense.

3. Trooper Wilder transported petitioner to a breathalyzer room for the purpose of requesting him to submit to a chemical analysis of his breath.

4. Trooper Wilder advised petitioner of his rights enumerated in G.S. 20-16.2(a).

5. Trooper Wilder is a certified chemical analyst in accordance with G.S. 20-139.1.

6. At 12:22 A.M., Trooper Wilder requested petitioner to submit to a chemical analysis of his breath.

7. Trooper Wilder used an Intoxilyzer 5000 instrument.

8. Petitioner told Trooper Wilder that he was not going to submit to the chemical analysis of his breath and did not submit to the test.

9. Trooper Wilder reported petitioner as having willfully refused to submit to a chemical analysis of his breath at 12:33 A.M.

After a hearing on 2 June 1993, the trial court entered an order rescinding the administrative revocation of petitioner's driver's license because "[p]etitioner was not notified of his rights as required

by subsection (a) of G.S. 20-16.2 and therefore condition (4) as set out in [G.S. 20-16.2(d)] was not met." Respondent appeals.

Moore, Diedrick, Carlisle & Hester, by Lawrence G. Diedrick, for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Bryan E. Beatty, for respondent-appellant.

EAGLES, Judge.

In its sole assignment of error, respondent argues that the trial court erred in this civil proceeding in ordering a rescission of the DMV order of revocation of petitioner's license because respondent contends petitioner was properly advised of his rights under G.S. 20-16.2(a). After careful review, we disagree and affirm.

G.S. 20-16.2 provides:

> (a) Basis for Charging Officer to Require Chemical Analysis; Notification of Rights.—. . . .
>
> Except as provided in this subsection or subsection (b), before any type of chemical analysis is administered the person charged must be taken before a chemical analyst authorized to administer a test of a person's breath, who must inform the person orally and also give the person a notice in writing that:
>
> (1) He has a right to refuse to be tested.
>
> (2) Refusal to take any required test or tests will result in an immediate revocation of his driving privilege for at least 10 days and an additional 12-month revocation by the Division of Motor Vehicles.
>
> (3) The test results, or the fact of his refusal, will be admissible in evidence at trial on the offense charged.
>
> (4) His driving privilege will be revoked immediately for at least 10 days if:
>
> a. The test reveals an alcohol concentration of 0.08 or more; or
>
> b. He was driving a commercial motor vehicle and the test reveals an alcohol concentration of 0.04 or more.

(5) He may have a qualified person of his own choosing administer a chemical test or tests in addition to any test administered at the direction of the charging officer.

(6) He has the right to call an attorney and select a witness to view for him the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time he is notified of his rights.

If the charging officer or an arresting officer is authorized to administer a chemical analysis of a person's breath and the charging officer designates a chemical analysis of the blood of the person charged, the charging officer or the arresting officer may give the person charged the oral and written notice of rights required by this subsection.

. . . .

(c) Request to Submit to Chemical Analysis; Procedure upon Refusal.—The charging officer, in the presence of the chemical analyst who has notified the person of his rights under subsection (a), must request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law. Then the charging officer and the chemical analyst must without unnecessary delay go before an official authorized to administer oaths and execute an affidavit stating that the person charged, after being advised of his rights under subsection (a), willfully refused to submit to a chemical analysis at the request of the charging officer. . . .

(d) Consequences of Refusal; Right to Hearing before Division; Issues.—. . . . If the person properly requests a hearing, he retains his license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws his request, or he fails to appear at a scheduled hearing. . . . The hearing must be conducted in the county where the charge was brought, and must be limited to consideration of whether:

(1) The person was charged with an implied-consent offense;

(2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense;

(3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;

(4) The person was notified of his rights as required by subsection (a); and

(5) The person willfully refused to submit to a chemical analysis upon the request of the charging officer.

If the Division finds that the conditions specified in this subsection are met, it must order the revocation sustained. If the Division finds that any of the conditions (1), (2), (4), or (5) is not met, it must rescind the revocation.

G.S. 20-16.2 (emphasis added).

Preliminarily, it is important to emphasize that the matter at issue is the Superior Court's decision rescinding DMV's administrative decision which revoked petitioner's driver's license pursuant to G.S. 20-16.2. The matter at issue here does not involve the result of any jury trial for driving while impaired pursuant to G.S. 20-138.1 or any similar criminal offense.

Regarding the interpretation of statutes, our Supreme Court has stated that:

> The intent of the legislature controls the interpretation of a statute. When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

In re Banks, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) (citations omitted). *See Carter v. Wilson Construction Co.*, 83 N.C. App. 61, 68, 348 S.E.2d 830, 834 (1986) ("Statutes imposing a penalty are to be strictly construed").

Notwithstanding the appellant's concession in oral argument that reading G.S. 20-16.2 in conjunction with G.S. 20-139.1 produces an ambiguous result, we conclude that the language of G.S. 20-16.2, the statute at issue here, is clear and unambiguous. It is uncontradicted that after he designated that a chemical analysis of petitioner's breath was to be performed, instead of a blood analysis, Trooper Wilder failed to take defendant before another officer to inform defendant both orally and in writing of the rights enumerated in G.S. 20-16.2(a).

This failure has no adverse effect whatever on any subsequent criminal prosecution for driving while impaired pursuant to G.S. 20-16.2 or any similar criminal offense. Likewise our decision here has no adverse effect whatever on the admissibility of the results of the breath analysis using an automated breath instrument that prints the result of its analysis, where a driver has agreed to submit to the breath analysis. However, in the context of the statutorily mandated twelve (12) month administrative revocation of driver's license for failure to submit to breath analysis, the failure to take petitioner before another law enforcement officer to advise petitioner of his rights pursuant to G.S. 20-16.2 is a fatal flaw.

This error could have been avoided if the initial law enforcement officer, upon hearing petitioner decline to submit to the breath analysis, had called for a second officer to advise petitioner of his rights pursuant to G.S. 20-16.2. Where a second officer was present and participating, the failure of defendant to submit would constitute a proper basis for the twelve month revocation for willful refusal to submit.

On this record, given the strict construction required in dealing with statutes that impose a penalty, we conclude that the trooper's failure to comply with G.S. 20-16.2(a) in the face of petitioner's refusal to submit must result in the rescission of the revocation of petitioner's license in this case. G.S. 20-16.2(d). We have carefully considered respondent's *in pari materia* argument regarding G.S. 20-139.1 in the briefs and upon oral argument. Though ably presented, we conclude that it is not persuasive. We do not disagree with appellant that G.S. 20-16.2 must be read in conjunction with G.S. 20-139.1 to determine the procedures governing the **administering** of chemical analyses. However, we conclude that G.S. 20-16.2, and that statute alone, sets forth the procedures governing **notification of rights** pursuant to a chemical analysis. "If and when the lawmaking body wishes to amend the statute, a few words will suffice. This Court must forego the opportunity to amend here." *Insurance Co. v. Bynum*, 267 N.C. 289, 292, 148 S.E.2d 114, 117 (1966).

In oral argument appellant expressed its concerns regarding the admissibility of the results of the breath analysis by the Intoxilyzer instrument, an automated breath instrument that prints the result of the analysis, in criminal trials for violations of Chapter 20. We emphasize that our decision here is limited to our careful interpretation of the governing statutes relating to the statutorily mandated twelve (12) month administrative revocation of petitioner's driver's license

for refusal to submit to breath analysis pursuant to G.S. 20-16.2. Our holding today is intended to apply to cases in which the issue has not been waived by petitioner's failure to raise the issue at the DMV hearing or at the *de novo* hearing in superior court or by petitioner's failure to properly preserve the issue on appeal to the appellate courts. Furthermore, our holding does not apply to cases in which petitioner did not exercise his rights of review of the DMV's determination.

For the reasons stated, the assignment of error fails and the trial court's order rescinding the DMV order of revocation is affirmed. This opinion supersedes our previous opinion filed in this case on 19 July 1994, *Nicholson v. Killens*, 115 N.C. App. 552, 445 S.E.2d 608 (1994).

Affirmed.

Judges LEWIS and WYNN concur.

STATE OF NORTH CAROLINA v. ROBERT LEWIS STYLES, DEFENDANT

No. 9324SC842

(Filed 4 October 1994)

1. Criminal Law § 304 (NCI4th)— marijuana crimes on different dates—consolidation for trial

The trial court did not abuse its discretion in denying defendant's motion to sever and in granting the State's motion to join for trial 11 September 1992 charges against defendant of maintaining a dwelling for keeping and selling marijuana and possession of marijuana with the intent to sell and deliver and a 12 October 1992 charge for selling marijuana to a minor since defendant's scheme to sell and distribute marijuana for a profit was a common thread connecting all of the crimes.

Am Jur 2d, Actions § 159.5; Criminal Law § 20.

Consolidated trial upon several indictments or informations against same accused, over his objection. 59 ALR2d 841.

2. Searches and Seizures § 105 (NCI4th)— affidavit for search warrant—confidential informant—double hearsay

Information contained in an affidavit for a warrant to search defendant's apartment for marijuana and on the face of the war-

rant was insufficient to establish probable cause for issuance of the warrant where the affiant stated only that a confidential informant had stated "that two other men had been to the apartment on 9-10-92 and saw large quantities of marijuana in the apartment," and that the informant "has given me reliable information in the past," since the affiant did not adequately explain why this "double hearsay" was credible, and the magistrate had no way of knowing whether the informant was with the two men, if he observed the two men, or if the two men told the informant what happened. Therefore, the trial court erred by denying defendant's motion to suppress evidence seized as a result of the search of defendant's apartment pursuant to the warrant.

Am Jur 2d, Searches and Seizures §§ 120, 121.

Sufficiency of affidavit for search warrant based on affiant's belief, based in turn on information, investigation, etc., by one whose name is not disclosed. 14 ALR2d 605.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant. 10 ALR3d 359.

Appeal by defendant from judgments entered 28 April 1993 by Judge Charles C. Lamm in Mitchell County Superior Court. Heard in the Court of Appeals 22 August 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Douglas A. Johnston, for the State.

William A. Leavell, III for defendant-appellant.

JOHNSON, Judge.

Defendant was charged and indicted for the offenses of maintaining a dwelling for keeping and selling controlled substances (92CRS942), possession with the intent to sell and deliver marijuana (92CRS943), and sale or delivery of a controlled substance to a person under sixteen years of age (92CRS1056). These charges came on for trial at the 26 April 1993 term of Mitchell County Superior Court.

State's evidence tended to show the following: On 8 August 1992, defendant offered a fourteen-year-old girl beer and marijuana at his apartment. The girl observed defendant sell marijuana to two men. On 11 September 1992, after obtaining a search warrant, officers went

to defendant's home and found ten bags of marijuana (each weighing one quarter ounce) in various places throughout the house. The officers arrested defendant.

On 12 October 1992, Sheriff Vernon Bishop went to Harris Middle School where he met with the school principal and a male student who had several bags of marijuana. The student admitted that he bought the marijuana from defendant the previous day; that he had called defendant to ask if he had any marijuana, and the price; and that he then made up a story about a friend's grandmother's death so that his father would give him a ride to the area where defendant lived. The student further stated that he then went to defendant's apartment and purchased a bag of marijuana; that after the purchase, the student used a neighbor's phone to call his father to come and pick him up; and that the next day, the student took the marijuana to school and gave it to other students.

Defendant testified that on 8 August 1992, the fourteen-year-old girl came to his apartment and observed two men who wanted to buy marijuana. Defendant told the men he did not sell marijuana but would give marijuana to them. Defendant admitted he gave the men two or three joints. Defendant denied giving any marijuana to the girl. Defendant said the men gave marijuana to the girl.

Defendant further testified that on 11 October 1992, the student from Harris Middle School called him but that the phone connection was bad. Defendant denied any mention of marijuana in the conversation, stating that when the student came to defendant's apartment, the student talked to Jackie Ledford, who lived with defendant, and then left to meet his father. Defendant denied selling any marijuana to the student. Defendant did admit to the possession of the ten bags of marijuana which he claimed were for his own personal use.

Defendant was convicted of selling marijuana to a minor, knowingly keeping a building for the purpose of keeping or selling controlled substances, and possession of marijuana with intent to sell. Defendant received a sentence of twenty-five years in prison. Defendant filed notice of appeal to our Court.

[1] Defendant first argues that the trial court committed reversible error in denying defendant's motion to sever cases 92CRS942 and 92CRS943 from case 92CRS1056, and in granting the State's motion to join those same offenses, because the offenses were not properly joinable under North Carolina General Statutes § 15A-926 (1988) and

should have been severed pursuant to North Carolina General Statutes § 15A-927 (1988).

North Carolina General Statutes § 15A-926(a) provides:

> (a) Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

In *State v. Kornegay*, 313 N.C. 1, 326 S.E.2d 881 (1985), our Supreme Court held that separate charges of obtaining property by false pretenses, embezzlement and malfeasance of a corporate agent were properly joined because the defendant had a scheme to embezzle funds from his law firm. The Supreme Court stated that the trial court did not abuse its discretion in joining the cases because "[t]he common thread connecting the crimes is defendant's shortage of ready cash in April of 1982." *Id.* at 24, 326 S.E.2d at 898. In *Kornegay* there was sufficient evidence of a "transactional connection" to support joinder of the offenses.

In the instant appeal, the charges of 11 September 1992 (knowingly keeping a dwelling for the purpose of keeping or selling controlled substances and possession of marijuana with intent to sell and deliver) were joined with the charge of 12 October 1992 (selling marijuana to a minor). The "common thread" is the selling and distribution of marijuana. The "scheme" was to sell the illegal substance for profit. "Motions to join for trial offenses which have the necessary transactional connection under G.S. 15A-926 are addressed to the discretion of the trial court and, absent a showing of abuse of discretion, its ruling will not be disturbed on appeal." *Kornegay*, 313 N.C. at 23-24, 326 S.E.2d at 898, *quoting State v. Avery*, 302 N.C. 517, 524, 276 S.E.2d 699, 704 (1981). (*See also State v. Harding*, 110 N.C. App. 155, 162, 429 S.E.2d 416, 421 (1993), where some fifteen indictments for drug charges against defendant were properly joined because "the transactions were closely related in time and nature under the circumstances.") We find that the trial court herein did not abuse its discretion and properly joined these cases.

[2] Defendant next argues the trial court committed reversible error in denying defendant's motion to suppress evidence seized as a result of a search of defendant's apartment made pursuant to a search warrant dated 11 September 1992 because the affidavit in the application

for the search warrant did not provide a sufficient basis for a finding of probable cause to search defendant's apartment. We agree with defendant.

When presented with an application for a search warrant, it is the duty of the magistrate to make a practical common sense decision given all of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, that there is a fair probability that contraband will be found. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984). *See* North Carolina General Statutes § 15A-245 (1988). The U.S. Supreme Court has adopted a totality of the circumstances analysis of probable cause that examines the entire affidavit, gives appropriate weight to each relevant piece of information, and assesses the various indications of reliability or unreliability in an informant's report. *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527 (1983). "[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." *Id.* at 234, 76 L.Ed.2d at 545.

We note that pursuant to North Carolina General Statutes § 15A-245, the magistrate

> may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.

A review of North Carolina cases indicates that when an affidavit is based on hearsay, the affidavit usually contains some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and usually contains the underlying circumstances from which the affiant concluded that the informer was credible and his information reliable. In the instant case, the application for the search warrant contained *double* hearsay information. The application states in its entirety:

> I [Deputy Bishop] being first duly sworn, do hereby swear the following to be true to the best of my knowledge and based upon

> personal knowledge and upon information I received from a confidential informant. That [defendant] is a known felon with a large criminal record. He has been convicted of possession of marijuana in the past two years and is [sic] been reported to me before on many occasions for selling controlled substances. In addition to this I received information today that [defendant] has a large quantity of marijuana in his possession today. This was relayed to me by a confidential reliable informant who stated that two other men had been to the apartment on 9-10-92 and saw large quantities of marijuana in the apartment. This informant has given me reliable information in the past which led to arrests.

In the instant case, the affiant did not adequately explain on the search warrant why this "double hearsay" was credible. The deputy only states that the informant has given the deputy reliable information in the past. The magistrate had no way of knowing whether the informant was with the two men, if he observed the two men, or if the two men told the informant what happened. Although the magistrate questioned the deputy further about the application, the deputy provided the magistrate with no additional information. As such, we believe that the information contained in the affidavit and on the face of the warrant was inadequate to establish that probable cause existed for the issuance of the warrant. *See State v. Roark*, 83 N.C. App. 425, 427, 350 S.E.2d 153, 154 (1986), where our Court stated, "[I]t was error for the magistrate to issue search warrants based on affidavits which only said a 'reliable and confidential informant personally contacted the applicant with the information' that stolen property was on the premises of defendant." *See also State v. Heath*, 73 N.C. App. 391, 326 S.E.2d 640 (1985). (*Cf. State v. Hicks*, 60 N.C. App. 116, 298 S.E.2d 180 (1982), *disc. review denied*, 307 N.C. 579, 300 S.E.2d 553 (1983), where the magistrate's handwritten notes made contemporaneously from information supplied by the affiant under oath, but not attached to the warrant in order to protect the identity of the informant, were properly considered while determining probable cause.)

We, therefore, hold that the trial court committed reversible error in denying defendant's motion to suppress the evidence seized pursuant to the search warrant dated 11 September 1992.

Defendant is entitled to a new trial.

Judges ORR and WYNN concur.

ELMER O. MAYNOR, EMPLOYEE-PLAINTIFF v. SAYLES BILTMORE BLEACHERIES, EMPLOYER-DEFENDANT AND GEORGIA CASUALTY & SURETY COMPANY, CARRIER-DEFENDANT

No. 9310IC1020

(Filed 4 October 1994)

Workers' Compensation § 296 (NCI4th)— compensation award—no evidence of order to undergo surgery—no violation of order to cooperate with rehabilitation specialist

The Industrial Commission did not err in continuing plaintiff's compensation for temporary total disability rather than ordering plaintiff to undergo doctor-recommended surgery where there was no evidence that defendant employer ever requested that the Commission order plaintiff to undergo surgery. Nor did the Commission err in failing to conclude that plaintiff was not entitled to continued compensation on the ground that plaintiff violated an order of a deputy commissioner that he submit to and cooperate with a vocational rehabilitation specialist chosen by defendant where the evidence showed that defendant's vocational rehabilitation specialist did not contact plaintiff after the deputy commissioner's order was entered, and there was no other evidence that plaintiff refused to cooperate with any vocational rehabilitation specialist chosen by defendant after the date of the order. N.C.G.S. § 97-25.

Am Jur 2d, Workers' Compensation §§ 389, 390.

What amounts to failure or refusal to submit to medical treatment sufficient to bar recovery of workers' compensation. 3 ALR5th 907.

Appeal by defendants from opinion and award of the North Carolina Industrial Commission filed 16 July 1993. Heard in the Court of Appeals 24 August 1994.

Gary A. Dodd for plaintiff-appellee.

Crossley, McIntosh, Prior & Collier, by Frances B. Prior and Sharon J. Stovall, for defendants-appellants.

JOHNSON, Judge.

Plaintiff sustained a compensable back injury while working for defendant on 18 August 1986. Plaintiff missed work as a result of the injury from 18 August 1986 to 26 August 1986, and from 14 November 1986 to 9 January 1987 at which time he returned to light duty. By 15 December 1987 plaintiff's back problems had become so severe that he was taken out of work and plaintiff has not worked since that time. Plaintiff has been treated by Drs. David O. Lincoln, Wayne S. Montgomery, and Keith Maxwell. On 13 January 1988, plaintiff underwent lumbar surgery. Plaintiff continued to have severe pain problems with his back and Dr. Maxwell recommended further surgery to decrease pain. Dr. Maxwell opined that surgery would provide a 92% chance of relieving 70% to 80% of plaintiff's pain. Plaintiff decided against the surgery because plaintiff had had enough of doctors, surgery, and hospitals. Plaintiff received temporary total disability benefits during the periods of disability and until 29 June 1989 when his benefits were terminated upon approval of a Form 24 filed with the Industrial Commission by defendant. On 11 July 1989 plaintiff filed a Request for Hearing seeking compensation benefits starting 30 June 1989 along with medical treatment and payment for permanent disability.

On 9 November 1990, plaintiff's claim was heard in part by Deputy Commissioner Charles Markham. Deputy Commissioner Markham filed an order on 13 December 1990 requiring plaintiff to "submit himself at reasonable times and places for evaluation and testing by a vocational rehabilitation specialist of defendant's choosing" subject to certain provisions. Before the order was ever issued, plaintiff had worked with a vocational rehabilitation specialist (Ann Hughes of Intercorp) specifically chosen by defendants. Ms. Hughes discontinued her work with plaintiff when the case appeared to be near settlement. When the case did not settle, defendant retained Central Rehabilitation Associates (CRA) to attempt to do a vocational assessment of plaintiff. Karen Guetel of CRA contacted plaintiff in June of 1990, six months before the order. Plaintiff did not meet with Ms. Guetel on advice of counsel. Plaintiff retained Stephen Carpenter as his vocational rehabilitation specialist after the order was issued. Deputy Commissioner Markham filed his opinion and award on 16 December 1991 concluding that as a result of plaintiff's compensable injury, plaintiff was entitled to compensation for a 15% permanent partial disability of his back at a rate of 66.66% of plaintiff's average weekly wage. Plaintiff appealed portions of Deputy Commissioner

Markham's decision to the Full Commission. On 16 July 1993 the Full Commission filed an opinion and award concluding that plaintiff was entitled to temporary total disability compensation at the rate of $270.88 per week beginning on 30 June 1989 and continuing until plaintiff sustained a change of condition or returned to work, or until defendants obtain permission from the Industrial Commission to stop payment; also that plaintiff was entitled to the payment of all medical expenses incurred, or to be incurred, as a result of his injury by accident. From this opinion and award employer-defendant appeals.

Defendant first contends that the Full Commission erred in continuing plaintiff's compensation rather than ordering plaintiff to undergo doctor-recommended surgery. We disagree.

The standard of review for an opinion and award of the Industrial Commission is limited to two questions of law: "(1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether . . . the findings of fact of the Commission justify its legal conclusions and decisions." *Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990) (*quoting Dolbow v. Holland Industrial*, 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984)). *See also Gilbert v. Entenmann's Inc.*, 113 N.C. App. 619, 623, 440 S.E.2d 115, 118 (1994). Defendant argues that it was error for the Full Commission to continue plaintiff's compensation benefits as there was no competent evidence to support the Commission's finding that defendant failed to request an order that plaintiff undergo surgery. This argument is without merit.

North Carolina General Statutes § 97-25 (1989) states in part:

> In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, *the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.* . . . The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure *when ordered by the Industrial Commission* shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which

case, the Industrial Commission may order a change in the medical or hospital service. (Emphasis added.)

The record does not indicate that defendant ever requested the Industrial Commission to order surgery for plaintiff, or that the Industrial Commission made any such order. Plaintiff could not disobey an order plaintiff never received. Without any evidence of an order, defendant's argument must fail.

Defendant next contends that the Full Commission erred in failing to conclude that plaintiff violated the order of the Deputy Commissioner that plaintiff submit to and cooperate with a vocational rehabilitation specialist chosen by defendant.

Defendant contends that the evidence in the record as to the Full Commission's finding that "there is no evidence in the record that after 13 December 1990 plaintiff refused to meet with defendant's rehabilitation specialist or that plaintiff refused to cooperate with any rehabilitation program," is not supported by any competent evidence and as such, the Full Commission's conclusion that plaintiff was entitled to continued compensation is error. We disagree.

The general rule is that the burden of proof lies upon the person who will be defeated as to a particular issue or entire case if no evidence relating thereto is given on either side. *Johnson v. Johnson*, 229 N.C. 541, 50 S.E.2d 569 (1948). Defendant cites Exhibit 2 in the deposition of Stephen Carpenter as evidence of plaintiff's failure to cooperate with a vocational rehabilitation specialist chosen by defendant. This document is a report filed with defendant Georgia Casualty by vocational rehabilitation specialist Karen Guetel of CRA. It is dated 18 December 1990, five days after Deputy Commissioner Markham filed his order. The Full Commission did not recognize this letter as evidence. Exhibit 2 became a part of the record while defendant's counsel was cross-examining Mr. Carpenter and was never tendered into evidence by defendant. Nevertheless, Exhibit 2 contains "contact" notes at the bottom of the page which indicate that Ms. Guetel, defendant's vocational rehabilitation specialist, did not contact plaintiff or plaintiff's counsel after Deputy Commissioner Markham's 13 December 1990 order. Undoubtedly, if Ms. Guetel did not contact plaintiff, plaintiff could not have refused to cooperate with her.

No other evidence in the record establishes the fact that plaintiff refused to cooperate with Ms. Guetel or any other vocational rehabil-

itation specialist after Deputy Commissioner Markham's 13 December 1990 order. The record in this case remained open for nearly seven months after this letter was written and defendant made no effort to depose Ms. Guetel to establish plaintiff's alleged violation of Deputy Commissioner Markham's order. The Full Commission found as fact that after the order was issued plaintiff did not refuse to meet with any of defendant's designated vocational rehabilitation specialists, and plaintiff did not refuse to cooperate in a rehabilitation program. Defendant's argument that evidence to the contrary exists is clearly without merit.

Having reviewed the record, we find sufficient evidence to support the Full Commission's findings of fact, and we hold that those findings support the conclusions of law. The Full Commission's opinion and award is

Affirmed.

Judges ORR and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 SEPTEMBER 1994

BALDRIDGE v. EMERY AIR FREIGHT No. 9310DC687	Wake (89CVD09540)	Affirmed
CARLYLE v. CARLYLE No. 9321DC1044	Forsyth (91CVD6202)	Affirmed
DAVIS v. NEWMARKET MEDIA No. 9321SC778	Forsyth (92CVS5064)	Affirmed
EURY v. NATIONWIDE MUTUAL INS. CO. No. 9320SC1136	Union (91CVS00632)	Affirmed
GASTON COUNTY v. ALEXANDER No. 9327DC1146	Gaston (91CVD1995)	Reversed & Remanded
GUM v. GUM No. 9328DC944	Buncombe (87CVD3782)	Remanded
IN RE BARKER No. 9314DC977	Durham (90J1)	Affirmed
IN RE COURTNEY No. 9325DC981	Catawba (92J128) (92J129)	Affirmed
IN RE HUNT No. 9318DC1128	Guilford (86J393) (89J150) (89J175) (89J176)	Affirmed
IN RE YOUNGBLOOD No. 935DC987	New Hanover (93J0008)	Modified & Affirmed
LASSITER v. CLARK EQUIPMENT No. 9322SC555	Iredell (92CVS274)	Affirmed
OMNI INVESTMENT, INC. v. MILLER No. 9328SC603	Buncombe (92CVS3310)	Affirmed
SELF v. SPRING GARDEN PIZZA No. 9318SC1145	Guilford (91CVS12084)	New Trial
STANDRIDGE v. STANDRIDGE No. 9327DC1048	Gaston (86CVD1667)	Affirmed

STATE v. CARTER No. 9320SC1063	Richmond (92CRS377) (92CRS378)	No Error
STATE v. HICKS No. 935SC1025	New Hanover (93CRS428)	No Error
STATE v. HOWELL No. 9322SC654	Davidson (92CRS386) (92CRS387)	No Error at trial, Remand for Correction of Judgment
WOODS v. UZZELL CADILLAC No. 9314SC1033	Durham (90CVS04900)	Dismissed

FILED OCTOBER 4, 1994

EDWARDS v. CURRY No. 9318DC1260	Guilford (93CVD8764)	Affirmed
HALE v. McDONALD No. 9312SC963	Cumberland (92CVS5185)	Affirmed
HEDGECOCK v. CITY OF HIGH POINT No. 9318SC1158	Guilford (91CVS12094)	Affirmed
HUNEYCUTT v. PETTIT No. 9421SC209	Forsyth (92CVS2107)	Affirmed
IN RE KENION No. 9314DC1037	Durham (85J109B)	Affirmed
IN RE PLACKO No. 9428DC158	Buncombe (93J109)	Affirmed
IN RE WILLIAMS No. 947DC303	Wilson (93J130)	Vacated & Remanded
JENKINS v. HAYES No. 9412DC8	Cumberland (93CVD6347)	No Error
REASON v. NATIONWIDE MUTUAL INS. CO. No. 947SC258	Wilson (91CVS1906)	Affirmed
SHAW v. JONES No. 9411SC205	Harnett (93CVS1193)	Affirmed

STATE v. BROOKS No. 9416SC348	Robeson (89CRS22752) (89CRS22753) (89CRS22755) (89CRS22867) (89CRS22868) (89CRS22869)	Affirmed
STATE v. KIMBRO No. 9410SC260	Wake (93CRS3187)	No Error
STATE v. PERKINS No. 9417SC173	Rockingham (93CRS309) (93CRS310) (93CRS311)	No Error

PEACE RIVER ELECTRIC COOPERATIVE, INC., PLAINTIFF AND THIRD-PARTY PLAINTIFF v. WARD TRANSFORMER COMPANY, INC., DEFENDANT, AND NATIONWIDE MUTUAL INSURANCE COMPANY AND ELECTRO-TEST CORPORATION, THIRD-PARTY DEFENDANTS

No. 9210SC847

(Filed 18 October 1994)

1. Liens § 9 (NCI4th)— amount of lien alleged in complaint not challenged—order to subcontractor to release property proper

The clerk of court did not err in ordering defendant subcontractor, who repaired plaintiff's transformer under an agreement with the contractor, to relinquish possession of the transformer upon plaintiff owner's tender of $100.00 pursuant to N.C.G.S. § 44A-2(a)(3), since N.C.G.S. § 44A-3 explicitly provides that the amount set forth in the complaint of the party seeking possession shall be deemed to be the amount of the asserted lien unless that allegation is challenged in the statutorily specified manner, and defendant failed to file within three days following service of plaintiff's summons and complaint a statement alleging a contrary amount of lien.

Am Jur 2d, Mechanics' Liens §§ 239 et seq.

2. Liens § 9 (NCI4th)— repairer of equipment as legal possessor and not owner—applicability of statute—appropriate amount of lien

Third-party defendant Electro-Test, which contracted to repair plaintiff's transformer, was a "legal possessor" rather than an "owner" of plaintiff's transformer, and defendant subcontractor, which actually repaired the transformer, was an independent contractor rather than an agent of third-party defendant; therefore, the clerk of court properly determined the amount of defendant's lien to be limited by N.C.G.S. § 44A-2(a)(3) to $100.00.

Am Jur 2d, Mechanics' Liens §§ 65 et seq., 239 et seq.

Right of subcontractor's subcontractor or materialman, or of materialman's materialman, to mechanic's lien. 24 ALR4th 963.

3. Appeal and Error § 150 (NCI4th)— statute providing constitutionally adequate lien—failure to raise constitutionality question

There was no merit to defendant subcontractor's contention that N.C.G.S. § 44A-2 failed to provide a constitutionally adequate lien, since defendant did not challenge the constitutionality of the statute during any of the proceedings before the trial court; by limiting to $100.00 the amount of the lien allowed for a lienor who deals with a legal possessor of certain property, the statute protects an owner from having to pay two contractors for one set of services, and defendant's arguments presented no basis for upsetting the presumption of constitutionality in favor of this legislative balance of adverse interests; and defendant was statutorily entitled to contest the $100.00 amount of the lien asserted by the owner in its complaint but failed to do so.

Am Jur 2d, Appeal and Error § 574.

4. Liens § 9 (NCI4th)— failure of subcontractor to contest amount of lien—assertion of equitable remedy barred

Because of defendant subcontractor's failure to contest the amount of lien claimed by plaintiff in the manner prescribed by statute, it was disqualified from asserting any equitable remedy; furthermore, because plaintiff and its insurer established the nonexistence of an essential element of defendant's counterclaim for breach of an implied contract, i.e., that any alleged enrichment of plaintiff was unjust, summary judgment on that claim was properly allowed.

Am Jur 2d, Mechanics' Liens §§ 239 et seq.

Appeal by defendant from order entered 27 April 1992 by Judge Narley L. Cashwell in Wake County Superior Court and order entered 1 May 1992 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 17 June 1993.

Crisp, Davis, Schwentker, Page, Currin & Nichols, by Cynthia M. Currin, for plaintiff-appellee.

Brent E. Wood, for defendant-appellant.

Bailey & Dixon, by Dorothy V. Kibler and Lauren A. Murphy, for third-party defendant-appellee.

JOHN, Judge.

Defendant Ward Transformer Company, Inc. (Ward) appeals dismissal of its counterclaims. A first order, dated 27 April 1992, entered judgment on the pleadings in favor of plaintiff Peace River Electric Cooperative, Inc. (Peace River) on Ward's negligence claim and in favor of third-party defendant Nationwide Mutual Insurance Company (Nationwide) on the derivative negligence claim brought against it by Peace River. A second order, entered 1 May 1992, granted summary judgment to Peace River on Ward's remaining claim for breach of an implied contract and to Nationwide on Peace River's third-party implied contract claim. In the latter order, the court also affirmed certain prior orders issued by the Wake County Clerk of Superior Court.

In its argument before this Court, Ward asserts statutory entitlement to a mechanics' lien for the full extent of its claim for payment. In addition, Ward alleges the trial court erred by denying its request for a continuance of the hearing on Peace River's motion for judgment on the pleadings. We are unpersuaded by Ward's contentions.

Pertinent procedural and factual background is as follows: Peace River is a non-profit rural electric cooperative based in Wauchula, Florida. On 7 May 1989, a Peace River 12 MVA transformer was vandalized in Bowling Green, Florida. Peace River promptly notified its insurer, Nationwide, and received assurances from the latter's agent Robert Newsome and claims adjuster Delores Sill (Sill) that damage to the transformer was covered by Peace River's insurance policy. After discussing available options, Peace River and Nationwide agreed the former would "choose a contractor for an estimate of repairs to the transformer" which would be provided either to Peace River or directly to Nationwide.

Joseph Hegwood (Hegwood), a Peace River engineer, contacted Electro-Test Corporation (Electro-Test) to obtain a preliminary repair estimate. At this time, Harold Murphree (Murphree), President of Electro-Test, informed Hegwood that Electro-Test could repair the transformer, but that it would be necessary to subcontract part of the work to Ward. Hegwood "had no problem with Ward doing the work."

Contractual negotiations with Electro-Test for the repair of Peace River's transformer were handled exclusively by Nationwide's agent Sill. In correspondence between Murphree and Sill, the total final cost was set at $153,607.00; Sill thereafter authorized Electro-Test to commence work on the transformer and Nationwide advanced Electro-

Test a deposit of half the total repair costs "up front." Pursuant to the contract executed by Nationwide and Electro-Test, Peace River shipped the transformer to Electro-Test's plant in Chattanooga, Tennessee, issuing a "purchase order" for the work on 11 May 1989.

Thereafter, Electro-Test officially subcontracted with Ward to perform certain repairs upon Peace River's transformer and shipped the transformer to Ward's plant in Raleigh, North Carolina. The terms of the agreement were later revised in a document dated 20 July 1989. Ultimately, Electro-Test was to pay Ward $97,000.00 upon the latter's delivery of the repaired transformer.

In mid-September 1989, upon Nationwide's inquiry, Electro-Test indicated the transformer would be available around 15 October 1989. In late November, Murphree informed Sill repair had been accomplished and requested payment of the balance due. To that end, on 30 November Sills issued a Nationwide check in the amount of $76,803.50 payable to the order of Electro-Test. Meanwhile, having completed its contractual obligation to Electro-Test, Ward issued invoices directly to Electro-Test in the amount of $97,000.00 plus accumulated interest for repair of the Peace River transformer.

However, Electro-Test forwarded no payment to Ward. Correspondence between the two companies reveals an on-going dispute concerning past due bills for unrelated work. In a 19 March 1990 letter to Ward, Murphree demanded payment of the earlier unpaid invoices, acknowledged Electro-Test owed Ward $97,000.00 for repair of the Peace River transformer, and requested immediate release of the transformer. The request was not honored, however, and by letter dated 16 May 1990 Ward advised Murphree that if Electro-Test failed to tender $97,000.00 within ten days, Ward would sell or salvage the transformer to cover its costs. Despite Nationwide's payment to Electro-Test for repair of the transformer several months earlier, Electro-Test persisted in its failure to remit any sum to Ward. In the interim, an attorney for Peace River had written Murphree demanding immediate delivery of the transformer. On 31 May 1990, Sills wrote Murphree in a similar vein, setting a 15 June 1990 deadline.

On or about 4 June 1990, Ward served Peace River by registered mail with a Notice of Intent to Enforce Lien pursuant to N.C. Gen. Stat. § 44A-4 (1989 & Cum. Supp. 1993). As authorized by the statute, Peace River thereafter timely sought a judicial hearing to determine the validity of Ward's asserted lien, properly serving Ward with notice thereof. *See* G.S. § 44A-4(b)(2).

In addition, on 13 June 1990 Peace River filed the instant civil action, seeking possession of the transformer. *See* G.S. § 44A-4(a). In its complaint, Peace River alleged it held legal title to the transformer; that Electro-Test was a "legal possessor" of the transformer; and that because Ward had dealt directly with a legal possessor as opposed to an owner of the transformer, the amount of any lien asserted by Ward was properly limited to $100.00 under N.C. Gen. Stat. § 44A-2(a)(3) (1989). Peace River thereafter tendered $100.00 to the Wake County Clerk of Superior Court and requested immediate possession of its transformer from Ward. The latter filed no contrary statement of the amount of lien within three days. *See* G.S. § 44A-4(a).

On 2 July 1990, the matter came on for hearing before the Clerk, who, by order issued that same date, determined as follows:

> Peace River contracted with Electro-Test Corporation of Chattanooga, Tennessee to repair the transformer. Electro-Test then subcontracted with Ward to perform some portion of or all of the repairs.
>
> Peace River properly served Ward with a copy of a Summons and Complaint on June 13, 1990. The complaint requested immediate possession of the transformer and stated the correct amount of the lien to be $100, *which was undisputed.* Defendant Ward has not within three days after the service of the summons and complaint contested the amount of the lien. Accordingly, the amount of the lien is deemed to be $100. The Plaintiff, Peace River, having paid into court the amount of the lien, $100, and having requested immediate possession of its property, a 12MVA three phase transformer . . . , all in accordance with GS § 44A-4(a), it is hereby
>
> DECLARED AND ORDERED that Defendant Ward Transformer Company, Inc. hereby relinquish control and possession of the transformer to the Plaintiff Peace River Electric Cooperative, Inc., the lawful and rightful owner of said transformer.

(Emphasis added). Ward promptly filed a motion to reconsider which was denied by order filed 10 July 1990.

In its 5 July 1990 answer to Peace River's complaint herein, Ward asserted counterclaims based upon the alleged negligence of, and breach of implied contract by, Peace River. In response, Peace River denied liability and named Nationwide third-party defendant for indemnification in the event Peace River was held liable to Ward in

any amount. Peace River also set out in its reply a third-party complaint against Electro-Test. Nationwide filed answer to Peace River's third-party complaint on 25 March 1991, denying liability and also cross-claiming against Electro-Test under a theory of unjust enrichment.

Peace River and Nationwide obtained default judgments against Electro-Test on 24 October 1990 and 6 June 1991, respectively. Electro-Test subsequently filed for bankruptcy, obtaining an automatic stay of all legal proceedings against it. By order entered 23 December 1991, the Bankruptcy Court lifted the stay and allowed the instant action to proceed.

On 29 January 1992, Nationwide moved for judgment on the pleadings pursuant to N.C.R. Civ. P. 12(c) (1990), and submitted a calendar request for hearing at the 16 March 1992 session of Wake County Superior Court. Receiving no objection, the court calendared the motion for hearing on 16 March at 2:45 p.m. Subsequently, Peace River on 6 March also moved for judgment on the pleadings, and sought concurrent scheduling of its motion with that of Nationwide. On 9 March 1992, Ward filed objection to the 16 March hearing date sought by Peace River, alleging that as Ward's counsel had not anticipated the presence of Peace River at the 16 March hearing on Nationwide's motion, he had made "a pre-existing commitment[,] in Alamance County on that date." Counsel also made reference to certain outstanding discovery requests, and concluded it "would be grossly unfair and certainly not in the interest of justice" to have Peace River's motion heard on 16 March.

The hearing nonetheless proceeded on the scheduled date with the court "tak[ing] the motions under advisement." On 27 April 1992, Superior Court Judge Narley Cashwell granted Peace River's motion for judgment on the pleadings only as to Ward's counterclaim for negligence. The court also dismissed Peace River's third-party complaint against Nationwide arising out of Ward's negligence claim.

On 16 March 1992, Nationwide moved pursuant to N.C.R. Civ. P. 56 (1990) for summary judgment on those third party claims of Peace River against it which survived the hearing; the motion was then refiled on 14 April 1992 to include an affidavit from Sill. On 23 March 1992, Peace River moved for summary judgment on Ward's remaining counterclaim for breach of implied contract. Counsel for Peace River, Nationwide, and Ward each filed affidavits in support of their positions. Following a hearing, Superior Court Judge Gregory Weeks

entered an order dated 1 May 1992 awarding summary judgment to Peace River on Ward's counterclaim for breach of an implied contract; granting summary judgment in favor of Nationwide on Peace River's derivative third-party claim against it for breach of implied contract; dismissing in its entirety Ward's counterclaim against Peace River and Peace River's third-party complaint against Nationwide; and affirming the 2 July 1990 and the 10 July 1990 orders of the clerk of court which, respectively, required Ward to relinquish possession of the transformer and denied Ward's motion for reconsideration of the 2 July order.

Ward raises nine assignments of error (subsumed into four arguments in its appellate brief) to the 27 April 1992 and 1 May 1992 orders of the superior court. Ward also contends the court erred by hearing Peace River's motion for judgment on the pleadings on 16 March 1992 despite Ward's request for a continuance.

Pursuant to N.C.R. App. P. 10(d), Peace River and Nationwide cross-assign as error the trial court's failure in its 27 April order to grant judgment on the pleadings in their favor as to all claims asserted against them.

I.

Ward's primary contention before us is that the clerk of court and the trial court erred by failing to recognize its statutory entitlement to a mechanics' lien to the full extent of its claim for payment, i.e., $97,000.00 plus accrued interest, as opposed to the $100.00 exacted by the Clerk. Ward supports its assertion with a multi-faceted argument, beginning with proposed construction of certain language contained in Chapter 44A and progressing into discussion of legislative history and constitutional mandates. However, our resolution of this matter renders unnecessary detailed review of Ward's historical and policy analyses.

A.

[1] The parties to the instant action first became *directly* involved with each other shortly after it became apparent Electro-Test had determined not to compensate Ward for its services in the agreed contractual amount. Ward thereupon claimed a lien upon the transformer in its possession, and accordingly served Peace River with a "Notice of Intent to Enforce Lien Under G.S. 44A-4" on or about 4 June 1990. The Notice provided *inter alia* as follows:

> *The undersigned lien claimant* gives this Notice of Intent to Enforce Lien pursuant to North Carolina law and *claims all rights [to which] it is entitled under Part 1 and under Article I of Chapter 44A of the North Carolina General Statutes.*

(Emphasis added).

Article 1 of Chapter 44A codifies the long-recognized common law lien allowed for artisans and mechanics who retain possession of items of personal property after altering or repairing them, *see Finance, Inc. v. Thompson*, 247 N.C. 143, 146-47, 100 S.E.2d 381, 383-84 (1957), and governs the entitlement to, as well as the creation and enforcement of, possessory liens on such property. G.S. § 44A-2, the specific statutory section detailing the type of lien to which Ward claims entitlement, provides as follows:

> **§ 44A-2. Persons entitled to lien on personal property.**
>
> (a) Any person who tows, alters, repairs, stores, services, treats, or improves personal property other than a motor vehicle in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property has a lien upon the property. The amount of the lien shall be the lesser of
>
> (1) The reasonable charges for the services and materials; or
>
> (2) The contract price; or
>
> (3) One hundred dollars ($100.00) if the lienor has dealt with a legal possessor who is not an owner.
>
> This lien shall have priority over perfected and unperfected security interests.

The uncontradicted evidence below was that Ward, in the ordinary course of its business, repaired the transformer as contracted with Electro-Test, and thus under the plain language of the statute held a lien upon the subject property in its possession. What is less clear, and what lies at the heart of the dispute between the parties, is the *proper amount* of the lien to which Ward was entitled.

While resolution of this issue might in some instances be dependent upon the relationship between the entities involved in the transaction out of which the claim of lien arose (e.g., whether the lienor dealt with an "owner" or a "legal possessor," *see infra*, Part B.), we

believe assignment of labels to the parties in the circumstances of the case *sub judice* is unnecessary to a determination of the proper amount of lien.

The segment of G.S. § 44A-4 governing Peace River's entitlement to seek repossession of personal property owned by it subject to Ward's asserted possessory lien provides as follows:

> The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. *If in any such action the owner or other party requests immediate possession of the property and pays the amount of the lien asserted into the clerk of the court in which such action is pending, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party.* The request for immediate possession may be made in the complaint, which shall also set forth the amount of the asserted lien and the portion thereof which is not in dispute, if any. *If within three days after service of the summons and complaint . . . the lienor does not file a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien.*

G.S. § 44A-4(a) (emphasis added).

Included among the allegations in Peace River's complaint were the following:

> 8. Peace River . . . is the owner of the aforementioned transformer . . . .
>
> 9. Electro-Test . . . was at all times relevant to this action merely a "legal possessor" . . . inasmuch as Electro-Test . . . had been merely entrusted with possession of the transformer by the owner, Peace River . . . .
>
> 10. Ward . . . dealt directly with the legal possessor, Electro-Test . . ., which is not the owner of the transformer.
>
> 11. The amount of the lien alleged by Ward . . . is limited to $100 as set forth in N.C.G.S. § 44A-2(a)(3).
>
> 12. [T]he owner of the transformer, Peace River . . . , hereby tenders to the clerk of court the amount of the lien asserted herein, $100, and requests immediate possession of the transformer.

13. The amount of the asserted lien, $100, is not in dispute.

Thus, under the plain language of the statute, after being served with Peace River's summons and complaint containing the foregoing allegations and requesting immediate possession of the subject property, Ward was required within three days to file a statement alleging a contrary amount of lien. However, Ward concededly failed to do so in the three days following service of Peace River's summons and complaint (or indeed at any time thereafter).

In the event no statement is timely filed, the statute explicitly provides that the *amount set forth in the complaint* of the party seeking possession (here, $100.00) "*shall* be deemed to be the amount of the asserted lien." *Id.* (emphasis added). Under the plain language of G.S. § 44A-4, therefore, because the lien amount was designated as $100.00 in Peace River's complaint and that allegation was not challenged in the statutorily specified manner, the amount of the lien was conclusively established as being $100.00. Thus, regardless of any labels attached to the various parties herein, the clerk of court did not err in ordering Ward to relinquish possession of the transformer upon Peace River's tender of $100.00. *See* N.C. Gen. Stat. § 44A-3 (1989 & Cum. Supp. 1993) ("Liens conferred under this Article . . . *terminate and become unenforceable* when . . . an owner . . . tenders prior to sale the amount secured by the lien . . . .") (emphasis added).

In short, the amount of the lien in the case *sub judice* was established by Ward's own inaction. To hold otherwise would contravene a cardinal rule guiding statutory construction recently expressed by this Court as follows: "[t]he 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." *State v. White*, 101 N.C. App. 593, 605, 401 S.E.2d 106, 113 (citation omitted), *disc. review denied, appeal dismissed*, 329 N.C. 275, 407 S.E.2d 852 (1991). The relevant, indeed determinative, language of G.S. § 44A-4 to which we must give effect permits of but one interpretation, and our holding comports therewith.

Moreover, a party asserting rights pursuant to statute must operate within the guidelines created by that particular statutory scheme. *See, e.g., AT&T Family Federal Credit Union v. Beaty Wrecker Service*, 108 N.C. App. 611, 613, 425 S.E.2d 427, 428 (1993) ("N.C.G.S. § 44A-4 states with specificity the procedures which must be followed in order for a lienor . . . to enforce its lien . . . [;] lienor must . . . com-

ply with the requisite statutory procedures for the purposes of conducting a public or private sale . . . .") (citation omitted); *see also Mace v. Construction Corp.*, 48 N.C. App. 297, 302, 269 S.E.2d 191, 194 (1980) (Analogously, "Article 2 of Chapter 44A . . . grants to mechanics, laborers, and materialmen certain liens *upon their compliance with the procedures defined in the Article.*") (emphasis added). Because Ward failed to adhere to the procedural requirements of the section under which it asserts a claim of lien, it cannot now be heard to contest the amount or the adequacy of the lien determined by the clerk of court.

B.

[2] Further, even assuming *arguendo* Ward's failure to file a contrary statement did not extinguish its right to contest the lien amount set forth in Peace River's complaint, limitation of the lien to $100.00 was not error in the circumstances of the case *sub judice.*

Crucial to Ward's position is its contention that the party with whom it dealt, Electro-Test, was an "owner" rather than a "legal possessor" of the Peace River transformer. Ward relies upon the definitional section of Chapter 44A, Article 1—N.C. Gen. Stat. § 44A-1 (1989 & Cum. Supp. 1993), in particular the following:

(1) "Legal possessor" means

a. Any person entrusted with possession of personal property by an owner thereof, or

b. Any person in possession of personal property and entitled thereto by operation of law.

(2) "Lienor" means any person entitled to a lien under this Article. . . . .

(3) "Owner" means

a. Any person having legal title to the property, or

b. A lessee of the person having legal title, or

c. A debtor entrusted with possession of the property by a secured party, or

d. A secured party entitled to possession, or

e. *Any person entrusted with possession of the property by his employer or principal who is an owner under any of the above.*

G.S. § 44A-1 (emphasis added).

Ward claims this section signifies that Peace River, although holding legal title to the transformer, is not the sole "owner" as that term is defined. Under G.S. § 44A-1(3)(e.), it continues, Electro-Test was also functioning as "owner" of the transformer upon entering into a subcontract with Ward. This assertion is based upon the contention that Peace River was acting in the capacity of an employer or principal when it entrusted Electro-Test (*ergo*, Peace River's employee or agent) with possession of the transformer. Therefore, Ward proceeds, having dealt with an "owner," it was entitled to a lien in the amount of either "[t]he reasonable charges for the services and materials" expended in repair of the transformer, *see* G.S. § 44A-2(a)(1), or for "[t]he contract price." *See* G.S. § 44A-2(a)(2).

We believe Ward misapprehends the purport of the statutory definitions. Although no reported case has yet examined this particular point of law, the principles behind the definition of "owner" to which Ward refers are a matter of well-established principal and agent (or master and servant) doctrine.

In the circumstance when an individual who contracts or is hired to perform a certain task causes injury or damage to persons or property, a question arises as to which entity assumes liability. Under the theory of *respondeat superior*, a principal (or employer) is vicariously liable for actions of its agent (or employee) undertaken within the course and scope of the latter's authority. *Blanton v. Moses H. Cone Hosp.*, 319 N.C. 372, 374-75, 354 S.E.2d 455, 457 (1987) (citation omitted).

There are two essential ingredients in a principal-agent relationship: (1) the authority of the agent, whether express or implied, to act for or on behalf of the principal, and (2) control over the agent by the principal. *See* 7 Strong's N.C. Index 4th *Principal and Agent* § 1, at 273 (1993). Our cases emphasize that the element of "control" is the primary indicator of an agency relationship. Thus, when an entity retains the right and is able to exert control or dominance over another's manner or method of performing a designated task, the former occupies the role of principal with respect to the latter. *Willoughby v. Wilkins*, 65 N.C. App. 626, 633, 310 S.E.2d 90, 95 (1983), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 698 (1984).

The test for determining whether the parties maintain an employer-employee relationship is, for all practical purposes, identical. Specifically, the primary indicator is that the alleged employer has the right to control and direct the manner in which the alleged employee conducts

his work. *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383-84, 364 S.E.2d 433, 437 (citations omitted), *reh'g denied*, 322 N.C. 116, 367 S.E.2d 923 (1988). An additional factor commonly involved in the employer-employee circumstance is continuity of employment, as opposed to engagement for a specific, one-time task. *Sharpe v. Bradley Lumber Co., Inc.*, 446 F.2d 152, 154 (4th Cir. 1971) (citation omitted), *cert. denied*, 405 U.S. 919, 30 L.Ed. 2d 789 (1972).

In contrast to the foregoing relationships, an independent contractor agrees to perform certain specified work according to its own judgment and methods, and is not subject to control by the entity with whom it contracts except as to the result of its labor. *Youngblood*, 321 N.C. at 383-84, 364 S.E.2d at 437 (citations omitted). Accordingly, an independent contractor is generally held personally liable for injury or damages to persons or property occurring in the course of the contracted employment.

In the case *sub judice*, it appears Electro-Test undeniably constituted a "legal possessor" of the transformer. We again observe this term includes "[a]ny person entrusted with possession of personal property by an owner thereof." G.S. § 44A-1(1)(a.). As Peace River is indisputably an "owner" of the transformer, *see* G.S. § 44A-1(3)(a.), and it is uncontroverted that Peace River shipped the transformer directly to Electro-Test pursuant to a contract of repair (thereby entrusting the latter with its possession), Electro-Test falls within the "legal possessor" category of entities with respect to the transformer.

By a somewhat confusing argument, however, virtually devoid of citation to authority, Ward contends that because Peace River was aware Electro-Test might hire Ward to perform some part of the repair work, Peace River should be considered an "employer" or "principal" with respect to Electro-Test. *See* G.S. § 44A-1(3)(e.) (" 'Owner' means . . . [a]ny person entrusted with possession of the property by his *employer or principal who is an owner* under any of the above.") (emphasis added); *see also* G.S. § 44A-2(a) ("The amount of the lien shall be . . . [o]ne hundred dollars ($100.00) if the lienor has dealt with a *legal possessor who is not an owner.*") (emphasis added). As further support for its position, Ward emphasizes the fact that Peace River "authorized Electro-Test to repair the transformer unqualifiedly with their purchase order." We are not persuaded by Ward's argument that Peace River was Electro-Test's employer or principal with regard to repair of the transformer. *See, e.g., Albertson v. Jones*, 42 N.C. App. 716, 718, 257 S.E.2d 656, 657 (1979) (when a

party seeks to enforce against an alleged principal a contract made by an alleged agent, the party has the burden of proving the existence of the agency relationship and the authority of the agent to bind the principal to a contract) (citations omitted).

A single contract for repair, entered into by Electro-Test and Nationwide (Peace River's insurer), comprises the total extent of any association between Electro-Test and Peace River. Beyond selection of Electro-Test to repair the transformer and receiving its cost estimate, Peace River was in no way involved in any negotiations with Electro-Test and exerted no control over the manner in which Electro-Test would or could perform the necessary labor. Electro-Test was in business for itself, a specialist in the task involved, and as even Ward observes, Peace River turned the job over to Electro-Test "unqualifiedly," signifying a complete lack of supervision by Peace River. While Peace River's agent Hegwood "had no problem with Ward doing the work" and thus gave his tacit approval to Electro-Test's choice of subcontractor, this simple fact does not change our analysis.

Accordingly, Electro-Test, a "legal possessor" with regard to the transformer, does not qualify as an "owner" under G.S. § 44A-1(3)(e.). That being the case and Ward thus having "dealt with a legal possessor [Electro-Test] who is not an owner," the clerk of court properly determined the amount of Ward's lien to be limited by statute to $100.00. *See* G.S. § 44A-2(a) ("The amount of the lien *shall be* . . . [o]ne hundred dollars ($100.00) if the lienor has dealt with a legal possessor who is not an owner.") (emphasis added). Therefore, the trial court properly affirmed the Clerk's 2 July and 10 July 1992 orders.

C.

[3] We decline to conduct an exhaustive analysis of Ward's constitutional, legislative history, and policy arguments. In brief, it contends that should the amount of lien be limited to $100.00 by G.S. § 44A-2, the statute fails to provide a constitutionally adequate lien. *See* N.C. Const. art. X, § 3 ("The General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor."). We disagree.

First, it has long been the rule that we will not decide at the appellate level a constitutional issue or question which was not raised or considered in the trial court. *Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 47-48, 332 S.E.2d 67, 69 (1985); *Midrex Corp. v. Lynch*,

Sec. of Revenue, 50 N.C. App. 611, 618, 274 S.E.2d 853, 857-58 (citations omitted), *disc. review denied, appeal dismissed*, 303 N.C. 181, 280 S.E.2d 453 (1981). The record in the case *sub judice* is devoid of any affirmative indication that Ward challenged the constitutionality of G.S. § 44A-2 during any of the proceedings before the trial court. This contention thus has not been properly preserved for our review. *Midrex*, 50 N.C. App. at 618, 274 S.E.2d at 857-58.

Moreover, the general rule endures that when considering the constitutionality of a statute, this Court will " 'indulge every presumption in favor [thereof].' " *Tetterton*, 314 N.C. at 49, 332 S.E.2d at 70 (quoting *Painter v. Board of Education*, 288 N.C. 165, 177, 217 S.E.2d 650, 658 (1975)). In enacting Chapter 44A, Article 1, it was necessary for the General Assembly to consider and protect competing interests, *see Caesar v. Kiser*, 387 F. Supp. 645, 648 (M.D.N.C. 1975) (ownership rights versus a craftsman's right to have security for payment of his services); by limiting to $100.00 the amount of the lien allowed for a lienor who deals with a legal possessor of certain property, for example, the statute protects an owner from having to pay two contractors for one set of services. Ward's arguments present no basis for upsetting the presumption of constitutionality in favor of this legislative balance of adverse interests.

Finally, we note again that Ward was statutorily entitled to contest the $100.00 amount of the lien asserted by Peace River in its complaint, but failed to do so. Particularly in light of this attendant circumstance, Ward's contention that G.S. § 44A-2 furnished it a constitutionally inadequate lien is unfounded. *See Jones Cooling & Heating v. Booth*, 99 N.C. App. 757, 760, 394 S.E.2d 292, 294 (1990) ("We do not consider plaintiff's failure to timely assert the remedy a circumstance that renders the statutory remedy 'inadequate . . . .' "), *disc. review denied*, 328 N.C. 732, 404 S.E.2d 869 (1991).

II.

[4] Ward next maintains the court erred in granting summary judgment in favor of Peace River on Ward's claim of breach of implied contract and to Nationwide on Peace River's third-party implied contract claim. These arguments cannot be sustained.

Summary judgment is a procedural device designed to penetrate unfounded claims in advance of trial. *See* Rule 56(c); *see also Patrick v. Hurdle*, 16 N.C. App. 28, 37, 190 S.E.2d 871, 877, *disc. review denied*, 282 N.C. 304, 192 S.E.2d 195 (1972). In ruling, the trial court

is to view all the evidence (pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any) in the light most favorable to the non-movant, *Patterson v. Reid*, 10 N.C. App. 22, 28, 178 S.E.2d 1, 5 (1970) (citation omitted), drawing all reasonable inferences in its favor, *Whitley v. Cubberly*, 24 N.C. App. 204, 207, 210 S.E.2d 289, 291 (1974) (citations omitted), and accepting as true all its asserted facts. *Railway Co. v. Werner Industries*, 286 N.C. 89, 98, 209 S.E.2d 734, 739 (1974). When the evidence, construed in that light, establishes the absence of a genuine issue of material fact, summary judgment is properly granted.

Citing the "implied contract" language in G.S. § 44A-2(a) (a lien is established in favor of "[a]ny person who tows, alters, repairs, stores, services, treats, or improves personal property . . . *pursuant to an express or* ***implied contract with an owner*** *or legal possessor* of the personal property") (emphasis added), Ward urges us to hold Peace River impliedly contracted with Ward for repair of the transformer. Alternatively, Ward contends construing all the evidence in its favor at a minimum raises a genuine issue of fact concerning the existence of such an implied contract.

We first note that Ward in its brief to this Court has cited no North Carolina authority bolstering its position. *See* N.C.R. App. P. 28(b)(5). Moreover, the facts and circumstances of the 1956 Mississippi case to which Ward does refer render it easily distinguishable from the case *sub judice*.

In addition, it is well-established that if an "adequate remedy at law" may be sought, the court's "equitable intervention is obviated." *See, e.g., Embree Construction Group v. Rafcor, Inc.*, 330 N.C. 487, 491, 411 S.E.2d 916, 920 (1992); "restitution is not available on a claim of unjust enrichment for a subcontractor who failed to utilize the remedies of Chapter 44A when these would have given him adequate relief." *Id.* (citation omitted). Therefore, because of Ward's failure to contest the amount of lien claimed by Peace River in the manner prescribed by the statute, it was disqualified from asserting any equitable remedy.

Finally, a brief examination of the law of contracts implied in law (quasi-contracts) reveals that Ward's contention in any event is without basis. The basic equitable principle which developed into the law of quasi-contracts is that "a person shall not be allowed to enrich himself unjustly at the expense of another." 25 Strong's N.C. Index 4th *Quasi Contracts and Restitution* § 1, at 7 (1993). Accordingly, in the

absence of any actual agreement between parties, the law will nonetheless impose a contract in order to prevent "unjust enrichment," *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 645, 312 S.E.2d 215, 217 (1984), basing recovery on a theory of *quantum meruit*. *Paxton v. O.P.F., Inc.*, 64 N.C. App. 130, 132, 306 S.E.2d 527, 529 (1983) (citation omitted).

> "Unjust enrichment" has been described as follows:
>
> the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle underlying various legal doctrines and remedies, that *one person should not be permitted unjustly to enrich himself [or herself] at the expense of another* . . . .

Ivey v. Williams, 74 N.C. App. 532, 534, 328 S.E.2d 837, 839 (1985) (emphasis added) (quoting 66 Am. Jur. 2d *Restitution and Implied Contracts* § 3, at 945 (1973)). Furthermore, "[t]he mere fact that one party was enriched, even at the expense of the other, does not bring the doctrine of unjust enrichment into play. 'There must be some added ingredients to invoke the unjust enrichment doctrine.' " *Williams v. Williams*, 72 N.C. App. 184, 187, 323 S.E.2d 463, 465 (1984) (quoting, inaccurately in part, *Wright v. Wright*, 305 N.C. 345, 351, 289 S.E.2d 347, 351 (1982)); *see also Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761 (recovery under *quantum meruit* based upon contract implied-in-law is only proper in circumstances such that it would be "unfair" for the recipient to retain the benefit of the claimant's services), *aff'd per curiam*, 312 N.C. 324, 321 S.E.2d 892 (1984).

Construing all the evidence in the light most favorable to Ward, we conclude its claim of implied contract is fatally deficient and that summary judgment thereon was properly granted. In short, Peace River was not unjustly enriched by Ward's completion of its contractual obligation to Electro-Test. Although Peace River received the benefit of a repaired transformer, Electro-Test (the party with whom Nationwide, the insurer of Peace River, contracted) was fully paid for the completed repairs. Therefore, while Peace River arguably may have been "enriched," any such enrichment was in no way *unjust*. Moreover, under the circumstances of this case, requiring Peace River to pay Ward for its services would itself be manifestly unjust. Peace River had no knowledge of or control over the terms of the contract entered into between Electro-Test and Ward; it therefore

was in no position to protect Ward from any potential breach of contract by Electro-Test. Accordingly, because Peace River and Nationwide established the non-existence of an essential element of Ward's counterclaim for breach of an implied contract, i.e., that any alleged enrichment of Peace River was *unjust*, summary judgment on that claim was properly allowed. *Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 690, 340 S.E.2d 510, 512 (1986).

Our resolution of this issue renders unnecessary discussion of the arguments contained in Ward's reply brief regarding certain allegedly applicable exceptions to the general rules relating to the law of implied contracts.

III.

Ward next argues the trial court erred in granting judgment on the pleadings to Peace River on Ward's counterclaim for negligence, and to Nationwide on Peace River's third-party claim for indemnification should Peace River be found liable to Ward for negligence. We disagree.

Initially, we observe Ward has presented no citation to any authority directly supporting this argument. While consideration of this assignment of error is thus not required, *see* N.C.R. App. P. 28(b)(5), we nonetheless elect to examine briefly the merits thereof. *See* N.C.R. App. P. 2.

Motions for judgment on the pleadings pursuant to Rule 12(c) are designed to "dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). As such motions are not favored, "the pleadings under attack will be liberally construed in the light most favorable to the non-moving party." 1 G. Gray Wilson, *North Carolina Civil Procedure* § 12-13, at 222 (1989). To that end, a party raising a motion under Rule 12(c) simultaneously admits the truth of all well-pleaded factual allegations in the opposing party's pleading and the untruth of its own allegations insofar as the latter controvert or conflict with the former. *Pipkin v. Lassiter*, 37 N.C. App. 36, 39, 245 S.E.2d 105, 106 (1978) (citation omitted). The movant bears the burden of establishing that, even viewing the facts and permissible inferences in the light most favorable to the non-movant, it is entitled to judgment as a matter of law. *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 504, 353 S.E.2d 269, 271 (1987) (citation omitted). Our examina-

tion of the record reveals Peace River and Nationwide have each carried this burden.

The essential elements of any negligence claim are the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff. *Sasser v. Beck*, 65 N.C. App. 170, 171, 308 S.E.2d 722, 723 (1983) (citations omitted), *disc. review denied*, 310 N.C. 309, 312 S.E.2d 652 (1984). As stated by our Supreme Court in *Meyer v. McCarley and Co.*, 288 N.C. 62, 68, 215 S.E.2d 583, 587 (1975), "[t]he first prerequisite for recovery of damages for injury by negligence is the existence of a legal duty, owed by the defendant to the plaintiff, to use due care." (Citations omitted). Even construing Ward's pleadings liberally, we discern no allegation of an actual legal duty owed by Peace River to Ward. Ward claims Peace River had an obligation to ensure that Ward received payment for its work, but no precedent supports the imposition of such a duty. Accordingly, Ward's pleadings fail to establish an essential element of a claim for negligence, and the trial court properly granted judgment on the pleadings with respect to Ward's counterclaim based upon that theory of recovery. Because no valid claim was asserted against Ward, its third-party claim for indemnification against Nationwide was also properly dismissed.

IV.

In its final assignment of error, Ward maintains the trial court erred by hearing Peace River's Rule 12(c) motion on 16 March 1992 in the face of objection and ostensible request for continuance by Ward's counsel. We are unpersuaded by this contention.

First, "continuances are not favored and the party seeking [one] has the burden of showing sufficient grounds for it." *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984) (citations omitted); *see* N.C.R. Civ. P. 40(b) (1990). Second, the question of whether or not to grant a continuance is a matter solely within the discretion of the trial court; absent a manifest abuse of discretion, this Court will not disturb the decision made below. *Pickard Roofing Co. v. Barbour*, 94 N.C. App. 688, 691-92, 381 S.E.2d 341, 343 (1989) (citations omitted).

In the case *sub judice*, Ward's counsel alleged he had a "preexisting commitment" in another county on the scheduled hearing date and also alluded to certain outstanding discovery matters. However, neither circumstance mandated postponement. As this Court

has stated, "[a]ttorneys, under the guise of having business requiring their presence elsewhere, ought not to be allowed to delay, defeat or prevent a litigant from . . . being heard on a motion at some reasonably suitable and convenient time." *Austin v. Austin*, 12 N.C. App. 286, 297, 183 S.E.2d 420, 428 (1971). Additionally, when a motion for judgment on the pleadings is being considered, discovery materials are not examined.

Further, it is not disputed that the court took Ward's motion under advisement and reserved ruling thereon for almost five weeks. During that time, Ward was provided copies of briefs filed by Peace River and Nationwide in support of their motions; Ward nonetheless filed no brief in opposition.

In sum, we discern no abuse of discretion by the trial court in hearing Peace River's motion concurrently with that of Nationwide, nor has Ward shown it suffered any prejudice thereby. Accordingly, we reject this assignment of error.

Cross-Assignments of Error

Pursuant to N.C.R. App. P. 10(d), Peace River and Nationwide cross-assign as error the trial court's failure to grant their motions for judgment on the pleadings regarding Ward's counterclaim for breach of implied contract. Our decision to affirm the 27 April and 1 May 1992 orders renders unnecessary consideration of these cross-assignments of error.

Based on the foregoing, we affirm the 27 April 1992 and 1 May 1992 orders of the trial court in their entirety.

Affirmed.

Judges JOHNSON and WYNN concur.

STARKEY SHARP v. LINDA R. SHARP

No. 931DC776

(Filed 18 October 1994)

1. Divorce and Separation § 155 (NCI4th)— equitable distribution—post-separation appreciation of marital property—consideration by trial court

In an equitable distribution action, there was no merit to defendant's contention that the trial court failed to consider post-separation appreciation of marital property in the hands of plaintiff where the record reflected that the referee thoroughly considered the post-separation appreciation and depreciation of marital assets in his report and recommended an unequal distribution to the trial court, and the court, after reviewing the referee's report and considering the income, property, and liabilities of each party at the time the division of the property was to become effective, adjusted the distribution to give defendant an even greater share.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

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

2. Trial § 151 (NCI4th)— stipulated value of land—stipulations binding

Where the parties entered into stipulations as to the value of real property on the date of the hearing before the referee, and defendant did not seek to set aside her stipulations and present evidence to the trial court as to the value of the property two years later at the date of distribution, defendant was bound by her stipulation.

Am Jur 2d, Stipulations §§ 13 et seq.

3. Divorce and Separation § 135 (NCI4th)— equitable distribution—value of subdivision

The evidence was sufficient to support the trial court's finding in an equitable distribution action as to the value of a residential subdivision where that value was based on an appraiser's

report and testimony showing that the method used to arrive at the valuation reasonably approximated the net value of the business interest.

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

4. Divorce and Separation § 155 (NCI4th)— equitable distribution—no inconsistent findings by trial court

The trial court's findings in an equitable distribution action that the proceeds from the sale of lots in a residential subdivision were both income from the partnership which developed the property and liquidation of an asset were not inconsistent with each other.

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

5. Divorce and Separation § 156 (NCI4th)— equitable distribution—no waste of marital assets by plaintiff

The evidence was sufficient to support the referee's finding in an equitable distribution action that there was no evidence of any pre-separation or post-separation waste of marital assets by plaintiff.

Am Jur 2d, Divorce and Separation § 929.

Spouse's dissipation of marital assets prior to divorce as factor in divorce court's determination of property division. 41 ALR4th 416.

6. Divorce and Separation § 135 (NCI4th)— equitable distribution—value of wetland lots

The trial court in an equitable distribution action did not err in finding that two wetland lots owned by a partnership in which plaintiff held 25% interest had no value, though there was conflicting evidence as to their value.

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

7. Divorce and Separation § 140 (NCI4th)— law partnership—method of valuation proper

The trial court did not err in applying an average of methodologies to value plaintiff's partnership interest in his law firm; furthermore, defendant could not complain about this method of valuation where she did not argue in her brief an alternative methodology of an alternative valuation that should have been used, or cite any portion of the record containing evidence of an

alternative methodology or valuation, or cite evidence in support of her contention that the appraiser's figure did not approximate the fair market value of the partnership.

Am Jur 2d, Divorce and Separation §§ 944-946.

Evaluation of interest in law firm or medical partnership for purposes of division of property in divorce proceedings. 74 ALR3d 621.

8. Divorce and Separation § 140 (NCI4th)— valuation of law partnership—proper method used—requirements for challenging methodology

The trial court did not err by finding as fact that the deduction of taxes at a 40% rate in the capitalization of earnings and capitalization of excess earnings analysis of the value of plaintiff's law partnership was properly treated as an expense of the practice; furthermore, when the trial court has accepted an expert's methodology, a party desiring to challenge the methodology must produce other testimony challenging that methodology and set out the prejudicial error which resulted from its use.

Am Jur 2d, Divorce and Separation §§ 944-946.

Evaluation of interest in law firm or medical partnership for purposes of division of property in divorce proceedings. 74 ALR3d 621.

9. Divorce and Separation § 156 (NCI4th)— equitable distribution—decline in value of business—failure to find plaintiff's poor management—no error

The trial court in an equitable distribution action did not err in failing to find as a fact that plaintiff's poor management practices of a restaurant were directly responsible for the decline in the value of the business after the date of separation, since evidence existed in the record contrary to defendant's contention.

Am Jur 2d, Divorce and Separation § 929.

Spouse's dissipation of marital assets prior to divorce as factor in divorce court's determination of property division. 41 ALR4th 416.

10. Divorce and Separation § 152 (NCI4th)— equitable distribution—contribution of each spouse during law school

The trial court in an equitable distribution action sufficiently considered as a distributive factor the financial contributions of

each spouse to the marriage during the time plaintiff was in law school.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

11. Divorce and Separation § 528 (NCI4th)— expert witness fee—award proper

The trial court did not err in ordering defendant to pay $8,000 and plaintiff to pay $19,912 in expert witness fees, since the fees were reasonable; the consent order entered by the referee stating that the parties would not be ordered to pay more than $21,000 in expert witness fees did not deprive the court of its authority to award reasonable compensation to an expert witness appointed by consent of the parties; and the court's finding that the bulk of the fees was a direct result of plaintiff's delay in providing information to the appraiser was supported by the evidence.

Am Jur 2d, Divorce and Separation § 617.

Excessiveness or adequacy of attorneys' fees in domestic relations cases. 17 ALR5th 366.

12. Divorce and Separation § 528 (NCI4th)— referee fee—equal payment required—no error

The trial court in an equitable distribution action did not err in ordering the parties to bear equal responsibility for the referee fee of $13,319.92. N.C.G.S. § 1A-1, Rule 53(d).

Am Jur 2d, Divorce and Separation § 617.

Appeals by plaintiff and defendant from judgment and orders entered 19 April 1993 by Judge A. Elizabeth Keever in Dare County District Court. Heard in the Court of Appeals 15 April 1994.

Plaintiff and defendant were married on 19 July 1972. On 23 January 1984, plaintiff and defendant separated, and on 1 July 1985, plaintiff husband filed a complaint for absolute divorce from defendant wife. On 5 August 1985, defendant wife filed an answer and counterclaim for an equitable distribution of the marital assets pursuant to N.C. Gen. Stat. §§ 50-20, 50-21. The trial court severed the claim for equitable distribution and in 1987 entered an order granting plaintiff an absolute divorce.

On 15 August 1988, by consent of the parties, the trial court entered an order of reference appointing Jack P. Gulley, attorney at law, as referee "to hear and determine all of the issues involved in this action." Subsequently, on 1 July 1992, Mr. Gulley filed his referee report. Thereafter, defendant filed her objections and exceptions to the report.

On 19 April 1993, Judge A. Elizabeth Keever entered a judgment on the equitable distribution claim adopting in part and amending in part the referee's report. In this judgment, Judge Keever determined the net marital estate at the date of separation to be $444,514 and concluded that an unequal division of the marital assets would be just and proper. Subsequently, Judge Keever awarded defendant 56% of the marital estate, which included an in-kind award of $49,601 and a distributive award of $200,000 from plaintiff, and awarded plaintiff 44% of the marital estate which included an in-kind award of $394,913 and the liability of the distributive award to plaintiff.

Judge Keever also entered an order regarding payment of expert witness fees in which Judge Keever ordered plaintiff to pay the sum of $19,912 and defendant to pay the sum of $8,000 to the firm of Lowrimore, Warwick & Company for their expert appraisal of seven business entities with regard to the equitable distribution claim. Judge Keever also entered an order requiring the parties to equally divide the payment of the referee fee of $13,319.92 to be paid by the parties to Mr. Gulley.

From the judgment of equitable distribution and the order regarding the allocation of the expert witness fee, plaintiff appeals. From the judgment of equitable distribution, the order regarding the allocation of the expert witness fee, and the order regarding payment of the referee fee, defendant appeals.

Sharp, Michael, Outten & Graham, by Steven D. Michael, for plaintiff-appellant/appellee.

Womble Carlyle Sandridge & Rice, by Carole S. Gailor and Marilyn R. Forbes, for defendant-appellant/appellee.

ORR, Judge.

At the outset, we note that plaintiff has abandoned his assignments of error with regard to the order for equitable distribution pursuant to N.C.R. App. P. 28(b)(5).

I.

DEFENDANT'S APPEAL FROM ORDER OF EQUITABLE DISTRIBUTION

[1] First, defendant assigns as error the trial court's failure to consider the post separation appreciation of marital property in the hands of plaintiff. Because we find that the trial court correctly considered these factors in its award, we find no error.

In an action for equitable distribution, "[t]he trial judge must consider those distributional factors raised by the evidence." *Truesdale v. Truesdale*, 89 N.C. App. 445, 450, 366 S.E.2d 512, 516 (1988). N.C. Gen. Stat. § 50-20(c) (1987 & Supp.) lists these distributional factors. N.C. Gen. Stat. § 50-20(c)(1),(11a), and (12) state:

> (c) There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:
>
> (1) The income, property, and liabilities of each party at the time the division of property is to become effective;
>
> . . .
>
> (11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution; and
>
> (12) Any other factor which the court finds to be just and proper.

In the present case, defendant specifically contends that the trial court failed to consider income plaintiff received after the date of separation but before the date of distribution from a real estate partnership, Foreman, Roebuck, Small & Sharp ("FRS&S"), in which plaintiff was a 25% partner, and income plaintiff received when he withdrew from his law firm, Kellogg, White, Evans & Sharp, in November 1985 from the sale of personalty, payments on notes receivable, and from distribution of a share of the partnership assets as distributive factors in its equitable distribution.

Our review of the judgment shows, however, that the trial court considered the post-separation appreciation and depreciation of the

assets regarding the income plaintiff received from FRS&S. The judgment states:

> 14. DISTRIBUTION ISSUES. FINDING #12. (p. 64) Any other factor which the Court finds to be just and proper.
>
> Subsequent to the separation of the parties, the Plaintiff maintained active oversight of the marital interests in Foreman, Robuck [sic], Small & Sharp and in FRISSCO, Inc. [a corporation formed primarily for the purposes of building and operating a restaurant. During the period following the separation, the Keeper[']s Hill Subdivision was primarily developed [by FRS&S] and the Plaintiff received the marital share of all of the profits from that venture. The value of this interest significantly decreased from the date of separation until the date of hearing as lots were developed and sold. The Plaintiff was actively involved in the development of this subdivision and received no compensation for that except for his proportionate share of the profits. He was also actively involved in the management of FRISSCO, Inc. and the restaurant that was built as part of that venture. The character of FRISSCO, Inc. also significantly changed from the date of separation until the date of the hearing and many of the assets were transferred to FRISSCO Partnership. Throughout the period following the date of separation, the Plaintiff had the advantage of retaining any profits from said venture and the benefit of any losses.

Further, although the trial court did not make specific findings of fact regarding plaintiff receiving the assets from his law firm in 1985, the trial court did find that the expert's evaluation of plaintiff's interest in the law partnership of Kellogg, White, Evans, & Sharp, "took into account the components of the practice including its fixed assets, cash, furniture, equipment, and other supplies, other assets including accounts receivable . . ., the value of work in progress, its goodwill, and its liabilities."

Following these findings, the trial court concluded, "[b]ased on a consideration of all of the foregoing, the court has determined and finds as a fact that an unequal division of the marital assets would be equitable . . . ." Based on this conclusion, the court awarded defendant 56% of the marital estate and plaintiff 44% of the marital estate.

Subsequently, defendant argues that the trial court's distribution of 56% of the total marital estate to defendant "has no rational rela-

tionship to the demonstrated magnitude of the post-separation economic loss incurred by the [d]efendant." In support of this argument, defendant contends that the distribution of marital property and the distributive award to defendant "should reflect her equitable share of the cash, benefits or appreciation realized by the [p]laintiff . . . and the additional investment value of a fair rate of return on those assets."

In North Carolina, trial courts are permitted "to distribute the marital property in any ratio deemed equitable through the award of adjustive credits reflecting the court's consideration of post-separation appreciation as a distributional factor." *Truesdale*, 89 N.C. App. at 450, 366 S.E.2d at 516. In making an award in an equitable distribution action, the trial court is vested with wide discretion, and appellate review of the equitable distribution award "is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

> A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. . . . A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

Id. (citation omitted).

In the case *sub judice*, the record reflects that the referee thoroughly considered the post-separation appreciation and depreciation of marital assets in his report and recommended to the trial court that approximately 51.5% of the marital estate be distributed to defendant. After reviewing the referee's report, the trial court modified the report and determined that defendant was entitled to a distribution of 56% of the marital estate. Subsequently, the trial court awarded defendant $49,601 in marital assets and a distributive award of $200,000.

In making this award, the trial court also considered the fact that "[b]ased on the 1983 Federal and State tax liability of the parties, the [d]efendant owes to the [p]laintiff the sum of Two Thousand Eight Hundred Two and No/100 Dollars ($2,802.00)[.]" Further, the trial court considered the income, property, and liabilities to each party at the time the division of the property was to become effective pursuant to N.C. Gen. Stat. § 50-20(c)(1) and found:

> Both parties have considerable separate property as of the date of distribution of the property. Plaintiff's income from his law practice in 1990 was One Hundred Twenty-nine thousand and No/100 Dollars ($129,000.00) and Defendant's income from her CPA practice in 1990 was Fifty-one Thousand and No/100 Dollars ($51,000.00). The value of Plaintiff's interest in his present law firm and the value of the Defendant's CPA practice have increased significantly since the date of separation.

Although defendant is entitled to have the trial court consider the post-separation appreciation of marital property and the effect the appreciation had on the parties, defendant is not necessarily entitled to a distribution of this post-separation appreciation. *See Truesdale*, 89 N.C. App. at 448-50, 366 S.E.2d at 514-15; *See also Gum v. Gum*, 107 N.C. App. 734, 738, 421 S.E.2d 788, 790 (1992). Based on our review of the judgment, and in light of our limited scope of review, we do not find that the trial court's award was a "clear abuse of discretion." Accordingly, we find no error.

II.

[2] Next, defendant contends that the trial court erred in accepting the parties' stipulations as to the value of certain real property on the date of the hearing before the referee. Defendant argues that because the parties entered into these stipulations in 1991 and the trial court did not enter its judgment until 1993, these values did not properly represent the value at the date of distribution and the trial court should have made separate findings of fact as to the value of this property on the date of distribution.

" 'Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position.' " *Moore v. Richard West Farms, Inc.*, 113 N.C. App. 137, 141, 437 S.E.2d 529, 531 (1993) (citation omitted). Further, in North Carolina,

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

Id. at 141-42, 437 S.E.2d at 531-32 (citation omitted).

In the present case, defendant did not seek to set aside her stipulations and present evidence to the trial court as to the value of the property at the date of distribution. Defendant is, therefore, bound by her stipulations. Accordingly, we find no merit to defendant's second assignment of error.

III.

[3] Defendant also contends that the trial court erred in finding that the Keeper's Hill Subdivision, a residential subdivision developed by FRS&S, had a value of $635,000 on the date of separation. We disagree.

In an action for equitable distribution, "[a]fter classifying the property as marital, separate or mixed, the court must determine the *net* value of the property. Net value has been defined as market value, if any, less the amount of any encumbrance serving to offset or reduce the market value." *Nix v. Nix*, 80 N.C. App. 110, 113, 341 S.E.2d 116, 118 (1986) (emphasis added); *See also Smith v. Smith*, 111 N.C. App. 460, 470, 433 S.E.2d 196, 202, *disc. review denied*, 335 N.C. 177, 438 S.E.2d 202 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994); N.C. Gen. Stat. § 50-20(c). Further,

> [i]n reviewing the trial court's valuation of an ongoing business or an interest therein for purposes of equitable distribution, the task of the appellate court is to determine whether the approach used by the trial court reasonably approximates the net value of the business interest. . . . If it does, the valuation will not be disturbed.

Smith, 111 N.C. App. at 486, 433 S.E.2d at 212 (citations omitted).

In the present case, the trial court appointed H. Glenn James, a commercial real estate appraiser and consultant, to appraise Keeper's Hill Subdivision as of 23 January 1984, the date the parties separated. On this date, Keeper's Hill consisted of forty-seven residential lots. Mr. James subsequently appraised Keeper's Hill Subdivision on this date at a value of $635,000. Our review of Mr. James' testimony as well as his appraisal report shows that in valuing this subdivision, he calculated the market value of the subdivision using a discounted cash flow analysis method.

The following is reflected in Mr. James' appraisal report:

> For this appraisal assignment, the appraisers have assumed that the market value estimate is based on a cash sale or typical

financing which could be secured through a commercial lending institution.

Based upon a stipulated agreement of the parties and upon direction provided by their counsel, we have utilized actual sales data for lots sold within the subdivision, based upon settlement statements and other data supplied by the clients. However, we have made appropriate adjustments for lots sold which did not sell on an arm's-length basis. Further, we have made additional adjustments for appropriate costs (sales commissions and closing fees) for certain lots which sold that did not include such normal charges in their settlement statements.

Further, Mr. James testified that he also accounted for real estate tax assessments, land tax, and transfer and revenue stamps. The following is reflected in Mr. James' testimony:

So for sales in each quarter I have deducted the ordinary and customary expenses of administering the subdivision and have arrived at a net cash flow figure for each and every quarter. I have then discounted the net cash flow for each quarter in order to derive a present value or present worth of each cash flow.

Based on this evidence, the referee found that "the value of Six Hundred Thirty-Five Thousand and No/100 Dollars . . . placed on Keeper's Hill Subdivision by Mr. James was a fair and accurate market value of the property as of the date of separation." Subsequently, the trial court adopted this finding. Our review of the evidence shows that the method used to arrive at this valuation "reasonably approximates the net value of the business interest", and we find no abuse of discretion.

IV.

[4] Next, defendant contends that the trial court erred in making inconsistent findings of fact regarding the proceeds from Keeper's Hill Subdivision. In support of this contention, defendant argues that the trial court found that the proceeds from the sale of lots in Keeper's Hill were both income from the partnership and liquidation of an asset and that these findings are inconsistent with each other. We disagree.

Defendant's assignment of error refers to the findings of fact number 9 and 12 under the "DISTRIBUTION ISSUES" The trial court adopted the referee's finding of fact found in DISTRIBUTION ISSUE number 9 that

> [a]t the time of the separation of the parties, the marital property was extremely nonliquid. At the present time because of the elapsed time the largest assets, to-wit; the interest in Foreman, Robuck [sic], Small & Sharp has greatly decreased because it was liquidated.

The trial court modified the referee's finding of fact found in DISTRIBUTION ISSUE number 12 and found that

> [d]uring the period following the separation, the Keeper[']s Hill Subdivision was primarily developed and the Plaintiff received the marital share of all of the profits from that venture. The value of this interest significantly decreased from the date of separation until the date of hearing as lots were developed and sold. The Plaintiff was actively involved in the development of this subdivision and received no compensation for that except for his proportionate share of the profits.

Our review of the record shows sufficient evidence to support these two findings, and we do not agree with defendant's contention that these findings are inconsistent.

V.

[5] Defendant also contends that "the trial court erred by finding that [p]laintiff[']s preseparation and post-separation waste of marital assets was a distributive factor." We disagree.

Our review of the trial court's order shows that the trial court adopted the referee's finding that "[t]here was no evidence of any waste during the period of separation." This finding is binding and conclusive " ' "if supported by any competent evidence . . . ." ' " *Little v. Little*, 9 N.C. App. 361, 365, 176 S.E.2d 521, 523-24 (1970) (citation omitted). Our review of the record shows sufficient evidence to support this finding. Defendant's argument is without merit.

VI.

[6] Next, defendant contends that the "trial court erred by finding as a fact that the two wetland lots owned by FRS&S had no fair market value as of the date of separation or as of the date the distribution of property was to become effective." We disagree.

The record shows that defendant was qualified as an expert in "the area of valuation methodology as applied to real estate businesses and partnerships." Subsequently, defendant testified that in her opinion the twenty-five percent interest in the two wetland lots

had a value of $1,500. Mr. James, the expert appointed by the trial court as an expert to appraise various properties owned by the parties, testified, however, that in his opinion the wetlands were "not buildable" and from a residential selling standpoint, had no value. In Mr. James' report to the court, he stated that the wetlands are "considered to have little or no value." Additionally, plaintiff testified that in his opinion the wetlands had no value.

"Where the court finds the facts, . . . the duty of resolving conflicts in the evidence is for the court." *Little*, 9 N.C. App. at 366, 176 S.E.2d at 524. Accordingly, we find competent evidence to support the trial court's finding as to the valuation of the wetlands.

VII.

Defendant also contends that the trial court erred in failing to find as a fact "that the partners in FRS&S were compensated for their capital contributions by distribution to each of lots" and to find that plaintiff was not a credible witness. In support of her contention that evidence existed from which the trial court should have found the partners in FRS&S were compensated by distributions of lots, defendant cites to page 140-41 of the 5 August 1991 transcript. The testimony contained on these two pages is that of defendant concerning the value of the wetlands and the following testimony:

> Q. Now, in addition to the sale of the residential lots, there were other parcels that were sold, [by FRS&S] correct?
>
> A. Yes.
>
> Q. Now, we mentioned earlier the seven-acre parcel which . . . is next to the 1.6 acres, correct?
>
> A. Correct.
>
> Q. To whom was that property sold?
>
> A. It was sold to Eastern Savings and Loan.
>
> Q. All right. Do you know when it was sold?
>
> A. 1986.
>
> Q. What was the sale price?
>
> A. $990,000.
>
> Q. Now, to who [sic] was the 1.6 acres conveyed?

A. It was conveyed to Frissco, Inc.

Q. And when was it conveyed?

A. December 29th of '83.

Q. Do you know the terms under which the property was conveyed from Foreman, Roebuck, Small & Sharp to Frissco, Inc. in 1983?

A. For the amount of the release fee due to Mr. Dietrich on that piece.

Q. Which was?

A. $40,000.

Q. Now, to your knowledge were the proceeds of the sales that we have—you have just described—distributed to the partners of Foreman, Roebuck, Small and Sharp?

A. Yes.

Our review of this evidence does not show support for defendant's contention. Accordingly, because "appellant has the burden of showing error," we find no merit to defendant's argument as presented to this Court. *See Gum*, 107 N.C. App. at 738, 421 S.E.2d at 791.

Further, on the issue of the trial court's failure to find plaintiff was not a credible witness, "issues of witness credibility are to be resolved by the trial judge." *Smithwick v. Frame*, 62 N.C. App. 387, 392, 303 S.E.2d 217, 221 (1983).

> The trial judge is both judge and jury, and he has the duty to pass upon the credibility of the witnesses who testify. He decides what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom. The appellate court cannot substitute itself for the trial judge in this task.

General Specialties Co., Inc. v. Nello L. Teer Co., 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979). We find no basis in the law to support defendant's contention that the trial court was required to find that plaintiff was not a credible witness.

VIII.

[7] Defendant also contends that the trial court erred in applying an averaging of methodologies to value plaintiff's partnership interest in

his law firm. As stated numerous times by this Court, "there is no single best approach to valuing a professional association or practice, and various approaches or valuation methods can and have been used." *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985). Further,

> [t]he valuation of each individual practice will depend on its particular facts and circumstances. . . . In valuing a professional practice, a court should consider the following components of the practice: (a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities.

Id. (citation omitted). "The task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximated the net value of the partnership interest." *Id.*; *See Weaver v. Weaver*, 72 N.C. App. 409, 412, 324 S.E.2d 915, 917-18 (1985).

In the present case, the trial court found,

> [t]he court appointed expert, David Miller, made an evaluation of the [p]laintiff's interest in the partnership. Mr. Miller in approaching his evaluation took into account the components of the practice including its fixed assets, cash, furniture, equipment, and other supplies, other assets including accounts receivable (including the value of the Coppoch fee), the value of work in progress, its goodwill, and its liabilities. He used a combination of the following methods in determining his valuation: capitalization of earnings, capitalization of excess earnings, buy-out evaluation based on the Partnership Agreement and annual fee multiplier. He assigned the greatest weight to the capitalization of excess earnings method.

Further, the trial court found that the "use of this evaluation method [was] appropriate for the facts in this case." Based on this method, the trial court assigned the marital interest in the law firm a value of $63,000.

On appeal, defendant argues that "[i]t was error for the court to adopt the methodology of the appraiser by taking an average of differing valuation methods[.]" In support of her argument, defendant cites to Revenue Ruling 59-60. We do not find this Revenue Ruling persuasive in this case. Defendant has not argued, and we have not

found any cases in North Carolina holding that valuation of a law partnership based on an averaging of methodologies approach is erroneous.

Further, defendant does not argue in her brief an alternative methodology or an alternative valuation that should be used or cite to any portion of the record containing evidence of an alternative methodology or valuation or evidence in support of her contention that Mr. Miller's appraisal did not approximate the fair market value of the partnership.

> (a) **Function.** The function of all briefs [to this Court] is to define clearly the questions presented to [this Court] and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. . . .
>
> (b) **Content of Appellant's Brief** . . .
>
> . . .
>
> (5) . . . The body of the argument [in the brief] shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

N.C.R. App. P. 28(a), (b)(5). As stated previously, the burden of showing error is always on the party asserting the error. *Patton v. Patton*, 78 N.C. App. 247, 256, 337 S.E.2d 607, 613 (1985), *disc. review denied*, 316 N.C. 195, 341 S.E.2d 585, *rev'd in part on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986) (citing *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967)); *See also Gum*, 107 N.C. App. at 738, 421 S.E.2d at 791.

Accordingly, we find that the defendant has failed to produce any evidence to show that the methodology adopted by the trial court did not reasonably approximate the net value of the partnership interest, and we decline to reverse the trial court's valuation absent a showing of error.

IX.

[8] Next, defendant contends that the trial court erred by finding as fact that the deduction of taxes at a 40% rate in the capitalization of

earnings and capitalization of excess earnings analysis of the value of plaintiff's law partnership was properly treated as an expense of the practice. Based on the facts of this case, we find no error.

The expert was assigned the task of determining "what was the net value of plaintiff's interest in the law partnership, Kellogg, White, Evans, & Sharp, as of the date of separation?" There is no simple or straightforward method, nor any single approach from which the answer to such a complex question can be resolved, particularly under the facts of this case. The deduction of taxes in the capitalization of earnings was just one facet of the expert's effort to resolve this question. Absent a clear showing of legal error in utilizing that approach, this Court is not inclined to second guess the expert and the trial court, which accepted and approved this determination.

We also note that where the trial court has accepted an expert's methodology, a party desiring to challenge the methodology must produce other testimony challenging that methodology and set out the prejudicial error which resulted from its use. Simply arguing that the expert "did it wrong" is an inadequate approach to resolving such complex issues, and if there is evidence challenging or contradicting the expert's methodology, then it is for the trial court to decide which method prevails.

X.

[9] Next, defendant argues that the trial court erred by failing to find as a fact that plaintiff's poor management practices of the FRISSCO restaurant, a restaurant owned by FRISSCO, Inc., a corporation incorporated by plaintiff on 7 November 1983, were directly responsible for the decline in the value of the business after the date of separation. We disagree.

In support of her contention, defendant cites to the appraiser's valuation of FRISSCO, Inc. that "a lack of professional management led to poor control over daily operations. The restaurant began to develop a negative reputation as a result of less than quality food and poor service. These factors caused a negative cumulative effect on the financial results for 1990." Plaintiff testified, however, that

> [t]here [were] a number of reasons why the restaurant had problems in [1990]. In terms of our management, we had a manager who was the same manager who had been with us since 1984. He was a man named Charlie Griffin and although he's a good individual and knows the restaurant business very well, over a period

> of time he became more and more inattentive to the operations. So we had management, but the management was in a poor situation there. . . . One of the factors in our losses, we believe, was poor control over the operations. He wasn't there a lot.
>
> . . .
>
> He went golfing. He had problems in supervising the people by not being present. He knew the restaurant business per se but he didn't supervise at all. He became more and more lax in his supervision of the bookkeeping end of the business. He didn't follow anything on the figures and so forth, a lot of food waste, a lot of petty theft, if you will, or you know food waste by employee theft that is sort of an intangible thing, things of that kind.

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 the testimony. *Id.* at 568-69, 331 S.E.2d at 303. Accordingly, because evidence existed in the record contrary to defendant's contention, we find no merit to defendant's contention.

XI.

[10] Defendant also contends that the trial court erred by failing to consider as a distributive factor the disproportionate contributions of the defendant to the support of the family unit while the plaintiff was in law school. Because we find that the trial court properly considered the contributions of each spouse to the family unit during times of education and developing careers as a distributional factor, we disagree.

The trial court adopted the following findings of the referee: While plaintiff was in law school, defendant was employed at the Duke Forestry School and worked part-time at Kelly Girls. During the summer, both parties worked and lived rent free with plaintiff's parents, and in the Spring of 1977, defendant worked with a CPA firm in Elizabeth City. Mr. Davis, a friend of plaintiff's family, agreed to help financially with plaintiff's law school education and with defendant's education to become a Certified Public Accountant. While plaintiff was in law school, he received a payment each semester from Mr. Davis, which amounted to $28,000 over the three years. During the

time of law school, defendant earned $17,000, and plaintiff earned approximately $2,000.

Subsequently, the trial court also adopted the referee's finding that "[w]hile the [d]efendant earned more while [p]laintiff was in law school, [p]laintiff had substantial support from a third party which also contributed to the [d]efendant obtaining her CPA education." Further, the trial court adopted the referee's finding that "[w]hen the [d]efendant left her employment [to open] her own office, there was a drop in her income to the family while she established her practice. The [p]laintiff was able to help [d]efendant get some business for her practice."

Thus, we conclude that the trial court sufficiently considered the financial contributions of each spouse to the marriage during the time plaintiff was in law school as presented by the evidence.

XII.

Finally, defendant contends that the trial court failed to make findings of fact and conclusions of law. We disagree.

N.C. Gen. Stat. § 50-20(j) states:

> In any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property has been equitably divided.

"The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review 'to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law.' " *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (citation omitted). Because we find the trial court's judgment contains sufficient findings of fact to permit this Court to determine on appeal whether the judgment and legal conclusions represent a correct application of the law, we find no merit to defendant's argument.

APPEALS FROM ORDER AWARDING EXPERT FEES

[11] In her appeal from the order awarding expert witness fees, defendant first assigns as error the amount of the award of fees to David Miller and the accounting firm of Lowrimore, Warwick and Co. On 17 December 1990, the referee and the parties in the present case signed a consent order appointing "Mr. Stephen Locke in association

with the firm of Lowrimore, Warwick & Co., in particular David C. Miller" as expert witnesses to appraise the business interest owned by either or both of the parties. After appraising such property, Lowrimore, Warwick & Co. submitted a bill for services in the amount of $32,912.

On 19 April 1993, the trial court entered an order finding that the total fee requested by Lowrimore, Warwick & Co. was "appropriate for the time involved and the types of evaluations which were completed." Further, the court found that "the bulk of those fees were a direct result of the delay in the provision of the information by the plaintiff, Mr. Sharp, to the appraiser." Based on these findings, and on the fact that a retainer of $5,000 had already been paid, the trial court ordered plaintiff to pay $19,912 and defendant to pay $8,000 to the firm of Lowrimore, Warwick & Co.

N.C. Gen. Stat. § 8C-1, Rule 706(a) gives that trial court the authority to appoint expert witnesses, as in this case, "agreed upon by the parties . . . ." Further, pursuant to N.C. Gen. Stat. § 8C-1, Rule 706(b),

> [e]xpert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

Thus, after being appointed by the court by the consent of the parties as experts in this case, the firm of Lowrimore, Warwick & Co., in association with Mr. Miller, was entitled to "reasonable compensation in whatever sum the court may allow." *See Swilling v. Swilling*, 329 N.C. 219, 223-24, 404 S.E.2d 837, 840 (1991); N.C. Gen. Stat. §§ 6-1, 7A-314(d). Our review of the record shows that the sum awarded to the experts at issue was reasonable.

Defendant argues, however, that the trial court did not have the authority to award expert fees in excess of the amount agreed upon by the parties in the consent order, which order stated that "[i]n no event will the parties be ordered to pay collectively more than $21,000 for services rendered." Defendant has failed to cite, and we find no legal authority for the proposition that a consent order entered by a

referee deprives the trial court of its authority to award reasonable compensation to an expert witness appointed by consent of the parties. Again, the burden is on the appellant to show error. *Patton*, 78 N.C. App. at 256, 337 S.E.2d at 613; *Gum*, 107 N.C. App. at 738, 421 S.E.2d at 791.

Further, defendant contends that the trial court erred in failing to reduce the expenses of the expert witnesses by the amount attributable to the acts and omissions of the appraiser. Our review of the record shows no abuse of discretion.

Plaintiff also appeals from the order awarding expert witness fees. In his appeal, plaintiff contends that the trial court's finding that the bulk of the fees were a direct result of plaintiff's delay in providing information to the appraiser is not supported by the evidence. We disagree.

The evidence shows that of the seven entities appraised by Mr. Miller and his firm, information regarding six of these entities was in the exclusive possession of the plaintiff. Mr. Miller testified that plaintiff was slow in getting information to his firm and that after receiving some information, the firm would often have to ask plaintiff to supply additional information, which plaintiff provided, "but not in the most expeditious manner." Further, the evidence shows that the experts worked on an hourly basis. We find this evidence sufficient to support the trial court's finding.

DEFENDANT'S APPEAL FROM ORDER FOR REFEREE'S FEES

[12] Defendant contends that the trial court erred in ordering that the parties are equally responsible for the referee fee of $13,319.92. N.C.R. Civ. P. 53(d) states:

> The compensation to be allowed a referee shall be fixed by the court and charged in the bill of costs. After appointment of a referee, the court may from time to time order advancements by one or more of the parties of sums to be applied to the referee's compensation. Such advancements may be apportioned between the parties in such manner as the court sees fit. Advancements so made shall be taken into account in the final fixing of costs and such adjustments made as the court then deems proper.

We find no abuse of discretion.

Affirmed.

Judges COZORT and MARTIN concur.

STATE OF NORTH CAROLINA v. NORRIS LEWIS WESTALL

No. 9329SC1070

(Filed 18 October 1994)

1. Robbery § 80 (NCI4th)— pellet gun dangerous weapon

A pellet gun may be a dangerous weapon *per se*, or at a minimum, such determination must be made upon a consideration of the instrument's use. In this case, there was clearly sufficient evidence to permit the jury to decide whether defendant committed robbery with a dangerous weapon or the lesser-included offense of common law robbery where the evidence tended to show that defendant placed the pellet gun into the victim's back, pointed directly at her kidney, and the projectile from such a pistol was capable of totally penetrating a quarter-inch of plywood and thus very likely would have resulted in a life-threatening injury to the victim had defendant fired the weapon.

Am Jur 2d, Robbery §§ 62 et seq.

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

2. Robbery § 116 (NCI4th)— dangerous weapon—jury instructions proper

The trial court's instructions defining "dangerous weapon" in a prosecution for armed robbery with a pellet gun were not confusing and erroneous because the court inadvertently omitted the word "death" from its pattern jury instruction that a weapon is dangerous when it is likely to cause serious bodily injury since serious bodily injury is synonymous with endangering or threatening life. Moreover, there could have been no doubt in any juror's mind that the pellet gun as used by defendant was dangerous only if it threatened or endangered the victim's life where the trial court, after giving the pattern instruction, gave an instruction requested by defendant that repeated three times the explicit requirement that a weapon must in fact be capable of

threatening or endangering life in order to be a dangerous weapon.

Am Jur 2d, Robbery §§ 71 et seq.

3. Evidence and Witnesses § 2165 (NCI4th)— opinion testimony allowed—no objection to qualifications of witness

In North Carolina, unless a party specifically objects to the qualification of the expert, a ruling permitting opinion testimony is tantamount to a finding by the trial court that the witness is qualified to state an opinion; furthermore, a defendant who does not object to the qualifications of the witness but merely objects to the content of the testimony waives the right to challenge the witness's qualification on appeal.

Am Jur 2d, Expert and Opinion Evidence §§ 60 et seq.

4. Evidence and Witnesses § 2227 (NCI4th)— force of pellet gun—opinion testimony

In a prosecution of defendant for robbery with a dangerous weapon, the trial court did not err in allowing a detective to state his opinion with respect to the force of the pellet gun used by defendant and the damage which could be caused by a projectile fired from it where that opinion was based on the detective's experience with firearms and their capabilities and on the detective's observation of the firing of a comparable pellet gun and the destructive force of this similar weapon.

Am Jur 2d, Expert and Opinion Evidence §§ 303 et seq.

5. Evidence and Witnesses § 1782 (NCI4th)— defendant required to place stocking over head—no error

The trial court did not err in requiring defendant to place over his head a stocking recovered from the car of his codefendant, since the demonstration was relevant to aid the jury in assessing the credibility of the victim's identification of defendant.

Am Jur 2d, Evidence §§ 950 et seq.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury. 3 ALR4th 374.

6. Evidence and Witnesses § 2888 (NCI4th)— prosecutor's question of witness as to religious sincerity—door opened by defense—no error

There was no error in the prosecution's questioning of a witness concerning the solemnity and sincerity with which he took the oath, including questions as to what the Bible meant to him and what significance swearing on the Bible had for him, since the defense had already opened the door to this line of inquiry.

Am Jur 2d, Witnesses §§ 484 et seq.

7. Evidence and Witnesses § 867 (NCI4th)— no inadmissible hearsay allowed

There was no merit to defendant's contention that the trial court allowed inadmissible hearsay into evidence, since one statement was offered for the non-hearsay purpose of impeaching defendant's brother and to explain conduct of investigating officers, and another statement merely confirmed what the jury had already heard.

Am Jur 2d, Evidence §§ 658 et seq.

8. Evidence and Witnesses § 1070 (NCI4th)— flight of defendant—sufficiency of evidence to support instruction

Evidence was sufficient to reasonably support an inference that defendant fled from the scene of the crime and later eluded police after a high-speed pursuit, and the mere fact that other evidence showed defendant later voluntarily surrendered to police did not render the instruction on flight erroneous.

Am Jur 2d, Trial § 1184.

9. Criminal Law § 1105 (NCI4th)— sentence not enhanced by pending cases—no error

Where the record did not affirmatively show that the trial court considered other charges pending against defendant in imposing the sentence in this case, the court on appeal does not find error.

Am Jur 2d, Criminal Law §§ 525 et seq., 598, 599.

Appeal by defendant from judgment entered 1 April 1993 by Judge Zoro J. Guice, Jr., in McDowell County Superior Court. Heard in the Court of Appeals 29 August 1994.

Defendant was charged in a proper bill of indictment with one count of robbery with a dangerous weapon, to which he entered a plea of not guilty. The evidence presented by the State at trial may be briefly summarized as follows: On 13 July 1992, Michelle Reel was working as a clerk at Kehler's store, a convenience store located in McDowell County. Around 10:00 p.m. that night, two men came into the store and demanded that Ms. Reel give them the money in the cash register. Both men had their faces covered, one by a bandana, dark glasses, and a baseball cap and the other by a stocking placed over his head.

The man wearing the stocking pointed a pistol at Ms. Reel and demanded money. He walked up to her, pressed the pistol to her lower back in the area of her kidney, and marched her to the cash register. Ms. Reel was able to see through the stocking and was able to recognize defendant, with whom she had been previously acquainted. Defendant emptied the cash drawer, after which he and the other man both ran outside and behind the store to a waiting vehicle. Ms. Reel immediately summoned the police and identified defendant as the man wearing the stocking over his head.

Approximately two hours later, a detective with the sheriff's department passed an automobile matching the description of the getaway car. When the detective turned his car around to investigate, the suspect vehicle accelerated away from the officer. He gave chase, but lost sight of the car until he found it abandoned at the end of the road. The car was registered to Darrell Thomason, a friend and co-defendant of Norris Westall, and inside, the detective found a pair of stockings and dark glasses. With the help of bloodhounds, two sets of footprints were tracked from the car to defendant's older brother's mobile home, approximately one-and-a-half miles away. Sheriff's deputies searched the area, but neither Thomason nor defendant was discovered. A warrant was issued for defendant's arrest for robbery with a dangerous weapon.

The next day, a patron of the convenience store found a baseball cap and a pistol behind the store. Ms. Reel identified them as the ones used by the robbers. The recovered pistol was a Crossman .177 caliber pistol capable of firing either pellets or BBs at 450 feet per second.

Defendant testified in his own behalf. He admitted that he had been in the company of Thomason and a third co-defendant, John Minish, earlier on the afternoon preceding the robbery, but main-

tained that he had gone shopping in Hickory that evening with a friend, Holly Price. He and Ms. Price then went to Lake James and later went to defendant's father's house and watched a videotaped movie until they fell asleep after midnight. He denied having been near Kehler's store at anytime on the date of the robbery. On the following day when he heard that a warrant had been issued for his arrest, he went to the courthouse and turned himself in.

Defendant and Thomason were tried jointly. The jury was instructed as to both robbery with a dangerous weapon and the lesser included offense of common law robbery. The jury found defendant guilty of robbery with a dangerous weapon. The trial court entered judgment upon the verdict, sentencing defendant to an active term of imprisonment for forty years. Defendant appealed.

Attorney General Michael F. Easley, by Associate Attorney General William McBlief, for the State.

C. Frank Goldsmith, Jr., for defendant-appellant.

MARTIN, Judge.

Defendant contends the trial court erred by submitting the charge of robbery with a dangerous weapon to the jury, in its rulings with respect to the admission of certain evidence, in its instructions to the jury, and by sentencing defendant to the maximum term of imprisonment allowed by law. We find no prejudicial error in defendant's trial.

I.

[1] Defendant's first assignment of error results from his claim that the pellet gun used in the robbery cannot be considered a dangerous weapon. G.S. § 14-87(a) defines the offense of robbery with a dangerous weapon as the unlawful taking, or attempted taking, of personal property while "having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, *whereby the life of a person is endangered or threatened.*" (Emphasis added.) Our Supreme Court has ruled that for a weapon to be considered dangerous under this statute, "the determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened." (Emphasis original.) *State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982). The rules for making the above determination were summarized in *State v. Allen*, 317 N.C. 119, 124-25, 343 S.E.2d 893, 897 (1986).

> The rules are: (1) When a robbery is committed with what appeared to the victim to be a firearm or other dangerous weapon capable of endangering or threatening the life of the victim and there is no evidence to the contrary, there is a mandatory presumption that the weapon was as it appeared to the victim to be. (2) If there is some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened. (3) If all the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury.

Defendant contends that the armed robbery charge should not have been submitted to the jury because there was insufficient evidence that the pellet gun used during the robbery was actually capable of threatening or endangering Ms. Reel's life. We disagree.

We must look at the circumstances of use to determine whether an instrument is capable of threatening or endangering life. *State v. Pettiford*, 60 N.C. App. 92, 298 S.E.2d 389 (1982). In *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978), the Supreme Court found a soda bottle to be a sufficiently deadly weapon for a jury to consider a charge of assault with a deadly weapon and noted that "where the instrument, according to the manner of its use or *the part of the body at which the blow is aimed*, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury." (Emphasis added.) *Id.* at 64-65, 243 S.E.2d at 373. This same analysis may be used in determining whether an instrument is a dangerous weapon for armed robbery. *State v. Rowland*, 89 N.C. App. 372, 366 S.E.2d 550 (1988).

A pellet gun was found to be a deadly weapon *per se* in *Pettiford, supra*, where the defendant fired the pistol at close range in the victim's face. This caused a metal fragment to lodge in the victim's skull, leaving behind an entry wound and a large bruise. Despite the fact that the victim never lost consciousness, remained fully lucid, and suffered no impairment as a result of the injury, this Court found the

use of the pellet gun constituted a deadly weapon *per se* to uphold the assault with a deadly weapon conviction.

In *State v. Alston*, *supra*, an accomplice admitted on direct examination that the gun he used was a pellet rifle, while on cross-examination, he called it a BB rifle. Our Supreme Court distinguished the weapons by concluding that the evidence the rifle

> was a Remington pellet gun was sufficient to support a jury finding that the [l]ives of the victims here in fact were endangered or threatened by his possession, use or threatened use of the rifle. The testimony . . ., on the other hand, that the rifle was a BB rifle constituted affirmative evidence to the contrary and indicated that the victims' lives were not endangered or threatened in fact by his possession, use or threatened use of the rifle.

Alston, 305 N.C. at 650-51, 290 S.E.2d at 616. The Supreme Court found this evidence created only a permissive inference, allowing the jury to decide whether the instrument threatened or endangered life, and thus, required the instruction on the lesser included offense of common law robbery should the jury reject the inference of the gun's dangerous properties.

Defendant relies upon *State v. Summey*, 109 N.C. App. 518, 428 S.E.2d 245 (1993) to support his position that pellet guns, as a matter of law, are not dangerous weapons. His reliance on *Summey* is misplaced. In *Summey*, we simply reiterated the principle that contrary evidence as to the dangerous properties of weapons used in a robbery requires that the jury be instructed as to the question of a defendant's guilt of common law robbery in addition to robbery with a dangerous weapon. We expressly disavow any interpretation of our opinion in *Summey* as standing for the proposition that a pellet gun is not, as a matter of law, a dangerous weapon. We continue to follow prior holdings, specifically those set forth in *Alston and Pettiford*, *supra*, that a pellet gun may be a dangerous weapon *per se*, or at a minimum, that such a determination must be made upon a consideration of the instrument's use.

Defendant placed the pellet gun into the clerk's back, pointed directly at her kidney. Taken in the light most favorable to the State, the evidence showed the projectile from such a pistol was capable of totally penetrating a quarter-inch of plywood, and, thus, very likely would have resulted in a life-threatening injury to Ms. Reel had defendant fired the weapon. From the manner in which the pellet gun

was used, there was clearly sufficient evidence to permit the jury to decide whether defendant committed robbery with a dangerous weapon or the lesser included offense of common law robbery.

[2] By a separate assignment of error, defendant further contends that the jury instructions defining "dangerous weapon" were confusing, contradictory, and erroneous. We disagree. The instructions defining "dangerous weapon" were discussed in the jury instruction conference, and the court's offer to give the defendant's requested instruction as to the definition of a dangerous weapon immediately following that contained in the pattern jury instruction was agreed to by defendant's counsel.

The trial court instructed the jury, as suggested in NCPI Crim. 217.30, that "[a] dangerous weapon is a weapon which is likely to cause [sic] or serious bodily harm" and that serious bodily injury "is one which causes great pain and suffering." Although the court apparently omitted the word "death" through inadvertence, the instruction was not error. The use of a dangerous weapon need not result in death, but the instrument itself must merely be capable of taking life in the manner that it was used. Instructing the jury that a weapon is dangerous when it is likely to cause death or serious bodily injury does not lower the standard for determining what is a dangerous weapon, as any instrument capable of causing serious bodily injury could also cause death depending on its use. *See Joyner, supra.* In our view, serious bodily injury is synonymous with endangering or threatening life. Thus, the trial court's instruction as to the definition of serious bodily injury was appropriate to aid the jury in determining if the instrument was likely to cause death or serious bodily injury, and, therefore, to endanger or threaten life.

Moreover, the instruction requested by defendant and given by the trial court repeated three times the explicit requirement that a weapon must in fact be capable of threatening or endangering life in order to be a dangerous weapon, further assuring us that there could have been no doubt in any juror's mind that the pellet gun used by defendant was dangerous only if it threatened or endangered the victim's life. These assignments of error are overruled.

II.

By his next assignment of error, defendant asserts that the trial court erred in allowing Detective Robert Smith to state his opinion with respect to the force of the pellet gun and the damage which

could be caused by a projectile fired from it. We find no error in the trial court's decision to allow the testimony.

[3] Defendant first argues that the testimony of Detective Smith should have been excluded since the witness was never qualified as an expert. This is not the rule in North Carolina. Our Supreme Court commented on this issue in *State v. Aguallo*, 322 N.C. 818, 821, 370 S.E.2d 676, 677 (1988).

> In considering this assignment of error, we find instructive this Court's decision in *State v. Phifer*, 290 N.C. 203, 225 S.E.2d 786 (1976). There, the defendant objected to the trial judge's decision to allow into evidence the testimony of two SBI agents. One agent gave his opinion as to whether the washing of one's hands would destroy any possibility of a valid gun residue test, and a second agent explained the differences between a latent lift and a fingerprint. Neither of the agents had been formally qualified as experts. We held that because of the nature of their jobs and the experience which they had, they were better qualified than the jury to form an opinion on these matters. *Id.* at 213, 225 S.E.2d at 793. The Court further held that because the defendant never requested a finding by the trial court as to the witnesses' qualifications as experts, such a finding was deemed implicit in the ruling admitting the opinion testimony. *Id.* at 213-14, 225 S.E.2d at 793.

Thus, in North Carolina, unless a party specifically objects to the qualification of the expert, a ruling permitting opinion testimony is tantamount to a finding by the trial court that the witness is qualified to state an opinion.

Furthermore,

> "An objection to a witness's qualifications as an expert in a given field or upon a particular subject is waived if it is not made in apt time upon this special ground, and a mere general objection to the content of the witness's testimony will not ordinarily suffice to preserve the matter for subsequent review." The defendant merely made a general objection to the testimony which is the subject of this assignment. Therefore, any objection to the witness testifying as an expert was waived, and the assignment is overruled.

State v. Riddick, 315 N.C. 749, 758, 340 S.E.2d 55, 60 (1986), citing *State v. Hunt*, 305 N.C. 238, 243, 287 S.E.2d 818, 821 (1982). "In the

absence of a special request to qualify a witness as an expert, a general objection to specific opinion testimony will not suffice to preserve the question of the expert's qualifications, even on ultimate issues." *State v. Hamilton*, 77 N.C. App. 506, 509, 335 S.E.2d 506, 508-09 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986). Defendant did not object to the qualifications of the witness, but merely objected to the content of the testimony related to specific knowledge of the pellet gun involved in the case. Defendant waived the right to challenge the witness's qualification on appeal.

[4] As an expert, Detective Smith did not testify as to any experiments he conducted inside or outside of the courtroom. Rather, he testified as to the basis of his opinion on the force of a pellet fired from the gun and the damage it could cause to the human body. Provided that the opinion is based on adequate facts and data, reasonably relied upon by experts in the particular field, such testimony regarding the basis for an expert's opinion is admissible, though not as substantive evidence. N.C. Gen. Stat. § 8C-1, Rule 703, Commentary. Detective Smith observed the firing of a comparable pellet gun and witnessed the destructive force of this similar weapon. This observation, coupled with his experience with firearms and their capabilities, adequately provided Detective Smith with sufficient facts and data on which he could reasonably rely in forming his expert opinion. He concluded that the pellet gun used at point-blank range was a life-threatening weapon, and we find no error in the admission of his opinion testimony.

III.

[5] Defendant next assigns as error the trial court's requiring defendant to place over his head a stocking recovered from the car of his co-defendant. Defendant claims the procedure was an experiment erroneously admitted because it was not conducted under circumstances reasonably similar to those existing at the time of the robbery. We disagree.

The demonstration with the stocking was not an experiment requiring substantially similar circumstances. Citing *State v. Hunt*, 80 N.C. App. 190, 341 S.E.2d 350 (1986), our Supreme Court explained:

> In *Hunt*, Judge Becton, writing for the panel, made a distinction between a demonstration and an experiment. He defined a demonstration as "an illustration or explanation, as of a theory or product, by exemplification or practical application." He defined

> an experiment as "a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried." [Citation omitted.] We believe the evidence challenged by this assignment of error is more in the nature of a demonstration than an experiment. We agree with Judge Becton that the test of the admissibility is as set forth in N.C.G.S. 8C-1, Rule 403. If the evidence is relevant it will be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

State v. Allen, 323 N.C. 208, 225, 372 S.E.2d 855, 865 (1988), *vacated on other grounds*, 494 U.S. 1021, 108 L.Ed.2d 601 (1990), *judgment reinstated*, 331 N.C. 746, 417 S.E.2d 227 (1992), *cert. denied*, —— U.S. ——, 122 L.Ed.2d 775 (1993). The demonstration here was factually similar to demonstrations addressed in *State v. Perry*, 291 N.C. 284, 230 S.E.2d 141 (1976) and *State v. Suddreth*, 105 N.C. App. 122, 412 S.E.2d 126, *disc. review denied*, 331 N.C. 281, 417 S.E.2d 68 (1992). In both cases, no error was found in requiring the defendants to place masks over their heads, when there was a question before the jury as to whether the victims were able to identify the defendants. We hold the demonstration was relevant to aid the jury in assessing the credibility of the store clerk's identification of defendant.

Moreover, we hold that the danger of unfair prejudice to defendant in the present case did not outweigh the probative value of the demonstration. In fact, in the present case, the demonstration may actually have benefitted defendant. His initial efforts to place the stocking over his head tore the first stocking, supporting his testimony that it would not fit over his head. When the prosecutor gave defendant the second stocking and admonished him for his rough treatment of the first stocking, defendant said, "Do you want to put it on for me? I've never put one on before." In addition, the trial court promptly instructed the jury to disregard the victim's unsolicited indication that she recognized defendant through the stocking. This assignment of error is overruled.

IV.

[6] Defendant's fourth assignment of error concerns the cross-examination of a witness regarding his religious beliefs. Defendant argues that it was error for the trial court to allow the prosecutor to question the witness's religious sincerity. We disagree.

G.S. § 8C-1, Rule 603 provides that "[b]efore testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." At trial, John Minish, originally a third co-defendant, took the stand after being administered the oath, and proceeded to deny the truth of an earlier statement he had made to the police implicating himself and defendant in the armed robbery. Under oath, he claimed that he had lied to the police and had not been with defendant at the time of the robbery.

In an attempt to bolster the credibility of this witness for the defense, on cross-examination defendant's counsel questioned the witness as to why he had lied earlier and was now telling the truth. Specifically, the witness was asked what the Bible meant to him and what significance swearing on the Bible had for him. The witness replied that he had not been under oath earlier, and that swearing on the Bible meant a great deal to him. Subsequently, during re-direct examination by the prosecutor, the witness was questioned regarding the sincerity of his oath taking, and the witness admitted he did not claim to be a Christian nor did he attend church, but he maintained that swearing on the Bible had significance for him.

Despite the prohibition in G.S. § 8C-1, Rule 610 that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced," there was no error. By questioning the sincerity and solemnity with which the witness took the oath, the defense exposed the witness to the same inquiry by the prosecution. We find there was no error in the prosecution's questioning of the witness because the defense had already "opened the door" to this line of inquiry. *See State v. Shamsid-deen*, 324 N.C. 437, 379 S.E.2d 842 (1989).

V.

Defendant next assigns error to the admission of out-of-court statements made by two of the State's witnesses to Detective Smith. The statements were admitted to corroborate the witnesses' in-court testimony. Defendant contends that the out-of-court statements varied materially from the witnesses' testimony and, therefore, were inadmissible. His arguments have no merit.

First, defendant argues that when Detective Smith testified that the victim, Ms. Reel, had told him she was 99.9% certain of the identi-

ty of one of the robbers, this was in material variance with Ms. Reel's own testimony that she was 99% certain. However, Ms. Reel's statements as to her certainty could only have been figures of speech meant to express a near total certainty, not an exact percentage as defendant argues. Certainly, among statisticians, there is a great material variance between 99% and 99.9%. However, it is ludicrous to maintain that a store clerk reporting a crime, and later testifying in court, should be held to the same standard of materiality. The officer's testimony was corroborative, and it was not error to admit it.

Defendant next argues that it was error to allow Detective Smith to testify as to a prior statement implicating defendant made by witness John Minish. Defendant cites as authority our Supreme Court's decision in *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989). In *Hunt*, the witness denied having ever made the earlier statement, and an officer's testimony to the contrary could, therefore, not be considered corroboration. Here, witness Minish never denied making the statement to police implicating defendant in the robbery. Rather, Minish testified in court that he made the earlier statement, but that it had been a lie. The officer's testimony corroborated Minish's testimony concerning the earlier statement. *See State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984). We find no error.

VI.

Defendant's sixth assignment of error is that the trial court erred in allowing Detective Smith to tell the jury why he believed witness Minish was more involved in the robbery than Minish had admitted to the police in the earlier interview. We disagree.

On cross-examination, defendant established that Detective Smith, contrary to his usual procedure, had made no notes during or after Minish's interview. On re-direct, the prosecutor asked him to explain this departure from custom, and Detective Smith responded that he had thought Minish was lying, and explained that his interview of Minish's sister led him to doubt Minish's pretrial statement. G.S. § 8C-1, Rule 701 provides that

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Detective Smith expressed a lay opinion that he did not believe Minish, and this opinion was rationally based on his own firsthand knowledge and observations. This opinion was helpful to explain his earlier testimony, specifically as to why no notes were taken during the police interview, and was properly admissible under Rule 701. *See State v. Rhinehart*, 322 N.C. 53, 366 S.E.2d 429 (1988).

VII.

Defendant next assigns as error the trial court's permitting the prosecutor to question a defense witness about facts allegedly not in evidence. Defendant contends the prosecutor assumed a fact not in evidence when he asked defendant's alibi witness, Holly Price, if she knew that an officer had been to defendant's father's home during the time she claimed to have been there with defendant. However, Detective Smith testified that an officer had been sent to the father's residence, where both defendant and Ms. Price claimed to have been. Ms. Price stated that she and defendant returned to the home between 11:00 p.m. and 12:00 p.m., perhaps as early as 11:00 p.m. Detective Smith stated that he sent an officer to the residence sometime after his arrival on the scene of the robbery at 10:45 p.m. The officer was unable to find defendant at the home and returned to the store. Upon his return, he and Detective Smith drove to Thomason's residence and then to Minish's residence before encountering the vehicle matching the description of the getaway car, approximately at midnight. The above facts were all in evidence at the time the prosecutor asked the alibi witness if she knew an officer had looked for defendant at the location and time of the alibi offered by the witness. The trial court committed no error in allowing this question to be asked of the witness.

VIII.

[7] Defendant's eighth assignment of error is that the trial court allowed inadmissible hearsay into evidence. Defendant first argues that the trial court erred when it permitted defendant's brother, Larry Westall, and Detective Scott Hollifield to testify concerning Larry's prior out-of-court statement to the detective. We disagree.

On direct examination, Larry Westall testified that he had told officers who were searching for defendant in Larry's trailer that they might find defendant at his father's house, but that the officers had seemed uninterested in the directions to his father's house. On cross-examination, the prosecutor asked Larry if he had told Detective

Hollifield that defendant's father had said that defendant had come to his house around 10:30 p.m. and asked to borrow his car, that defendant's father had refused to give it to him, and that defendant had left. Larry Westall denied making any such statement. In rebuttal, Detective Hollifield testified that Larry had made such a statement in his presence. The trial court properly admitted the prior inconsistent statement for the non-hearsay purpose of impeaching Larry.

In *State v. Green*, 296 N.C. 183, 192-93, 250 S.E.2d 197, 203 (1978), our Supreme court addressed this exact issue.

> A witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony . . . . If the matters inquired about are collateral, but tend "to connect him directly with the cause or the parties" or show his bias toward either, the inquirer is not bound by the witness's answer and may prove the matter by other witnesses, but not before he has confronted the witness with his prior statement so that he may have an opportunity to admit, deny or explain it. (Citations omitted.)

The court further stated that impeachment of an alibi witness "respected the main subject matter in regard to which such witnesses were examined, namely, the whereabouts of the defendant at the time the offense is alleged to have been committed." *Id.* at 194, 250 S.E.2d at 204. Whether or not Larry's testimony can be considered an alibi, his "close connection" to the defendant allows for extrinsic evidence to be used in impeaching his testimony, despite being a collateral matter. Thus, it was not error to allow testimony concerning Larry's prior out-of-court statement.

The fact that Larry's statement itself contained a statement by defendant's father did not render Larry's statement inadmissible. The father's statement, relayed by Larry, explained why the deputies did not subsequently look for defendant at the father's house. Such use does not constitute hearsay. "[T]here was no hearsay—within—hearsay problem presented here because the statements of the third party declarants were not offered for their truth, but to explain the officer's conduct." *State v. Harper*, 96 N.C. App. 36, 40, 384 S.E.2d 297, 299 (1989). 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, 259 S.E.2d 281 (1979). Larry's prior statement to the deputy was not offered to prove the

truth of the matter asserted, but rather to explain the officers' actions, and was, therefore, not hearsay.

Defendant also contends it was error for the trial court to allow Detective Hollifield to testify that he had heard a dog handler's in-court statement regarding the officers securing the scene around the abandoned getaway car before using the bloodhounds to track the footprints. The dog handler had previously been cross-examined by defendant's counsel concerning the presence of officers at the scene before the tracking dogs had arrived. Detective Hollifield's testimony was not offered for the truth of the matter asserted, but merely acknowledged that the deputy had heard the testimony. In any event, the statement could not have prejudiced the defendant since the dog handler had testified immediately prior to the deputy, and the jury had already heard the testimony concerning the officers' actions at the abandoned vehicle and in tracking the footprints to Larry Westall's mobile home. We find no error.

IX.

[8] Defendant's next assignment of error is that the trial court erred in instructing the jury with respect to evidence of flight. Defendant is correct that mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension. However, there need only be "some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged." *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 434 (1990). Defendant contends that because he voluntarily surrendered himself to the police upon learning of a warrant for his arrest there was no evidence of flight. We disagree.

Sufficient evidence of defendant's flight existed to warrant an instruction to the jury on this point, notwithstanding defendant's voluntary surrender. After the perpetrators left the scene of the robbery, an officer attempted to stop an automobile matching the description of that used by the robbers. A high speed chase ensued and the suspects' getaway car was abandoned. Three sets of footprints led from the abandoned vehicle, two of which were tracked with bloodhounds through the woods to defendant's brother's mobile home. The officers were unable to locate defendant at home that night. This evidence is sufficient to reasonably support an inference that defendant fled from the scene of the crime, and later eluded police after a high-speed pursuit, thus taking additional steps to avoid apprehension. The mere

fact that other evidence showed defendant later voluntarily surrendered to police does not render the instruction erroneous. *See State v. Jenkins*, 57 N.C. App. 191, 291 S.E.2d 268 (1982).

X.

[9] Defendant's final assignment of error is that the trial court erred or abused its discretion in sentencing defendant to the maximum term of forty years for robbery with a dangerous weapon. Defendant argues that the trial judge considered other charges pending against defendant when imposing the sentence in this case and this constituted error. Alternatively, he contends that the trial court abused its discretion by imposing the maximum sentence upon a nineteen-year-old whose prior criminal record consisted only of two misdemeanors.

It is well established that a trial judge may not consider, when imposing a sentence, other charges pending against a defendant for which he has not been convicted. In the present case, during colloquy with defendant's counsel, the trial court referred to the fact that several other charges, some of which arose after defendant had been released on bond for the present charge, were pending against defendant. However, the trial judge expressly stated that he was not considering the pending charges in sentencing defendant for the robbery conviction. We have had occasion to consider this issue under similar circumstances.

> [T]he sentencing court may never enhance defendant's presumptive sentence merely because defendant has charges for other crimes pending against him.
>
> Nevertheless, we uphold the trial court's sentencing in the instant case since the record does not affirmatively disclose the court enhanced defendant's sentence based on any consideration of his pending charges. Instead, the trial court's statements merely indicate it was aware of defendant's pending charges, not that it found or even considered them a factor aggravating defendant's sentence. Therefore, the sentencing court's statements regarding defendant's other pending charges do not themselves necessitate resentencing. (Citations omitted.)

State v. Mack, 87 N.C. App. 24, 31, 359 S.E.2d 485, 490 (1987), *disc. review denied*, 321 N.C. 477, 364 S.E.2d 663 (1988). The record does not affirmatively disclose that the trial court enhanced defendant's sentence due to the pending cases, and we decline to find error.

We also decline to hold that the trial judge abused his discretion in imposing the sentence in this case. The trial judge may be reversed for abuse of discretion only upon a showing that his ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision. *State v. Shoemaker*, 334 N.C. 252, 432 S.E.2d 314 (1993). It is not the role of an appellate court to substitute its judgment for that of the sentencing judge as to the appropriate length of the sentence. *State v. Aldridge*, 76 N.C. App. 638, 334 S.E.2d 107 (1985).

> [S]o long as the punishment rendered is within the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office. Furthermore, when the sentence imposed is within statutory limits it cannot be considered excessive, cruel or unreasonable. (Citations omitted.)

State v. Conard, 55 N.C. App. 63, 67, 284 S.E.2d 557, 559-60 (1981), *disc. review denied*, 305 N.C. 303, 290 S.E.2d 704 (1982).

Defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge ARNOLD and Judge THOMPSON concur.

MAO/PINES ASSOCIATION, LTD. D/B/A THE PINES OF WILMINGTON, APPELLANT v. NEW HANOVER COUNTY BOARD OF EQUALIZATION, APPELLEE

No. 9310PTC209

(Filed 18 October 1994)

Taxation § 99 (NCI4th)— asbestos contamination—no consideration in determining value for ad valorem taxes—information to County not timely

The Property Tax Commission did not err as a matter of law by not considering evidence of a factor allegedly affecting the "true value" of taxpayer's property for a given year (asbestos contamination) but which factor taxpayer failed to make known to the County. Plaintiff's statement regarding asbestos contamination to the County's appraiser nearly sixteen months after the effective date of appraisal and almost four months following conclusion of the tax year in question, as well as the proffer of

asbestos contamination evidence at the hearing before the Property Tax Commission, came too late to qualify as proper and timely notification.

Am Jur 2d, State and Local Taxation §§ 802 et seq.

What constitutes laches barring right to relief in taxpayers' action. 71 ALR2d 529.

Appeal by taxpayer from decision entered 19 November 1992 by Vice Chairman George C. Cunningham of the North Carolina Property Tax Commission. Heard in the Court of Appeals 1 December 1993.

Parker, Poe, Adams & Bernstein, by Charles C. Meeker and Henry C. Campen, Jr., for appellant.

New Hanover County Attorney's Office, by Kemp Burpeau, for appellee.

JOHN, Judge.

Taxpayer MAO/Pines Associates, Ltd., d/b/a The Pines of Wilmington (Pines), challenges the Final Decision of the Property Tax Commission (Commission) entered 19 November 1992 in favor of New Hanover County. Pines owns a 233-unit apartment complex (the property) located upon thirteen acres in Wilmington, N.C. The complex was built in 1974 and purchased by Pines in 1985.

The record reflects New Hanover County appraised the property pursuant to N.C. Gen. Stat. § 105-286 (1992) at a value of $4,936,424.00, effective 1 January 1991. Pines appealed this appraisal to the New Hanover County Board of Equalization and Review for 1991 (Board). During Pines' appearance before the Board on 18 June 1991, no reference was made to asbestos contamination. However, Gary Bruce Lipton (Lipton), Vice President of the company which owns and manages Pines, later testified at the Commission hearing that he had become aware of the presence of asbestos "in May, June of 1991." On 20 June 1991, the Board concluded the value of the property coincided with the amount of the County's appraisal. Pines thereafter timely requested a hearing before the Commission, contending the assessed value of the property should be reduced to $3,500,000.00. In introducing the case at the 16 July 1992 hearing, the Commission Secretary summarized Pines' grounds for seeking a reduced appraisal (apparently contained in its Application for Hearing) as being "due to excessive expenses and low rents."

In September 1991, Testwell Craig Environmental Consultants (Testwell) conducted an "environmental assessment of asbestos" on the property at the behest of Pines, and on 5 December 1991 Testwell performed air sampling for asbestos. On each occasion it furnished a report to Pines detailing its findings. The first investigation revealed the presence of asbestos-containing building materials, particularly in the roofs and ceilings of all tested units, and in the linoleum flooring of one. The later air sampling indicated asbestos concentrations within the units at "below the clearance level of 0.010 fibers/cc," which is "below the clearance criteria for most regulations." Nothing in the record suggests either report was provided to the County until the 16 July 1992 hearing.

James S. Bethune (Bethune), Appraiser Supervisor in the New Hanover County Assessors Office, testified at the hearing that he personally reviewed the County's appraisal upon Pines' appeal to the Board and visited the premises in April 1991. However, it was not until almost exactly one year later that he received his "first notice" of asbestos contamination while meeting Lipton and others at the property on 16 April 1992. The record reflects no other indication of the presence of asbestos being given to the County or any of its employees. Bethune reached an appraised value of $4,945,274.00 as of 1 January 1991 using "a capitalized value by income approach." He stated he had been furnished information indicating occupancy "slightly under 98%" as of that date, and that 95% is the figure normally used for appraisal purposes. In Bethune's opinion, the presence of asbestos at the property had no effect either upon occupancy or rental rates as of 1 January 1991. Lipton's testimony at the 16 July 1992 hearing confirmed his belief that as of that date, notification of tenants about asbestos contamination "ha[d] not been done."

Bethune addressed the 16 April 1992 asbestos information in his subsequent appraisal and concluded there was no requirement "to remove [asbestos materials], and they would or will not be removed until the buildings are torn down, which would not be within the economic lifetime of the buildings." Further, he knew of "[no] sales conditions requiring the removal of asbestos material . . . unless the intent of the buyer was to demolish the improvements, or the improvements required extensive renovations."

Bethune further pointed out in his report that "[t]he owners admitted at [the 16 April 1992 meeting] that they were using the estimate [in excess of four million dollars] for removing and replacing

the hazardous material as a reason to persuade RTC, receivers for the failed mortgage holder, to write the mortgage down to about one half the current value." Lipton testified before the Commission that Pines had stopped paying the mortgage as of 1 April 1991, and had been attempting to renegotiate it with RTC.

Robert C. Cantwell (Cantwell), a certified real estate appraiser, inspected the property on 22 June 1992 on behalf of Pines. He testified the "owner" made him aware of asbestos contamination prior to his appraisal. Taking into consideration the presence of asbestos and using "the capitalization of income approach," Cantwell appraised the value of the complex in the amount of $2,600,000.00 as of 1 January 1991.

On 2 July 1992, Pines moved to amend its Application for Hearing before the Commission on grounds that when that document was originally filed (18 July 1991), Pines "did not have an appraisal as to the true value" of the property on 1 January 1991. In its motion, Pines requested modification of the Application to "reflect the property owner's appraisal [by Cantwell] of $2,530,000.00." Although Cantwell's appraisal itself took into account the apparent presence of asbestos on 1 January 1991, Pines did not specifically refer to asbestos in its Motion to Amend. Immediately prior to commencement of the hearing, Vice-Chairman Cunningham indicated the motion was allowed "to reflect the amount as stated in the motion of $2,530,000.00."

Following a full evidentiary hearing on 16 July 1992, the Commission subsequently upheld the County's assessment in a written Final Decision on 19 November 1992. Regarding asbestos contamination within the premises, the Commission found as a fact that:

> 8. While it appears that the subject property is, and was as of 1 January 1991, affected by the presence of asbestos-containing materials, this problem was not know [sic] to either the owner or the County as of 1 January 1991.

It then entered Conclusions of Law, including the following:

> 3. While the County's [sic] did not consider the possible impact on value of the presence of asbestos-containing materials in the course of its appraisal of the subject property, this was not error. The Commission concludes as a matter of law that because the presence of asbestos containing materials was not known to the Taxpayer and was therefore not made known to the County prior

> to the appraisal date of 1 January 1991, the County was under no obligation to consider it. Neither the County nor this Commission is required to consider a factor which was not known to the owner at the time of the appraisal. The true value in money of the property as of 1 January 1991 could not have been affected by a condition which was unknown. The County is not required to exercise twenty-twenty hindsight.

On 17 December 1992, Pines filed a Motion for Reconsideration with the Commission, which motion was denied 22 January 1993. Pines timely appealed to this Court.

Pines brings forward two assignments of error: (1) the Commission erred in refusing to consider evidence of asbestos within the apartment complex on the appraisal date of 1 January 1991, and (2) the Commission erred in finding the sale and income approaches support the appraisal because the other apartment complexes analyzed were not contaminated with asbestos.

The standard to be employed by a county upon valuation is that all property "shall as far as practicable be appraised or valued at its true value in money." N.C. Gen. Stat. § 105-283 (1992). "True value" is defined in G.S. § 105-283 as meaning:

> market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Id. Furthermore, property appraisals shall be administered to include "any other factors that may affect [the] value [of the property]." N.C. Gen. Stat. § 105-317(a)(1) (1992) (addressing "true value of land"); G.S. § 105-317(a)(2) (concerning "true value of a building or other improvement"); *see also In re Appeal of Bosley*, 29 N.C. App. 468, 471, 224 S.E.2d 686, 688, *disc. review denied*, 290 N.C. 551, 226 S.E.2d 509 (1976).

The function of the Commission is to "hear and decide appeals from decisions concerning the listing, appraisal, or assessment of property made by county boards of equalization and review. . . ." N.C. Gen. Stat. § 105-290(b) (1992 & Cum. Supp. 1993). In conducting such appeals, the Commission is to hear the "evidence and affidavits

offered by the appellant and appellee county . . . ." G.S. § 105-290(b)(2). Further, the Commission shall "determine the weight and sufficiency of the evidence and the credibility of the witnesses, . . . draw inferences from the facts, and . . . appraise conflicting and circumstantial evidence." *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 126-27 (1981). Finally, the Commission "shall make findings of fact and conclusions of law and issue an appropriate order" based on evidence considered at the hearing. G.S. § 105-290(b)(2).

In order to prevail upon appeal of an appraisal, an objecting taxpayer must produce "competent, material and substantial evidence" which tends to show:

(1) Either the county tax supervisor used an *arbitrary method* of valuation;

or

(2) the county tax supervisor used an *illegal method* of valuation;

AND

(3) the assessment *substantially* exceeded the true value in money of the property.

In re Appeal of Amp, Inc., 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975) (citation omitted).

N.C. Gen. Stat. § 105-345.2 (1992) "is the controlling judicial review statute for appeals from the Property Tax Commission." *McElwee*, 304 N.C. at 74, 283 S.E.2d at 120. Under this section, the appellate court is to decide all relevant questions of law and interpret constitutional and statutory provisions to determine whether the decision of the Commission is, *inter alia*, affected by errors of law. *See* G.S. § 105-345.2(b). The statute also provides that we are to review "the whole record" in determining the foregoing, G.S. § 105-345.2(c); *see also In re Appeal of Ele, Inc.*, 97 N.C. App. 253, 256-57, 388 S.E.2d 241, 244, *aff'd per curiam*, 327 N.C. 468, 396 S.E.2d 325 (1990), and "due account shall be taken of the rule of prejudicial error." G.S. § 105-345.2(c).

Additionally, certain other principles apply: (1) a reviewing court is neither free to weigh the evidence presented to the Commission nor to substitute its own evaluation of the evidence for that of the Commission; (2) *ad valorem* tax assessments are presumed to be correct; (3) "the correctness of tax assessments, the good faith of tax

assessors and the validity of their actions are presumed;" and (4) the taxpayer bears the burden of showing that the assessment was erroneous. *McElwee*, 304 N.C. at 75, 283 S.E.2d at 120 (citations omitted).

Having set out the applicable legal principles, we now proceed to a consideration of the issue presented *sub judice*. We emphasize the question is *not* whether asbestos contamination is properly a factor to be considered in determining the "true value" of real property. At least by implication, that subject has previously been addressed by our appellate courts. *See In re Valuation*, 282 N.C. 71, 79, 191 S.E.2d 692, 697 (1972) (economic blight affecting city downtown area where property located must be taken into account); *see also In re Appeal of Camel City Laundry Co.*, 115 N.C. App. 469, 472, 444 S.E.2d 689, 691 (1994) ("cost to conduct environmental remediation" on property affected by chemical pollutants noted to "play a part" in the price offered by a buyer for property).

Rather, the precise issue herein is whether the Commission erred as a matter of law by not considering evidence of a factor allegedly affecting the "true value" of taxpayer's property for a given year but which factor taxpayer failed to make known to the County. Under the circumstances of the case *sub judice*, we believe the Commission was not required to take such evidence into account.

Once real property has been appraised for taxation, it continues to be listed at the appraised valuation figure until next formally appraised, *see* G.S. § 105-286(c), or unless that figure is modified on the basis of justifiable cause. *See, e.g.*, N.C. Gen. Stat. §§ 105-287 (a)(3), (b) (1992) (assessed value "shall" be increased or decreased to "[r]ecognize an increase or decrease in the value of the property resulting from a factor" other than normal physical depreciation, economic changes affecting county in general, or certain specified betterments). The General Assembly has thus intentionally authorized local taxing authorities, "*when requested so to do*," *In re Pine Raleigh Corp.*, 258 N.C. 398, 401, 128 S.E.2d 855, 857 (1963) (emphasis added), to correct any "unjust [or] inequitable assessment." *Id.* (referring to similar provisions of earlier version of G.S. § 105-287).

If a property owner believes an appraisal is inaccurate, "be the [inaccuracy] deliberate, an error in judgment, or caused by a misconception of the law," *King v. Baldwin*, 276 N.C. 316, 326, 172 S.E.2d 12, 18 (1970), or that the property has changed in value resulting from a statutorily recognized factor, the taxpayer must initially "complain to the county board of equalization and review and request a hearing."

Id. at 326, 172 S.E.2d at 18-19. While there is thus an affirmative duty upon the taxing authority to reappraise property if statutorily enumerated circumstances exist, *In the Matter of Appeal of Butler*, 84 N.C. App. 213, 219, 352 S.E.2d 232, 235, *disc. review denied*, 319 N.C. 673, 356 S.E.2d 775 (1987), the burden of proof is on the taxpayer to establish the presence of such conditions. *Id.* (quoting *Amp*, 287 N.C. at 562, 215 S.E.2d at 761-62). Following a hearing before the county board of equalization and review, any property owner who excepts to the board's order may appeal therefrom to the Property Tax Commission. G.S. § 105-290(b). The requisite notice "shall be in writing and *shall state the grounds for the appeal.*" G.S. § 105-290(f) (emphasis added).

In the case *sub judice*, Pines has failed to show the Commission erroneously concluded that the County's appraisal was neither *arbitrary* nor *illegal.* Indeed, the appraisal was conducted according to accepted methods (Pines' only exception to the County's methodology being that buildings with similar asbestos contamination were not utilized as comparables), and was based upon all the information available to the County on the relevant date. The statutory scheme provides for the correction of errors in the initial appraisal by making available appeal to the local board of equalization and review, and by mandating reappraisal in certain enumerated circumstances. *See* G.S. § 105-287; *see also In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 577-78, 160 S.E.2d 728, 732-33 (1968); *Pine Raleigh Corp.*, 258 N.C. at 401, 128 S.E.2d at 857. The obvious purpose of such a procedure is to provide opportunity at the local level to deal with taxpayer-presented information and to modify appraisals as such information requires before any appeal need be heard by the Commission.

However, the record herein reflects that Pines, neither at the Board proceeding nor in its Application for Hearing to the Commission, *see* G.S. § 105-290(f), made any reference to asbestos contamination nor indicated that the existence of asbestos was a factor it relied upon in seeking adjustment of the County appraisal. It instead sought adjustment exclusively on the basis of "excessive expenses and low rents," despite the fact the presence of asbestos appears to have been known by Pines prior to the Board hearing and was confirmed by two subsequent reports in September and December 1991. This knowledge of Pines notwithstanding, only in April 1992 did Pines' representative reveal it to the County appraiser who by chance was on the property in preparation for testifying before the Commission. The County was furnished no other notification. Moreover, it

was not until immediately prior to appearing before the Commission that Pines moved to amend its application to reflect a valuation which incorporated asbestos contamination; yet even in that motion Pines failed to mention specifically any asbestos problem.

Under the foregoing circumstances, we are unable to discern any error in the Commission's determination that the County acted neither arbitrarily nor illegally in using traditional methods to assess the property based upon information it possessed. We further find the Commission acted properly in not considering evidence of a condition alleged to affect "true value" which, despite knowledge of its existence by taxpayer, was neither presented to the County at the time of Pines' appearance before the Board of Equalization and Review for 1991, nor stated in Pines' Application for Hearing to the Commission, nor conveyed to the County within the tax year in question.

Our analysis finds support by way of analogy in a recent decision of this Court. In *Kinro, Inc. v. Randolph County*, 108 N.C. App. 334, 423 S.E.2d 513 (1992), the plaintiff manufacturing company filed suit pursuant to N.C. Gen. Stat. § 105-381(c)(2) (1992) seeking refunds for taxes allegedly overpaid as the result of an unjust tax assessment. We affirmed summary judgment entered in favor of defendant county, holding that Kinro had failed to follow the statutory procedures for disputing a paid property tax. *Id.* at 337-38, 423 S.E.2d at 515. G.S. § 105-381(a)(3) requires a taxpayer demanding refund of paid taxes to submit to the local governing body "a written statement of his [valid] defense [as set out in G.S. § 105-381(a)(1)]" as well as a request for refund. Kinro had made no such assertion in its initial letter to the county protesting the valuation of certain property, and was therefore unable to proceed against the county under the statute. *Id.*; *see also Johnston v. Gaston County*, 71 N.C. App. 707, 711, 323 S.E.2d 381, 383 (1984), *disc. rev. denied*, 313 N.C. 508, 329 S.E.2d 392 (1985). The *Kinro* panel did not specifically point out that the statutory provision was undoubtedly intended to provide the county an opportunity to rectify any error before institution of litigation, and that for this reason the basis of taxpayer's contention of defense must clearly be conveyed to the county so that it might grant relief if required. However, the Court did note that upon the demand for refund and assertion of statutory defense not being "resolved in the taxpayer's favor, [it] may *then* bring a civil action to compel a refund." *Kinro*, 108 N.C. App. at 337, 423 S.E.2d at 515 (emphasis added) (citation omitted).

In this regard, "[o]ur courts have long recognized that the public interest demands questions relating to the base of taxable property be settled as cheaply and speedily as possible consistent with due process." *In re Forestry Foundation*, 35 N.C. App. 414, 425, 242 S.E.2d 492, 499 (1978) (citation omitted), *aff'd*, 296 N.C. 330, 250 S.E.2d 236 (1979). Both the public policy enunciated here as well as due process support the existence of an obligation on the part of an objecting taxpayer to notify the county at the earliest opportunity of its grounds for challenging an appraisal.

Under the facts of the instant case, we need not rule on the specific occurrence of the foregoing time of opportunity—be it the effective date of appraisal, the date of proceedings before the local Board, the date of filing of Application for Hearing with the Commission, or simply within the tax year itself. As previously indicated, the record reflects no notification of the County by Pines at any of these junctures that asbestos contamination was present in complex buildings and that Pines was relying upon asbestos contamination as a factor affecting appraised value.

However, we do hold that the statement regarding asbestos to the County's appraiser nearly sixteen months after the effective date of appraisal and almost four months following conclusion of the tax year in question, as well as the proffer of asbestos contamination evidence at the 16 July 1992 hearing before the Commission, came too late to qualify as proper and timely notification.

In so holding, we are advertent to the fact that hearings before the Commission are *de novo*, *id.*; *see also Butler*, 84 N.C. App. at 218, 352 S.E.2d at 235, as well as to the fact the Commission meets on a limited basis. *See* N.C. Gen. Stat. § 105-288(e) (1992). Nonetheless, these considerations are outweighed by the presumptions in favor of the taxing authority, the burden assumed by an objecting taxpayer, and the legislative intent to require local authorities to adjust tax appraisals under proper circumstances without formal proceedings *upon adequate notice* from the taxpayer. *See Pine Raleigh Corp.*, 258 N.C. at 401, 128 S.E.2d at 857. As stated above, the notice given the County here was neither adequate, formal, nor sufficiently timely.

While we thus approve, on grounds of lack of timely notice to the County, the Commission's refusal to consider evidence of asbestos contamination, we do not find it necessary to consider for purposes of this opinion the propriety of the Commission's basis for its ruling as set out in Conclusion No. 3 contained in the Final Decision. Having

held the Commission reached the proper conclusion, albeit based upon different reasoning, we determine its decision was unaffected by any prejudicial error. *See, e.g., Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990) ("Where a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision.") (citations omitted); *see also* G.S. § 105-345.2(c). Accordingly, the Final Decision of the Property Tax Commission is affirmed.

Affirmed.

Judges ORR and LEWIS concur.

RAINTREE HOMEOWNERS ASSOCIATION, INC., PLAINTIFF-APPELLANT v. KARL R. BLEIMANN AND WIFE, RENA BLEIMANN, DEFENDANTS-APPELLEES

No. 9326SC1169

(Filed 18 October 1994)

1. Deeds § 87 (NCI4th)— compliance with subdivision covenants and restrictions—unreasonableness and bad faith of architectural review committee—sufficiency of evidence

In an action by plaintiff homeowners' association to require defendant homeowners to remove vinyl siding and restore their home to its original condition, the evidence was sufficient to submit to the jury the issue of unreasonableness and bad faith on the part of plaintiff's architectural review committee where it tended to show that the vinyl siding did not change the physical appearance of the house and thus was harmonious with the existing standards of the neighborhood, and it tended to show that the architectural review committee had made up its mind about vinyl siding before it considered defendants' application and thus was not, as it contended, open-minded about defendants' application.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 281-287.

Covenant in deed restricting material to be used in building construction. 41 ALR3d 1290.

2. Evidence and Witnesses § 1942 (NCI4th)— letters stating legal position—irrelevancy

The trial court properly excluded letters to defendant homeowners indicating plaintiff homeowners association's legal position in an action to enjoin defendants from replacing wood clapboard siding on their home with vinyl siding since the letters had no tendency to prove any issue in the case.

Am Jur 2d, Evidence §§ 1276-1278.

3. Evidence and Witnesses § 1934 (NCI4th)— memorandum of meeting—reasons for decision—exclusion not prejudicial

A memorandum of a meeting in which members of the architectural review committee of plaintiff homeowners association explained their reasons for disapproving defendant homeowners' application for permission to replace wood siding on their home with vinyl siding was relevant to the issue of whether the committee acted reasonably and in good faith, but the trial court's exclusion of this evidence was not prejudicial error where several of the reasons set forth in the memorandum were testified to at trial and plaintiff could have established the other reasons through the testimony of committee members.

Am Jur 2d, Evidence §§ 1254 et seq.

4. Evidence and Witnesses § 1652 (NCI4th)— before and after photographs—admissibility for illustrative purposes

Before and after photographs of defendants' home were properly admitted to illustrate testimony that defendants' replacement of wood clapboard siding on their home with vinyl siding did not change the appearance of their home.

Am Jur 2d, Evidence §§ 965-967.

5. Deeds § 95 (NCI4th)— compliance with subdivision conditions and restrictions—requested jury instruction not given—no error

In an action by plaintiff homeowners' association to require defendant homeowners to remove vinyl siding and restore their home to its original condition, the trial court did not err in refusing to give plaintiff's requested instruction with regard to the validity of conditions and restrictions in the subdivision covenant and with regard to the jury's not substituting their opinion about

vinyl siding for the opinion of the architectural review committee, since the instruction given by the court fully and fairly presented the issues in controversy.

Am Jur 2d, Trial §§ 1092 et seq.

Appeal by plaintiff from judgment entered 11 March 1993 by Judge James W. Webb in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 August 1994.

Defendants Karl R. Bleimann and Rena Bleimann own a home within a planned unit development known as Raintree. The property is subject to recorded covenants. Plaintiff Raintree Homeowners Association, Inc. (RHOA) owns property within Raintree and has the authority and duty to enforce, through its Architectural Review Committee (ARC), the terms of those covenants.

On or about 23 March 1990, defendants began to replace wood clapboard siding on their home with vinyl siding. Soon after, on 26 March, the Chairman of the ARC advised defendants to stop installation because it had to be approved by the ARC pursuant to the Declaration of Covenants, Conditions and Restrictions. Those covenants require prior written approval by the ARC of the location, plans and specifications of alterations to any building within Raintree and, in order "to provide architectural value to the subdivision," require that before any structural changes are made a "site plan, final plans and specifications" be submitted to and approved in writing by the Committee "as to harmony of exterior design and general quality with the existing standards of the neighborhood and as to location in relation to surrounding structures and topography."

Defendants applied for approval from the ARC on the day they were notified that they needed such approval. Defendants attended an ARC meeting on the evening of 26 March and presented evidence in support of their application. The ARC denied the application. Defendants requested another hearing before the ARC. The ARC discussed the application again at their meeting on 23 April 1990 and unanimously reaffirmed their prior decision. Defendants attended the ARC meeting on 21 May 1990 and again presented evidence in support of their application and suggested a compromise by which their home would be deemed a "test case" for vinyl siding. The ARC denied the application again.

Defendants had continued installation of vinyl siding. After the ARC's final determination to deny the application, plaintiff sued defendants, seeking to enjoin them from placing the vinyl siding on their house and seeking to require them to permanently remove the vinyl siding and restore the house to its original condition. Defendants answered, asserting certain defenses and praying that, among other things, plaintiff's prayers for relief be denied and that defendants be permitted to finish installing the vinyl siding.

At trial, plaintiff moved for summary judgment, which was denied. The case was tried before a jury. The issue before the jury was whether plaintiff, through its ARC, acted reasonably and in good faith when it denied defendants' application for approval of installation of vinyl siding on defendants' home.

After the close of the evidence, plaintiff moved for a directed verdict, which was denied. The jury found that plaintiff had not acted reasonably and in good faith when it denied the application. Thereafter, plaintiff moved for a judgment notwithstanding the verdict or for a new trial, which motions were denied. Based on the jury's verdict, the trial court entered an order on 11 March 1993 (1) denying plaintiff's requests for injunctive relief and for an order directing defendants to remove the vinyl siding and restore the home to its original condition, and (2) enjoining plaintiff from preventing defendants from completing the installation of vinyl siding on their home.

Weaver, Bennett & Bland, P.A., by Michael David Bland and John R. Lynch, Jr., for plaintiff-appellant.

Donald S. Gillespie, Jr., for defendants-appellees.

THOMPSON, Judge.

In this appeal, plaintiff contends the trial court erred by (1) denying its motion for summary judgment, (2) denying its motions for directed verdict and judgment notwithstanding the verdict, (3) excluding certain exhibits of the plaintiff and admitting certain exhibits of defendants, and (4) failing to instruct the jury according to plaintiff's request. For the reasons discussed below, we affirm.

I.

SUMMARY JUDGMENT

Plaintiff first assigns as error the trial court's denial of its motion for summary judgment. The denial of a motion for summary judgment

is not reviewable during appeal from a final judgment rendered in a trial on the merits. *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Since there was a trial and final judgment in this case, this issue is not before us.

II.

DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT

The purpose of a motion for directed verdict, made pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a), 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. *Eatman v. Bunn*, 72 N.C. App. 504, 505, 325 S.E.2d 50, 51 (1985). In determining whether the evidence is sufficient to withstand a motion for directed verdict, the nonmovant's evidence must be taken as true and all the evidence must be viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, with conflicts, contradictions and inconsistencies being resolved in the nonmovant's favor. *Hornby v. Pennsylvania Nat'l Mut. Casualty Ins. Co.*, 62 N.C. App. 419, 421-22, 303 S.E.2d 332, 334, *cert. denied*, 309 N.C. 461, 307 S.E.2d 364, 365 (1983). If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986). The same test is to be applied on a motion under N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) for judgment notwithstanding the verdict as is applied on a motion under N.C. Gen. Stat. § 1A-1, Rule 50(a) for a directed verdict. *DeHart v. R/S Financial Corp.*, 78 N.C. App. 93, 99, 337 S.E.2d 94, 98 (1985), *cert. denied*, 316 N.C. 376, 342 S.E.2d 893 (1986).

[1] We review the evidence in light of the above standard and find there was sufficient evidence to submit the issue of unreasonableness and bad faith to the jury. Defendants' evidence tended to prove that the vinyl siding did not change the physical appearance of the house and thus was harmonious with the existing standards of the neighborhood. It also tended to show that the ARC had made up its mind about vinyl siding before it considered defendants' application and thus was not, as it contended, open-minded about defendants' application.

To show that it acted reasonably in denying defendants' application, plaintiff presented evidence that vinyl siding had never been

used in North Raintree, the section of Raintree in which defendants' home is located, and that before defendants' application on 26 March 1990, seven residents had applied for and were denied approval of vinyl siding.

Plaintiff introduced documentary evidence of the reasons given for the denial of prior applications and the reasons given for denying defendants' application. Plaintiff's Exhibit 26B consists of the minutes of the 26 July 1983 ARC meeting which state that Mr. Clayton Ellison's proposal to re-side his house with vinyl siding was denied and that the ARC "suggested he look into getting siding of natural material that would fit in with other houses in the neighborhood" and that "[t]he committee knows of no houses within our jurisdiction that presently have vinyl siding." Plaintiff's Exhibit 26C is a letter from the ARC to Mr. and Mrs. Paul Hilgeford, which informs them that their proposal to re-side their entire home with vinyl was disapproved. The letter states:

> "The concept of Raintree is one of natural wood tones in absence of brick and a preponderance of natural or stained cedar siding and trim. It is felt that the siding presented does not meet these criteria. Other colors and textures of vinyl may well meet the criteria and should be sought out and resubmitted if found. The [ARC] is most concerned that the re-sided home blend in with the surrounding homes and maintain the natural look."

Exhibit 26G includes a letter dated 18 December 1989 from the ARC to Dr. & Mrs. A. D. Colombo informing them that the ARC was rejecting their plans to re-side in vinyl because, among other reasons, "vinyl siding for a complete change has never been approved." Plaintiff's Exhibit 7 is a letter dated 6 April 1990 from the ARC to the defendants, which informs defendants that their application for approval is being denied. The letter states that the ARC performed an in-depth study of vinyl siding the previous October when another resident applied to re-side with vinyl. It further states that the ARC inspected the vinyl siding already on defendants' house after defendants' presentation to the ARC and "noted that the work continued without approval" and concludes that "[b]ased upon its studies, the committee feels strongly that vinyl siding is not conducive to the architectural integrity of North Raintree."

Ms. Betsy Smith, an ARC member at the time defendants' application was denied, testified as to the reasons for denying the application. Ms. Smith indicated that vinyl siding was unacceptable because

the colors "even including Mr. and Mrs. Bleimann's house . . . don't look like wood." Ms. Smith also testified that the ARC looked at the siding and determined that it made it "look very much colonial or traditional, in a contemporary area." Ms. Smith further testified that the ARC studied vinyl siding and subsequently decided that it was "inappropriate for this end of Raintree."

On cross-examination of Ms. Davis, defendants' attorney pointed out the inconsistency between the ARC's reasons for denying the application evidenced by Exhibit 26C, and the reasons stated for denying the applications evidenced by Exhibits 26E and 26F in order to rebut plaintiff's contention that it acted reasonably and in good faith. Exhibit 26E embodies the ARC minutes of 24 March 1986, which states that J. Patel presented his proposal to install vinyl siding and that "Tom [Gahegan] explained to him that we cannot accept vinyl siding regardless of its quality and appearance." Exhibit 26F embodies the ARC minutes of 30 May 1985, which states that the ARC denied Cricket Lake Homeowners Association's proposal to use vinyl siding on all of the units there and notes that "[i]t was the feeling of Tom, Jack and Claire that they would not approve the use of any vinyl siding regardless of the quality." This evidence tended to show that the ARC did not, as it contended, have an open mind towards vinyl siding and suggests that the purported reasons for denying defendants' application and prior applications to re-side with vinyl were not genuine.

Defendants presented five witnesses: Betsy Smith, Allen Stacey, Marion Wollman, James Auten, and Karl Bleimann. Betsy Smith testified as to the contents of defendants' Exhibits 16 and 17, which were introduced into evidence. Defendants' Exhibit 16 consists of the RHOA Board of Directors' minutes of 3 April 1990, which state that:

> Betsy Smith, Chairman of the ARC, attended the meeting to discuss the vinyl siding used by [defendants]. An application was made by Dr. and Mrs. A. D. Colombo to use vinyl siding and was denied in October. On March 25, 1990, Dr. Colombo brought to the attention of the ARC the vinyl siding currently being installed by the Bleimanns. Betsy immediately contacted the Bleimanns to inform them that they were in violation of the covenants. [Defendant] made application . . ., but the installation continued without approval. A letter will be sent from the ARC, along with the official denial form, to explain the Committee's position.

Defendant's Exhibit 17 is a letter from the ARC to the president of RHOA which states that they researched vinyl siding in response to the Colombo's application and the ARC strongly believes it would bring down the value of houses in North Raintree. It also states that the ARC further reviewed the issue and is asking defendants to remove the siding. Exhibits 16 and 17, like plaintiff's Exhibits 26E and 26F, tend to show that the ARC had already made up its mind about vinyl siding before defendant's application and thus was not, as it contended, open-minded about defendants' application.

Allen Stacey testified that he had lived in a house diagonally across the street from defendants' house for almost five years and that since he moved into his house none of the houses had been sold. Mr. Stacey further testified that there is a house in North Raintree that appears to be a bright white color. Mr. Stacey identified pictures of the defendants' home, which were introduced into evidence and passed among the jury.

Ms. Wollman testified that she had lived in the house across the street from defendants for approximately eighteen years and that since the Staceys moved in no other houses had been sold. She also testified that there is a white house and also a greenish blue house in North Raintree. She identified pictures of defendants' home taken after the vinyl siding installation and stated that the exterior looks like wood.

James Auten, the contractor who installed siding on defendants' house, testified that he believed the siding was wood-grained and that you couldn't tell whether it was wood or siding unless you "go feel it." He further testified that, according to defendants' instructions, he painted the house to look as close as possible to the way it looked before the vinyl siding was installed.

Defendant Karl Beimann testified that in 1989 he had vinyl siding installed on a portion of the house in order to correct problems the Bleimanns were having with the paint on the house and with mildew on the north side of the house. Defendant testified that the paint was "constantly peeling and we had to re-paint the house, almost every year. And it started deteriorating with mildew; in particular, on the north-side . . . ." Mr. Bleimann described his previous unsuccessful efforts to solve these problems by painting and re-roofing. He further testified that he submitted actual samples of the vinyl siding and the rotten wood siding to the ARC at their 26 March 1990 meeting and discussed his structural problems with them at length. When asked why

he did not comply with the ARC's request to remove the siding, Mr. Bleimann responded, "Because, I felt that I had complied with everything that was in the covenant; . . . And, at the time I felt that I was doing my best effort to comply with the—let's say, surroundings of the houses to have the same board widths and have the same—I did not change the physical properties of the house; I did not change the appearance of the house or any architectural feature of the house. . . ." Mr. Bleimann also testified that there are homes in North Raintree that are painted in colors other than earth tones.

III. Admission and Exclusion of Evidence

Plaintiff contends the trial court committed prejudicial error in excluding as irrelevant Exhibits 8, 13, 18 and 32. Plaintiff argues that these exhibits were relevant to show that the ARC acted reasonably and in good faith in denying defendants' application and specifically in giving notice to the defendant of the reasons for the denial.

" '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). If proferred evidence has no tendency to prove a fact in issue in the case, the evidence is irrelevant and must be excluded. *See Hensley v. Ramsey*, 283 N.C. 714, 733, 199 S.E.2d 1, 12 (1973). A trial court's ruling on relevancy is given great deference on appeal. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *review denied*, 331 N.C. 290, 416 S.E.2d 398 (1992), *cert. denied*, 113 S. Ct. 321 (1992).

[2] We find the trial court properly excluded Exhibits 8, 13, 18, and 32. Exhibits 8, 13, and 18 merely indicate plaintiff's legal position towards defendants and thus do not have a tendency to prove a fact at issue in the case. Exhibits 8, 13, and 18 were letters from the law firm representing RHOA to the Bleimanns. Exhibit 8 reiterates the RHOA's position on defendants' installation of vinyl siding and informs defendants that the RHOA is prepared to sue defendants if they do not remove the siding and replace it with an approved ARC material. Exhibit 13 is a letter regarding defendants' request to the RHOA's Board of Directors for a delay in the filing of its law suit. Exhibit 18 is a letter informing defendants that the RHOA intends to

file a lawsuit if defendants do not submit an acceptable plan for removal within ten days.

[3] Exhibit 32 is an internal memorandum of the 27 March 1990 ARC meeting in which ARC members each wrote down a few sentences explaining their reasons for disapproval. While we agree that evidence of the committee's reasons for disapproval has some bearing on whether the committee acted reasonably and in good faith and was thus relevant, we hold, pursuant to N.C. Gen. Stat. § 1A-1, Rule 61 (1990), that the exclusion of the memorandum was harmless error. "No error in . . . the exclusion of evidence . . . is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action amounts to the denial of a substantial right." N.C. Gen. Stat. § 1A-1, Rule 61 (1990). The burden is on the appellant not only to show error but also to enable the court to see that he was prejudiced and that a different result would likely have ensued had the error not occurred. *Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864, *cert. denied*, 314 N.C. 336, 333 S.E.2d 496 (1985). Plaintiff has not shown that it was prejudiced by the exclusion of the memorandum and that had the memorandum been admitted, a different result would likely have ensued. In so holding, we note that several of the reasons set forth in the memorandum were testified to at trial and that plaintiff could have established the other reasons for disapproval through the testimony of ARC members.

[4] Plaintiff also argues that the trial court committed reversible error by allowing into evidence defendants' Exhibits 5-1 through 5-19, which consisted of before and after photos of defendants' home, to illustrate the testimony of Allen Stacey, Marion Wollman, and James Auten. Plaintiff objected to their admission on grounds that they were irrelevant to the issues and that they prejudiced the plaintiff by confusing the jury as to the issues in the case. Specifically, plaintiff contended that the photographs allowed the jury to substitute its own opinion for that of the ARC. The trial court allowed the photographs to be admitted and passed among the jury for illustrative purposes only. The trial court's charge to the jury included an instruction that the photographs were received into evidence for the purpose of illustrating and explaining the testimony of witnesses, not as substantive or direct evidence, and thus were only to be considered for that purpose.

Plaintiff's objection to the admission of photographs was essentially based on Rule 403. "Although relevant, evidence may be ex-

cluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (1992). Whether or not to exclude evidence under this Rule is a matter within the sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). Having reviewed the testimony of Mr. Stacey, Ms. Wollman, and Mr. Auten and having observed the photographs, we find the trial court did not abuse its discretion in admitting the photographs of defendants' home for the purpose of illustrating their testimony.

IV.

JURY INSTRUCTIONS

[5] Plaintiff requested the trial court to give the following instructions to the jury:

> 1. Under the laws of North Carolina, the restrictions contained in the Covenants, Conditions, and Restrictions which require submission of plans and prior approval before starting construction or alteration of any structure or home is valid and enforceable, even if it allows the [ARC] broad discretionary power. Therefore, you must set aside any personal opinion that you may have concerning the restriction in this case. Whether you personally like or dislike such a restriction or believe such a restriction is proper or fair is not an issue. I am instructing you that, as a matter of law, the restriction is valid and enforceable.
>
> 2. It is not your duty to second guess or substitute your opinions concerning vinyl siding for the opinion of the [ARC]. The issue is not whether vinyl siding is good or bad or whether the [ARC] made the right or wrong decision. You are to decide only whether the manner in which the [ARC] carried out their duties was reasonable or unreasonable, and done in good faith or bad faith.

The trial court instructed the jury that the issue is, "Did the plaintiff, through its [ARC], act reasonably and in good faith when it denied defendants' application for approval of installation of vinyl siding on defendants' home?" The trial court further instructed the jury as follows:

> Now, on this issue . . . the burden of proof is on the plaintiff. This means that the plaintiff must prove, that its [ARC] acted reasonably and in good faith with its denying defendants' application.

You must determine for yourself, based on the totality of the circumstances, whether or not the plaintiff's denial of defendants' application because it was not conducive to the architectural integrity of North Raintree, was based on reason, on adequate determining principles, on fairness, and not arbitrary and capricious.

The validity and enforceability of the covenants, conditions and restrictions in Raintree are not an issue in this case. They are valid and enforceable, as a matter of law.

The only limitation, under law, placed upon the plaintiff . . . through its [ARC's] discretion is that in the exercise of its authority, such must be exercised reasonably and in good faith.

. . .

Each of you was chosen and sworn as jurors to find the true facts of this case, from the evidence. You are to perform this duty fairly and objectively and without bias or prejudice for either party.

You should not be swayed by pity, sympathy, prejudice or public opinion. You must not consider the affect of the verdict on the plaintiff or the defendants or concern yourself as to whether it pleases the Court.

Plaintiff contends that the trial court committed reversible error in failing to instruct the jury according to its request. We disagree. A court's refusal to submit a requested instruction is not error where the instructions which are given fully and fairly present the issues in controversy. *Tan v. Tan*, 49 N.C. App. 516, 521, 272 S.E.2d 11, 15 (1980). Since we find that the court's instructions fully and fairly presented the issues in controversy, we find no error.

No Error.

Chief Judge ARNOLD and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. SAMUEL EARL HILL

No. 9311SC1121

(Filed 18 October 1994)

1. **Criminal Law § 261 (NCI4th)— continuance denied—no error**

The trial court did not err in denying defendant's motion to continue in order to allow defendant's counsel time to prepare for the DNA analytic evidence presented by the State, since the trial court allowed defendant's motion for funds with which to hire an expert in DNA analysis to evaluate the results achieved by the SBI laboratory; the trial court turned the SBI report over to defendant and ordered that defendant's DNA expert have immediate access to all discoverable information; and the trial court also continued the case for eight days to allow defendant adequate time to contact an expert and have him evaluate the DNA testing and report.

Am Jur 2d, Continuance § 28.

2. **Searches and Seizures § 57 (NCI4th)— lawful entry to effect arrest—seizure of items in plain view**

Officers lawfully entered defendant's trailer to effect an arrest, and items observed by the officers in plain view in defendant's bedroom were lawfully seized and admissible into evidence, where the officers possessed valid arrest warrants for defendant on rape and kidnapping charges; the officers had reason to suspect that defendant was present in the trailer; and upon entering the trailer the officers informed defendant's brother of their purpose. N.C.G.S. § 15A-401(e)(1).

Am Jur 2d, Searches and Seizures § 161,

Constitutionality of searching premises without warrant as incident to valid arrest—Supreme Court cases. 108 L. Ed. 2d 987.

Applicability of "plain view" doctrine and its relation to Fourth Amendment prohibition against unreasonable searches and seizures—Supreme Court cases. 110 L. Ed. 2d 704.

3. Evidence and Witnesses § 625 (NCI4th)— admission of items previously suppressed—denial of mistrial—absence of prejudice

The trial court did not err in denying defendant's motion for mistrial based on the admission into evidence of a pin and photograph previously suppressed by the trial court in pretrial motions on the ground that defendant's opening argument to the jury had reflected the trial court's suppression order where the suppression order was entered without prejudice to the State to show that the two items might be admissible under another theory of law; defendant was thus aware that the State might come forward with a legally acceptable basis for admission of the evidence; the State showed that the items were lawfully seized by an officer who entered defendant's trailer to effect an arrest; and defense counsel admitted that he did not tell the jury during the opening statement that the State would not offer either the pin or the photograph. Even if the admission of these items was error, defendant failed to present evidence of prejudice worthy of a mistrial considering the overwhelming evidence presented against him.

Am Jur 2d, Evidence §§ 601 et seq., 936 et seq.

4. Evidence and Witnesses § 2211 (NCI4th)— witness accepted as expert in molecular genetics

The trial court in a rape case did not err in accepting an SBI special agent as an expert in the field of molecular genetics where the agent testified that he had a bachelor's degree in biology, a masters degree in forensic sciences, and additional training in molecular genetics; had performed approximately 85 DNA analyses; and had been qualified as an expert in two other states.

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

5. Evidence and Witnesses § 2211 (NCI4th)— DNA testimony—statistical probability of DNA matching—evidence admissible

The trial court in a rape case did not err in allowing a DNA expert to testify to the statistical probability of another individual having the same DNA profile as defendant where the evidence showed that the expert possessed the requisite skill to form an opinion concerning the statistical probability of the DNA matching, and defendant had adequate opportunity to cross-examine the witness and to produce scientific evidence to impeach the witness at trial.

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

Admissibility, in criminal case, of statistical or mathematical evidence offered for purpose of showing probabilities. 36 ALR3d 1194.

6. Kidnapping and Felonious Restraint § 18 (NCI4th)— rape and kidnapping charged—restraint of kidnapping not inherent part of rape—instruction on both crimes proper

There was no merit to defendant's contention that the trial court erred by instructing the jury on first-degree rape and second-degree kidnapping because the restraint defendant must have employed in the kidnapping was an inherent part of the crime of first-degree rape, since defendant forced the victim from the sales floor to the store restroom at gunpoint and tied her hands; defendant thus procured the victim's submission and restrained her within the meaning of N.C.G.S. § 14-39 with the purpose of committing rape; and at that point the crime of second-degree kidnapping was complete, irrespective of the fact that defendant went on to commit the crime of first-degree rape.

Am Jur 2d, Abduction and Kidnapping § 32.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

7. Criminal Law § 777 (NCI4th)— no alibi evidence offered—instruction not required

The trial court did not err in refusing to instruct on the defense of alibi where defendant offered no evidence that he was elsewhere when the crimes charged in the indictment occurred but instead merely challenged the identification of himself as the rapist by the State's witnesses.

Am Jur 2d, Trial §§ 1261 et seq.

Appeal by defendant from judgment entered 17 March 1993 by Judge William C. Gore, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 31 August 1994.

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

Michael F. Easley, Attorney General, by Valerie B. Spalding, Assistant Attorney General, for the State.

WYNN, Judge.

Defendant was indicted for first degree rape and first degree kidnapping. The jury found defendant guilty of first degree rape and second degree kidnapping for which he was sentenced respectively to imprisonment terms of life and thirty years.

The State's evidence tends to show the following: At approximately 4:30 p.m. on 3 January 1992, Mary Doe (pseudonym) was in her country craft store when defendant and a woman entered. Ms. Doe testified that defendant was wearing a light brown/tan jacket, blue jeans and dirty sneakers and his hair was fairly long, stringy and unkempt. Defendant and the woman purchased an "I Love Jesus" button and then left the store. Approximately twenty minutes later, defendant returned alone and purchased a bottle of fabric paint. He then asked Ms. Doe if he could use the restroom in the back of the store. While defendant used the restroom, Ms. Doe remained behind the counter.

After exiting the restroom, defendant walked behind the counter and pulled a gun out of his coat. He put the gun in Ms. Doe's back and told her to keep quiet. After stating that he was going to tie her up and rob her, defendant forced Ms. Doe into the restroom, where he tied her hands behind her back with a telephone cable. During this time, defendant kept the gun at the Ms. Doe's head. Defendant pushed Ms. Doe to the floor and forced her to engage in vaginal intercourse with him. After a few minutes defendant appeared to become frustrated. He told Ms. Doe to perform oral sex on him, but she said she would rather die, and she could not do it because she was a Christian. Defendant replied that he would not have done it if he had known she was a Christian. He then got off of Ms. Doe and made her promise not to report him to the police.

Ms. Doe heard the store bell and loosened her hands and replaced her clothing. Defendant told Ms. Doe to get rid of the customer or he would shoot her. He then gave Ms. Doe her glasses and she walked out of the restroom. As she walked to the front of the store, Ms. Doe saw that the woman who had accompanied defendant on his first visit had returned. After asking Ms. Doe several questions, the woman left the store and defendant came out of the restroom. But, as defendant exited the restroom, the woman reentered the store and asked defendant what he was doing in the restroom. He told her that he was fixing the plumbing and they left the store.

After they left, Ms. Doe drove to the police station and told an officer that she had just been raped. She gave a general description of defendant and the woman to a detective and was then transported to the local hospital where a rape kit was completed. While at the hospital, Ms. Doe gave a more detailed statement to the police, including the fact that defendant had facial hair, a protruding lower tooth, and reeked of cat litter. Ms. Doe described the woman as a white female having auburn hair with very dark roots, a rounded face with no makeup, wearing a pink coat with embroidery on the shoulders, and having the same cat litter odor as defendant. She described defendant's gun as a medium sized semi-automatic. After the hospital visit, Ms. Doe returned to the police department where she identified a photograph of defendant. She told the police officers that she did not consent to having vaginal intercourse with defendant.

Detective Jerry Smith of the Clayton Police Department testified that he took a second, more detailed statement from Ms. Doe after she completed her physical examination. Later, at the police department, he had her look through some photograph albums from which she picked out a photograph of defendant. Defendant was also identified by Ms. Doe's friend who was in the store when defendant and the woman bought the "I Love Jesus" pin.

On 4 January 1992, Detective Smith and a member of the Sheriff's Department obtained defendant's last known address and went to his trailer. After informing defendant's brother of their purpose, the officers walked through the trailer looking for defendant. Upon entering defendant's bedroom the officers saw an "I Love Jesus" pin and a photograph of a white female with red hair. Detective Smith later showed the photograph to Ms. Doe and she identified it as a photograph of the woman who had accompanied defendant; it was later determined that the woman was defendant's wife. There were several cats in the trailer and a strong odor of cat litter. Defendant was arrested on 8 January 1992, at which time he was photographed. The photograph showed a protruding lower tooth.

Special Agent Mark Boodee of the SBI was accepted by the trial court as an expert in the fields of molecular genetics and forensic DNA analysis. He testified to the reliability and accuracy of the analysis undertaken at the SBI laboratory. He then explained the general procedures involved in DNA analysis. Special Agent Boodee testified that the analysis in this case began on 5 November 1992 when he received blood samples from Ms. Doe, her husband and defendant.

Special Agent Boodee then performed the DNA tests and obtained seven autorads. One of the autorads was a quality control check, but the other six produced four visual matches and two inconclusive results. Special Agent Boodee characterized the four matches as an extremely rare event. Finally, Special Agent Boodee testified that the probability of selecting another unrelated individual having the same DNA profile as defendant was approximately 1 in 2.6 million for the North Carolina white population.

Defendant presented no evidence.

I.

Defendant first assigns error to the trial court's denial of his motion to continue. He contends that a continuance was necessary in order to allow his counsel time to prepare for the DNA analysis evidence presented by the State. Defendant argues that his constitutional rights to: (1) due process; (2) effective assistance of counsel; (3) confront and cross examine his accusers; and (4) fundamental fairness were violated. For the following reasons, we disagree.

[1] We note initially that defendant's failure to cite any authority to support his argument subjects this assignment to be deemed abandoned. *S.J. Graves & Sons & Co. v. State*, 50 N.C. App. 1, 273 S.E.2d 465 (1980), *cert. denied*, 302 N.C. 396, 279 S.E.2d 353 (1981) (defendant's failure to afford the appellate court any citations of authority or portions of the record upon which it relied to support its argument deems his argument abandoned); *See Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987) (where plaintiff failed to cite authority in support of an assignment of error, such assignment would be deemed to be abandoned). We exercise our discretion, however, and review this assignment of error. A motion to continue is within the sound discretion of the trial court, and its ruling is not subject to review absent an abuse of discretion. *State v. Weimer*, 300 N.C. 642, 268 S.E.2d 216 (1980); *State v. Winston*, 47 N.C. App. 363, 267 S.E.2d 43 (1980). Even when a motion for a continuance raises a constitutional issue and is denied, the denial is grounds for a new trial only when a defendant shows that the denial was erroneous and also that his case was prejudiced as a result of the error. *State v. Pickard*, 107 N.C. App. 94, 418 S.E.2d 690 (1992); *State v. Bunch*, 106 N.C. App. 128, 415 S.E.2d 375 (1992), *cert. denied*, 332 N.C. 149, 419 S.E.2d 575 (1992). The trial court, in the case *sub judice*, allowed defendant's motion for funds with which to hire an expert in DNA analysis to evaluate the results achieved by the SBI laboratory. The trial court turned

the SBI report over to defendant and ordered that defendant's DNA expert have immediate access to all discoverable information. The trial court also continued the case for eight days to allow defendant adequate time to contact an expert and have him evaluate the DNA testing and report. Based on this evidence, we find that defendant failed to demonstrate error or prejudice. This assignment of error is overruled.

II.

Defendant next assigns error to the trial court's denial of his motion for mistrial based on the admission into evidence of items previously suppressed by the trial court in pre-trial motions. Defendant argues that the admission of this evidence constitutes substantial and irreparable prejudice. Specifically, defendant argues that the trial court erroneously relied on N.C. Gen. Stat. § 15A-401(e)(1) (1988 & Cum. Supp. 1993) to support its decision to admit the "I Love Jesus" pin and the photograph of defendant's wife. Defendant contends that he was prejudiced by the admission of the evidence because his opening argument to the jury reflected the trial court's earlier suppression order. We disagree.

[2] Defendant made a pre-trial motion to suppress the "I Love Jesus" pin and the photograph of his wife. The trial court allowed defendant's motion on the basis that the officers' search warrant was invalid and that defendant's brother did not have commonality of interest sufficient to permit him to open defendant's bedroom door. The trial court stated, however, that its orders were entered without prejudice to the State to show that the two items might be admissible under another theory of law. Thus, during the State's case in chief, the prosecutor asked for a *voir dire* in order to show why the items were in fact admissible. The trial court granted this request on the basis of its earlier caveat, and further testimony was presented. The trial court determined that when the officers were permitted to enter defendant's trailer by defendant's brother, they possessed valid arrest warrants for defendant on the charges of first degree rape and first degree kidnapping. The record also indicates that the officers had reason to suspect that defendant was present in the trailer and upon entering the trailer the officers informed defendant's brother of their purpose. Accordingly, defendant's bedroom door was lawfully opened, and the two items were thereafter seen in plain view. N.C. Gen. Stat. § 15A-401(e)(1) (1988 & Cum. Supp. 1993) provides that a law enforcement officer may enter private premises to effect an

arrest when: a) the officer has in his possession a warrant or order for the arrest of a person; 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. Thus, both the "I Love Jesus" pin and the photograph of defendant's wife were admissible into evidence.

[3] Next, defendant argues that he was prejudiced because his opening argument to the jury reflected the trial court's earlier suppression of the pin and the photograph. We disagree. The pre-trial motion to suppress the "I Love Jesus" pin and the photograph was entered without prejudice to the State to show that the two items might be admissible under another theory of law. Defendant was, therefore, aware that the State might come forward with a legally acceptable basis for admission of the evidence. Furthermore, defense counsel admitted that he did not tell the jury during the opening that the State would not offer either the pin or the photograph. Thus, the admission of the pin and the photograph did not prejudice defendant.

Even if this Court found error in the trial court's admission of the pin and the photograph, defendant has failed to present evidence of prejudice worthy of a mistrial, considering the overwhelming evidence presented against him. In *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991), our Supreme Court held that a mistrial should be granted only when improprieties in trial are so serious that they substantially and irreparably prejudice the defendant's case. *See State v. Bailey*, 97 N.C. App. 472, 389 S.E.2d 131 (1990) (trial court's ruling on motion for mistrial not reviewable on appeal absent manifest abuse of discretion). In addition to the "I Love Jesus" pin and the photograph, the State submitted other incriminating evidence which connected defendant to the rape and kidnapping committed on 3 January 1992. This evidence included the physical and photographic identification of defendant by Ms. Doe and her friend, as well as the DNA matches between his blood and Ms. Doe's vaginal swabs and panty cutting, and the statistical calculations made thereon. The trial court, therefore, did not err by denying defendant's motion for a mistrial. Accordingly, this assignment of error is overruled.

III.

[4] Defendant next contends that the trial court erred by accepting Special Agent Boodee as an expert in the field of molecular genetics. We disagree.

Whether a witness is qualified as an expert is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. *State v. Parks*, 96 N.C. App. 589, 592, 386 S.E.2d 748, 750 (1989). Special Agent Boodee testified that he received a Bachelors degree in Biology from the University of Virginia, a masters degree in Forensic Sciences from George Washington University, and he received additional training in Molecular Genetics from North Carolina State University. He also stated that he has performed approximately 85 DNA analyses and has been qualified as an expert in both Kansas and Illinois.

We have reviewed Special Agent Boodee's testimony and conclude that he was qualified to inform the jury about molecular genetics. This assignment of error is overruled.

IV.

Defendant next contends that the trial court erred by allowing Special Agent Boodee to conclude that four out of six DNA probes yielded visual matches. We disagree.

Defendant argues that by testifying that a match of four out of the six probes was a rare event, Special Agent Boodee improperly stated his opinion that defendant was the person who committed the rape. N.C. Gen. Stat. § 8C-1, Rule 703 (1992), however, provides that an expert may state an opinion that embraces an ultimate issue to be decided by a trier of fact. Furthermore, in *Liverman v. Bridgett*, 77 N.C. App. 533, 335 S.E.2d 753 (1985), *cert. denied*, 315 N.C. 391, 338 S.E.2d 880 (1986), this Court recognized that Rule 704 allows testimony by an expert on an ultimate issue. See *Welborn v. Roberts*, 83 N.C. App. 340, 349 S.E.2d 886 (1986).

Thus, Special Agent Boodee's testimony regarding the DNA match was properly admitted. This assignment of error is overruled.

V.

[5] Defendant next contends that the trial court erred by allowing Special Agent Boodee to testify to the statistical probability of another individual having the same DNA profile as defendant. Specifically, defendant argues that the database used was too small to accurately conclude that there was only a chance of 1 in 2.6 million that another individual would have the same DNA profile as the defendant. We disagree.

This Court recently discussed the issue of DNA analysis in *State v. Futrell*, 112 N.C. App. 651, 436 S.E.2d 884 (1993). In *Futrell*, this Court allowed evidence of DNA profile testing and held that it was for the jury to determine the credibility of the experts and the weight of the expert's testimony. *Id.* at 667, 436 S.E.2d at 892. The competency of a witness to testify as an expert is within the sound discretion of the trial court. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984).

In *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990), our Supreme Court held that DNA profile testing is "generally admissible." In *Pennington*, the Court ruled that DNA molecules extracted from the defendant's blood and DNA molecules extracted from a stain on a bedspread taken from the crime scene were admissible in the prosecution for first degree rape, first degree sexual offense, and other crimes. *Id.* The Court focused on "indices of reliability" which include: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting scientific evidence on faith, and independent research conducted by the expert." *Id.* at 98, 393 S.E 2d at 853. The Court also ruled that admission of DNA evidence is not automatic but is subject to attack. Issues such as relevancy, prejudice, reliability of procedures, reliability of results obtained, and contamination of the sample or chain of custody may be presented. *Id.* at 101, 393 S.E.2d at 854.

Defendant contends that the database was too small to permit use of statistical analysis regarding the probability that the DNA sample could have belonged to someone other than defendant. The trial court testimony, however, shows that Special Agent Boodee possessed the requisite skill to form an opinion concerning the statistical probability of the DNA matching. Furthermore, defendant had adequate opportunity to cross-examine the witness and to produce scientific evidence to impeach the witness at trial. Thus, the evidence was properly admitted by the trial court, and it was the jury's duty to determine if the evidence was credible.

VI.

Defendant next contends that the trial court erred by allowing Special Agent Boodee to testify that Dr. Bruce Weir determined the 500 samples to be a representative sample upon which the North Carolina population frequency database was developed. We disagree.

Under N.C. Gen. Stat. § 8C-1, Rule 703 (1992), an expert may base an opinion on facts or data perceived before the hearing if it is of a

type reasonably relied upon by experts in the field. Our Supreme Court has held that Rule 703 permits an expert to rely on an out-of-court communication as a basis for an opinion. *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988); *See State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991). Special Agent Boodee testified in some detail to Dr. Weir's professional background and the results of the statistical testing to which Dr. Weir had subjected the SBI database. Special Agent Boodee was obviously familiar with Dr. Weir's analysis of the SBI database and the results, particularly since Special Agent Boodee used the database himself when making his statistical calculations for this case. Thus, the trial court did not err by allowing Special Agent Boodee to testify about the results of Dr. Weir's study. This assignment of error is overruled.

VII.

[6] Defendant next contends that the trial court erred by instructing the jury on first degree rape and second degree kidnapping because the restraint defendant must have employed in the kidnapping was an inherent part of the crime of first degree rape. We disagree.

In *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978), our Supreme Court construed the element of restraint in N.C. Gen. Stat. § 14-39 (1993) to connote a restraint separate and apart from that which is inherent in the commission of certain other felonies, such as forcible rape and armed robbery. The Court went on to say that "[t]here is no constitutional barrier to the conviction of a defendant for kidnapping by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 352. In *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987), this Court stated that "[a]sportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetuated the offense when he first threatened the victim and instead took the victim to a more secluded area to prevent others from witnessing or hindering the rape." Although defendant could have committed the rape in the front of the store, he forced Ms. Doe into the store restroom by threatening her with a gun. Thereafter, he tied her hands behind her back with a telephone cable. He thus procured Ms. Doe's submission and restrained her within the meaning of N.C. Gen. Stat. § 14-39 (1993) with the purpose of committing rape. At that point, the crime of second degree kidnapping was complete, irre-

spective of the fact that defendant went on to commit the crime of first degree rape.

The evidence, in the case *sub judice*, was sufficient to support the convictions of both first degree rape and second degree kidnapping. Thus, this assignment of error is overruled.

VII.

[7] Finally, defendant contends that the trial court erred by refusing to instruct on the defense of alibi. We disagree. Defendant relies on *State v. Hunt*, 283 N.C. 617, 197 S.E.2d 513 (1973), in support of this assignment of error. In *Hunt*, the defendant offered his own testimony and the testimony of other witnesses to support his argument that he was somewhere else when the crimes charged in the indictments were committed. In the case *sub judice*, defendant offers no evidence that he was elsewhere when the rape and kidnapping occurred; he merely challenges the identification of him as the rapist by the State's witnesses. The trial court, therefore, did not err in refusing to give an alibi instruction. This assignment of error is overruled.

No error.

Judges COZORT and McCRODDEN concur.

MICHAEL KENT LEE AND WIFE, ANNE P. LEE, PLAINTIFFS v. ALLEN C. BIR, DEFENDANT

No. 9320SC1040

(Filed 18 October 1994)

1. Trespass § 17 (NCI4th)— unauthorized cutting of trees and shrubs—punitive damages—sufficiency of evidence

The trial court did not err in denying defendant's motions for directed verdict and judgment n.o.v. on the issue of punitive damages where the evidence tended to show that defendant cut or directed another to cut trees and shrubs from plaintiffs' property when he knew he was trespassing on their property; he instructed his helpers "to be quiet about cutting the trees"; and he instructed one of his helpers to lie during a deposition and say that the trees removed had all been damaged by Hurricane Hugo.

Am Jur 2d, Trespass §§ 117 et seq.

2. Trespass § 28 (NCI4th)— trespass—aesthetic value of property—consideration in determining diminished value

In an action for trespass where plaintiffs sought damages for defendant's unauthorized cutting of trees and shrubs from their property, the jury could consider the aesthetic value of the property to the landowner plaintiffs and the replacement cost of the trees and shrubs as was reasonably practical in determining the diminished value of the property.

Am Jur 2d, Trespass §§ 126 et seq.

Appeal by defendant from judgment entered 14 May 1993 by Judge William H. Helms in Union County Superior Court. Heard in the Court of Appeals 25 May 1994.

On 8 April 1991, plaintiffs filed a complaint against defendant alleging that defendant had unlawfully entered upon plaintiffs' property and "employed and directed others to unlawfully enter upon [p]laintiffs' property . . . to cut trees, laurel, and rhododendron on [p]laintiffs' property, stripping the property of large and beautiful native trees, mountain laurel and rhododendron, leaving stumps, brush, and cut wood remaining on the property." Further, plaintiffs alleged that "such entries and cutting of trees and bushes was without the knowledge or consent of the [p]laintiffs and . . . was intentionally undertaken by the [d]efendant and others at his express employ and direction willfully, wantonly, maliciously, and surreptitiously." Based on these allegations, plaintiffs sought compensatory and punitive damages.

In his answer to plaintiffs' complaint, defendant denied plaintiffs' allegations. At trial, however, defendant admitted cutting the trees on plaintiffs' property.

Subsequently, the jury returned a verdict finding that plaintiffs were entitled to recover $68,266 from defendant for actual damages and $100,000 from defendant for punitive damages. Defendant moved for a judgment notwithstanding the verdict, and plaintiffs consented to a remittitur with respect to the actual damages. Thereafter, the trial court denied defendant's motion, and Judge William H. Helms entered a judgment awarding plaintiffs $60,392.44 in actual damages and $100,000 in punitive damages, both with interest. From this judgment, defendant appeals.

Griffin, Caldwell, Helder, Lee & Helms, P.A., by W. David Lee, for plaintiff-appellees.

Vannoy, Colvard, Triplett & McLean, by J. Gary Vannoy and Jay Vannoy, for defendant-appellant.

ORR, Judge.

At all times relevant to this action, Plaintiffs Michael Kent Lee and his wife Anne P. Lee owned Lot 21, Section K in the High Meadows Subdivision located in Alleghany County, North Carolina, and Defendant Allen C. Bir owned Lot 20, the lot adjacent to plaintiffs' property. The parties stipulated that "during May, June and July, 1990, certain trees and other natural growth were cut from the lot owned by the plaintiffs without their knowledge or consent." Further, the parties stipulated that between 1 May 1990 and 1 August 1990, the defendant "requested one Kenneth Miles to cut and remove some trees located behind his house in order for him to view Stone Mountain."

At trial, Kenneth Miles testified that in May or June of 1990 he was contacted to do some landscaping work for defendant. Subsequently, Miles went to defendant's home on Lot 20 where defendant took Miles outside on the back deck of his house and "showed [him] from looking straight out on his deck . . . some trees that [defendant] wanted cut from a viewpoint down." Miles testified that the area from which defendant wanted Miles to cut the trees ran from the back of defendant's deck to a specific point on the mountain and a clearing which defendant pointed out to Miles.

Miles further testified that he cut trees down for two or three weeks. During this time, defendant did not indicate to Miles that he might be on someone else's property. Miles then cut up the brush and trees, stacked the wood and began to burn the brush as he was instructed to do by defendant. Thereafter, Miles testified that defendant told him that everything looked good but that they had to "hurry up and get what [they] had to get done because . . . [they were] cutting on somebody else's property." Miles also testified that defendant instructed him to keep quiet about the cutting. Subsequently, Miles also testified that two days before Miles' deposition was to be taken in this case, defendant told Miles to say that the trees that were cut were all from Hurricane Hugo damage.

Defendant also testified at trial. He testified that he "admitted cutting the trees" on plaintiffs' property. Further, he testified that

when he told Miles to say that the trees they had cut down were from Hurricane Hugo damage, defendant was just joking with Miles.

I.

On appeal, defendant contends that the trial court erred in (1) denying defendant's motion for a directed verdict at the close of plaintiffs' evidence and at the close of all of the evidence on the issue of whether defendant trespassed on plaintiffs' land, (2) denying defendant's motion for a directed verdict and judgment notwithstanding the verdict on the issue of punitive damages, and (3) denying defendant's motion for judgment notwithstanding the verdict on the issue of actual damages.

First, "[a] motion for a directed verdict shall state the specific grounds therefor." N.C.R. Civ. P. 50(a) (1990). "On review of a directed verdict, appellate review is usually limited to those grounds asserted by the movant upon making his motion before the trial judge." *Warren v. Canal Industries, Inc.*, 61 N.C. App. 211, 213, 300 S.E.2d 557, 559 (1983); *See also Southern Bell Tel. and Tel. Co. v. West*, 100 N.C. App. 668, 670, 397 S.E.2d 765, 766 (1990), *aff'd per curiam*, 328 N.C. 566, 402 S.E.2d 409 (1991).

Similarly, "[t]he motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of all the evidence, and thus the movant cannot assert grounds not included in the motion for directed verdict." *Love v. Pressley*, 34 N.C. App. 503, 511, 239 S.E.2d 574, 580 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

In the present case, the only grounds defendant asserted as the basis for his directed verdict motion was the insufficiency of the evidence to support an award of punitive damages. Defendant did not assert the insufficiency of the evidence to support plaintiffs' allegations of trespass or to support an award of actual damages. Because defendant failed to assert the insufficiency of the evidence to support plaintiffs' action for trespass or an award of actual damages as grounds for his motion for a directed verdict, defendant has waived his right to appellate review of these issues. *See Southern Bell Tel. and Tel. Co.*, 100 N.C. App. at 670, 397 S.E.2d at 766 (the scope of appellate review of a directed verdict motion "is limited to those grounds asserted by the moving party before the trial court."); *See also Love*, 34 N.C. App. at 511, 239 S.E.2d at 580 (upon review of a motion for judgment notwithstanding the verdict, defendant waives

his right to appellate review of the sufficiency of the evidence to support a verdict as to damages when he did not assert this issue as grounds for his directed verdict motion). Thus, as to defendant's first assignment of error, the only issues before this Court are whether the trial court erred in denying defendant's motions for directed verdict and judgment notwithstanding the verdict on the issue of punitive damages.

[1] A motion for a directed verdict pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure raises the question of whether plaintiff's evidence, considered in the light most favorable to the non-movant, is sufficient to submit the issue to the jury. *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 665, 391 S.E.2d 831, 832 (1990). The court must resolve any conflicts in the evidence in the favor of the non-movant. *Id.* Similarly,

> "[w]hen passing on a motion for judgment notwithstanding the verdict, the same standards applicable to a motion for directed verdict are to be applied. Thus, the court must consider the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to support a verdict for plaintiff. . . ."

Clontz v. Clontz, 44 N.C. App. 573, 577, 261 S.E.2d 695, 698, *disc. review denied*, 300 N.C. 195, 269 S.E.2d 622 (1980) (citations omitted). Subsequently, "[t]he court should deny motions for directed verdict and judgment notwithstanding the verdict when it finds any evidence more than a scintilla to support plaintiff's prima facie case in all its constituent elements." *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580-81 (1983). Applying these standards to the issues before us, we conclude that the trial court did not err in denying defendant's motions for directed verdict and judgment notwithstanding the verdict on the issue of punitive damages.

" 'While punitive damages are not recoverable as a matter of right, sometimes they are justified as additional punishment for intentional acts which are wanton, wilful, and in reckless disregard of a plaintiff's rights.' " *Maintenance Equipment Co., Inc. v. Godley Builders*, 107 N.C. App. 343, 351, 420 S.E.2d 199, 203 (1992), *disc. review denied*, 333 N.C. 345, 426 S.E.2d 707 (1993) (citation omitted). In an action for trespass, "[a] jury may award punitive damages if the trespass was committed under circumstances of aggravation or resulted from malicious conduct on the part of the defendant." *Id.*

In proving that a plaintiff is entitled to recover punitive damages in an action for trespass, " '[t]he plaintiff is at liberty to give in evidence the circumstances which accompany and give character to the trespass.' " *Brame v. Clark*, 148 N.C. 364, 366, 62 S.E. 418, 419 (1908) (citation omitted). Further, "[i]f the pleading and evidence so warrant, an issue as to punitive damages should be submitted to the jury." *Hinson v. Dawson*, 244 N.C. 23, 26, 92 S.E.2d 393, 395 (1956).

In the present case, in their complaint, plaintiffs alleged that defendant's trespass on their land and cutting of trees "was intentionally undertaken by the [d]efendant and others at his express employ and direction willfully, wantonly, maliciously, and surreptitiously." At trial, Kenneth Miles testified that defendant told him to clear cut the trees in the area behind defendant's house from defendant's deck to a clearing on the mountain so that defendant could see Stone Mountain. Defendant testified that at the time he told Miles where to cut the trees, he had made no investigation as to the position of his property line. Further, he testified that he just "assumed" that his property line ran perpendicular to the road.

Subsequently, in Miles' statement to Sergeant Hudson of the Alleghany Sheriff's Department, Miles stated that after he and his helper, Dale Wyatt, had cut down the trees as instructed by defendant, defendant told them "he wanted it cleaned up and wanted [them] to hurry and get done because this was someone else's property", and when defendant paid Miles and Wyatt, he told them "to be quiet about cutting the trees." (Emphasis added.) Further, the record reveals that when defendant later found out that plaintiffs were taking Miles' deposition in this case, defendant told Miles not to worry about anything but to just "[t]ell them it was all Hugo damage."

Based on this evidence, we find that more than a scintilla of evidence existed from which the jury could find that defendant's trespass was accompanied by a reckless disregard for plaintiffs' rights and an element of intent after defendant discovered he had trespassed on plaintiffs' property and continued to trespass. Accordingly, we conclude that the trial court properly denied defendant's motions for directed verdict and judgment notwithstanding the verdict on the issue of punitive damages.

II.

Next, defendant contends that the trial court erroneously allowed the following into evidence: (1) the opinion testimony of Plaintiff Michael Kent Lee and Andrew Ausley as to the value of plaintiffs'

property, (2) the defendant's tax returns and financial statements, and (3) plaintiffs' exhibits 25, 26, and 27 representing the cost of repair to plaintiffs' property. Defendant failed, however, to object to the admission of this evidence at trial.

"In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b). Further, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected," and, where the ruling is one admitting evidence, "a timely objection or motion to strike appears of record." N.C.R. Evid. 103(a)(1).

By failing to object to the admission of this evidence at trial, defendant waived his right to object to the admission of this evidence on appeal. *See State v. Lucas*, 302 N.C. 342, 349, 275 S.E.2d 433, 438 (1981). Accordingly, we need not address these assignments of error.

III.

[2] Defendant also contends that the trial court erred in allowing evidence concerning the aesthetic value of plaintiffs' property and the replacement cost of the trees and the type of trees used for replacement. We disagree.

In *Harper v. Morris*, 89 N.C. App. 145, 365 S.E.2d 176, *disc. review denied*, 322 N.C. 479, 370 S.E.2d 223 (1988), this Court held that in an action for trespass in which a plaintiff seeks damages for defendant's unauthorized cutting of trees and shrubs from plaintiffs' property, the jury could consider the aesthetic value of the property to the landowner plaintiffs and the replacement cost of the trees and shrubs as is reasonably practicable in determining the diminished value of the property. This Court stated:

> The purpose for which these trees and shrubs were grown and maintained and the contemplated use of the land including aesthetic value to the landowners, in our opinion, directly affects the market value of this property. Similarly the cost of producing the trees and shrubs has some bearing on the value of plaintiffs' land, and one factor in determining the diminished value would be the cost of replacing or restoring the trees and shrubs to the same extent as is reasonably practicable.

Id. at 147, 365 S.E.2d at 178.

Further, on the admissibility of evidence showing the cost of replacing or restoring the trees and shrubs, this Court held:

> We believe the testimony of the cost of replacing these trees and shrubs presented by plaintiffs' expert witness was relevant and properly admitted. Its probative value was not outweighed by any possible prejudicial impact on the jury, particularly where as here the trial court cautioned the jury to consider replacement cost only to the extent "that it is reasonable and practicable; that is, not being excessive in relation to the damage to the land itself . . . ."

Id.

In the present case, Robert Jordan, a landscape architect, testified over defendant's objection that the cutting of the trees affected the aesthetic value of the property. Further, Jordan testified over defendant's objection that the aesthetic value of the property was particularly diminished by the fact that after the trees were removed, defendant's house was visible and that the "visibility of and the closeness and proximity of [defendant's house] . . . was the major distraction that had occurred." Based on our holding in *Harper*, we conclude that this testimony was properly admitted.

Defendant also contends that the trial court erred in allowing Jordan to testify that the replacement cost for a minimum amount of planting would be thirty-nine to forty thousand dollars and that his replacement plan consisted of planting crab apple trees, chestnut trees, maple trees, river birch trees, and mixed pine trees. In support of his contention, defendant argues that this testimony was not reasonable and practicable and that the replacement cost was excessive in relation to the actual damage to the property itself. We disagree.

Our review of this testimony shows that it was relevant and properly admitted. Further, we find that the probative value was not outweighed by any possible prejudicial impact on the jury, especially in light of the trial court's jury instructions relating to this testimony. The trial court instructed the jury that

> the cost of restoration or replacement of trees and landscaping to the extent that it is reasonable and practical have some bearing on the value of the plaintiffs' land. And one factor in determining the diminished value which would be the cost of replacing or restoring the trees and landscaping to the same extent as is reasonably practical.

Now, members of the jury, it's important that you keep in mind that the cost of replacing or restoring the trees and landscaping is not the true measure of damages. However, you may consider the evidence with respect to the estimated cost to replace or restore trees and landscaping as an aid in arriving at the true measure of damages, which as I have already instructed you, is the difference between the fair market value of the property immediately before it was damaged and its fair market value immediately after it was damaged.

Accordingly, we find no error.

No error.

Judges JOHNSON and WYNN concur.

LIDA MANUFACTURING COMPANY, INC., AND CIGNA INSURANCE COMPANY (SUCCESSOR IN INTEREST TO INSURANCE COMPANY OF NORTH AMERICA) v. UNITED STATES FIRE INSURANCE COMPANY (A MEMBER OF THE CRUM AND FORSTER INSURANCE GROUP)

No. 9326SC1291

(Filed 18 October 1994)

Insurance §§ 895, 1300 (NCI4th)— covenant not to execute confession of judgment—lessee not legally obligated to pay damages—no coverage under insurance policies

A settlement agreement between plaintiff and a company which leased knitting machines from plaintiff which contained a covenant not to execute a confession of judgment against the lessee precluded plaintiff from recovering for fire damage to the machines under defendant's general liability and commercial umbrella policies issued to the lessee where those policies provided coverage only if the lessee was "legally obligated to pay" damages.

Am Jur 2d, Insurance §§ 703 et seq., 1871 et seq.

Appeal by plaintiffs from order entered 24 August 1993 in Mecklenburg County Superior Court by Judge C. Walter Allen. Heard in the Court of Appeals 14 September 1994.

Dean & Gibson, by Rodney Dean and Barbara J. Dean, for plaintiff-appellants.

Spears, Barnes, Baker, Wainio, Brown & Whaley, by Alexander H. Barnes, for defendant-appellee.

GREENE, Judge.

Lida Manufacturing Company, Inc. (Lida) and its insurer, CIGNA Insurance Company (CIGNA), successor in interest to Insurance Company of North America, appeal from an order entered 24 August 1993 in Mecklenburg County Superior Court, ordering that Lida and CIGNA (plaintiffs) "have and recover nothing from the [United States Fire Insurance Company (defendant)]."

Lida is a corporation doing business in North Carolina, and Wagner Knitting, Inc. (Wagner) is a corporation in the business of manufacturing textiles at a facility in Lowell, North Carolina. On 3 June 1982 and 1 April 1986, Lida and Wagner entered into agreements for Wagner's lease and purchase of knitting machines from Lida over a period of time. Under the agreements, Wagner agreed to reimburse Lida "for any damage of [sic] destruction of the [knitting machines] arising out of or related to [Wagner]'s negligent act or omission or misuse" of the knitting machines.

On 8 June 1986, a fire occurred on Wagner's premises, damaging the knitting machines described in the contracts and destroying an inventory of yarn Wagner had manufactured for Lida with Lida's materials. At the time of the fire, Wagner had in effect defendant's General Liability Insurance Policy No. 500-428830-6 (general policy) and defendant's Commercial Umbrella Insurance Policy No. 523-419976-8 (umbrella policy). The general policy provides in pertinent part that defendant "will pay on behalf of [Wagner] all sums which [it] shall become legally obligated to pay as damages because of" property damage caused by an occurrence. The policy further states that "[t]his insurance does not apply . . . to liability assumed by the insured under any contract or agreement except an incidental contract," which includes "any oral or written contract or agreement relating to the conduct of the named insured's business." The umbrella policy provides that defendant "will pay on behalf of [Wagner] the ultimate net loss . . . which [Wagner] shall become legally obligated to pay as damages because of bodily injury, property damage or personal injury."

In November 1986, counsel for plaintiffs made demand on Wagner and defendant for payment of Lida's losses resulting from the fire. On 11 December 1986, defendant sent Wagner a letter stating that defendant would not provide a defense and disclaiming coverage for any damages claimed by Lida against Wagner resulting from the fire. On 14 August 1987, Lida instituted a civil action in Mecklenburg County Superior Court against Wagner for negligence and breach of their lease agreement and sought payment for damage to its equipment, machinery, inventory, and for loss of rental income and interruption of Lida's business.

After Lida's action against Wagner had proceeded for some time, Lida and Wagner entered a settlement agreement which provides in pertinent part:

> A. At the execution of this Agreement Wagner shall pay the sum of Twenty Five Thousand Dollars ($25,000) to Lida by certified or cashiers check made payable to Cozen and O'Connor, Esquires, as attorneys for Lida.
>
> B. Wagner shall execute a confession of judgment in the amount of $1,000,000 in favor of Lida, to be held by Lida and its counsel and to be filed and enforced upon such terms and conditions as appear in Section IV herein;
>
> C. Wagner agrees to and does hereby assign to Lida all of its rights and entitlement, including the right to sue thereon, possessed by it under and pursuant to the contracts of insurance with [defendant] . . .
>
> . . . .
>
> IV. OTHER TERMS AND CONDITIONS
>
> . . . the Confession of Judgment referred to herein shall be held by Cozen and O'Connor, shall remain unfiled, and shall for no purposes be employed against the interests of Wagner, nor shall any execution issue, regardless of the outcome of any action against [defendant] provided that the terms and conditions of this Agreement are complied with by Wagner.

Subsequent to execution of the settlement agreement, Wagner paid Lida $25,000.00, executed a confession judgment in the amount of $1,000,000.00, and by virtue of the terms of the agreement, assigned its rights under its insurance policies with defendant.

On 26 March 1991, plaintiffs filed this declaratory action and requested the trial court to declare that defendant's denial of coverage under its policies to Wagner was inappropriate and to direct defendant to pay plaintiffs its policy limits in accordance with the policy provisions. By order entered 24 August 1993, the trial court concluded that defendant was not obligated to pay anything to Lida on behalf of Wagner and "did not have an obligation under the terms and conditions of the insurance policies to defend Wagner."

The issue presented is whether the settlement agreement, which contains a covenant not to execute a confession judgment against Wagner, precludes plaintiffs from recovering payment under the defendant's general policy and under defendant's umbrella policy which provide coverage only if Wagner is "legally obligated to pay" damages.

Defendant argues that the trial court's determination that defendant is not liable for plaintiffs' loss under the general policy or under the umbrella policy is proper because "Wagner is not legally obligated to pay damages to CIGNA or Lida" under the settlement agreement, and defendant's indemnity obligation under the policies only arises if Wagner is "legally obligated to pay" damages to a third party. We agree.

A defendant insurance company's liability is "derivative in nature"; therefore, its liability depends on whether or not its insured is liable to the plaintiff. *Buchanan v. Buchanan*, 83 N.C. App. 428, 429, 350 S.E.2d 175, 176 (1986), *disc. rev. denied*, 319 N.C. 224, 353 S.E.2d 406 (1987). In determining whether or not an insured is liable where the insurance policy states it will pay if plaintiff is "legally entitled to recover" from the insured, our Supreme Court stated "[t]o be 'legally entitled to recover damages,' a plaintiff must not only have a cause of action but a remedy by which he can reduce his right to damage to judgment." *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 293-94, 378 S.E.2d 21, 24 (1989) (*quoting Brown v. Casualty Co.*, 285 N.C. 313, 319, 204 S.E.2d 829, 833 (1974)). Although the language in Wagner's policies is "legally obligated to pay" damages, that phrase is simply another way of saying that, in this case, Lida must have a cause of action against Wagner and "a remedy by which [it] can reduce [its] right to damage to judgment" before defendant is liable to Lida. Therefore, the issue presented by the terms of the settlement agreement in this case is whether Lida "can reduce [its] right to damage to judgment" where Wagner only consented to a judgment in the

amount of $1,000,000.00, and Lida cannot execute this $1,000,000.00 confession of judgment against Wagner.

There is a division among states as to whether an insurer is liable when its insured is protected by an agreement not to execute. Some states allow an injured party to proceed against the insurer even though the insured is protected by a covenant not to execute because such a covenant "is merely a contract, and not a release, such that the underlying tort liability remains and a breach of contract action lies if the injured party seeks to collect his judgment." *Freeman v. Schmidt Real Estate & Ins.*, 755 F.2d 135, 137 (8th Cir. 1985). Under this rationale, the insured is still "legally obligated" to the injured party and the insurer must fulfill "its contractual promise to pay." *Id.* at 137-38 (*citing State Farm Mut. Auto. Ins. Co. v. Paynter*, 593 P.2d 948 (Ariz. Ct. App. 1979); *Globe Indem. Co. v. Blomfield*, 562 P.2d 1372 (Ariz. Ct. App. 1977)). Another rationale behind subjecting an insurer to liability in the face of a covenant not to execute is that an insured and therefore his or her insurer is " 'legally obligated to pay' within the meaning of the policy despite an agreement not to execute when the insured enters into such an agreement to protect himself from the insurer's denial of coverage and refusal to defend under the policy." *Freeman*, 755 F.2d at 138 (citing *Metcalf v. Hartford Accident & Indem. Co.*, 126 N.W.2d 471 (Neb. 1964)). "[S]ome element of misconduct by the insurer generally has been present in the cases in which courts have followed *Metcalf*." *Freeman*, 755 F.2d at 138 (*citing American Family Mut. Ins. Co. v. Kivela*, 408 N.E.2d 805 (Ind. Ct. App. 1980) (insurer "abandoned" insured when it refused to defend on ground policy had been revoked for false statements on the application); *Griggs v. Bertram*, 443 A.2d 163 (1982) (insurer failed to promptly notify insured that it was denying coverage)). Underlying both these rationales is the recognition that under an opposite conclusion, "settlements such as the one here would no longer serve their intended purpose." *Freeman*, 755 F.2d at 138.

This Court, however, along with other states, has determined that when an insurance policy contains language such as "legally obligated to pay," an insurer has no obligation to an injured party where the insured is protected by a covenant not to execute. *Huffman v. Peerless Ins. Co.*, 17 N.C. App. 292, 294, 193 S.E.2d 773, 774, *cert. denied*, 283 N.C. 257, 195 S.E.2d 689 (1973); *see also Freeman*, 755 F.2d 135; *Stubblefield v. St. Paul Fire & Marine Ins. Co.*, 517 P.2d 262 (Or. 1973); *Bendall v. White*, 511 F. Supp. 793 (N.D. Ala. 1981). Some courts cite as a rationale for this view the danger of collusion

between the insured and the injured party to relieve the injured party from the burden of proving its claim, to establish the liability of the insured, and to prevent a defense by the insurer. *Roach v. Estate of Ravenstein*, 326 F. Supp. 830, 834 (S.D. Iowa 1971). The Eighth Circuit noted that "[s]uch collusion . . . would be possible anytime the insured were protected by an agreement not to execute prior to entry of judgment; the insured . . . loses the incentive to contest his liability or the extent of the injured party's damages either in negotiations or at trial." *Freeman*, 755 F.2d at 139; *see generally Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128 (D.C. Cir. 1989) (discussing effect of victim's release of insured from satisfying judgment in return for insured's assignment of cause of action against insurer and comparing releases to covenants not to execute).

In this case, Wagner confessed judgment in Lida's lawsuit against Wagner for negligence and breach of contract in the amount of $1,000,000.00; however, Lida agreed that it could not execute this $1,000,000.00 judgment against Wagner. Under *Huffman*, which we are bound to follow, *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (this Court is bound by decisions of other panels of this Court), Lida cannot "reduce [its] right to damage to judgment" because of the covenant not to execute, and Wagner is therefore not "legally obligated to pay" Lida for any damages resulting from the fire based on negligence or breach of contract. As a result, defendant's obligations under the general policy and under the umbrella policy, if any, were extinguished. Although there were several reasons on which the trial court based its decision, we need not address these reasons because we affirm on a basis not used by the trial court. *See Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (if correct result has been reached, judgment will not be disturbed even though trial court may not have assigned correct reason for the judgment entered). The decision of the trial court is therefore

Affirmed.

Judges JOHNSON and LEWIS concur.

PHILLIP SHAW, EMPLOYEE, PLAINTIFF v. UNITED PARCEL SERVICE, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 9310IC772

(Filed 18 October 1994)

1. **Workers' Compensation § 285 (NCI4th)— past injury diminished earnings capacity established by plaintiff—no rebuttal from defendant—election of benefits required**

Where plaintiff showed that he was unable to earn the same wages he had earned before the injury by evidence that he obtained other employment at a wage less than that he was earning at the time of his injury, and defendant employer failed to show that alternative jobs were available to plaintiff and that he was capable of obtaining one of those jobs, plaintiff was entitled to elect benefits under N.C.G.S. § 97-30 rather than benefits for permanent partial disability of his foot under N.C.G.S. § 97-31.

Am Jur 2d, Workers' Compensation § 383.

2. **Workers' Compensation § 471 (NCI4th)— attorney's fees properly denied**

Where the parties "brought, prosecuted, or defended" this matter with reasonable grounds, the Industrial Commission properly declined to award attorney's fees in this matter.

Am Jur 2d, Workers' Compenation § 722.

Judge ORR concurs in part and dissents in part.

Appeal by plaintiff from Opinion and Award entered 22 March 1993 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 August 1994.

Gulley and Calhoun, by Wilbur P. Gulley, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, by P. Collins Barwick, III, for defendants-appellees.

JOHNSON, Judge.

This is the second time this matter has been before our Court. We summarize the prior proceedings and facts in part from our earlier

opinion, *Shaw v. UPS and Liberty Mutual Ins. Co.*, No. 91110IC855 (N.C. App. filed 20 October 1992):

> On 7 December 1987, plaintiff sustained a compensable injury by accident arising out of and in the course of his employment with defendant-employer. As a result of the 7 December 1987 accident, plaintiff sustained a chronic talofibular ligament sprain. On 1 September 1988, while performing his normal job duties, plaintiff re-twisted his right ankle and sustained an aggravation of the original 7 December 1987 injury. Plaintiff's average weekly wage on 1 September 1988 was $295.42, yielding a compensation rate of $196.96.
>
> On 7 September 1988, plaintiff was terminated by defendant-employer for reasons having nothing to do with his ankle injury. As a result of the aggravation on 1 September 1988 of his prior compensable ankle injury of 7 December 1987, plaintiff was out of work and incapable of earning wages with defendant-employer or in any employment from 8 September 1988 through 4 October 1988. On 5 October 1988, plaintiff was capable of resuming his regular duties with defendant-employer; however, due to his termination on 7 September 1988, plaintiff did not return to work with defendant-employer.

Id. at 2-3. On 13 September 1988, plaintiff filed a claim under the North Carolina Workers' Compensation Act. On 14 June 1990, following a hearing on the claim, Deputy Commissioner Scott M. Taylor issued an Opinion and Award. Deputy Commissioner Taylor found that plaintiff had sustained an injury by accident arising out of and in the course of his employment with defendant-employer, and concluded:

> 4. As a result of his aggravating injury by accident on 1 September 1988, plaintiff is entitled to temporary total disability compensation at the rate of $196.96 per week, from 8 September 1988 through 4 October 1988. G.S. § 97-29; G.S. § 97-2(5).
>
> 5. As a result of his aggravating injury by accident on 1 September 1988, plaintiff has a 10% permanent partial disability of his right foot, for which he is entitled to compensation at the rate of $196.96 per week, for a period of 14.4 weeks. G.S. § 97-31(14).

The Deputy Commissioner awarded plaintiff benefits as to plaintiff's permanent partial disability of his right foot under North Carolina General Statutes § 97-31 (1991), although plaintiff sought an election

of remedies pursuant to North Carolina General Statutes § 97-30 (1991). The Deputy Commissioner also denied plaintiff's request for attorney's fees and costs pursuant to North Carolina General Statutes § 97-88.1 (1991). Plaintiff appealed to the Full Industrial Commission; the Commission affirmed the Deputy Commissioner's decision.

On appeal to our Court, plaintiff argued that the Commission committed reversible error when it did not allow plaintiff to elect to receive benefits under North Carolina General Statutes § 97-30, and that the Commission committed reversible error when it failed to award attorney's fees and costs to plaintiff under North Carolina General Statutes § 97-88.1. Our Court held:

> Plaintiff's evidence clearly tended to establish that since 28 October 1988 and continuing to the time of hearing, he had suffered a loss in post-injury wages and that based on his education, training, and experience plaintiff's earnings reflected his limited capacity to earn the same wages he earned at the time of his injury. Therefore, plaintiff was entitled to a determination of whether he suffered a reduction in his capacity to earn, thus qualifying to be compensated pursuant to N.C. Gen. Stat. § 97-30. Because the Commission failed to make findings as to the employee's diminished wage earning capacity, we remand this case to the Commission for additional findings on the issue of wage earning capacity and for an appropriate award based on those findings. *See Strickland v. Burlington Industries*, 87 N.C. App. 507, 361 S.E.2d 394 (1987). . . . On remand, the Commission may reconsider [the issue of attorney's fees and costs] in light of our disposition of the first issue.

Shaw at 4-5. On 22 March 1993, the Full Industrial Commission issued an Opinion and Award denying plaintiff an election of benefits under North Carolina General Statutes § 97-30. Plaintiff gave timely notice of appeal to our Court.

Plaintiff argues on appeal that the Commission committed reversible error by not allowing plaintiff to elect to receive benefits under North Carolina General Statutes § 97-30.

North Carolina General Statutes § 97-30 provides allowance for "where the incapacity for work resulting from [an] injury is partial[.]" North Carolina General Statutes § 97-31 sets out a specific schedule of injuries and the rate and period of compensation for those injuries. Our Supreme Court noted in *Gupton v. Builders Transport*, 320 N.C.

38, 42, 357 S.E.2d 674, 678 (1987) that "a claimant who is entitled to benefits under either N.C.G.S. § 97-31 or N.C.G.S. § 97-30 may select the more munificent remedy." The Court discussed North Carolina General Statutes § 97-30:

> When an employee suffers a "diminution of the power or capacity to earn," *Branham v. Panel Co.*, 223 N.C. 233, 237, 25 S.E.2d 865, 868 (1943), he or she is entitled to benefits under N.C.G.S. § 97-30. . . .
>
> Accordingly, "[w]here an employee can show that the physical injury from which he is suffering causes appreciable employment disability, the employee is allowed to recover under which provisions affords [*sic*] him greater compensation." *Patin v. Continental Cas. Co.*, 424 So.2d 1161, 1165 (La. App. 1982). . . .
>
> In order to secure an award under N.C.G.S. § 97-30, the plaintiff has the burden of showing "not only permanent partial disability, but also its degree." [*Hall v. Chevrolet Co.*, 263 N.C. 569, 575, 139 S.E.2d 857, 861 (1965).] "The compensation is to be computed upon the basis of the difference in the average weekly earnings before the injury and the average weekly wages *he is able to earn* thereafter." *Branham v. Panel Co.*, 223 N.C. at 236, 25 S.E.2d at 867.

Gupton, 320 N.C. at 42-43, 357 S.E.2d at 678 (emphasis retained).

In *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993), our Court noted, as to impairment of an employee's earning capacity, that "[t]he burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." We noted that the employee may meet this burden in one of four ways, one of which is "the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury." *Id.* After the claimant meets this initial burden, the burden shifts to the employer to show that not only were suitable alternative jobs available to the plaintiff, but that the plaintiff was capable of obtaining one of these jobs. *Tyndall v. Walter Kiddie Co.*, 102 N.C. App. 726, 403 S.E.2d 548, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991).

"The standard of review on appeal to this Court of a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact, and whether

these findings support the conclusions of the Commission." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. The Commission, on remand, was required to determine whether plaintiff suffered a reduction in his capacity to earn, thus qualifying him to be compensated pursuant to North Carolina General Statutes § 97-30.

[1] We observe that plaintiff met his burden of showing he was unable to earn the same wages he had earned before the injury by producing evidence that he obtained employment at a wage less than what he earned prior to the injury. *Russell; Tyndall.* There is no evidence in the record to indicate that defendant, plaintiff's employer, met its burden of showing that alternative jobs were available to plaintiff, and that plaintiff was capable of obtaining one of those jobs. *Id.* Nonetheless, and despite having found that plaintiff had a 10% permanent partial disability of his right foot, the Commission found that

> plaintiff's actual wages decreased, but taking all facts into account, there was no convincing evidence presented . . . that plaintiff's ability to earn the same wages was affected at all by the injury or any resulting physical problems. . . . Plaintiff's wage earning capacity was not affected by his work-related injury. Thus an award under 90-31 is the only alternative in the case at hand. As 97-30 is not applicable based upon the record review as a whole, it cannot be elected over 97-31.

We find that the Commission's findings are conclusory and not supported by competent evidence. As such, because we find that plaintiff's presumption of post-injury diminished earnings capacity was established by plaintiff and unrebutted by defendant, we direct the Commission to allow plaintiff to elect benefits pursuant to North Carolina General Statutes § 97-30.

[2] Finally, plaintiff argues that the Commission committed reversible error by failing to award attorney's fees and costs pursuant to North Carolina General Statutes § 97-88.1. Because we feel that the parties "brought, prosecuted, or defended" this matter with reasonable grounds, we find the Commission properly declined to award attorney's fees in this matter. *See* North Carolina General Statutes § 97-88.1.

Remanded to allow plaintiff to elect benefits pursuant to North Carolina General Statutes § 97-30.

Judge WYNN concurs.

Judge ORR concurs in part and dissents in part.

Judge ORR concurring in part, dissenting in part.

Because I find that the Commission's findings of fact support its conclusion that plaintiff is not entitled to elect benefits under N.C. Gen. Stat. § 97-30 as a matter of law, I respectfully dissent on the election of remedies issue. On the issue regarding attorney's fees, I concur.

Plaintiff has not excepted to the Commission's findings of fact; these findings are, therefore, conclusive on appeal. *See Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 719, 115 S.E.2d 27, 31 (1960). Thus, this Court's review is limited to whether the findings of fact support the legal conclusions of the Commission.

As correctly stated by the majority, an employee is entitled to benefits under N.C. Gen. Stat. § 97-30 "where the incapacity for work *resulting* from the injury is partial[.]" N.C. Gen. Stat. § 97-30 (emphasis added). Thus, N.C. Gen. Stat. § 97-30 "provide[s] compensation for loss of wages *due to* a[n] . . . 'incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' " *Gupton v. Builders Transport*, 320 N.C. 38, 42, 357 S.E.2d 674, 677-78 (1987) (emphasis added). An employee is entitled to benefits under N.C. Gen. Stat. § 97-30 when he suffers a " 'diminution of the power or capacity to earn' " caused by the work-related injury. *Id.* at 42, 357 S.E.2d at 678 (citation omitted).

In the present case, the Commission found (and no exception was taken) that "[p]laintiff's loss of wage-earning capacity was not due to his work-related injury and its aggravation." I would conclude that this finding by the Commission supports a conclusion that plaintiff's loss of wage-earning capacity was not a result of plaintiff's work-related injury and therefore compels the conclusion that plaintiff was not entitled to obtain benefits under N.C.G.S. § 97-30.

Accordingly, I would affirm the Commission's decision to deny plaintiff an election of benefits under N.C.G.S. § 97-30.

STEWART ENTERPRISES, A SOLE PROPRIETORSHIP, PLAINTIFF v. MRM CONSTRUCTION COMPANY, INC., CHARLES F. LaFRATTA AND WIFE, SHARON B. LaFRATTA, BRUCE W. WEIR AND WIFE, SANDRA H. WEIR, THE PRUDENTIAL HOME MORTGAGE COMPANY, INC. AND LIBERTY SAVINGS BANK, FSB, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, v. MICHAEL R. MULHALL, THIRD-PARTY DEFENDANT

No. 9326SC1151

(Filed 18 October 1994)

Liens § 29 (NCI4th); Pleadings § 378 (NCI4th)— laborers' and materialmen's liens—amendment of complaint adding additional parties—no relation back—enforcement barred by limitations

Plaintiff subcontractor's March 1993 amendment of his complaint to enforce laborers' and materialmen's liens against additional defendants (purchasers and lenders) did not relate back to plaintiff's original action against defendant contractor for money owed and materials and supplies filed in December 1992 where the amendment was not filed within 180 days of the last furnishing of materials and labor as N.C.G.S. § 44A-13(a) requires for an action to enforce the liens, and there was no evidence that the additional defendants received notice or should have known of the action against them within the limitation period.

Am Jur 2d, Mechanics' Liens §§ 339 et seq.; Pleading §§ 337, 338.

Sufficiency of notice or knowledge required under Rule 15(c)(1)(2) of Federal Rules of Civil Procedure dealing with relation back of amendments changing parties against whom claim is asserted. 11 ALR Fed 269.

Rule 15(c), Federal Rules of Civil Procedure, or state law as governing relation back of amended pleading. 100 ALR Fed 880.

Appeal by plaintiff from judgment filed 15 July 1993 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 August 1994.

R. Keith Johnson, P.A., by M. Olene Sampson, for plaintiff-appellant.

Boxley, Bolton & Garber, by Ronald H. Garber, for defendants-appellees Charles F. LaFratta and Sharron B. LaFratta, Bruce W. Weir and Sandra H. Weir, The Prudential Home Mortgage Company, Inc., and Liberty Savings Bank, FSB.

LEWIS, Judge.

On 15 December 1992 plaintiff Stewart Enterprises (hereinafter "plaintiff") filed a complaint against defendant MRM Construction Company (hereinafter "MRM") requesting money owed for labor and materials supplied pursuant to contracts between plaintiff and MRM. On 1 March 1993 plaintiff filed an amended complaint adding the following defendants (hereinafter collectively referred to as "the Claim of Lien defendants"): Charles F. and Sharron B. LaFratta (hereinafter "the LaFrattas"), Bruce W. and Sandra H. Weir (hereinafter "the Weirs"), The Prudential Home Mortgage Company (hereinafter "Prudential"), and Liberty Savings Bank, FSB (hereinafter "Liberty"). These defendants added third-party defendant Michael R. Mulhall, the president of MRM (hereinafter "Mulhall"). On 15 July 1993 the trial court granted summary judgment for the Claim of Lien defendants, and plaintiff now appeals.

In April 1992 MRM, as general contractor for the improvement of several lots in Davidson, North Carolina, requested that plaintiff provide materials and labor for the improvement of the two lots relevant to this lawsuit, Lot 14 and Lot 15. From 27 April 1992 to 23 June 1992, plaintiff furnished materials and labor to Lot 14, and from 6 May 1992 to 24 June 1992 plaintiff supplied materials and labor to Lot 15. MRM sold Lot 14 to the Weirs on 16 July 1992, and Lot 15 to the LaFrattas on 29 June 1992. The Weirs executed a deed of trust in favor of Liberty, and the LaFrattas executed a deed of trust in favor of Prudential. Plaintiff alleges that, at the time of the conveyances to the Weirs and the LaFrattas, MRM still owed plaintiff money.

Plaintiff filed claims of lien against both properties on 2 October 1992. The claims were served on MRM, the Weirs and the LaFrattas on 5 October 1992. When plaintiff filed suit in December 1992, however, he only asserted claims against MRM for money owed for materials and supplies. Plaintiff did not assert any claims based on the liens and did not include the Claim of Lien defendants as parties to the lawsuit. In March 1993, plaintiff amended the complaint to add the Claim of Lien defendants and to add a claim for enforcement of any judgment awarded through sale of the properties to the extent of the claims of lien.

The trial court awarded summary judgment to the Claim of Lien defendants because plaintiff failed to file an action against them within the time period set forth in N.C.G.S. § 44A-13(a) (1989). On appeal, plaintiff contends the court erred because (1) his amended complaint

relates back to the date of the original complaint, and (2) genuine issues of material fact remain and require resolution by the trier of fact.

It is undisputed that plaintiff properly filed and perfected claims of lien against the Weirs' and LaFrattas' properties within the 120-day statutory period set forth in N.C.G.S. § 44A-12(b) (1989). However, section 44A-13(a) provides that actions to *enforce* such liens must be commenced within 180 days of the last furnishing of labor or materials. § 44A-13(a). Plaintiff last furnished materials on 23 and 24 June 1992, but did not institute an action to enforce the liens against the proper defendants until March 1993, well beyond the statutory period. Although the original complaint was filed within the statutory period, that complaint did not include a claim to enforce the liens and did not include the necessary defendants. The issue before us, therefore, is whether the allegations in the March 1993 complaint relate back to the date of the original complaint.

According to Rule 15 of the North Carolina Rules of Civil Procedure, a claim in an amended pleading may relate back to the date of the original pleading as long as the original pleading gave notice of the transactions or occurrences to be proved under the amended pleading. N.C.G.S. § 1A-1, Rule 15(c) (1990). This Court has discussed whether, under Rule 15(c), a new party defendant may be added after the statute of limitation period has run. In *Ring Drug Co. v. Carolina Medicorp Enterprises*, 96 N.C. App. 277, 385 S.E.2d 801 (1989), this Court held that the assertion of a claim in an amended complaint adding a new defendant may relate back to the date of the original complaint if the added defendant had notice of the original claim and would not be prejudiced by the untimely amendment. *Id.* at 283, 385 S.E.2d at 806. The Court stated that if there was "some nexus" between the original and new defendant which would permit an inference that the new defendant had notice, the amendment should be allowed under Rule 15(c). *Id.* However, the Court also stated that the statute of limitation should bar an action if the plaintiff's failure to name the proper defendant originally is "solely attributable" to the plaintiff. *Id.*

The *Ring Drug* Court adopted a four-part test for determining when a party defendant may be added after the limitation period has run. The factors to be considered are: (1) whether the basic claim arises out of the conduct set forth in the original pleading; (2) whether the party to be added receives such notice that it will not be

prejudiced in maintaining its defense; (3) whether the party knows or should have known that, but for a mistake in identity, the action would have been brought against it; and (4) whether the second and third requirements were fulfilled within the limitation period. *Id. See also Medford v. Haywood County Hosp. Found.*, 115 N.C. App. 474, 444 S.E.2d 699 (1994); *Crossman v. Moore*, 115 N.C. App. 372, 444 S.E.2d 630 (1994).

Plaintiff contends his amended complaint should relate back, because the original and amended complaints contain the same allegations regarding the work performed, the claims of lien filed, and the amounts owed. Plaintiff also contends that the Weirs and LaFrattas had notice that a claim existed within the 180-day time period, because they were served with the Notice of Claim of Lien and the Claim of Lien on 5 October 1992. Plaintiff contends that there are genuine issues of material fact regarding the existence of the *Ring Drug* factors.

We agree with the trial court that plaintiff's amended complaint does not relate back to the date of the original complaint, and we therefore affirm summary judgment in favor of the Claim of Lien defendants. We find that plaintiff has failed to establish the second, third and fourth elements set forth in *Ring Drug*: that the added parties received notice or should have known of the action against them within the limitation period. In reaching this conclusion we have examined two cases addressing the issue of whether an amendment adding a new party and a claim to enforce a lien under section 44A-13(a) may relate back to the date of the original complaint: *Mauney v. Morris*, 316 N.C. 67, 340 S.E.2d 397 (1986), and *Lawyers Title Insurance Corp. v. Langdon*, 91 N.C. App. 382, 371 S.E.2d 727 (1988), *cert. denied*, 324 N.C. 335, 378 S.E.2d 793 (1989).

In *Mauney*, the plaintiff attempted to amend the complaint to add a claim for the enforcement of a claim of lien. The motion to amend was filed within the 180-day limitation period. The Court allowed the amendment, noting that the defendants had failed to establish prejudice since the plaintiff filed the amended claim within the time limitation. 316 N.C. at 72, 340 S.E.2d at 400. The Court stated that whether an amendment will relate back generally depends upon whether the original claim gave sufficient notice of the new claim. *Id.* at 71, 340 S.E.2d at 400.

In *Langdon*, the defendant subcontractor, Langdon, had previously sued the builders for damages, and, as in our case, had failed to

include the present owners of the property as parties to the lawsuit. Langdon had filed a claim of lien against the property within the 120-day period. At trial, Langdon moved to amend his complaint to add a claim to enforce the claim of lien but apparently did not seek to add the owners of the property as parties to the lawsuit. The trial resulted in a judgment for Langdon. 91 N.C. App. at 383, 371 S.E.2d at 729. The owners of the property then instituted another action to prevent the sale of the property on the basis that they should have been made parties to the original lawsuit. The court granted summary judgment for the plaintiffs and declared the claim of lien void. *Id.* at 384, 371 S.E.2d at 729.

On appeal, this Court noted that by his amendment Langdon sought to add "an entirely new cause of action for the enforcement of a lien pursuant to [section] 44A-13(a)"; the original claim was based on breach of contract and did not mention the lien or section 44A-13. *Id.* at 385, 371 S.E.2d at 730. Although Langdon's motion to amend his complaint was allowed, no notice was given to the owners concerning enforcement of the lien until after the judgment was entered. This Court rejected Langdon's argument that the owners were not prejudiced since the claim of lien was properly filed and recorded and thereby served as notice to all parties. The amended complaint did not relate back, although the amendment was filed within the 180-day time period, because it did not give notice to the property owners of the enforcement of the lien. *Id.* at 387, 371 S.E.2d at 731.

The *Mauney* decision hinged on the fact that the motion to amend was made within the statutory period and therefore could not have prejudiced the added parties for lack of timely notice. In the case at hand, however, the motion to amend was made after the statutory period had expired. As in *Langdon*, in the original complaint plaintiff only asserted claims based on breach of contract and did not mention enforcement of liens or section 44A-13. Plaintiff did not name the property owners as defendants in the original suit. Furthermore, although the Claim of Lien defendants were aware that claims of lien had been filed within the time period, they were not aware of a claim to enforce the liens until well after the 180-day time period had expired. The *Langdon* Court rejected the argument that notice of filing the claim of lien satisfied the element of notice of enforcement of that claim of lien. Because defendants in the case at hand did not have notice of the enforcement claim within the statutory time period, plaintiff's amended complaint could not relate back to the date of the original complaint.

Plaintiff failed to file an action to enforce the claim of lien against the Claim of Lien defendants until well after the 180-day time limit had expired. There is no evidence that defendants otherwise had notice within the time period that such claims would be filed or that they should have known an action would be instituted against them. There is no evidence that the Claim of Lien defendants and MRM had some "nexus" or identity of interest such that service on MRM would constitute notice to the Claim of Lien defendants. We conclude that there are no genuine issues of material fact regarding the elements of the *Ring Drug* test. Because the amendment did not relate back to the date of the original complaint, the action against the Claim of Lien defendants was barred by the 180-day limitation period set forth in section 44A-13. We therefore affirm summary judgment in favor of the Claim of Lien defendants.

Affirmed.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA v. PAUL RAY HOWIE, JR.

No. 9324SC1046

(Filed 18 October 1994)

1. Burglary and Unlawful Breakings § 153 (NCI4th); Criminal Law § 25 (NCI4th)— voluntary intoxication negating intent—insufficiency of evidence

Though evidence of a defendant's intoxication at the time of a burglary may require an instruction on the lesser-included offense of misdemeanor breaking and entering, which requires no specific intent, evidence in this case, consisting of the testimony of defendant and his family and friends that he was an alcoholic and that he had been drinking on the dates in question and the fact that police on a later date found beer in his car, was insufficient to require an instruction on misdemeanor breaking and entering, particularly where the evidence tended to show that defendant, in order to commit the crimes in question, had to plan his actions by watching the victims use their ATM cards, attempting to memorize their access numbers, following the victims home, and, at an opportune moment, stealing their purses.

Am Jur 2d, Burglary § 69; Criminal Law §§ 155, 156.

Effect of voluntary drug intoxication upon criminal responsibility. 73 ALR3d 98.

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

2. Constitutional Law § 286 (NCI4th)— no ineffective assistance of counsel—no showing of different result

Defendant could not succeed on a claim of ineffective assistance of counsel where defendant gave two voluntary and detailed confessions after properly signing a *Miranda* waiver; evidence of defendant's only defense, voluntary intoxication, was clearly insufficient to negate the intent element of first-degree burglary; and there was thus no possibility that the jury would have reached a different verdict absent the alleged errors of defendant's counsel.

Am Jur 2d, Criminal Law §§ 748 et seq., 984 et seq.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters. 7 ALR4th 180.

3. Criminal Law § 307 (NCI4th)— similar offenses involving same pattern of operation—consolidation proper

Consolidation of charges of first-degree burglary and larceny was not unjust and prejudicial where the offenses were similar and involved the same pattern of operation.

Am Jur 2d, Actions § 159.5; Criminal Law § 20.

Consolidated trial upon several indictments or informations against same accused, over his objection. 59 ALR2d 841.

Appeal by defendant from judgment and sentence entered 19 May 1993 by Judge Charles C. Lamm, Jr. in Watauga County Superior Court. Heard in the Court of Appeals 23 August 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Sherra R. Smith, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Charlesena Elliott Walker, for defendant.

LEWIS, Judge.

Defendant was convicted of two counts of first-degree burglary and two counts of felonious larceny and sentenced to life in prison plus forty years. On appeal, defendant contends that (1) the court erred in failing to instruct on a lesser-included offense, (2) he was inadequately represented by counsel, and (3) the court erred in consolidating the charges into one trial.

The evidence introduced at trial shows that defendant committed two similar break-ins, one at the residence of Michael and Patricia Bowman, and one at the residence of Mary Noel Gorka. In each case defendant observed the victim using her ATM card at a NationsBank at Watauga Village and attempted to memorize the card number. Defendant then followed the victim home, broke into the house and stole the victim's purse. In the first incident, on 7 July 1992, defendant opened a sliding glass door to the Bowman house, reached in and took two purses off of a table. In the second incident, on 5 August 1992, defendant entered the Gorka home through a window and stole Ms. Gorka's purse.

Defendant successfully withdrew $2,000 with the ATM card belonging to Ms. Bowman. He was unable to use Ms. Gorka's ATM card as he had forgotten the number, and he unsuccessfully attempted to use Ms. Gorka's credit card, which had been reported stolen.

On 12 August 1992, the chief of police of the Blowing Rock Police Department, Owen Tolbert, pulled defendant over after observing suspicious activity unrelated to the charges involved in this case. When defendant could not produce either his license or registration, Tolbert asked him to get out of the car. Defendant drove off. Tolbert and another police officer gave chase and defendant lost control of his car, crashed, and escaped on foot. The officers searched the car, which was determined to be stolen, and found several items which had been taken from the Bowman and Gorka residences. The car also contained an empty six-pack of beer and another partially consumed six-pack.

The officers ascertained defendant's address from a telephone bill found in the car. They searched his home and found shoes with a tread matching that of a shoeprint at the Gorka residence. Although defendant was not home at that time, the officers asked his wife to ask defendant to call the police. Defendant called the police several days later to turn himself in.

On 17 August 1992 a store clerk identified defendant as the man who had attempted to use a stolen credit card. On 20 August 1992, and again on 21 August, defendant was questioned at the police station, after signing a *Miranda* waiver. Sergeant Harrison interviewed defendant on each occasion and testified that defendant was "quiet and soft spoken [and] cooperative," and that he did not appear to be intoxicated on either occasion. Defendant confessed in detail to the two break-ins.

At trial defendant presented evidence that he is an alcoholic and that he had been drinking at the time of the offenses and before he turned himself in to the police. He testified that he drank about a twelve-pack of beer before breaking into the Gorka residence and that he drank about fourteen beers before breaking into the Bowman residence. He said he has been an alcoholic for twenty years and usually drinks about three twelve-packs a day. Defendant contends that he broke into the homes because he was drinking and did not know what he was doing.

At trial defendant pled guilty to seven traffic violations, but pled not guilty to the charges of first degree burglary and felonious larceny.

I.

[1] Defendant first argues that his intoxication at the time of the alleged offenses is evidence that he lacked the requisite intent for burglary, and therefore the judge should have instructed the jury on misdemeanor breaking and entering, a lesser-included offense of first-degree burglary. *See State v. Patton*, 80 N.C. App. 302, 305, 341 S.E.2d 744, 746 (1986). Defendant's counsel did not object to the jury charge at trial or request an instruction on misdemeanor breaking and entering. Although failure to object to a jury charge would normally preclude our review of this issue, N.C.R. App. P. 10(b)(2), on appeal defendant contends that the court's failure to instruct on the lesser offense amounted to plain error which likely affected the jury's verdict. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)

(adopting the plain error rule). To show plain error in a jury instruction, a defendant must show that the instructional mistake probably affected the jury's findings that the defendant was guilty. *Id.* at 660, 300 S.E.2d at 378 (citing *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). We find no plain error in the case at hand.

A trial court must instruct the jury on a lesser-included offense only if there is evidence that the defendant might be guilty of the lesser-included offense. *State v. Collins*, 334 N.C. 54, 58, 431 S.E.2d 188, 191 (1993). Evidence of a lesser-included offense must be evidence which might convince a rational trier of fact to convict of the lesser offense. *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985). If the State's evidence is clear and positive as to each element of the charged offense, and if there is no evidence of the lesser-included offense, there is no error in refusing to instruct on the lesser offense. *Id.*

The elements of first-degree burglary are (1) breaking into the dwelling house of another at night, (2) with the intent to commit a felony therein, and (3) while the house is occupied by another person. *See id.*; N.C.G.S. § 14-51 (1993). Voluntary intoxication may negate the existence of specific intent as an essential element of a crime. *See State v. Harvell*, 334 N.C. 356, 367, 432 S.E.2d 125, 131 (1993). Thus, evidence of a defendant's intoxication at the time of a breaking and entering may require an instruction on the lesser-included offense of misdemeanor breaking and entering, which requires no specific intent, in addition to an instruction on burglary. *Peacock*, 313 N.C. at 560, 330 S.E.2d at 194. In order for intoxication to negate the existence of specific intent, the evidence must show that the defendant was "utterly incapable" of forming the requisite intent. *State v. Brown*, 335 N.C. 477, 492, 439 S.E.2d 589, 598 (1994) (quoting *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)). Evidence of mere intoxication is insufficient to meet this burden. *Id.*

We find that the evidence of intoxication in this case was insufficient to require an instruction on misdemeanor breaking and entering. The only evidence of defendant's intoxication is the testimony of defendant and his family and friends that he is an alcoholic, defendant's testimony that he had been drinking on the dates in question, and the fact that the police, on a later date, found beer in his car. Defendant testified that he had consumed a twelve-pack of beer before going to the Gorka residence, and that he had had about four-

teen beers before entering the Bowman residence. Defendant testified that he broke into the homes because he was drunk and did not know what he was doing.

However, the very nature of defendant's crimes belies his story that he was sufficiently intoxicated on the dates in question so as to negate specific intent. In order to commit the crimes in question, defendant had to plan his actions. He watched his victims use their ATM cards, he attempted to memorize the access numbers, he followed his victims home, and at an opportune moment, he stole their purses out of their houses. Whether or not he was drinking, defendant obviously intended to steal the purses in order to obtain the ATM cards. The evidence only supports a finding that, if defendant committed these offenses at all, he committed them with the intent to steal the ATM cards and use them to steal from the victims' bank accounts. We conclude that there was no evidence before the court supporting an instruction on the lesser-included offense of misdemeanor breaking and entering. We find no plain error, in fact no error at all, on this issue.

II.

[2] Defendant next contends that he was deprived of his right to effective assistance of counsel, because his attorney inadequately prepared for trial, "facilitated the admission of prejudicial and oftentimes incompetent evidence," and failed to request an instruction on a lesser-included offense.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) the errors prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984); *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). A conviction may not be reversed for ineffective assistance of counsel unless, based on the totality of the circumstances, there would have been a different result but for the counsel's alleged errors. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

We find it unnecessary to address the details of defendant's contentions, because there is no possibility that the jury would have reached a different verdict but for his counsel's alleged errors. The jury had before it overwhelming evidence of defendant's guilt. Prior to the appointment of counsel for defendant, defendant gave two voluntary and detailed confessions after properly signing a *Miranda*

waiver. Furthermore, the evidence of defendant's only defense, voluntary intoxication, was clearly insufficient to negate the intent element of first degree burglary. We conclude that there is no possibility that the jury would have reached a different verdict absent the alleged errors of defendant's counsel.

III.

[3] Defendant finally contends that the court erred in consolidating the charges of first-degree burglary and larceny for one trial, because the charges stemmed from two different incidents. Offenses may be joined for trial if they are "based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C.G.S. § 15A-926(a) (1988); *State v. Wilson*, 108 N.C. App. 575, 424 S.E.2d 454, *motion to dismiss allowed and disc. review denied*, 333 N.C. 541, 429 S.E.2d 562 (1993). The decision to consolidate is within the discretion of the trial judge and will not be reversed unless the defendant was deprived of a fair trial. *Wilson*, 108 N.C. App. at 582, 424 S.E.2d at 458. A defendant is not prejudiced by the joinder of two crimes unless the charges are "so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant." *State v. Hammond*, 112 N.C. App. 454, 458, 435 S.E.2d 798, 800 (1993) (quoting *State v. Oxendine*, 303 N.C. 235, 240, 278 S.E.2d 200, 203 (1981)), *disc. review denied*, 335 N.C. 562, 441 S.E.2d 126 (1994).

Defendant contends that the lapse of time between the two offenses in the case at hand is long enough to break any transactional connection between them. Defendant points out that in *State v. Wilson*, 57 N.C. App. 444, 291 S.E.2d 830, *disc. review denied*, 306 N.C. 563, 294 S.E.2d 375 (1982), the Court found that offenses allegedly committed three weeks apart had no transactional connection and could not be joined for trial. The crimes in the case at hand occurred four weeks apart. Defendant contends that joining the two offenses could have prejudiced the jury against him, because the jury may have been influenced by its knowledge of both charges when it should have been ascertaining guilt as to each charge separately.

The evidence clearly shows that the offenses were not only similar, but that they involved the same pattern of operation. Defendant watched as each victim used a teller machine at the same bank, NationsBank in Watauga Village. Defendant followed each victim home. Defendant observed each victim while hiding outside, and, stealthily, entered the house and stole the victim's purse. On cross-

examination, defendant admitted that it was his "operation" to watch people use their ATM cards, memorize the numbers, and then steal their purses. We do not find that the circumstances of the two offenses are so distinct as to render consolidation unjust and prejudicial.

Having reviewed defendant's arguments, we conclude that defendant received a fair trial, free from prejudicial error.

No error.

Judges EAGLES and COZORT concur.

IN THE MATTER OF: ERIC SHANE MAYNARD AND MAURICA IRENE MAYNARD

No. 9322DC970

(Filed 18 October 1994)

1. **Parent and Child § 111 (NCI4th)— surrender documents signed by mother—motion to set aside—jurisdiction of district court**

The district court which obtained jurisdiction over respondent's neglected children in late 1991 had jurisdiction over a motion to set aside documents signed by respondent and entitled "Parent's Release, Surrender, and General Consent to Adoption," since a district court's jurisdiction over a case involving a juvenile ends when an adoption petition is filed, and no such petition had been filed in this case.

Am Jur 2d, Parent and Child §§ 7, 11.

2. **Parent and Child § 116 (NCI4th)— neglect proceeding—signing of surrender documents—right to counsel**

Because respondent's signing of surrender documents occurred following and as a consequence of a neglect proceeding which petitioner initiated, the signing of the papers directly related to the neglect proceedings, and respondent was entitled to counsel when she signed the forms.

Am Jur 2d, Parent and Child §§ 7, 11.

3. **Parent and Child § 116 (NCI4th)— mentally ill mother—signing of surrender documents—violation of right to counsel—documents null and void**

Petitioner's continuing discussions, during supervised visitations, urging the reluctant respondent to sign papers surrendering

her parental rights without her counsel being present or at least having any knowledge of the discussions violated respondent's right to counsel; petitioner was estopped from asserting that respondent was competent to make a rational and informed decision to surrender her children when the original action taken by petitioner against respondent appeared to have been based in large part upon her mental illness; and the trial court was therefore correct in ordering that the surrender documents were null and void.

Am Jur 2d, Parent and Child §§ 7, 11.

Appeal by petitioner from order signed 17 May 1993 by Judge George Fuller in Iredell County District Court. Heard in the Court of Appeals 12 May 1994.

On 15 August 1991, the Iredell County Department of Social Services (DSS) filed a petition for neglect against Debra S. Painter (hereinafter respondent) and Maurice Maynard, Jr. alleging that their two minor children, Eric Shane Maynard and Maurica Irene Maynard, were neglected juveniles as defined by G.S. 7A-517(21). Pursuant to G.S. 7A-587, on 26 August 1991 the district court appointed attorney Mark Childers to represent respondent during the neglect proceedings.

On 16 September 1991, respondent through her appointed counsel stipulated to the district court that because of her mental illness her minor children were dependent as defined by G.S. 7A-517(13). The trial court adjudicated the minor children dependent as to their mother and neglected by their father. The court placed legal and physical custody with DSS and granted respondent supervised visitation with her children. A review hearing was set for 16 December 1991. Prior to the 16 December hearing, respondent, unaccompanied by counsel, met with a DSS social worker on 17 October, 21 November, and 3 December 1991. At each of these meetings, the DSS social worker discussed with respondent the possibility of surrendering her children for adoption. Respondent's attorney was not present and was not notified of these discussions. At the 16 December hearing, respondent conferred with her attorney and decided not to sign the consent to adopt papers. Respondent also stated to the court that she wanted her children returned to her. The court, however, ordered that legal and physical custody remain with DSS and scheduled another review hearing for May 1992. During the interim, at her scheduled

supervised visits with her children at DSS's facility, DSS social workers continued to talk with respondent about surrendering her children for adoption. Respondent's attorney was not present and was not notified of these discussions.

On 27 February 1992, respondent signed two documents entitled "Parent's Release, Surrender, and General Consent to Adoption" (hereinafter "Surrenders") which gave custody of respondent's children to DSS pursuant to G.S. 48-9.1. The Surrenders became irrevocable on or about 28 March 1992 pursuant to G.S. 48-11 which provides that the consenting party may not revoke consent after thirty days from the date of giving consent for adoption. Respondent's counsel learned that his client had signed the Surrenders when counsel conferred with respondent in preparation for the regularly scheduled review hearing set for 18 May 1992. The court continued the hearing until 1 June 1992 at petitioner DSS's request.

On 8 April 1993, respondent's attorney filed a verified motion to set aside the Surrenders on the grounds that DSS violated respondent's right to counsel by obtaining the Surrenders and allowing the revocation period to elapse without notifying respondent's attorney. Between the date that respondent signed the Surrenders and the date she moved to have the Surrenders set aside, respondent was able to discontinue her therapy and medication, resume employment, obtain her own residence, and begin working toward reunification with her children. At the hearing held on 10 May 1993, the district court granted respondent's motion to set aside the Surrenders. From the order setting aside the Surrenders, DSS appeals.

Iredell County Department of Social Services, by Susan Nye Surles, for petitioner-appellant.

Neel & Randall, by Mark L. Childers, for respondent-appellee.

EAGLES, Judge.

Petitioner DSS (hereinafter petitioner) contends that the trial court erred in setting aside the Surrenders. After careful review of the record and briefs, we affirm.

I.

[1] Petitioner first contends that the district court did not have jurisdiction to grant the motion setting aside the Surrenders. We disagree. The district court has "exclusive, original jurisdiction over any case

involving a juvenile who is alleged to be delinquent, undisciplined, abused, neglected, or dependent." G.S. 7A-523. "When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until [the juvenile] reaches his eighteenth birthday." G.S. 7A-524. Petitioner alleged that respondent's children were neglected in August of 1991 and the district court adjudicated respondent's children as neglected and dependent in September 1991. Accordingly, the district court acquired jurisdiction of respondent's children beginning in late 1991.

While the statutes do not explicitly address who has jurisdiction to consider a motion to set aside a Surrender, we have previously held that a district court's jurisdiction over a case involving a juvenile ends when an adoption petition is filed. *In Re Adoption Of Duncan*, 112 N.C. App. 196, 201, 435 S.E.2d 121, 124 (1993) (citations omitted). Here, no petition for adoption had been filed. On this record, the motion to set aside the Surrenders is a matter properly within the district court's jurisdiction.

II.

[2] Petitioner also contends that the trial court erred by basing its decision to grant respondent's motion on the ground that respondent was denied her right to counsel. Petitioner argues that counsel's presence is not required when a parent signs a consent to adoption form. In support of its position, petitioner contends that since Chapter 7A does not address the issue of whether counsel should be present when a parent consents to his or her child's adoption, the absence of counsel could not have violated the statute. While Chapter 7A does not explicitly address this issue, G.S. 7A-587 provides that:

> [i]n cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right.

Here, respondent was involved in a case because petitioner alleged that her children were neglected. Because respondent never waived her right to counsel, respondent was entitled to counsel in the neglect proceedings pursuant to G.S. 7A-587. After petitioner initiated the neglect proceedings against respondent, petitioner asked respondent to sign the consent forms during the supervised visitation periods at petitioner's facilities. Because the signing of the Surrenders occurred following and as a consequence of a neglect proceeding which peti-

tioner initiated, we hold that the signing of the Surrenders directly related to the neglect proceedings and that respondent was entitled to counsel when she signed the forms.

[3] Because we have established that respondent had the right to counsel when she signed the Surrenders, we now address the issue of whether petitioner's actions deprived respondent of her right to counsel. In its order, the trial court made several pertinent findings of fact: 1. Petitioner's petition alleging neglect of respondent's children recited that one condition which contributed to the neglect of respondent's children was respondent's mental illness. 2. Despite respondent's illness, DSS workers talked with respondent numerous times, in the absence of her attorney, about consenting to the adoption of her children. 3. Respondent's counsel advised her not to consent to the adoptions at the regularly scheduled December 1991 review hearing, respondent refused to consent to her childrens' adoptions at that time, and respondent indicated her interest in having the children placed with her. 4. In February 1992, petitioner had another discussion with respondent about signing the Surrenders without notifying her counsel and respondent signed the Surrenders. 5. Petitioner did not notify respondent's counsel that respondent had signed the Surrenders until well after the statutory thirty day revocation period had expired. Based on these findings, to which petitioner did not object, the trial court concluded that petitioner violated respondent's right to counsel in obtaining the Surrenders and that the Surrenders were null and void.

The court's findings show that the situation in this case is analogous to the situation where a defendant in a criminal case has counsel. Once a defendant invokes his right to counsel and counsel is retained or appointed, the defendant has the right to have counsel present during any questioning. *Miranda v. Arizona*, 384 U.S. 436, 474, 16 L.Ed.2d 694, 723, *reh'g denied*, *California v. Stewart*, 385 U.S. 890, 17 L.Ed.2d 121 (1966). Unless the criminal defendant effectively waives his right to have counsel present, no questioning may take place in the absence of counsel or without counsel's knowledge. *Miranda*, 384 U.S. at 475, 16 L.Ed.2d at 724.

Here, respondent requested and was provided the assistance of counsel when petitioner initiated neglect proceedings against respondent. This attorney-client relationship continued to exist during the visitations when petitioner asked respondent to sign the Surrenders. Just as custodial interrogation of a criminal defendant in the

absence of his appointed or retained counsel without a waiver is impermissible, petitioner's continuing discussions, during visitations, urging the reluctant respondent to sign the Surrenders without her counsel being present or at least having any knowledge of the discussions violated respondent's right to counsel.

The court's findings also show that petitioner is estopped to argue that it properly obtained the Surrenders. The court's findings show that petitioner continued to pursue the issue of surrendering respondent's children for adoption with respondent despite petitioner's contention that respondent was mentally ill. In addition, petitioner never informed respondent's counsel of these discussions. It is particularly disturbing that petitioner simultaneously contends that respondent was incapable of caring for her children because of her mental illness but was capable of signing consent to adoption forms while functioning under that same mental illness. On this record, we hold that petitioner was estopped from asserting that respondent was competent to make a rational and informed decision to surrender her children when the original action taken by petitioner against respondent appears to have been based in large part upon her mental illness.

We hold that petitioner's actions deprived respondent of her right to counsel, that petitioner is estopped to assert that the Surrenders were properly executed, and that the trial court was correct in ordering that the Surrenders are null and void. For the reasons stated, we hold that the trial court did not abuse its discretion.

III.

Finally, petitioner claims that the trial court erred in granting respondent's motion to set aside the Surrenders because the ground relied upon by the trial court is not constitutionally sufficient. We do not address this issue because petitioner did not properly preserve this assignment of error for appellate review. "[T]he scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal." *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991) (citations omitted). Furthermore, from the record it appears that petitioner never raised any constitutional issue below. Therefore, petitioner may not raise it for the first time on appeal. *Johnson v. North Carolina State Highway Com'n*, 259 N.C. 371, 373, 130 S.E.2d 544, 546 (1963) (stating that "[i]t is a well established rule of this Court that it will not decide a constitutional question which was not raised or considered in the court below"); *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 31, 431 S.E.2d 828, 844,

review denied, 335 N.C. 175, 436 S.E.2d 379 (1993), *cert. denied*, *Winfield v. Kaplan*, — U.S. —, 129 L.Ed.2d 894 (1994).

Affirmed.

Judges LEWIS and WYNN concur.

CHERYL M. MEEHAN, PLAINTIFF v. ROBERT E. MEEHAN, DEFENDANT

No. 9426DC34

(Filed 18 October 1994)

Divorce and Separation § 453 (NCI4th)— children's unreimbursed medical expenses and activity fees—authority of court to apportion—defendant estopped to deny court's authority

The trial court was authorized to apportion the parties' uninsured medical expenses and activity fees and defendant was equitably estopped from denying that the court had such authority where the court was authorized by a consent order for child custody and child support to settle disputes concerning how the parties were to apportion medical expenses and activity fees; prior to an equitable distribution hearing the parties submitted memoranda contemplating that the trial court would resolve the issue of the apportionment of medical and activity expenses between the parties; and, prior to the hearing on these issues, defendant's counsel stated that an issue regarding defendant's reimbursement for the medical expenses and activities existed and that the parties would present testimony and would be bound by the court's decision concerning the issue.

Am Jur 2d, Divorce and Separation § 971.

Appeal by defendant from order entered 30 July 1993 by Judge Yvonne Mims Evans in Mecklenburg County Civil District Court. Heard in the Court of Appeals 28 September 1994.

Casstevens, Hanner, Gunter & Gordon, P.A., by Dorian H. Gunter, for plaintiff-appellee.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellant.

JOHNSON, Judge.

On 31 January 1992 a consent order for child custody and child support was entered in this proceeding which provided: that the parties would have joint custody of the parties' three children; that defendant would pay plaintiff child support in the amount of $1,100.00 per month; that the parties would equally divide the uninsured medical, dental and optical expenses incurred on behalf of the children up to a maximum obligation for each party of $100.00 per month; and in the aggregate, the court would apportion such expenses to the extent that the parties could not agree. The order also stated that the parties would seek to apportion expenses for the children's activities between themselves but, in the event that they could not reach an agreement, the parties and their attorneys consented to a provision in the order stating that the "matter will be referred back to the court for adjustments to be made in child support." No agreements were reached or orders entered with regard to equitable distribution at the time of the 27 January 1992 hearing regarding custody and child support.

In March 1992, the parties' youngest child Michael was diagnosed with cancer, and began undergoing extensive medical treatment as a result of his condition. As a result, Michael's medical expenses exceeded the minimum amounts which the parties had agreed to apportion on a monthly basis.

On 6 July 1992 defendant filed a request for unequal division of marital property requesting that the court consider as a distributive factor in the parties' equitable distribution the large anticipated and actual uninsured medical expenses for the minor child, terming the illness suffered by Michael as a "substantial emergency." The court had previously entered a pretrial equitable distribution order reflecting that a dispute existed regarding the medical condition of the minor child, terming the illness suffered by Michael as a "substantial emergency." The court had also previously entered a pretrial equitable distribution order reflecting that a dispute existed regarding the medical condition of the minor child and the attendant medical expenses and whether such situation should impact the equitable distribution between the parties.

In addition, since the entry of the joint custody and child support order, the parties had engaged in continuing disputes over the activities that the children would participate in and the apportionment of fees between the parties. Prior to the scheduled hearing in May 1993,

both parties through counsel presented briefs to the court reflecting that the court would resolve the issue of the apportionment of activity fees and uninsured medical expenses between the parties. Defendant's memorandum contemplated that the issue would be handled as a part of the equitable distribution. Plaintiff's brief stated that "although the parties agree that the child support and activities fees issues should be dealt with while they are in Court, this would be separate and apart from the equitable distribution of the marital property."

When the equitable distribution matter was called for trial, counsel for defendant stated that the parties had reached an agreement with regard to property division and equitable distribution. Counsel for defendant also stated:

> We've also agreed that there is an issue outstanding as to whether or not Mr. Meehan is to be reimbursed for any of the medical expenses and kids' expenses since the date of separation including Michael's expenses and both parties agree that they will present testimony on that issue and that we're bound by your decision concerning that issue.

Prior to evidence being presented, the court asked the attorneys, "[D]o you want to present testimony today on the issue of the medical expenses and the activity fee?" Counsel for plaintiff addressed the court, and counsel for defendant also reiterated that the issue before the court was apportionment of activity fees and uninsured medical expenses for all the children including Michael. In both instances, counsel for defendant affirmatively indicated that the issues to be heard by the court with the consent of defendant were the apportionment of the activity fees of the children and uninsured medical expenses of the children.

Subsequent to the recitations by counsel for the parties regarding what issues the court was to resolve, the court took evidence from plaintiff and defendant regarding expenditures made by both parties on behalf of the children regarding the activities and uninsured medical expenses of the children. The court also heard evidence from both parties regarding disputes that had been ongoing since the entry of the court's order since January 1992 regarding apportionment of uninsured medical expenses and activity fees. Both parties testified of voluntary efforts on the part of each to contend with the family crisis which had been created by the minor child Michael's illness. Plaintiff testified that she had quit work to take care of the minor

child during the time of his treatment. Defendant testified that plaintiff quitting work to take care of the minor son during the day was necessary and that plaintiff had utilized certain savings bonds to support herself while she was not working. Defendant also testified that he had increased the amount of child support he was paying to plaintiff to take into account that she could not work during this time and needed additional support.

Subsequent to entering a written order, counsel for the parties and the trial judge exchanged correspondence regarding the content of the order dealing with the medical expenses and activity fees issues as well as the equitable distribution order. The court's letter to counsel for the parties also indicates that counsel for defendant participated in the calculation of the "outstanding expenses" of the children as suggested by the court.

In the letter to the court from counsel for plaintiff, the court's attention was called to the provision in the equitable distribution judgment which gave defendant an $812.00 credit for the sum that the court found was owed by plaintiff to defendant as a result of the court's ruling as contained in her letter of 27 May 1993. The letter from counsel for plaintiff recites that plaintiff has agreed in the equitable distribution consent judgment to give defendant an immediate credit for the sum determined by the court to be owed by plaintiff to defendant for medical expenses and activity fees in exchange for defendant paying the distributive award to plaintiff in cash.

Counsel for defendant requested the court to enter the equitable distribution order immediately in his letter to the court on 26 July 1993. The equitable distribution judgment which was consented to by the parties and their attorneys recites that the distributive award owed by defendant to plaintiff is reduced by $812.00 which the court found to be the amount owed by plaintiff to defendant through the date of the hearing on 25 May 1993 and further stated that the "sum of $812.00 represents the amount owed by the plaintiff to defendant for her portion of the children's uninsured medical expenses from the date of separation through 25 May 1993."

In this appeal, defendant has forty-two assignments of error which can be generally summarized into a single issue: was the trial court authorized to apportion the parties' uninsured medical expenses and activity fees? We find that the trial court was so authorized by reason of estoppel.

The trial court was authorized by the 31 January 1992 consent order for child custody and child support to settle disputes concerning how the parties were to apportion medical expenses and activity fees. In addition, prior to the equitable distribution hearing, the parties submitted memorandum contemplating that the trial court would resolve the medical and activity expenses between the parties. Moreover, prior to the hearing on these issues, defendant's counsel stated that an issue regarding defendant's reimbursement for the medical expenses and activities existed and that the parties would present testimony and would be bound by the court's decision concerning the issue. The preceding instances show that defendant agreed that the trial court had the authority to decide the issues.

Our Courts have continuously recognized that a party may not assert a particular position in an action, and then assert a contrary position in subsequent proceedings after having accepted the benefits. *Johnson v. Johnson*, 262 N.C. 39, 136 S.E.2d 230 (1964); *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965); *Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E.2d 73 (1966). Consequently, defendant is estopped from maintaining that the court erred: by retroactively "divesting" defendant of sums previously ordered by the trial court; by proceeding due to a lack of notice; by proceeding because of a lack of a written motion; by deviating from the child support guidelines; and by modifying a prior order of a district court judge. The trial judge did exactly what the parties asked her to do—apportion uninsured medical expenses and activity fees between the parties when they were unable to do it themselves.

Defendant received benefits in that the court awarded a $812.00 credit in reimbursement for uninsured medical expenses of the children and part of the activity fees. This was reduced from the distributive award owed by defendant to plaintiff. Defendant is now attempting to have the court award a greater amount than that which he accepted and that for which he received credit. Defendant cannot accept the benefits of the court's ruling and then attack the court's ruling. Under the theory of equitable estoppel, a party who accepts the benefits of a transaction may not afterwards attack the validity of the transaction to the detriment of the other parties who relied on their assurances. *Thompson v. Soles*, 299 N.C. 484, 263 S.E.2d 599 (1980).

In the case *sub judice*, plaintiff relied on the assertion by defendant in court that the parties would be "bound" by the court's ruling on

the uninsured medical expenses and activity fees. Thus, defendant is equitably estopped from denying that the court had authority to settle the issue of apportionment of uninsured medical expenses and activity fees. The trial court's order is affirmed.

Affirmed.

Judges GREENE and LEWIS concur.

INTERIOR DISTRIBUTORS, INC., PLAINTIFF v. HARTLAND CONSTRUCTION COMPANY, INC., R.P. CONSTRUCTION COMPANY, INC. AND GUNATIT CORPORATION, DEFENDANTS

No. 9310SC1177

(Filed 18 October 1994)

1. Liens § 25 (NCI4th)— materialman's lien—insufficient service of notice of claim of lien

A second tier contractor which furnished building materials to a subcontractor failed to properly serve a notice of claim of lien on the corporate owner where neither the notice nor the claim of lien filed with the clerk of court included proof of service, and where the notice was not sent by certified mail and was addressed to the corporation and not to the attention of an "officer, director, or managing agent" as required by N.C.G.S. § 1A-1, Rule 4(j)(6). An affidavit which incorrectly alleged that a complaint and summons were served on the corporate owner did not constitute notice of the service of the notice of claim of lien.

Am Jur 2d, Mechanics' Liens §§ 167-237.

Sufficiency of designation of owner in notice, claim, or statement of mechanic's lien. 48 ALR3d 153.

2. Process and Service § 131 (NCI4th)— corporate defendant—service on Secretary of State—knowledge of address

Substitute service of process on the Secretary of State as agent for the corporate defendant in an action to enforce a materialman's lien was ineffective and violated defendant's due process rights where the record shows that plaintiff's attorney had actual knowledge of the address where the corporate defend-

ant could be served but did not attempt to serve defendant at that address. N.C.G.S. § 1A-1, Rule 4(j)(6)(b); N.C.G.S. § 55-5-04(b).

Am Jur 2d, Process §§ 263 et seq.

Appeal by plaintiff from order entered 1 July 1993 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 1 September 1994.

Gordon & Johnston, by Robert L. Johnston, for plaintiff-appellant.

Safran Law Offices, by V.A. Anderson, Jr., for defendant-appellee.

JOHNSON, Judge.

This action arises from the construction of a Comfort Inn motel in Garner, North Carolina on land owned by defendant, Gunatit Corporation. Although the deed shows the land to be in the name of Gunatit, Inc., 903 Hampshire Court, Cary, North Carolina 27511, both the contract between the owner and general contractor, R.P. Construction Company, Inc., and the general contractor and the subcontractor, Hartland Construction Co., show the owner of the property as Gunatit Corporation, 903 Hampshire Court, Cary, North Carolina 27511. Both Gunatits have the same address. Plaintiff alleges supplying building materials to the subcontractor Hartland between the dates of 10 July 1991 and 26 October 1991, such materials being valued at the alleged sum of $38,992.07, and for which plaintiff alleges that it never received payment.

Plaintiff alleges that he served on 28 January 1992, by certified mail, return receipt requested, a notice of claim of lien by second tier subcontractor on defendant. The notice of claim of lien is dated 27 January 1992. There is no affidavit of service nor a certificate of service for said notice of lien. There is no certified mail receipt for receipt of notice of claim of lien in the record or on file at the Wake County courthouse. Plaintiff concedes that the affidavit incorrectly states that a civil summons and complaint had been mailed. Although the incorrect affidavit is attached to the alleged notice of claim of lien of second tier subcontractor as of 28 January 1992, no civil summons nor complaint had been filed in this matter. The incorrect affidavit alleges that a complaint was mailed to defendant at 903 Hampshire Court, Cary, North Carolina 27511. There is no indication in the

record or the Wake County courthouse that the incorrect affidavit was served on or sent to defendant.

In addition, on 28 January 1992, plaintiff filed with the Clerk of Superior Court of Wake County, the county in which the land owned by defendant is located, a claim of lien. The lien lists the name and address of the record owner as Gunatit Corporation at 903 Hampshire Court, Cary, North Carolina 27511. There is nothing in the record or on file at the Wake County courthouse to indicate the lien was served on or sent to defendant. On 10 February 1992, plaintiff filed a summons and complaint with the Clerk of Superior Court of Wake County, North Carolina. The complaint listed defendant Gunatit as the owner of the real property, contractor R.P. Construction and the subcontractor Hartland Construction as defendants and sought to enforce a lien against R.P. Construction and defendant Gunatit. Plaintiff alleges in the complaint that defendant's principal place of business is in Wake County, North Carolina.

On 13 April 1992, defendant R.P. Construction filed its answer and cross-claim against defendant Hartland. On 13 April 1992, defendant filed a motion seeking dismissal of the claims against it under North Carolina Rules of Civil Procedure 12(b)(4) (for insufficiency of process), 12(b)(5) (for insufficiency of service of process) and 12(b)(6) (for failure to state a claim).

On 19 February 1993, plaintiff filed a third affidavit of service with the court which stated that (1) prior to filing the present action on 10 February 1992, he had been informed by the Office of the Secretary of State of North Carolina, Corporation Division, that the registered agent and office of Gunatit Corporation was Ramesh C. Patel at 6217 Pella Road, Charlotte, North Carolina 28211; (2) on 11 February 1992 he had placed the civil summons and a copy of the complaint in this action in an envelope with sufficient first-class postage attached and mailed the same, certified mail, return receipt requested, to Ramesh C. Patel at 6217 Pella Road, Charlotte, North Carolina 28211; and (3) sometime thereafter he received that same envelope back from the United States Postal Service marked "Moved-Left No Address." In addition, according to the affidavit, plaintiff placed the civil summons and complaint in an envelope with sufficient first-class postage attached thereto and mailed said envelope, certified mail, return receipt requested, to the Secretary of State of North Carolina, Corporate Division. It was delivered on 24 February 1992.

On 25 February 1993, plaintiff filed an affidavit of an employee of the Secretary of State's office stating that the office received a copy of the civil summons and complaint and mailed the civil summons and complaint to the address shown in the Office of Secretary of State as the registered office of defendant, the Charlotte office, and the documents were returned.

On 1 July 1993, the Honorable Gregory A. Weeks entered an order dismissing the case from Wake County Superior Court on the basis of insufficiency of process and insufficiency of service of process. From this order plaintiff appeals.

In the appeal, plaintiff alleges the trial court erred in granting defendant Gunatit Corporation's motion to dismiss pursuant to Rules 12(b)(4) (insufficiency of process) and 12(b)(5) (insufficiency of service of process). Having reviewed the grounds for dismissal, we reverse in part and affirm in part.

Plaintiff first alleges that the trial court erred in granting defendant Gunatit Corporation's motion to dismiss for insufficiency of process. Defendant does not contest plaintiff's contention that it was error to grant the motion on the basis of insufficiency of process. As such we hold that the trial court was in error and reverse the trial court's order dismissing defendant's motion pursuant to Rule 12(b)(4) (insufficiency of process).

Plaintiff next alleges the trial court erred in granting defendant Gunatit Corporation's motion to dismiss pursuant to Rule 12(b)(5) of the North Carolina Rules of Civil Procedure for insufficiency of service of process. We disagree.

[1] This appeal involves a claim of lien pursuant to North Carolina General Statutes § 44A-8 (1989). Plaintiff is a second-tier contractor and as such is entitled to a lien provided the second-tier contractor gives notice as required in North Carolina General Statutes § 44A-19(d) (1989). North Carolina General Statutes § 44A-19(d) states:

> (d) Notices under this section shall be served upon the obligor in person or by certified mail in any manner authorized by the North Carolina Rules of Civil Procedure. A copy of the notice shall be attached to any claim of lien filed pursuant to G.S. 44A-20(d).

In the instant case, however, neither the claim of lien, nor the notice of lien include proof of service. Plaintiff contends that the affi-

davit of service which incorrectly alleges that the complaint and summons that were served is notice of service of the notice of lien. We decline to embrace this contention. The proposed affidavits of service on their face give no indication that they are in reference to the notice of lien. Accordingly, there is no proof of service on the record.

Plaintiff notes that notice of lien was served by mailing it to the Cary address of Gunatit. The notice was sent to Gunatit Corporation not to the attention of an "officer, director, or managing agent" as required by Rule 4(j)(6). In addition, North Carolina General Statutes § 44A-19(d) requires that the lien be served in person or by certified mail. There is no indication in the record that plaintiff mailed a copy of the notice, registered, or certified mail, return receipt requested nor addressed to the officer, director, or managing agent. In fact, no proof of service of the lien is present in the record.

[2] Plaintiff also alleges that it complied with Rule 4(j)(6)(b) of N.C.R. Civ. P. and North Carolina General Statutes § 55-5-04(b) (1990) by serving a copy of the summons and complaint to the Secretary of State as an agent for defendant; North Carolina General Statutes § 55-5-04(b) provides in part that whenever the registered agent of a corporation to whom process may be served cannot be located, substitute service is proper. We disagree.

Defendant argues that plaintiff's failure to serve the summons and complaint at a known address of defendant violates defendant's due process rights.

> As a general rule compliance with the Rules of Civil Procedure relating to service of process satisfies the due process requirements of the Federal and North Carolina Constitutions. *See Royal Business Funds Corp. v. South E. Dev. Corp.*, 32 N.C. App. 362, 368, 232 S.E.2d 215, 218, *disc. rev. denied*, 292 N.C. 728, 235 S.E.2d 784 (1977). Compliance with these statutes, however, does not in every instance satisfy due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318, 94 L. Ed. 865, 875 (1950) (statutory provision for notice to trust beneficiaries by publication violates due process when whereabouts of beneficiary known to trustee). If due process is denied, then service is invalid. *Anderson Trucking Serv., Inc. v. Key Way Transp., Inc.*, 94 N.C. App. 36, 44, 379 S.E.2d 665, 670 (1989).

Partridge v. Associated Cleaning Consultants, 108 N.C. App. 625, 629, 424 S.E.2d 664, 666, *disc. review denied*, 333 N.C. 540, 429 S.E.2d

560 (1993). Our Court in *Partridge*, although declining to address the issue, said that a meritorious issue concerning whether due process rights had been violated could arise if plaintiff's attorney actually had knowledge of defendant's correct address, and nevertheless made service of process through the Secretary of State's office pursuant to North Carolina General Statutes § 55-5-04. *Id.*

The record shows that plaintiff's attorney had actual knowledge of an address where defendant Gunatit could be served and did not attempt to serve defendant at the known address. Thus, we hold, that substitute service of process on the Secretary of State was ineffective and violated defendant's due process rights. The record reveals that plaintiff knew that defendant Gunatit Corporation was located in Wake County. In fact, the complaint, the notice of claim of lien, the claim of lien, and the warranty deed for the property where the project was located, all note that defendant Gunatit Corporation is located at 903 Hampshire Court, Cary, North Carolina 27511. Therefore, plaintiff using due diligence should have been able to properly serve process on defendant.

In summary, we reverse the trial court's dismissal of the action on the basis of insufficiency of process, but affirm the dismissal of the action on the basis of insufficiency of service of process.

Reversed in part, affirmed in part.

Judges GREENE and LEWIS concur.

ARTHUR P. NELSON, PLAINTIFF v. HARRY HAYES, D/B/A TOTE A POKE, AND BG & S OF GREENSBORO, INC., D/B/A TOTE A POKE, DEFENDANTS

No. 9418SC81

(Filed 18 October 1994)

Attachment and Garnishment § 11 (NCI4th)— workers' compensation claim—uninsured employer—attachment of employer's property dissolved—defective affidavit

N.C.G.S. § 97-95 provides an avenue to allow for attachment where an employer (1) is uninsured or fails to qualify as a self-insurer, and (2) owns property in the State susceptible to disposal or removal, and a plaintiff's affidavit must meet one of the

grounds for attachment listed in N.C.G.S. § 1-440.2. In this case, the trial judge properly dissolved and vacated the order of attachment because the affidavit in support of the attachment failed to state in a definite and distinct manner the facts and circumstances supporting plaintiff's allegations of acts committed by defendants with intent to defraud creditors, thus rendering the affidavit defective.

Am Jur 2d, Attachment and Garnishment §§ 254 et seq.

Sufficiency of affidavit for attachment, respecting fraud or intent to defraud, as against objection that it is a mere legal conclusion. 8 ALR2d 578.

Appeal by plaintiff from order entered 7 December 1993 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 3 October 1994.

Donaldson & Horsley, P.A., by Kathleen G. Sumner, for plaintiff-appellant.

Henson Henson Bayliss & Sue, L.L.P., by Daniel L. Deuterman, for defendants-appellees.

JOHNSON, Judge.

The facts underlying this appeal are as follows: On 16 December 1992, plaintiff Arthur P. Nelson was robbed while working within the course and scope of his employment with defendants (Harry B. Hayes, d/b/a Tote a Poke and BG & S of Greensboro, d/b/a Tote a Poke). During this robbery, plaintiff was stabbed and sustained medical injuries requiring hospitalization and surgery. On 21 July 1993, plaintiff timely filed a workers' compensation action and request for hearing with the North Carolina Industrial Commission (the Commission).

At the time of the robbery, although defendants were subject to and bound by the Workers' Compensation Act, defendants were uninsured employers; nor did defendants qualify as self-insured. It is undisputed that the employment relationship existed at the time of the robbery.

On 31 August 1993, plaintiff filed a complaint, notice of lis pendens, affidavit in attachment proceeding, summons to garnishee and notice of levy. Plaintiff posted a $200.00 bond, attaching real proper-

ty of defendants located at 364 West Lee Street in Greensboro, North Carolina and defendants' bank account at Triad Bank. On 16 September 1993, the parties entered into a consent order. The consent order stated that in consideration of plaintiff's consent to the quashing of the summons to garnishee and notice of levy issued on 31 August 1993 to Triad Bank, defendants consented to the execution of a Form 21 Agreement for Compensation for Disability with the Commission. Pursuant to that Form 21 Agreement, defendants agreed to pay temporary total disability compensation from 16 December 1992 for necessary weeks. Plaintiff's average weekly wage was $115.38, which resulted in a weekly compensation rate of $76.15 (this agreement was approved by Deputy Commissioner Greg Willis on 3 October 1993). The consent order went on to state that with the execution of the Form 21 Agreement and defendants' payment of compensation due, plaintiff believed that sufficient security was available for payment of any compensation that may become due in the future "by virtue of the attachment of real property that continues to exist after this Order" and that therefore it was no longer necessary to maintain the lien on defendants' account at Triad Bank.

On 17 September 1993, defendants filed a verified answer and motion to dismiss, wherein they admitted the following averments of plaintiff's complaint: that they were bound by the Workers' Compensation Act; that "plaintiff timely gave notice to the Defendant, his employer, and filed Forms 18 and 33 with the North Carolina Industrial Commission on July 21, 1993, thereby commencing his claim[,]" and that "[t]here has been no final determination of the claim." Defendants further acknowledged "[t]hat corporate defendant BS & G executed Form 21 accepting liability for the plaintiff's disability proximately resulting from the work-related injuries of December 16, 1992 and has agreed to pay the plaintiff temporary total disability benefits and medical benefits pursuant to said agreement[.]"

A hearing on defendants' motion to dismiss was held at the 9 November 1993 Civil Session of Guilford County Superior Court. The trial court dissolved and vacated the order of attachment, finding as fact that plaintiff's affidavit filed on 31 August 1993 in support of the order of attachment "failed to state in a definite and distinct manner the facts and circumstances supporting the plaintiff's allegations of acts committed by the defendants with intent to defraud creditors[.]" The court further found as fact and concluded as a matter of law that the order of attachment issued by the assistant clerk of superior court

"was based on the plaintiff's fatally defective affidavit[.]" From this order, plaintiff appeals to our Court.

Plaintiff argues that the trial court committed reversible error when it entered its order setting aside the attachment issued by the assistant clerk of court, in that the attachment complied with the grounds set forth in North Carolina General Statutes § 97-95 (1991), for an injured employee to pursue an ancillary remedy of attachment against an uninsured employer.

North Carolina General Statutes § 97-95 states in pertinent part:

> **Actions against employers failing to effect insurance or qualify as self-insurer.**
>
> . . .
>
> [I]n addition to other penalties provided by this Article, such employer shall be liable in a civil action which may be instituted by the claimant for all such compensation as may be awarded by the Industrial Commission in a proceeding properly instituted before said Commission, and such action may be brought by the claimant in the county of his residence or in any county in which the defendant has any property in this State; and in said civil action, ancillary remedies provided by law in civil actions of attachment, receivership, and other appropriate ancillary remedies shall be available to plaintiff therein. Said action may be instituted before the award shall be made by the Industrial Commission in such case for the purpose of preventing the defendant from disposing of or removing from the State of North Carolina for the purpose of defeating the payment of compensation any property which the defendant may own in this State.

North Carolina General Statutes § 97-95 was enacted in 1941 and has not been amended since that date.

North Carolina General Statutes § 1-440.2 (1983) states that

> [a]ttachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action for alimony or for maintenance and support, or an action for the support of a minor child, but not in any other action.

North Carolina General Statutes § 1-440.3 (1983) states the grounds for attachment:

In those actions in which attachment may be had under the provisions of G.S. 1-440.2, an order of attachment may be issued when the defendant is

(1) A nonresident, or

(2) A foreign corporation, or

(3) A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence, or

(4) A resident of the State who, with intent to defraud his creditors or to avoid service of summons,

a. Has departed, or is about to depart, from the State, or

b. Keeps himself concealed therein, or

(5) A person or domestic corporation which, with intent to defraud his or its creditors,

a. Has removed, or is about to remove, property from this State, or

b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property.

North Carolina General Statutes § 1-440.3 was enacted in 1947 and has not been amended since that date.

Plaintiff argues that North Carolina General Statutes § 97-95 provides a further action in which attachment may be had, and which must be read in *pari materia* with North Carolina General Statutes § 1-440.2, noting that North Carolina General Statutes § 97-95 states that an attachment proceeding "may be instituted before the award shall be made by the Industrial Commission in such case for the purpose of preventing the defendant from disposing of or removing from the State of North Carolina for the purpose of defeating the payment of compensation any property which the defendant may own in this State." We agree and find that North Carolina General Statutes § 97-95 does provide a further action in which attachment may be had.

However, having reached the conclusion that North Carolina General Statutes § 97-95 does state an action in which attachment may be had, we now must consider plaintiff's argument that North Carolina General Statutes § 97-95, in and of itself, states grounds for attachment. We reject plaintiff's argument.

We find persuasive the wording of North Carolina General Statutes § 97-95 which states that the statute provides an employee with the same "ancillary remedies *provided by law in civil actions of attachment*" (emphasis added); therefore, we find the rights of a plaintiff in an action under North Carolina General Statutes § 97-95 are the same as those of any other plaintiff in a civil action. North Carolina General Statutes § 97-95 merely provides an avenue to allow for attachment where an employer (1) is uninsured or fails to qualify as a self-insurer, and (2) owns property in the State susceptible to disposal or removal. As such, plaintiff's affidavit must meet one of the grounds for attachment listed in North Carolina General Statutes § 1-440.2, as required by North Carolina General Statutes § 1-440.11 (1983).

In plaintiff's affidavit in attachment proceeding plaintiff properly noted that the civil action was allowed by North Carolina General Statutes § 97-95; plaintiff also checked a box stating that the grounds for attachment were those pursuant to North Carolina General Statutes § 1-440.3(5)(a) and (b). Plaintiff went on to state in his affidavit a general assertion that defendants "are now or are about to sell, transfer, hide, encumber, or otherwise dispose of the assets of the above referenced corporation," but this was unsupported by any facts which should have been alleged with particularity. *See Connolly v. Sharpe*, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

Therefore, we find the trial judge properly dissolved and vacated the order of attachment, because the affidavit in support of the attachment failed to state in a definite and distinct manner the facts and circumstances supporting plaintiff's allegations of acts committed by defendants with the intent to defraud creditors, thus rendering the affidavit defective.

No error.

Judges MARTIN and THOMPSON concur.

MYRON WOLBARSHT, PETITIONER v. THE BOARD OF ADJUSTMENT OF THE CITY OF DURHAM, RESPONDENT

No. 9314SC1228

(Filed 18 October 1994)

1. Zoning § 72 (NCI4th)— use permit application to build six-foot fence—denial supported by adequate evidence

Respondent's denial of petitioner's use permit application to replace a four-foot fence with a six-foot fence to enclose his yard and dog was supported by competent, material, and substantial evidence where such evidence tended to show that construction of a six-foot fence would be a potential safety problem for neighbors and passers-by; allowing the "dangerous dog" to roam within a see-through fence adjacent to the street would increase his aggressiveness; and a six-foot chain link fence in front of the property would not be compatible with the existing community and would have an adverse impact on the values of adjoining properties.

Am Jur 2d, Zoning §§ 803-806.

2. Zoning § 72 (NCI4th)— use permit application to build six-foot fence— denial not arbitrary and capricious

Respondent's denial of petitioner's use permit application to replace a four-foot fence with a six-foot fence to enclose his yard and dog was not arbitrary and capricious and an error of law, since it was not arbitrary and capricious to find that allowing the dog to roam the entire yard, albeit with six-foot fencing, but adjacent to the street traveled by small children and others on a daily basis, threatened public safety.

Am Jur 2d, Zoning §§ 803-806.

Appeal by petitioner from order and judgment entered 23 August 1993 by Judge Dexter Brooks in Durham County Superior Court. Heard in the Court of Appeals 13 September 1994.

Hayes Hofler & Associates, P. A., by R. Hayes Hofler and Daniel B. Hill, for petitioner-appellant.

Office of the City Attorney, by Assistant City Attorney Karen Sindelar, for respondent-appellee.

JOHNSON, Judge.

Petitioner Myron Wolbarsht resides at 1435 Acadia Street in Durham, North Carolina. Petitioner received a notice dated 20 October 1992 from the Durham County Animal Control Department that his dog had attacked an individual by biting her in the face, requiring plastic surgery. The notice instructed petitioner to "prevent your dog from engaging in any further acts as those [received by the Animal Control Department]." In response to this notice, on 10 December 1992, petitioner filed a Use Permit application with respondent Board of Adjustment of the City of Durham (hereafter, Board) to enable petitioner to replace the existing four-foot fence around his property with a six-foot chain link fence "to ensure safety from [petitioner's] dog."

A public hearing on the application was held on 26 January 1993. At this hearing, the Board considered evidence which included the City staff report, photographs, and testimony from area residents and petitioner's son. There was substantial testimony concerning two large neapolitan mastiffs owned by petitioner's adult son who lived with petitioner. The female dog, the less aggressive of the two dogs, had free run of both an area fenced with the four-foot fence and an area fenced with the six-foot fence. The second dog, a larger male, had formerly had access to the four-foot area, but since the incident when this dog bit an individual, this dog has been confined solely to the area to the side and back of the house which has six-foot fencing. Petitioner's son testified at the hearing that the purpose of the request to erect the six-foot fence was to increase the larger male dog's run to the areas adjacent to the streets, rather than confining him solely to the back and side yard areas. Petitioner's son also testified that the dog could "clear" a four-foot fence but not a six-foot fence.

Testimony from neighbors concerned the dogs' excessive barking and generally aggressive behavior, noting that the dogs threw themselves against the existing fencing. Neighbors further testified that children and adults frequently use the street and right of way adjacent to petitioner's front yard to walk to the neighboring park, and that expanding the aggressive dog's run would expand the threat to the neighborhood. Neighbors also testified that the fence would have a negative visual impact in the neighborhood because it would create a visual barrier and obstruct the view of pedestrians approaching the park. Testimony by the neighbors corroborated the City's staff report that a Use Permit for a wooden six-foot fence on the property across the street from petitioner had been granted in 1989.

The Board unanimously denied petitioner's application. Petitioner filed petition for a writ of certiorari which was entered on 9 March 1993. The certiorari proceeding was heard before Superior Court Judge Dexter Brooks at the 19 July 1993 session of Durham County Superior Court. Judge Brooks affirmed the Board's denial of petitioner's application, finding

> [p]rocedures specified by law in statute and local ordinance were followed at the Board of Adjustment hearing in this case, and in the rendering of the Board's decision.
>
> 4. The petitioner was afforded all necessary due process rights at the Board of Adjustment hearing.
>
> 5. The Board's decision and its findings that the granting of the use permit does not meet the conditions of Durham City Zoning Ordinance sections 24-12.N and 24-20.B.5 are supported by competent, material, and substantial evidence in the whole record.
>
> 6. In particular, the findings that the proposed increase in height is not reasonably compatible with the existing neighborhood and would have both a generally negative effect and an adverse economic impact on neighboring properties are supported by competent, material, and substantial evidence consisting of testimony that the increase in height was requested specifically to allow an aggressive dog, which is currently maintained in six foot fencing at the back of the property, to freely roam the areas to the front and to the side of the property. These areas are adjacent to public streets which are frequently used by pedestrians walking in the neighborhood and to the public park diagonally across the street from the subject property. Containing this dog in the area adjacent to pedestrian walking areas will present a danger to the public and to the neighborhood and is incompatible with the neighborhood.
>
> 7. In particular, the Board's finding that a six-foot chain-link fence will impede sight lines for pedestrians is supported by competent, material, and substantial evidence consisting of testimony from neighborhood residents concerning the negative visual impact of the proposed increase in height.
>
> 8. The Board's decision is not arbitrary and capricious.
>
> 9. No errors of law were committed by the Board of Adjustment in its decision.

From the decision of the trial court, petitioner filed timely notice of appeal to our Court.

Petitioner argues on appeal that it was error for the court to affirm the Board's denial of petitioner's Use Permit application. Specifically, petitioner argues that the Board's denial of petitioner's Use Permit application was not supported by competent, material and substantial evidence. Petitioner also argues that the Board's denial of petitioner's Use Permit application was arbitrary and capricious and was an error in law.

On review of a decision on an application for a use permit made by a Board sitting as a quasi-judicial body, our Court's tasks include:

(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.

Charlotte Yacht Club v. County of Mecklenburg, 64 N.C. App. 477, 479, 307 S.E.2d 595, 597 (1983). Because "[t]he trial court, reviewing the decision of a town board on a . . . permit application, sits in the posture of an appellate court[,]" *Id.* at 480, 307 S.E.2d at 597, our focus on this appeal is on the decision of the Board. *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).

[1] We first address petitioner's argument that the Board's denial of petitioner's Use Permit application was not supported by competent, material and substantial evidence. We note that the transcript of the hearing indicates that the Board moved to deny the Use Permit because it found that granting the permit would affect, adversely, the health and safety and welfare of the surrounding property. The Board noted that construction of a six-foot chain link fence would be a potential safety problem for the neighbors and passers-by in that both dogs would then be free to roam throughout the yard, and that allow-

ing the "dangerous dog" to roam within a see-through fence adjacent to the street would increase his aggressiveness. The Board further noted that this six-foot chain link fence in front of the property as proposed would not be compatible with the existing community, would have an adverse economic impact potentially on the values of adjoining properties, and would have a visual impact to the extent that it would block views. The Board observed that petitioner did not propose any type of landscaping or buffering for the fence. Therefore, upon our review of the record in this matter, we find that the Board's denial of petitioner's Use Permit application was supported by competent, material and substantial evidence.

[2] We next address petitioner's argument that the Board's denial of petitioner's Use Permit application was arbitrary and capricious and was an error in law. Petitioner argues that "the danger represented by a dog in the yard would be significantly reduced or eliminated by increasing the four-foot sections of fencing" to six-foot, and that therefore, the Board's decision was arbitrary and capricious in denying the six-foot fence "under the pretense that the six-foot fence threatened public safety." We disagree. The male dog, the dog which the Durham County Animal Control Department has on record as having attacked an individual by biting her in the face has, since the bite, been confined to the area to the side and back of the house which has six-foot fencing. This has significantly reduced or eliminated the danger represented by the dog in the yard. It is not arbitrary and capricious to find that allowing the dog to roam the entire yard, albeit with six-foot fencing, but adjacent to the street traveled by small children and others on a daily basis, threatens public safety. We find that the Board's decision was not arbitrary and capricious and was not an error in law.

Affirmed.

Judges GREENE and LEWIS concur.

WARD v. WARD

[116 N.C. App. 643 (1994)]

LEONARD P. WARD, PLAINTIFF v. WYNONA N. WARD, DEFENDANT

No. 9326DC1175

(Filed 18 October 1994)

1. Appeal and Error § 147 (NCI4th)— lack of subject matter jurisdiction—failure to raise on initial appeal—waiver

Plaintiff waived his right to challenge the validity of equitable distribution and permanent alimony orders on the ground that the trial judges lacked subject matter jurisdiction, since plaintiff could have presented the same challenges in his initial appeals which were dismissed, and, following those dismissals, he accepted the benefits of those judgments.

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

2. Judgments § 38 (NCI4th)— order entered out of session—when permissible

A district court judge has the authority to enter an order and judgment out of session as long as the trial on the merits, to which the judgment or order relates, was conducted at a regularly scheduled trial session.

Am Jur 2d, Judgments §§ 79, 81.

Appeal by plaintiff from orders entered 16 August 1993 by Judge H. William Constangy in Mecklenburg County District Court. Heard in the Court of Appeals 31 August 1994.

Joe T. Millsaps for plaintiff-appellant.

Edward P. Hausle for defendant-appellee.

MARTIN, Judge.

This case has a somewhat laborious procedural history involving a myriad of motions and notices of appeal by plaintiff. However, the issue presented by this appeal concerns only the jurisdiction of Mecklenburg County District Court Judges Robert P. Johnston and H. William Constangy to enter a judgment for equitable distribution and an order for permanent alimony respectively.

The facts relevant to this appeal are as follows: On 10 December 1986, plaintiff instituted a complaint for absolute divorce and equitable distribution against defendant. Defendant answered, asserting a

counterclaim for alimony pendente lite, permanent alimony, attorneys' fees, sequestration of certain marital assets, absolute divorce and equitable distribution. The parties were granted an absolute divorce by judgment entered 8 June 1987. Hearings with respect to equitable distribution of the parties' marital assets were conducted on 7-9 June 1988, 13-16 June 1989, 5 February 1990 and 3 May 1990 during the regularly scheduled civil domestic non-jury sessions of Mecklenburg County District Court before Judge Johnston. On 31 December 1990, Judge Johnston, who was assigned to a one day criminal session of court, entered an equitable distribution order and judgment. Consent had not been given by counsel for either party for Judge Johnston to sign the judgment out of session, and this case was not otherwise scheduled before him on that date.

Plaintiff filed a notice of appeal from the equitable distribution order, but later dismissed the appeal. Plaintiff also filed several motions to hold defendant in contempt for violation of the order, all of which were denied. Plaintiff then filed a motion pursuant to G.S. § 1A-1, Rule 52 to amend the findings of fact in the order; that motion was denied. At no time, however, did plaintiff challenge Judge Johnston's jurisdiction to enter the equitable distribution order until 29 July 1993, when he filed a motion to set the order aside.

On 16-17 April 1991, Judge H. William Constangy conducted an alimony hearing at the duly scheduled 15 April 1991 domestic session of Mecklenburg County District Court. The parties further argued the issue of alimony on 28 July 1992 during a regularly scheduled session of district court. No order for alimony was entered at either session, nor was the session continued, and neither parties' counsel consented to an entry, out of session, of an order resolving the issue of alimony. On 4 November 1992, based upon a previous draft order submitted by defendant, Judge Constangy, out of session, entered an order and judgment for alimony.

Subsequent to entry of the alimony order, plaintiff filed a motion for relief pursuant to Rules 52(b), 59 and 60, a notice of appeal from the permanent alimony order, and a notice of appeal from the denial of the motion. Both appeals were dismissed for plaintiff's failure to timely file with this Court a settled record on appeal. Again, at no time did plaintiff challenge the validity of the entry of the alimony order until 23 April 1993, when plaintiff filed a motion to set aside the alimony order on the ground that Judge Constangy lacked jurisdiction to enter such an order.

On 16 August 1993, plaintiff's motions to set aside the equitable distribution and permanent alimony orders and judgments were denied. Plaintiff appealed.

[1] Plaintiff's sole contention on appeal is that Judge Johnston and Judge Constangy lacked subject matter jurisdiction to enter the equitable distribution judgment and permanent alimony order respectively because both were entered out of session. We disagree.

Initially, we observe that plaintiff has waived his right to challenge the validity of both orders on the grounds asserted, because he could have presented the same challenges in his initial appeals which were dismissed. In *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984), we specifically considered the effect of a dismissed appeal on a later appeal questioning a trial court's exercise of subject matter jurisdiction to enter an order. In *Sloop*, the district court, pursuant to the Uniform Child Custody Jurisdiction Act, G.S. § 50A-1 *et seq.*, entered a child custody and support order against Friberg. *Id.* at 692, 320 S.E.2d at 923. Friberg appealed, but later withdrew the appeal, and two years later Friberg sought a change of custody alleging a change of circumstances. *Id.* at 693, 320 S.E.2d at 923. His motion was denied, and he appealed, challenging the district court's subject matter jurisdiction to enter the original order. *Id.* We noted that "the question of subject matter jurisdiction may be raised at any point in the proceeding, and that such jurisdiction cannot be conferred by waiver, estoppel or consent." *Id.* at 692-93, 320 S.E.2d at 923. However, we found that because plaintiff had withdrawn his initial appeal and acquiesced in the judgment for several years, he had failed to preserve his objection. *Id.* at 693, 320 S.E.2d at 923.

Similarly, in the case *sub judice*, plaintiff appealed from the equitable distribution order and judgment, which he later voluntarily dismissed on 15 February 1991. Since that dismissal, he has accepted the benefits of said judgment. Plaintiff also filed two notices of appeal from the permanent alimony order. Because plaintiff failed to file the settled record in both appeals within the prescribed time limit, said appeals were dismissed by Judge Constangy at the 16 August 1993 hearing. Accordingly, he has failed to preserve his objection to the entry of both orders.

[2] Even if plaintiff had preserved the question for review, his contentions are without merit. The recent decision of our Supreme Court in *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 446 S.E.2d 289 (1994) is dispositive. In *Capital Outdoor Advertising*, a

superior court judge entered an order out of session dismissing plaintiff advertising companies' complaint. *Id.* at 153, 446 S.E.2d at 291. The Court found nothing in the record of the trial court to indicate that the judge "extended the . . . session pursuant to N.C.G.S. § 15-167 or that the parties or their attorneys consented to entry of the order of dismissal in a session of court other than the session in which the motion was heard." *Id.* at 154, 446 S.E.2d at 292. Noting that the Supreme Court has "continuously recognized the authority of the legislature to provide by statute for the transaction of business in the superior court out of term and out of county," the Court held that "the rule [G.S. § 1A-1, Rule 6(c)] clearly allows a superior court judge to sign a written order out of session *without* the consent of the parties so long as the hearing to which the order relates was held in term." *Id.* at 156 and 158, 446 S.E.2d at 293 and 294.

Plaintiff attempts to distinguish *Capital Outdoor Advertising* on the sole ground that it involved a judgment rendered in the superior court division of the General Court of Justice of North Carolina, while the present case involves rulings made in the district court division. However, because we believe it sound policy that the same rules apply to judgments and orders of both trial divisions and because we find statutory authority to do so, we deem it appropriate to apply the holding set forth in *Capital Outdoor Advertising* to the case *sub judice.*

The General Assembly has specifically conferred on the district court division subject matter jurisdiction over domestic relations cases. N.C. Gen. Stat. § 7A-244. It is the duty of the chief district court judge, among other things, to set the schedules of the district court judges by assigning them to sessions of district court, and to arrange the calendaring of noncriminal matters for trial or hearing. *Schumacher v. Schumacher*, 109 N.C. App. 309, 311, 426 S.E.2d 467, 468 (1993); N.C. Gen. Stat. § 7A-146(1), (2). Pursuant to G.S. § 7A-190,

> [t]he district courts shall be deemed always open for the disposition of matters properly cognizable by them. But all trials on the merits shall be conducted at trial sessions regularly scheduled as provided in this Chapter.

Furthermore, G.S. § 1A-1, Rule 6(c) provides:

> [t]he period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued exist-

ence or expiration of a session of court in no way affects the power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

The foregoing statutes, considered together, lead us to the conclusion that a district court judge has the authority to enter an order and judgment out of session as long as the trial on the merits, to which the judgment or order relates, was conducted at a regularly scheduled trial session. Judge Johnston and Judge Constangy conducted hearings on equitable distribution and permanent alimony during their respective assigned sessions of domestic court. Thus, both judges had subject matter jurisdiction to enter their orders and judgments after the expiration of their respective sessions.

Affirmed.

Chief Judge ARNOLD and Judge THOMPSON concur.

ANNETTE GREEN, PLAINTIFF v. JOHN ROUSE, DEFENDANT

No. 949SC85

(Filed 18 October 1994)

Automobiles and Other Vehicles § 644 (NCI4th)— automobile accident—plaintiff driving while impaired—sufficiency of evidence of contributory negligence

In an action to recover for injuries sustained in an automobile accident, evidence of plaintiff's contributory negligence was sufficient to be submitted to the jury where it tended to show that plaintiff's blood alcohol level was .18% shortly after the collision, and the jury could properly consider such evidence while ascertaining whether plaintiff's condition caused her to operate her vehicle in a manner which was a proximate cause of the collision and whether plaintiff was capable of coping with highway and weather conditions in the manner of the reasonably prudent person.

Am Jur 2d, Automobiles and Highway Traffic § 422.

Appeal by plaintiff from order entered 15 November 1993 by Judge E. Lynn Johnson in Franklin County Superior Court. Heard in the Court of Appeals 3 October 1994.

Robert A. Miller, P.A., by Robert A. Miller, for plaintiff-appellant.

Smith & Holmes, P.C., by Robert E. Smith, for defendant-appellee.

JOHNSON, Judge.

Plaintiff Annette Green brought a personal injury action against defendant John Rouse, alleging that defendant's negligence proximately caused injuries sustained by plaintiff in an automobile accident occurring on 5 May 1990.

Evidence presented at trial showed the following: Plaintiff was operating a motor vehicle in a southerly direction on N.C. 39 at approximately 6:45 p.m. Plaintiff had a passenger in the front seat, and plaintiff's daughter and another occupant were in the back seat. It had been raining heavily off and on. Plaintiff was operating her vehicle at approximately forty-eight miles per hour in a fifty-five mile per hour zone, and at all times up until the moment of the collision stayed within her lane. Defendant was operating a motor vehicle in a northerly direction on N.C. 39. Plaintiff observed defendant's vehicle as it came out of a curve, approaching her from the opposite direction. After defendant's vehicle came out of the curve, defendant's vehicle crossed the centerline into plaintiff's lane of travel; at this time, it was raining. Plaintiff recalled that once defendant crossed the yellow centerline, she said, "[Y]ou all sit back, this fool is going to hit me." Plaintiff testified that she "went as far as [she] could get over" and "tried to get out [sic] the way" and that she was not sure if she went on the shoulder of the road because the collision happened so quickly, noting also that she believed there was a ditch on the side of the road. The vehicles collided. An investigating officer determined that the point of impact was approximately one foot within the lane of plaintiff's lane of travel and that defendant's vehicle was, at the point of impact, between one foot and eighteen (18) inches across the centerline. Plaintiff's vehicle spun 180 degrees and traveled a total of thirty-eight feet from the point of impact. Defendant's vehicle spun somewhat less than 180 degrees and traveled thirty-one feet from the point of impact. The width of N.C. 39 is twenty-four feet and there was a fourteen foot shoulder on either side of the highway. There were no visible tire marks on the roadway before the impact. Each vehicle was damaged on the left front from the impact. Plaintiff introduced evidence of her injuries which were a result of this accident.

The investigating officer found beer cans in plaintiff's front seat and plaintiff had a blood alcohol level of 0.18% when a blood sample was taken at the hospital two hours after the accident. Based upon the officer's observations of plaintiff and his interview of her, he was of the opinion that she had consumed a sufficient quantity of an impairing substance to appreciably impair both her mental and her physical faculties. In his opinion, the effects of alcohol were obvious and plaintiff was unfit to drive.

At the close of defendant's evidence, plaintiff moved for a directed verdict on the issue of negligence, which the trial court granted. Defendant moved for a directed verdict on the issue of plaintiff's contributory negligence, which the trial court denied. The case was submitted to the jury on the issue of contributory negligence and damages. Plaintiff's attorney objected to the jury instruction on contributory negligence as it related to driving while impaired; the trial court declined to revise the jury instruction. The jury returned a verdict finding plaintiff contributorily negligent. Subsequently, plaintiff filed N.C.R. Civ. P. 50 and 59 motions, which were denied. Plaintiff filed notice of appeal to our Court.

Plaintiff argues on appeal that plaintiff was entitled to a directed verdict on the issue of contributory negligence and to a new trial pursuant to plaintiff's N.C.R. Civ. P. 50 and 59 motions. Plaintiff notes that this action was submitted to the jury on the issue of contributory negligence based upon three grounds: that plaintiff (1) failed to keep a reasonable lookout; (2) failed to keep her vehicle under proper control; and (3) operated her motor vehicle while impaired. Plaintiff argues that none of these grounds were the proximate cause of the collision.

Relevant to the instant case is our Supreme Court's analysis of contributory negligence in this context in *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970):

> Unquestionably a motorist is guilty of negligence if he operates a motor vehicle on the highway while under the influence of intoxicating liquor. Such conduct, however, will not constitute either actionable negligence or contributory negligence unless—like any other negligence—it is causally related to the accident. Mere proof that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal relation between his condition and the collision. His condition must have caused him to violate a rule of the road and to operate his

> vehicle in a manner which was a proximate cause of the collision. (Citations omitted.)

Id. at 186, 176 S.E.2d at 794.

The evidence that plaintiff in the instant case was operating her motor vehicle while impaired was a

> pertinent circumstance for the jury to consider, not as conclusively establishing [her] negligence as a proximate cause of the collision if [she] was under the influence, but in determining whether [she] was capable of keeping a proper lookout, of maintaining proper control over [her] automobile, and of coping with highway and weather conditions in the manner of the reasonably prudent person. (Citations omitted.)

Id. at 187, 176 S.E.2d at 794-95.

In *Bosley v. Alexander*, 114 N.C. App. 470, 442 S.E.2d 82 (1994), Judge Wynn undertook an analysis of our State's doctrine of contributory negligence:

> 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*;] *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. review 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)).

Bosley at 472, 442 S.E.2d at 83.

The issue of plaintiff's contributory negligence should have been submitted to the jury if all the evidence and reasonable inferences drawn therefrom viewed in the light most favorable to defendant tended to establish or suggest contributory negligence. We find that defendant has met this burden by producing evidence that not only was plaintiff driving while impaired at a blood alcohol level registered to be 0.18% shortly after the collision, but that plaintiff may have had a blood alcohol level as high as 0.20% at the time of the collision. The jury could properly consider such evidence while ascertaining whether plaintiff's condition caused her to "operate [her] vehicle in a manner which was a proximate cause of the collision" and whether plaintiff was capable of "coping with highway and weather conditions in the manner of the reasonably prudent person." We find there was "more than a scintilla of evidence" on the issue of contributory negligence and that the issue was properly submitted to the jury.

No error.

Judges MARTIN and THOMPSON concur.

IN THE MATTER OF THE APPEAL OF HOTEL L'EUROPE

No. 9310PTC1150

(Filed 18 October 1994)

Taxation § 82 (NCI4th)— decline in value of downtown property—economic change—no revaluation of property permitted

A decline in the value of downtown property and a change in federal tax laws were economic changes affecting the county in general so that appellants were not entitled to a revaluation of their property in a nonreappraisal year. N.C.G.S. § 105-287(a),(b).

Am Jur 2d, State and Local Taxation §§ 753 et seq.

Appeal by taxpayers from the Final Decision of the Property Tax Commission entered 1 July 1993. Heard in the Court of Appeals 30 August 1994.

Hartzell & Whiteman, by J. Jerome Hartzell, for Taxpayer-appellants.

Durham County Attorney's Office, by Thomas W. Jordan, Jr., for Durham County-appellee.

GREENE, Judge.

Hotel L'Europe, Inc. and Triangle V, Limited Partnership (Taxpayers) appeal from a decision of the North Carolina Property Tax Commission (the Commission), sitting as the State Board of Equalization and Review which affirmed the decision of the Durham County Board of Equalization and Review (the Board) denying Taxpayer Hotel L'Europe's request of Durham County (County) to revalue its property.

On 22 April 1992, Taxpayer Hotel L'Europe, Inc., who at that time owned three parcels of commercial property in downtown Durham, requested a revaluation of those properties, pursuant to N.C. Gen. Stat. § 105-287. Subsequent to that request and sometime prior to the appeal to this Court, Triangle V, Limited Partnership, purchased certain of these properties and joins with Hotel L'Europe, Inc. in this appeal.

The Commission found as a fact that:

12. The value of the subject parcels has declined since 1 January 1985 [the last general octennial valuation year]. The reasons for this decline in value are: (1) the impact of the 1986 Act on commercial real estate and (2) the decline in property values in central business district areas generally and in downtown Durham in particular.

The Commission concluded as a matter of law that:

1. The decline in the value of the subject properties during the period 1 January 1985 to 1 January 1992 was caused by economic conditions affecting Durham County generally.

2. Under the provisions of G.S. 105-287, the Taxpayer is not entitled to a reduction in the appraised values of the properties under appeal in tax year 1992.

The issue presented is whether a decline in the value of downtown property and a change in federal tax laws are "economic change[s] affecting the county in general."

The North Carolina statutes relating to the appraisal and assessment of property taxes, N.C.G.S. §§ 105-271 to -395.1 (1992), known as the Machinery Act, N.C.G.S. § 105-271, permit revaluation in non-reappraisal years. Specifically, N.C.G.S. § 105-287 provides in pertinent part:

> (a) . . . the assessor shall increase or decrease the appraised value of real property . . . to:
>
> (1) Correct a clerical or mathematical error;
>
> (2) Correct an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment; or
>
> (3) ***Recognize an increase or decrease in the value of the property resulting from a factor other than one listed in subsection (b).***
>
> (b). . . the ***assessor may not increase or decrease the appraised value of real property,*** as determined under G.S. 105-286, ***to recognize a change in value caused by:***
>
> (1) Normal, physical depreciation of improvements;
>
> (2) ***Inflation, deflation, or other economic changes affecting the county in general;*** or
>
> (3) Betterments to the property made by:
>
> a. Repainting buildings or other structures;
>
> b. Terracing or other methods of soil conservation;
>
> c. Landscape gardening;
>
> d. Protecting forests against fire; or
>
> e. Impounding water on marshlands for non-commercial purposes to preserve or enhance the natural habitat of wildlife.

N.C.G.S. § 105-287(a & b) (1992) (emphasis added).

Because the Taxpayers only challenge the Commission's conclusion that the decrease in property values "was caused by economic conditions affecting Durham County generally," we review the decision only for errors of law. N.C.G.S. § 105-345.2(b)(4) (1992); *see In re Appeal of Stroh Brewery*, 116 N.C. App. 178, 447 S.E.2d 803 (1994).

The Taxpayers argue that the reasons found by the Commission for the decrease in value of the property in question are unique to downtown commercial property in Durham and thus do not affect "Durham County generally." The County argues that because the reasons for the decrease in value of the property are in the nature of "economic changes," they necessarily affect the county "in general." We agree with the County.

In determining the meaning of an ambiguous statute, as we have in this case, our goal is to ascertain the intent of the legislature. *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978). When the legislature amends an ambiguous statute, "no presumption arises that its intent was to change the substance of the original act." *Trustees of Rowan Tech. v. Hammond Assocs.*, 313 N.C. 230, 240, 328 S.E.2d 274, 280 (1985). "Rather, the purpose of the amendment may be merely to 'improve the diction, or to clarify that which was previously doubtful.' " *Id.* In this case, the statute as it existed prior to the 1987 amendment (the present version) prohibited revaluation of real property where the increase or decrease in value was the result of "increases or decreases in the general economy of the county." N.C.G.S. § 105-287(b)(6) (1979) (amended 1987). Our reading of the 1973 statute is that if the increase or decrease in the value of the property was the result of some change in the economy, revaluation was not permitted. The language used in the 1987 version of the statute, while somewhat more specific, in that it includes two examples of economic change (inflation and deflation), does not reflect a legislative intent to change the law. Thus, if the increase or decrease in value of real property is caused by some change in the economy, the property is not subject to revaluation pursuant to Section 105-287.

In this case it is not disputed that the reasons ascribed by the Commission for the decrease in value are in the nature of "economic changes."

Affirmed.

Judges JOHNSON and LEWIS concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. RALPH P. WOLFE, DEFENDANT

No. 9325SC1258

(Filed 18 October 1994)

1. Eminent Domain § 195 (NCI4th)— ownership of right of way—jury trial not required

The trial court did not err in denying defendant's request for a jury trial on the issue of the ownership of a right of way on defendant's property, since the matter was called for hearing pursuant to N.C.G.S. § 136-108; one of the purposes of the hearing is to resolve any preliminary questions as to what land the DOT is condemning and any questions as to its title before the jury trial on the issue of damages; and this hearing does not infringe upon the landowner's right to a jury trial as provided by the North Carolina and United States Constitutions.

Am Jur 2d, Eminent Domain § 407.

How to obtain jury trial in eminent domain: waiver. 12 ALR3d 7.

Supreme Court's construction of Seventh Amendment's guaranty of right to trial by jury. 40 L. Ed. 2d 846.

2. Eminent Domain § 265 (NCI4th)— right of way not recorded—recording not required—notice to defendant

The trial court did not err in concluding that the DOT owned a right of way to Highway 321 across defendant's property, since DOT acquired the right of way over the property in 1949; N.C.G.S. § 47-27 does not require DOT to record deeds of easement or rights of way executed prior to 1 July 1959; and defendant had notice of the right of way on his deeds and on other deeds in his chain of title.

Am Jur 2d, Eminent Domain §§ 443 et seq.

Appeal by defendant from order entered 12 August 1993 by Judge J. Marlene Hyatt in Catawba County Superior Court. Heard in the Court of Appeals 13 September 1994.

Sigmon, Clark, Mackie & Hutton, P.A., by E. Fielding Clark, II, for defendant-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General J. Bruce McKinney, for plaintiff-appellee.

WYNN, Judge.

In 1949, the State Highway and Public Works Commission, now the Department of Transportation (DOT), acquired a right of way in Catawba County for the construction of Highway 321. The right of way was seventy-five feet wide on either side of the centerline and ran across the property of Paul and Ella Mae Yount. This right of way was not recorded. In 1988, defendant, Ralph P. Wolfe, acquired the former Yount property.

On 2 March 1992, the DOT commenced a condemnation action in accordance with N.C. Gen. Stat. § 136-103 for the purpose of widening Highway 321. The pleadings and plan sheet indicated the existing right of way across defendant's property. Defendant filed an answer and counterclaim denying the existence of the right of way and requested a jury trial on this issue. Defendant later filed an amendment which alleged defendant owned the right of way by virtue of adverse possession. DOT filed a motion for a hearing pursuant to N.C. Gen. Stat. § 136-108. After the hearing, the trial court concluded that defendant was not entitled to a jury trial regarding the existence of the right of way; that the DOT was not required to record the right of way; and that notwithstanding the fact the right of way was not recorded, defendant had notice of its existence through his chain of title. From this order, defendant appeals.

As an initial matter, we note that while the order defendant appeals from is interlocutory, since the trial court denied defendant's request for a jury trial the order affects a substantial right and is, therefore, immediately appealable. *In re McCarroll*, 313 N.C. 315, 327 S.E.2d 880 (1985); *Dick Parker Ford, Inc. v. Bradshaw*, 102 N.C. App. 529, 402 S.E.2d 878 (1991). We accordingly now review defendant's assignments of error.

[1] Defendant contends that the trial court erred by denying his request for a jury trial on the issue of the ownership of the right of way on defendant's property. We disagree. This matter was called for hearing pursuant to N.C. Gen. Stat. § 136-108 which provides that in a condemnation action:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of neces-

sary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 136-108 (1993).

One of the purposes of this hearing is to resolve any preliminary questions as to what land the DOT is condemning and any questions as to its title before the jury trial on the issue of damages. *North Carolina State Highway Comm'n v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967). This hearing does not infringe upon the landowner's right to a jury trial as provided by the North Carolina and United States Constitutions. *Kaperonis v. North Carolina State Highway Comm'n*, 260 N.C. 587, 133 S.E.2d 464 (1963). In the instant case, therefore, the trial court did not err by denying defendant's motion for a jury trial.

[2] Defendant next argues that the trial court erred by concluding that the DOT owned a right of way to Highway 321 across defendant's property. Defendant contends that the DOT has not established title to the right of way because it has not recorded the right of way nor does any recorded reference to the right of way exist. We disagree.

In *Kaperonis*, the Supreme Court held that N.C. Gen. Stat. § 47-27, which governs deeds for rights-of-way and easements, provides that the DOT does not have to record such interests in land which were acquired prior to 1 July 1959. *Kaperonis*, 260 N.C. at 600, 133 S.E.2d at 473. In *Department of Transp. v. Auten*, 106 N.C. App. 489, 417 S.E.2d 299 (1992), this Court stated, "We read *Kaperonis* to hold that G.S. 47-27 does not require the DOT to record deeds of easement or other agreements conveying interests in land executed prior to 1 July 1959." *Id.* at 491, 417 S.E.2d at 301. We reject defendant's argument that this conclusion was a misreading and an overextension of the holding in *Kaperonis*. N.C. Gen. Stat. § 47-27 clearly provides that the provisions of the statute did not apply to the DOT until after 1 July 1959. N.C. Gen. Stat. § 47-27 (1984). Therefore, since the DOT acquired the right of way over defendant's property in 1949, it was not required to record that interest. In addition, defendant had notice of the right of way on his deeds and on the other deeds in his chain of title. Accordingly, the order of the trial court is

Affirmed.

Judges COZORT and McCRODDEN concur.

BUSTLE v. RICE

[116 N.C. App. 658 (1994)]

JOHNNY RAY BUSTLE, JR. AND WIFE, CHERYL M. BUSTLE, PLAINTIFFS v. JAMES S. RICE, AND WIFE, ANITA S. RICE, DEFENDANTS

No. 9427DC1

(Filed 18 October 1994)

Appeal and Error § 7 (NCI4th)— failure to comply with appellate rules—appeal dismissed

Plaintiffs' appeal is dismissed for failure to comply with Rules of Appellate Procedure requiring that assignments of error be stated without argumentation, specify the legal basis upon which error is assigned, and direct the attention of the appellate court to the particular error about which the question is made with clear and specific transcript references. N.C.R. App. P. 10(c)(1), 28(b)(5).

Am Jur 2d, Appeal and Error § 290.

Appeal by plaintiffs from order entered 25 August 1993 by Judge J. Keaton Fonvielle in Cleveland County District Court. Heard in the Court of Appeals 26 September 1994.

C. A. Horn for plaintiff-appellants.

Bridges & Gilbert, P.A., by R. L. Gilbert, for defendant-appellees.

PER CURIAM

Plaintiffs appeal from a judgment, entered after a non-jury trial, denying their claim for damages for alleged breach of a contract to purchase real property and for tortious "misappropriation" of certain monies. Plaintiffs assignments of error appear in the record as follows:

ASSIGNMENTS OF ERROR

That the Court entered the Order based on total misinterpretation of the contract between the parties and the prevailing laws of the State of North Carolina for the following reasons:

1. That the Court totally ignored monies received by the defendants which have not been accounted for to the plaintiff.

2. That the Court totally ignored the conversion of funds by the defendant, in violation of Chapter 75 of the North Carolina General Statutes.

3. That the findings of fact do not support the entering of the judgment in the aforesaid order.

These purported assignments of error violate the provisions of N.C.R. App. P. Rule 10(c)(1) in several respects: specifically, they are not stated "without argumentation"; they do not specify the "legal basis upon which error is assigned"; and they do not "direct the attention of the appellate court to the particular error about which the question is made, with clear and specific transcript references." *See Kimmel v. Brett*, 92 N.C. App. 331, 374 S.E.2d 435 (1988); *Pamlico Properties IV v. SEG Anstaldt Co.*, 89 N.C. App. 323, 365 S.E.2d 686 (1988); *McManus v. McManus*, 76 N.C. App. 588, 334 S.E.2d 270 (1985).

In addition, the issue presented by plaintiffs' brief, "Did the trial Court [sic] commit Error [sic] by finding that the plaintiffs' exclusive remedies for the defendants' breach of contract was liquidated damages?", does not correspond to any assignment of error set forth in the record on appeal. The scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant's brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court. *State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992).

Finally, appellants' brief does not comply with N.C.R. App. Rule 28(b)(5) which requires that "[i]mmediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." Appellants' violations of the foregoing rules in this case renders it virtually impossible for us to discern to which assignment of error appellants direct their argument; accordingly, we decline to address the merits of the argument. *Hines v. Arnold*, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

An appellate court will not review matters not properly before it. *State v. Fennell*, 307 N.C. 258, 297 S.E.2d 393 (1982). The Rules of

Appellate Procedure are mandatory; it is the duty of an appellate court to enforce them uniformly. *Id.; Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126 (1930). A failure to follow the Appellate Rules subjects an appeal to dismissal. *Craver v. Craver*, 298 N.C. 231, 258 S.E.2d 357 (1979); N.C.R. App. Rules 25(b), 34(b)(1). Accordingly, plaintiffs' appeal is dismissed.

Dismissed.

Panel consisting of:

Chief Judge ARNOLD, Judges MARTIN and THOMPSON

BRENDA M. GILLESPIE v. DENNIS R. GILLESPIE

No. 9329DC1267

(Filed 18 October 1994)

Divorce and Separation § 450 (NCI4th)— child support—order not appealable until entry of permanent alimony order

Defendant's assignment of error pertaining to a child support order was not reviewable on appeal until entry of a final order on plaintiff's claim for permanent alimony.

Am Jur 2d, Appeal and Error §§ 50 et seq.

Appeal by defendant from order entered 7 October 1993 by Judge Mark E. Powell in Transylvania County District Court. Heard in the Court of Appeals 14 September 1994.

Plaintiff and defendant married in 1969 and adopted two minor children. They separated on 2 January 1993. Plaintiff filed a complaint for divorce from bed and board, alimony, alimony pendente lite, child custody, child support and equitable distribution on 28 June 1993. After a hearing, the trial court ordered custody of the two minor children to plaintiff, as well as an award for child support and alimony pendente lite. Defendant appeals portions of the order only with regard to child support.

Averette & Barton, by Donald H. Barton, for plaintiff appellee.

Ramsey, Hill, Smart, Ramsey & Pratt, P.A., by Michael K. Pratt, for defendant appellant.

ARNOLD, Chief Judge.

This appeal is interlocutory and must be dismissed according to this Court's holding in *Fliehr v. Fliehr*, 56 N.C. App. 465, 289 S.E.2d 105 (1982).

The order appealed from in this case was for child custody and child support in conjunction with an order awarding alimony pendente lite. The Court in *Fliehr* concluded that if we allow such appeals we would defeat the purpose announced in *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981) of avoiding appeals from temporary support orders sought merely for the purpose of delay. *Fliehr*, 56 N.C. App. 465, 289 S.E.2d 105. Therefore, defendant's assignment of error pertaining to the child support order is not reviewable on appeal until entry of a final order on plaintiff's claim for permanent alimony. *Id.*; *see also* N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990).

Dismissed.

Judges MARTIN and THOMPSON concur.

JAMES A. RICHARDSON, PLAINTIFF v. SPENCER TODD PATTERSON, DEFENDANT

No. 937SC1187

(Filed 18 October 1994)

Evidence and Witnesses § 2278 (NCI4th)— two accidents—cause of injury—speculative and cumulative evidence properly excluded

In an action to recover for injuries sustained in an automobile accident where the issue at trial was whether this accident or a second accident was the proximate cause of plaintiff's injuries, the trial court did not err in refusing to allow two doctors to offer their opinions regarding the relationship of plaintiff's injuries to the first collision, since in one instance the question called for mere speculation on the part of the doctor and in the other the proffered testimony was cumulative.

Am Jur 2d, Expert and Opinion Evidence § 243.

Admissibility of opinion evidence as to cause of death, disease, or injury. 66 ALR2d 1082.

Appeal by plaintiff from judgments entered 15 July 1993 and 18 October 1993 in Wilson County Superior Court by Judge J. Richard Parker. Heard in the Court of Appeals 1 September 1994.

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

Battle, Winslow, Scott & Wiley, P.A., by Sam S. Woodley, Patterson, Dilthey, Clay & Bryson, by Reid Russell, and Maupin, Taylor, Ellis & Adams, P.A., by Elizabeth D. Scott, for defendant-appellee.

PER CURIAM

James A. Richardson (plaintiff) appeals from judgments of the trial court awarding him $30,000 (pursuant to a jury verdict) and taxing him with a portion of the court costs.

The evidence reveals that plaintiff had a series of three back surgeries between 8 December 1988 and 10 August 1989. During this same period of time plaintiff was involved in two automobile collisions, the first of which is the subject of this law suit. Prior to the trial the parties stipulated to defendant's negligence. The issue at trial was whether the first or the second collision was the proximate cause of plaintiff's injuries.

The plaintiff argues that the trial court committed prejudicial error in refusing to allow two medical doctors to offer their opinion regarding the relationship of plaintiff's injuries to the first collision. We disagree. In one instance the question called for mere speculation on the part of the doctor, *Cherry v. Harrell*, 84 N.C. App. 598, 604, 353 S.E.2d 433, 437, *disc. rev. denied*, 320 N.C. 167, 358 S.E.2d 49 (1987), and in the other instance the proffered testimony was cumulative. N.C.G.S. § 8C-1, Rule 403; *Lowery v. Love*, 93 N.C. App. 568, 572, 378 S.E.2d 815, 817 (1989). We have reviewed the other assignments of error asserted by the plaintiff and determine they must be dismissed because they either do not comply with the rules of this Court, *Kimmel v. Brett*, 92 N.C. App. 331, 334, 374 S.E.2d 435, 436-37 (1988) (assignments of error must state a basis upon which error is assigned); *Byrne v. Bordeaux*, 85 N.C. App. 262, 265, 354 S.E.2d 277, 279 (1987) (appellant must cite legal authority upon which his argument is based); N.C.R. App. P. 10(c)(2) (appellant must include his requested and denied jury instruction in the record on appeal), or on their merits do not require reversal.

No Error.

Panel consisting of: Judges JOHNSON, GREENE, LEWIS

AMANDA DAVIS, PLAINTIFF-APPELLEE v. TOWN OF SOUTHERN PINES; CHRIS VANDEREIT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; STANLEY KLINGENSCHMIDT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, DEFENDANTS-APPELLANTS

No. 9320SC889

(Filed 1 November 1994)

1. **Appeal and Error § 118 (NCI4th)— denial of summary judgment based on immunity claim—immediate appeal allowed**

The denial of a summary judgment motion on the grounds of absolute and qualified immunity is immediately appealable.

Am Jur 2d, Appeal and Error § 104.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

2. **Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)— civil rights action—jailing for public intoxication—summary judgment denied based on qualified immunity**

In plaintiff's claim for money damages under 42 U.S.C. § 1983 against defendant police officers in their individual capacities, the trial court properly denied defendants' motion for summary judgment based upon the qualified immunity defense where plaintiff alleged that defendants violated her Fourth and Fourteenth Amendment rights by taking her to jail solely for being intoxicated in a public place; based on the facts in the record, defendants did not have probable cause to believe that plaintiff was in need of assistance pursuant to N.C.G.S. § 122C-303; and there were disputed issues of fact regarding the officers' conduct so that summary judgment was inappropriate.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90 et seq.

Supreme Court's views as to application or applicability of doctrine of qualified immunity in action under 42

USCS § 1983, or in *Bivens* action, seeking damages for alleged civil rights violations. 116 L. Ed. 2d 965.

3. Appeal and Error § 118 (NCI4th)— waiver of governmental immunity—false imprisonment and negligence claims—merits not addressed on interlocutory appeal

Because defendant town waived its governmental immunity by the purchase of liability insurance, the trial court's denial of the town's motion for summary judgment on plaintiff arrestee's false imprisonment and negligence claims, based on the town's contention that it was exempt from liability for the conduct of its police officers, was not immediately appealable.

Am Jur 2d, Appeal and Error § 104.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

4. Constitutional Law § 81 (NCI4th)— constitutional claims—existence of adequate common law remedy—summary judgment on constitutional claims appropriate

The trial court erred in denying summary judgment on plaintiff's claims under Article I, §§ 1 and 19 of the North Carolina Constitution, since a direct cause of action under the State Constitution is permitted only in the absence of an adequate state remedy, and plaintiff's constitutional right not to be unlawfully imprisoned and deprived of her liberty are adequately protected by her common law claim of false imprisonment, which protects her right to be free from unlawful restraint.

Am Jur 2d, Actions §§ 40 et seq.; Constitutional Law §§ 557 et seq.

Appeal by defendants from order entered 29 June 1993 by Judge F. Fetzer Mills in Moore County Superior Court. Heard in the Court of Appeals 21 April 1994.

This is an action seeking relief for alleged violations of plaintiff's rights guaranteed by the Fourth Amendment to the United States Constitution and Article I, sections 1 and 19, of the Constitution of North Carolina and seeking money damages pursuant to 42 U.S.C. 1983. In addition, plaintiff asserted common law claims based on negligence and false imprisonment.

On 19 November 1992, defendants answered and asserted *inter alia* the defenses of governmental immunity, qualified immunity, and immunity pursuant to G.S. 122C-303. On 11 June 1993, defendants moved for summary judgment; plaintiff moved to oppose summary judgment or alternatively, to continue defendants' motion for summary judgment.

At a hearing on 28 June 1993, the trial court denied defendants' motion for summary judgment. Defendants appeal.

Rosenthal & Putterman, by Charles M. Putterman, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, by H. Lee Evans, Jr. and Kari Lynn Russwurm, for defendant-appellants.

EAGLES, Judge.

Defendants appeal the trial court's denial of their motion for summary judgment. After careful review of the record and briefs, we affirm in part and reverse in part.

[1] We note initially that the denial of a motion for summary judgment is ordinarily not immediately appealable. *Hill v. Smith*, 38 N.C. App. 625, 626, 248 S.E.2d 455, 456 (1978) (citations omitted). Here, defendants asserted the defenses of absolute and qualified immunity to plaintiff's 42 U.S.C. § 1983 claim and plaintiff's remaining claims. The denial of a summary judgment motion on the grounds of absolute and qualified immunity is immediately appealable. *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991); *Corum v. University of North Carolina*, 97 N.C. App. 527, 531, 389 S.E.2d 596, 598, *temporary stay allowed*, 326 N.C. 595, 394 S.E.2d 453, *review and writ allowed, dismissal denied*, 327 N.C. 137, 394 S.E.2d 170 (1990), *rev'd on other grounds*, 330 N.C. 761, 413 S.E.2d 276, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied, Durham v. Corum*, —— U.S. ——, 121 L.Ed.2d 431 (1992).

I. STANDARD OF REVIEW

A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact for trial and that the moving party is entitled to judgment as a matter of law. *Pressman v. University of N.C. at Charlotte*, 78 N.C. App. 296, 300, 337 S.E.2d 644, 647 (1985), *review allowed*, 315

N.C. 589, 341 S.E.2d 28 (1986). In passing upon a motion for summary judgment, the court must view the evidence presented by both parties in the light most favorable to the nonmoving party. *Bradshaw v. McElroy*, 62 N.C. App. 515, 518, 302 S.E.2d 908, 911 (1983).

The affidavits of plaintiff Davis and defendant Klingenschmidt are set out in pertinent part here:

AFFIDAVIT OF AMANDA DAVIS

. . . .

3. On or about September 22, 1991, sometime around 1:30 a.m., I was in the Town of Southern Pines. I had been in Brook's [a local bar] that evening.

4. I was walking to a phone booth so that I could call a cab to take me home.

5. I tripped and fell near the Southern Pines Police Department.

6. A Southern Pines police officer, who I have been informed was Chris Vandereit, approached me and asked what had happened.

7. Another Southern Pines police [sic], Stanley Klingenschmidt, approached me, soon after Officer Vandereit, and told me that he was taking me to jail because I was drunk and a danger to myself. Officer Klingenschmidt did not talk with me before telling me that I was going to jail.

8. I explained that I was not bothering anyone and that I was on the way to a phone booth to call a cab to take me home.

9. Officer Klingenschmidt's response was to say that I was going to jail. He did not allow me to call a cab.

10. Michelle Brown, who was present, explained that she was my sister, that we were planning to call a cab to take us home, and that she would take care of me. The officers did not allow Ms. Brown to call a cab for us.

11. Officer Klingenschmidt told Ms. Brown that if she did not shut up, she would be taken to jail also.

12. Neither Officer Klingenschmidt or Vandereit asked if there was somewhere else I could go.

13. Neither Officer asked if there was someone I could call to come and get me.

14. The officers did not offer to take me home, which is about 8 miles from where we were, instead of the jail, which is about 15 miles from there.

15. Although I had been drinking, I was not a danger to myself or others. I was capable of looking out for myself. At the time Officers Klingenschmidt and Vandereit took me to the jail I was not in immediate need of medical care.

16. I was fully capable of calling a cab to take me home.

17. I was fully capable of walking to the home of Susan Phillips, another sister who lived nearby. Although I did not get along with Ms. Phillips' husband, I would have preferred to go to her house and wait outside for my mother or father to come get me than to go to jail. I was never given that option. The officers did not ask any questions that would have let them know that option existed.

18. My sister, Ms. Brown, was willing to help me get home and to look out for me. I never refused her help. Before the officers arrived, Ms. Brown and I were planning to take a cab together. At the time, Ms. Brown was staying with our parents who live near my home.

19. My mother took me and my sister to Southern Pines that evening. If necessary, I could have called her and asked her to pick me up.

20. My father tried to get me out of jail soon after I was placed there, but was not allowed to get me out until around 11:00 a.m. I could have called him and asked him to come get me had the officers allowed me to call him or even asked if that was a possibility.

21. Despite my requests, the officers would not allow me to use a phone to call anyone.

22. Officers Klingenschmidt and Vandereit took custody of me. They placed me in the front seat. Officer Vandereit drove. Officer Klingenschmidt sat in the back seat. I was not handcuffed.

23. The officers took me to the Moore County Jail, in Carthage, approximately 15 miles from the Town of Southern Pines.

24. Before putting me in jail, Officer Klingenschmidt said words to this effect: "You think you've had a good time tonight, you're going to have a real good time now." He also told me, "Bitch, you're going to jail. You're drunk and you're going to jail."

25. Soon after I was placed in a jail cell, I was assaulted by a detainee. I did not provoke the assault.

26. I received a fractured nose, a scratched eye, and bruises during the assault.

27. I was kept in the jail until about 11:00 a.m. that morning.

AFFIDAVIT OF STANLEY L. KLINGENSCHMIDT

. . . .

1. My name is Stanley L. Klingenschmidt, and I am a lieutenant with the Southern Pines Police Department. I was a master police officer with the police department in September of 1991.

2. In the early morning hours of September 22, 1991, I was on routine patrol with officer-trainee, Chris Vandereit, traveling south on Southwest Broad Street in Southern Pines, North Carolina. We observed three white females out in front of the Southern Pines Post Office on Broad Street. As we got closer, I observed one female fall to the ground and one of the others tried to help her up.

3. We stopped the police car and got out of the car to approach the three females.

4. Two of the females were talking loudly to one another, and it appeared to us that they were arguing about something. We spoke to the two females who were talking loudly, and both appeared to have been drinking. One of the females, Amanda Davis, appeared to be extremely intoxicated. The other female, her sister, did not seem as intoxicated, nor did it appear that she needed any assistance.

5. Ms. Davis' sister informed us that they had just left the bar and were trying to get Ms. Davis home. We were informed that Ms. Davis lived in Hoke County.

6. We tried to get Ms. Davis to go home with her sister, but she refused. She used profane language towards us and said she was going to sit on the bench in front of the post office.

7. I informed Ms. Davis that in her condition, she could not be left there because she could be a danger to herself and that if she did not go home with her sister, that we would have to take her to jail until she sobered up. Ms. Davis continued to refuse to go with her sister.

8. At that point, we decided to take her to the Moore County jail. It was my opinion that she would be a danger to herself and possibly others if she was allowed to remain on the streets for any period of time. There was no other facility available to receive Ms. Davis in her condition that night.

9. We placed Ms. Davis in the patrol car and took her to the Moore County jail, where she was left in the custody of the Moore county jailers.

II. PLAINTIFF'S 42 U.S.C. § 1983 CLAIM

[2] Plaintiff alleged a claim for money damages under 42 U.S.C. § 1983 (hereinafter section 1983) against defendants Klingenschmidt and Vandereit (hereinafter defendant officers) in their individual capacities. We note that plaintiff does not allege that defendant town violated section 1983. Plaintiff's complaint alleges that defendant officers "unreasonably seized Plaintiff Davis in violation of the Fourth Amendment to the United States Constitution" and "deprived Plaintiff Davis's [sic] of her liberty without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, thus establishing a cause of action under 42 U.S.C. § 1983."

Section 1983 provides that:

> 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 to redress.

Corum v. University of North Carolina, 330 N.C. 761, 770, 413 S.E.2d 276, 282 (1992).

"[S]tate governmental officials [may] be sued in their individual capacities for [monetary] damages under section 1983." *Id.* at 772, 413

S.E.2d at 283. Government officials sued under section 1983 may raise the defense of qualified immunity. *Id.* (citations omitted).

"The test of qualified immunity for police officers sued under [section 1983] is whether [the officers' conduct violated] clearly established statutory or constitutional rights of which a reasonable person would have known." *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994) (citations omitted). In ruling on the defense of qualified immunity we must: (1) identify the specific right allegedly violated; (2) determine whether the right allegedly violated was clearly established at the time of the violation; and (3) if the right was clearly established, determine whether a reasonable person in the officer's position would have known that his actions violated that right. *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). The first two determinations are questions of law for the court and should always be decided at the summary judgment stage. *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992); *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994). However, "the third [determination] . . . require[s] [the factfinder to make] factual determinations [concerning] disputed aspects of the officer[s'] conduct." *Lee v. Greene*, 114 N.C. App. at 585, 442 S.E.2d at 550 (citations omitted).

First, we identify the right allegedly violated. Here, plaintiff contends that defendant officers violated her Fourth and Fourteenth Amendment rights by taking her to jail solely for being publicly intoxicated. G.S. 14-447(a) provides that "[n]o person may be prosecuted solely for being intoxicated in a public place. A person who is intoxicated in a public place and is not disruptive may be assisted as provided in G.S. 122C-301." G.S. 122C-301(a) provides that:

> (a) An officer may assist an individual found intoxicated in a public place by taking any of the following actions:
>
> (1) The officer may direct or transport the intoxicated individual home;
>
> (2) The officer may direct or transport the intoxicated individual to the residence of another individual willing to accept him;
>
> (3) If the intoxicated individual is apparently in need of and apparently unable to provide for himself food, clothing, or shelter but is not apparently in need of immediate medical care, the officer may direct or transport him to an appropriate public or private shelter facility;

(4) If the intoxicated individual is apparently in need of but apparently unable to provide for himself immediate medical care, the officer may direct or transport him to an area facility, hospital, or physician's office; or the officer may direct or transport the individual to any other appropriate health care facility; or

(5) If the intoxicated individual is apparently a substance abuser and is apparently dangerous to himself or others, the officer may proceed as provided in Part 8 of this Article.

We now decide whether plaintiff's right not to be taken to jail was "clearly established" under the particular circumstances. Plaintiff contends that defendant officers did not follow the procedures in G.S. 122C-301(a) before taking plaintiff to jail pursuant to G.S. 122C-303. Defendants respond that in their judgment plaintiff was in need of assistance as contemplated by G.S. 122C-303. G.S. 122C-303 allows a police officer to assist a publicly intoxicated individual by taking the person to jail but "**only if** the intoxicated individual is apparently in need of and apparently unable to provide for himself food, clothing, or shelter but is not apparently in need of immediate medical care and if no other facility is readily available to receive him." G.S. 122C-303 (emphasis added). Taking plaintiff to jail against her will constituted an arrest. *State v. Sanders*, 295 N.C. 361, 245 S.E.2d 674 (1978), *cert. denied*, *Sanders v. North Carolina*, 454 U.S. 973, 70 L.Ed.2d 392 (1981) (citations omitted).

In determining whether a constitutional right not to be arrested under particular circumstances was "clearly established," we must identify both "the facts known to the arresting officer and the contours of the offense asserted as the justification for the arrest." *Pritchett v. Alford*, 973 F.2d at 314. The right is clearly established if the officers lacked probable cause "on either or both the factual knowledge or legal understanding components of the equation." *Pritchett*, 973 F.2d at 314 (citations omitted). Probable cause is defined as "those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent [person] in believing that the suspect had committed or was committing an offense." *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985) (citations omitted).

In examining the facts and circumstances known to the officers at the time of the arrest to determine whether summary judgment was properly denied, we must view the evidence in the light most favor-

able to plaintiff. *Bradshaw*, 62 N.C. App. at 518, 302 S.E.2d at 911. Plaintiff and her sister had been drinking at a nearby club and were walking down the street to a phone booth to call a cab to take them home when plaintiff tripped and fell. As plaintiff's sister was helping her get up, defendant Vandereit arrived and asked plaintiff, "What happened?" Plaintiff responded, "I fell." Officer Vandereit then asked plaintiff, "Are you drunk?" Plaintiff testified in her deposition that she answered, "I'm not bothering anybody." Defendant Klingenschmidt then approached plaintiff and told plaintiff that she was going to jail. Plaintiff's deposition continues as follows:

> Q. Okay. What did Officer Klingenschmidt said? [sic]
>
> A. He said I was going to jail?
>
> Q. Why did he say that?
>
> A. Because I was drunk . . . and a danger to myself. I said, "from what?" And he said, "Because you're drunk." And I said, "I'm not bothering anyone. I'm just going to call a cab." Then he said, "Well, you're going to jail."

Plaintiff testified further in her deposition that before placing her in the police car, defendant Klingenschmidt told plaintiff, "Bitch, you're going to jail. You're drunk and you're going to jail." In her affidavit plaintiff stated that when her sister offered to call a cab for plaintiff and take care of plaintiff, defendants told plaintiff's sister "that if she did not shut up, she would be taken to jail also." From the record it appears that the operative facts known to defendant officers at the time of the plaintiff's arrest were that plaintiff was publicly intoxicated at 1:30 a.m. and that while walking to a phone booth to call a cab she tripped and fell. Plaintiff told defendants that she was not bothering anybody and that she was going to call a cab to take her home. Plaintiff's sister offered to call a cab for plaintiff and take care of plaintiff.

We conclude that on these facts, defendants did not have probable cause to believe that plaintiff was in need of assistance pursuant to G.S. 122C-303. Since defendants did not have probable cause to arrest plaintiff pursuant to G.S. 122C-303 under the plaintiff's forecast of evidence, the right allegedly violated was clearly established.

Finally, we turn to the third part of our qualified immunity analysis. The third inquiry is whether the conduct at issue actually occurred and if so, whether a reasonable officer would have known

that his conduct would violate that right. As stated earlier, this third inquiry cannot be answered on summary judgment if there are disputed questions of fact regarding the officers' conduct. *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994). Here, there is a dispute as to what defendants said upon arriving at the scene. Defendant Klingenschmidt stated in his affidavit that plaintiff refused to go home with her sister and that plaintiff was belligerent. Plaintiff testified in her deposition and in her affidavit that she did not refuse to go home with her sister. Because this creates an issue of material fact as to whether defendants' actions were reasonable under the circumstances, the trial court properly reserved this issue for trial. Accordingly, we affirm the trial court's denial of defendant officers' motion for summary judgment based upon the qualified immunity defense.

III. Plaintiff's False Imprisonment and Negligence Claims

[3] All defendants contend that the trial court erred in denying their motion for summary judgment on plaintiff's false imprisonment and negligence claims. Because defendant town has waived its immunity as explained below, we decline to address the merits of those two claims in this interlocutory appeal.

Plaintiff sued defendant officers in both their official and individual capacities on both claims and claimed that their actions could be imputed to defendant town. However, if a plaintiff "fails to advance any allegations in his or her complaint other than those relating to a defendant's official duties, the complaint does not state a claim against a defendant in his or her individual capacity." *Taylor v. Ashburn*, 112 N.C. App. 604, 607-08, 436 S.E.2d 276, 279 (1993), *review denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). Instead, we treat the complaint as a claim against defendant in his official capacity. *Id.* Here, plaintiff's allegations regarding her claims of false imprisonment and negligence relate only to defendants' official duties as police officers. Accordingly, plaintiff's complaint states a claim against defendant officers in their official capacities only.

A. Governmental Immunity

Under the common law doctrine of governmental immunity, "a municipality is immune from liability for the torts of its officers committed while they were performing a governmental function." *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985), *cert. denied*, 320 N.C. 178, 358 S.E.2d 72 (1987). This immuni-

ty protects the municipality and its officers and employees sued in their official capacities. *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 279 (1993) (citations omitted). A municipality may waive its governmental immunity by purchasing liability insurance. *Id*; G.S. 160A-485. However, immunity is waived only to the extent of the coverage of the liability insurance. G.S. 160A-485(a); *Wiggins v. City of Monroe*, 73 N.C. App. 44, 50, 326 S.E.2d 39, 43 (1985).

Here, defendant town admitted in its answer that it had purchased liability insurance for "certain acts by its officers, agents, or employees when acting within the scope of their authority and course of their employment" and that governmental immunity had been waived "to the limited extent allowed by N.C. Gen. Stat. § 160A-435." Defendant town does not argue that defendant officers were acting outside the course and scope of their employment at the time they took plaintiff to jail. Accordingly, defendants are not immune from liability for the torts of defendant officers to the extent of defendant town's liability insurance.

B. Plaintiff's False Imprisonment Claim

The sole issue before us in this interlocutory appeal is whether the trial court erred in denying summary judgment with regard to defendants' immunity defenses. Defendants have admitted that they are not shielded by immunity because they purchased liability insurance. Therefore, we decline to address the merits of the false imprisonment issue here, since a denial of summary judgment on that basis would be interlocutory and not immediately appealable.

In its defense of plaintiff's false imprisonment claim, defendant town also contends that it is exempt from liability under G.S. 122C-301(b) for the conduct of defendant officers. We have already noted that while the denial of a summary judgment motion is ordinarily interlocutory, the denial of a summary judgment motion on the grounds of sovereign and qualified immunity is an exception to the rule and is immediately appealable. The exemption from liability afforded to officers pursuant to G.S. 122C-301(b) is not included in this limited exception. Accordingly, we also decline to address the merits of defendants' defense under G.S. 122C-301(b) in this interlocutory appeal.

C. Plaintiff's Negligence Claim

Defendants further contend that the trial court erred in denying summary judgment on plaintiff's negligence claim. For the reasons

stated above with regard to plaintiff's false imprisonment claim, we decline to reach plaintiff's negligence claim in this limited interlocutory appeal.

IV. Plaintiff's State Constitutional Law Claim

[4] Finally, defendants contend that the trial court erred in denying summary judgment on plaintiff's claims under Article I, sections 1 and 19 of the North Carolina Constitution. We agree.

> Article I, sections 1 and 19 provide in pertinent part:
>
> Section 1. The equality and rights of persons.
>
> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.
>
> Section 19. Law of the land; equal protection of the laws.
>
> No person shall be taken, imprisoned, . . . or in any manner deprived of his life, liberty, or property, but by the law of the land. . . .

Plaintiff contends in her brief that if her state constitutional rights are to be protected, she must be allowed a direct cause of action under the State Constitution. However, a direct cause of action under the State Constitution is permitted only "in the absence of an adequate state remedy." *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992).

> When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, [] the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power.

Id. at 784, 413 S.E.2d at 291 (citations omitted).

Here, there is an adequate state remedy for plaintiff's injury. Plaintiff's constitutional right not to be unlawfully imprisoned and deprived of her liberty are adequately protected by her common law claim of false imprisonment, which protects her right to be free from unlawful restraint. *Alt v. Parker*, 112 N.C. App. 307, 317, 435 S.E.2d 773, 779 (1993), *cert. denied*, 335 N.C. 766, 442 S.E.2d 507 (1994). If

plaintiff's false imprisonment claim is successful, she will be compensated for the injury she claims in her direct constitutional claim. *Id.* at 317-18, 435 S.E.2d at 779. Accordingly, we reverse and remand for entry of summary judgment for defendants on plaintiff's state constitutional claims.

V.

In sum, we affirm the trial court's denial of summary judgment on plaintiff's section 1983 claim and her state common law claims of negligence and false imprisonment. We reverse the trial court's denial of summary judgment on plaintiff's claims under the State Constitution. Accordingly, we remand this case to the trial court for entry of summary judgment on the state constitutional claims and for trial of the remaining claims.

Affirmed in part, reversed in part and remanded.

Judges LEWIS and WYNN concur.

SHAURICE EVETTE MULLINS, A MINOR, BY HER GUARDIAN AD LITEM, THOMAS MULLINS, PLAINTIFF/APPELLEE v. BRODY'S STORE MANAGER, MRS. [DIXIE] FRIEND; ROGER FOREMAN, SECURITY GUARD, BRODY'S BRODYCO, INC.; AND PATROLMAN WOOLARD, GREENVILLE POLICE DEPARTMENT; AND BARBARA VOLCHER, BRODY'S EMPLOYEE, DEFENDANTS/APPELLANTS

No. 933SC1184

(Filed 1 November 1994)

1. Municipal Corporations § 444 (NCI4th)— claim against police officer—no allegation of purchase of insurance—immunity in official capacity

Plaintiff failed to state a claim for false imprisonment against defendant police officer in his official capacity where plaintiff did not allege a waiver of immunity by the purchase of liability insurance by the municipality.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 37 et seq.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 ALR2D 1437.

2. Municipal Corporations § 459 (NCI4th)— police officer—no action outside scope of duties—immunity in individual capacity

The trial court erred in concluding that plaintiff was entitled to recover judgment against defendant police officer in his individual capacity for false imprisonment where the officer responded to a shoplifting call involving plaintiff, acted at all times in accordance with his good faith belief that plaintiff had concealed merchandise, and at no time acted in a manner which was corrupt, malicious, or outside and beyond the scope of his duties, and thus had qualified immunity.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 675 et seq.

3. False Imprisonment § 9 (NCI4th)— sufficiency of evidence of false imprisonment

The trial court did not err in concluding that plaintiff was falsely imprisoned and that she did not voluntarily consent to the search of her shopping bag and her person where the evidence tended to show that defendant store manager and a male employee escorted plaintiff, her father, and her brother back into the store from the parking lot; two security guards entered the office, and a police officer who was armed and in uniform arrived; plaintiff was asked to empty her shopping bag and told she needed to be searched; when plaintiff objected, the officer told her that he had probable cause to suspect that she had concealed merchandise; and these facts were sufficient to induce in plaintiff a reasonable apprehension of force and to support the conclusion that she was restrained against her will.

Am Jur 2d, False Imprisonment § 13.

4. False Imprisonment § 9 (NCI4th)— customer detained by store manager—no probable cause to believe crime committed—manager not immune from suit

Defendant department store manager was not immune from plaintiff's suit for false imprisonment pursuant to N.C.G.S. § 14-72.1(c), since defendant did not have probable cause to believe that plaintiff had committed a crime at the store.

Am Jur 2d, False Imprisonment § 13.

Construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters. 47 ALR3d 998.

5. False Imprisonment § 11 (NCI4th)— amount of damages— no abuse of discretion

The trial court in an action for false imprisonment did not abuse its discretion in awarding plaintiff $10,000 in compensatory damages.

Am Jur 2d, False Imprisonment §§ 134-150.

Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest. 48 ALR4th 165.

6. False Imprisonment § 11 (NCI4th)— punitive damages improperly awarded

The trial court erred in determining that plaintiff was entitled to recover punitive damages from defendant store manager for false imprisonment where defendant's actions did not involve insult, indignity, malice, oppression, or bad motive, and were not willful or wanton.

Am Jur 2d, False Imprisonment §§ 134-150.

Pleading good faith or lack of malice in mitigation of damages in action for false arrest or imprisonment. 49 ALR2d 1460.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment. 93 ALR3d 1109.

Judge JOHNSON concurring in part and dissenting in part.

Appeal by defendants Dixie Friend and T.V. Woolard from judgment signed 7 May 1993 and filed 12 May 1993 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 1 September 1994.

John H. Harmon for plaintiff-appellee.

Battle, Winslow, Scott & Wiley, P.A., by J. Brian Scott and M. Greg Crumpler, for defendant-appellant Dixie Friend.

Ward and Smith, P.A., by Kenneth R. Wooten and Cheryl A. Marteney, for defendant-appellant T.V. Woolard.

LEWIS, Judge.

Plaintiff commenced this action for, *inter alia*, false imprisonment. After a bench trial, the trial court concluded that plaintiff had been falsely imprisoned and awarded her compensatory damages of $10,000 against defendant Dixie Friend, $10,000 against defendant T.V. Woolard, and punitive damages of $10,000 against each. We note that the other defendants named in the complaint were not served with process and were not parties to this action. From the judgment, defendants Friend and Woolard appeal.

The evidence presented at trial tended to show that on the afternoon of 25 April 1991, plaintiff, sixteen years old at the time, went with her father and brother to the Pitt Plaza Mall in Greenville. After making a purchase at the Foot Locker store, plaintiff went, along with her father and brother, to Brody's Department Store (hereinafter "Brody's" or "the store") to purchase footless stockings. Plaintiff's father remained at the entrance, and plaintiff and her brother went into the store. Plaintiff, wearing bib overalls and carrying a shopping bag, approached a store clerk to find out where the stockings were located, and was informed by the clerk that they were around the corner. From her vantage point, the clerk could not see the area where the stockings were displayed.

Plaintiff located the stockings and, upon seeing the price tag, called her brother over to discuss the purchase with him. The two decided the stockings were too expensive, and plaintiff placed the stockings back on the shelf. While plaintiff was examining the stockings, the store clerk, still unable to see the area where the stockings were displayed, heard the sound of rustling paper coming from that area. The clerk went over to the stocking area and saw that plaintiff had nothing in her hands. Plaintiff and her brother then left the area. The clerk noticed that plaintiff was walking with a limp. Plaintiff and her brother met their father, and the three left the store.

After the family left the store, the clerk reported to Friend, the store manager, that she suspected plaintiff of shoplifting. The clerk described to Friend what she had heard and seen and stated that she thought that plaintiff had put merchandise in her overalls. Friend and a male employee, identified as Todd, followed the Mullins out of the shopping center and into the parking lot. Friend and Todd caught up to the Mullins and told them that they needed to come back into the store. Friend and Todd took the Mullins to Friend's office, and Friend directed Todd to stay with the Mullins while she went to get security.

While Friend was gone, plaintiff's father went to look outside the office, and Todd told him to sit back down. Thereafter, two security guards entered the office. Friend also returned to the office. A short time later, Officer Woolard, of the Greenville Police Department, arrived at the store, and Friend told Officer Woolard what the store clerk had reported to her. Officer Woolard entered the office and advised the Mullins to calm down and cooperate. Friend then asked plaintiff to empty her Foot Locker shopping bag onto the table, but plaintiff's father protested. Officer Woolard repeated the request. After plaintiff's father got the names of the people in the office, he allowed plaintiff to empty her bag. No Brody's merchandise was found.

Officer Woolard then stated that plaintiff needed to be searched. When plaintiff objected, Officer Woolard told plaintiff that he had probable cause to suspect that she had concealed merchandise. Plaintiff then acceded and went into a bathroom with only a female employee of Brody's. Plaintiff was directed to pull down her pants and lift up her shirt. She did not remove her bra or underpants. Again, no merchandise was found. Plaintiff then got dressed and went back into Friend's office upset and crying. Friend apologized and told the Mullins they could leave. From the time the Mullins were stopped in the parking lot to the time they were told they were free to leave, between thirty minutes and one hour passed.

Defendant Woolard's Appeal

Officer Woolard first contends that the trial court erred in entering judgment against him, because he was immune from suit. It is not clear whether plaintiff brought her action against Officer Woolard in his official capacity as a Greenville Police Officer, in his individual capacity, or both. However, for the following reasons, we conclude that Officer Woolard was immune from suit in either capacity.

[1] We first discuss official capacity immunity. Under the doctrine of governmental immunity, a municipality and its officers or employees sued in their official capacities are immune from suit for torts committed while the officers or employees are performing a governmental function. *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278-79 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). A police officer in the performance of his duties is engaged in a governmental function. *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 175, 171 S.E.2d 427, 429 (1970). A city can waive its immunity, however, by purchasing liability insurance. N.C.G.S. § 160A-485(a) (1987);

Combs v. Town of Belhaven, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992). Immunity is waived only to the extent that the city is indemnified by the insurance contract from liability for the acts alleged. *Id.* If the plaintiff does not allege a waiver of immunity by the purchase of insurance, the plaintiff has failed to state a claim against the governmental unit or the officer or employee. *Whitaker v. Clark*, 109 N.C. App. 379, 384, 427 S.E.2d 142, 145, *disc. review and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). In the case at hand, plaintiff did not allege a waiver of immunity. Accordingly, plaintiff failed to state a claim against Officer Woolard in his official capacity.

[2] We next address the propriety of suing Officer Woolard in his individual capacity. The general rule is that a public official is immune from personal liability for mere negligence in the performance of his duties, but is not immune if his actions were corrupt or malicious or if he acted outside and beyond the scope of his duties. *Slade v. Vernon*, 110 N.C. App. 422, 428, 429 S.E.2d 744, 747 (1993). Police officers are public officials. *Shuping v. Barber*, 89 N.C. App. 242, 248, 365 S.E.2d 712, 716 (1988).

In the case at hand, Officer Woolard responded to a shoplifting call from Brody's. When he arrived, he was told what the clerk had reported, and he proceeded to the manager's office, where plaintiff was being detained. Officer Woolard told plaintiff and her family to calm down and to cooperate. He then repeated Friend's request that plaintiff empty her shopping bag. When it was clear that no Brody's merchandise was in plaintiff's bag, Officer Woolard stated that plaintiff needed to be searched. When plaintiff objected, Officer Woolard told her that he had probable cause to suspect that she had concealed merchandise. Plaintiff then went into a bathroom with a female employee and pulled down her pants and lifted up her shirt. Officer Woolard's participation in the detention lasted approximately ten minutes. His actions were at all times in accordance with his good faith belief that plaintiff had concealed merchandise. Officer Woolard's actions were not corrupt, malicious, or outside and beyond the scope of his duties. Therefore, Officer Woolard was entitled to qualified immunity from suit. Accordingly, the trial court erred in concluding that plaintiff was entitled to recover judgment against Officer Woolard for false imprisonment. We note that our disposition of this issue makes it unnecessary to address Officer Woolard's remaining contentions on appeal.

Defendant Friend's Appeal

I.

[3] Friend's first contention is that the trial court erred in concluding that plaintiff was falsely imprisoned. The tort of false imprisonment has been defined by our Supreme Court as follows:

> "False imprisonment is the illegal restraint of the person of any one against his will." . . . "There is no legal wrong unless the detention was involuntary. False imprisonment may be committed by words alone, or by acts alone, or by both; it is not necessary that the individual be actually confined or assaulted, or even that he should be touched. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment."

Hales v. McCrory-McLellan Corp., 260 N.C. 568, 570, 133 S.E.2d 225, 227 (1963) (citations omitted).

Friend first argues that no threat of force, express or implied, was manifested against plaintiff, and that plaintiff was not restrained against her will. We disagree. Friend and Todd escorted plaintiff and her father and brother back into the store and into Friends's office. In the presence of the Mullins, Friend told Todd to stay with the Mullins in the office while she went to get security. Thereafter, two security guards entered the office. Then Friend returned, and Officer Woolard arrived. Officer Woolard was in uniform and had his gun. Friend and Officer Woolard requested that plaintiff empty her shopping bag. Then Officer Woolard told plaintiff that she needed to be searched. When plaintiff objected, Officer Woolard told plaintiff that he had probable cause to suspect that she had concealed merchandise. We believe that these facts were sufficient to induce in plaintiff a reasonable apprehension of force, *see Ayscue v. Mullen*, 78 N.C. App. 145, 148, 336 S.E.2d 863, 865 (1985), and to support the conclusion that plaintiff was restrained against her will.

Friend's next argument is that the trial court's finding of fact that plaintiff did not voluntarily consent to the search of her shopping bag and her person was not supported by the evidence. Friend argues, instead, that plaintiff did consent to the searches. Based on the facts and circumstances as set forth above, however, we conclude that the searches were not consensual, but were the result of intimidation.

Regardless, it is clear that plaintiff did not consent to the illegal restraint of her person, and thus was falsely imprisoned.

[4] Lastly, Friend argues that even if plaintiff was falsely imprisoned, Friend is immune from suit pursuant to N.C.G.S. § 14-72.1(c) (1993), which provides in part that a merchant or his employee shall not be held civilly liable for detention or false imprisonment of a person where such detention is in a reasonable manner, for a reasonable length of time, and there is probable cause to believe that the person has willfully concealed goods or merchandise from the store. Probable cause has been defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. One has probable cause if he has information of facts which if submitted to a magistrate would require the issuance of an arrest warrant." *State v. Narcisse*, 90 N.C. App. 414, 421, 368 S.E.2d 654, 658, *disc. review denied*, 323 N.C. 368, 373 S.E.2d 553 (1988) (citation omitted).

In the case at hand, the trial court concluded that Friend did not have probable cause to believe that plaintiff had committed a crime at Brody's. Friend contends, however, that she did have probable cause to believe that plaintiff had willfully concealed merchandise from the store. The facts reveal that Friend had no first-hand knowledge of plaintiff's actions. The sales clerk reported to Friend that plaintiff and two other people had entered the store together talking loudly. One of the three remained near the store entrance, and the other two proceeded to the clerk's department. Plaintiff asked the clerk to direct her to a particular section of the department and the clerk did. Plaintiff then motioned to the man standing at the entrance, indicating the location of the particular section. From her vantage point, the clerk could not see that section. The clerk did hear a noise coming from the section, however, and it sounded like the rustling of paper. The clerk went to the section and saw plaintiff, who had been joined by the second person. The clerk observed that plaintiff was not holding anything. The second person then left the section. Plaintiff also left and headed toward the exit. The clerk noticed that plaintiff was walking with a limp. The clerk believed that plaintiff had concealed merchandise in her clothing, but admitted to Friend that she never saw plaintiff conceal anything.

Friend testified that from her experience in store security, she knew that it was common for shoplifters to wear loose-fitting clothing, and that shoplifters often engaged in "splitting." That is, the

shoplifter and another person split up, with the other person remaining near the store's entrance. Friend contends that from her experience and from what the clerk reported to her, she had probable cause to suspect that plaintiff had concealed merchandise. We disagree. Friend's suspicion was not "supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *Narcisse*, 90 N.C. App. at 421, 368 S.E.2d at 658. Likewise, the facts known to Friend, if submitted to a magistrate, would not require the issuance of an arrest warrant. *Id.* Thus, the trial court did not err in concluding that Friend did not have probable cause. Because Friend did not have probable cause, she is not immune from suit under N.C.G.S. § 14-72.1(c) even though her actions were otherwise reasonable.

II.

[5] Friend's next contention on appeal is that even if she is liable for false imprisonment, the trial court's award of $10,000 in compensatory damages is excessive. The trial court's award of damages at a bench trial is a matter within its sound discretion, and will not be disturbed on appeal as being excessive unless an abuse of discretion is manifest. *Sherrill v. Boyce*, 265 N.C. 560, 561, 144 S.E.2d 596, 598 (1965). In the case at hand, plaintiff testified that she was "very upset" after the search of her person. Plaintiff's father testified that after plaintiff was searched, she returned to the office upset and crying. Finally, plaintiff testified that her friends at school found out about the incident. We conclude that there was no manifest abuse of discretion in the award of compensatory damages.

III.

[6] Friend's final contention is that the evidence was insufficient to support an award of punitive damages. To justify an award of punitive damages, the tort in question must be accompanied by *additional* aggravating or outrageous conduct. *Rogers v. T.J.X. Cos.*, 329 N.C. 226, 230, 404 S.E.2d 664, 666 (1991). Outrageous conduct involves " 'insult, indignity, malice, oppression or bad motive.' " *Id.* (quoting *Swinton v. Savoy Realty Co.*, 236 N.C. 723, 727, 73 S.E.2d 785, 788 (1953)). Aggravation may also be shown where the wrongful conduct is willful or wanton. *Id.* at 230, 404 S.E.2d at 666-67.

Our research has revealed only two cases addressing the issue of punitive damages for false imprisonment in a commercial establishment. In *Rogers v. T.J.X. Cos.*, the plaintiff was detained by a store

security officer, who was wearing a badge of his own design, and another employee for approximately thirty-five minutes. Upon being taken to the security office, the plaintiff denied any wrongdoing and immediately dumped the contents of her purse onto the desk in an effort to prove her innocence. The officer ignored the plaintiff's protests and directed her to have a seat. The officer repeatedly questioned and badgered the plaintiff about the location of the allegedly missing merchandise. He then told the plaintiff that he could handcuff her to a chair, call the police, and have them put her in jail. The officer then forced the plaintiff to sign a release of liability as a condition of her release from his custody. In addition, the plaintiff was made to disclose her social security number, driver's license number, and telephone number before being released. The Court concluded that this evidence demonstrated sufficient aggravation of the tort of false imprisonment to survive the defendants' motion for summary judgment on the issue of punitive damages. *Id.* at 232, 404 S.E.2d at 668.

In *Ayscue v. Mullen*, 78 N.C. App. 145, 336 S.E.2d 863 (1985), the defendant store owner had a policy in effect which required customers who did not make a purchase to obtain a "no sale slip" before leaving each department. The two plaintiffs, unaware of the policy, tried to leave the store without a slip. The defendant cashier asked them if they had a slip, and the plaintiffs replied that they did not. The cashier then asked one of the plaintiffs if she was going to get one, and the plaintiff replied, "No." The cashier jumped over the counter, bolted the door, stood in front of it, and would not let the plaintiffs leave. He told the plaintiffs they could not leave without a "no sale slip." The cashier then asked the second plaintiff if she was going to get a slip, and she, too, not knowing of the policy, replied, "No." The cashier never told the plaintiffs why they were being detained. In an attempt to leave the store, the first plaintiff pushed the cashier. The cashier pushed her back with his chest. The plaintiffs then offered to let the cashier search their purses or call the police, but the cashier refused. Shortly thereafter, the owner of the store instructed the cashier that the plaintiffs were okay and to let them out. The detention lasted from three to five minutes. This Court held that "there was an entire lack of those elements of outrageous conduct which would subject the defendants to punitive damages." *Id.* at 149, 336 S.E.2d at 866.

In the case at hand, as in *Ayscue*, the false imprisonment was not accompanied by additional aggravating or outrageous conduct. While Friend erroneously believed she had probable cause to detain plain-

tiff, Friend's actions did not involve insult, indignity, malice, oppression, or bad motive, and were not willful or wanton. We therefore hold that the trial court erred in finding that Friend engaged in outrageous conduct and in concluding that Friend's outrageous conduct entitled plaintiff to recover punitive damages from Friend.

For the reasons stated, the judgment against Friend is affirmed as to the award of compensatory damages and reversed as to the award of punitive damages. The judgment against Officer Woolard is reversed.

Affirmed in part, reversed in part.

Judge GREENE concurs.

Judge JOHNSON concurs in part and dissents in part.

Judge JOHNSON concurring in part and dissenting in part.

I concur in all respects except in regards to defendant Friend's punitive damages. As to this, I respectfully dissent.

To justify an award of punitive damages for false imprisonment, an additional element of aggravating or outrageous conduct must exist. *Blackwood v. Cates*, 297 N.C. 163, 254 S.E.2d 7 (1979); *Rogers v. T.J.X. Companies*, 329 N.C. 226, 404 S.E.2d 664 (1991). "Evidence of insult, indignity, malice, oppression or bad motive" constitutes outrageous behavior. *Id.* at 230, 404 S.E.2d at 666.

Requiring plaintiff to drop her pants down to her ankles and lift her shirt up was more than enough evidence of insult, indignity and oppression constituting aggravating or outrageous conduct. The evidence presented shows that plaintiff was unjustly detained and subjected to outrageous conduct without benefit of probable cause. Under the facts and circumstances of this case the conduct was outrageous and exceeded the bounds of common decency.

Thus, I respectfully dissent and would affirm the trial court's award for punitive damages.

MARCIA ENNS AND ROD ENNS, PLAINTIFFS-APPELLANTS v. THE ZAYRE CORPORATION, INC., D/B/A ZAYRE, THE TJX COMPANIES, INC., FORMERLY THE ZAYRE CORPORATION D/B/A ZAYRE, DEFENDANT-APPELLEE

No. 9321SC1091

(Filed 1 November 1994)

1. Trial § 265 (NCI4th)— objection to submission of contributory negligence—objection not equivalent to directed verdict motion

The trial court erred in holding that plaintiff's objection to the submission of contributory negligence was the equivalent of a motion for directed verdict.

Am Jur 2d, Trial § 938.

2. Negligence § 109 (NCI4th)— contributory negligence—insufficiency of evidence

In an action to recover for injuries sustained by plaintiff when she was struck in the head by merchandise falling off a shelf in defendant's store, the trial court erred in submitting the issue of contributory negligence to the jury where the evidence established at best that plaintiff touched merchandise on a shelf, but there was no evidence that plaintiff disregarded her legal duty to exercise due care for herself.

Am Jur 2d, Negligence §§ 1096 et seq.; Premises Liability §§ 786, 790.

3. Pleadings § 379 (NCI4th)— punitive damages—denial of motion to amend complaint

It was within the discretion of the trial court to deny plaintiff's motion to amend to add a claim for punitive damages based upon gross negligence.

Am Jur 2d, Damages § 824; Pleading § 319.

Judge ORR concurring in part, dissenting in part.

Appeal by plaintiffs from order entered 25 February 1993 by Judge Melzer A. Morgan, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 8 June 1994.

On 23 February 1988, plaintiff Marcia Enns went to defendant's store in Winston-Salem, North Carolina to purchase a can opener.

While plaintiff was in the small appliance section of the store, a boxed electric can opener fell on her head. Plaintiff claimed that defendant's negligence caused a concussion, and later resulted in recurring migraine headaches, memory loss, and other complications. Defendant claimed that plaintiff was contributorily negligent and thus should be barred from recovery.

Defendant used a "gondola" shelving system of three shelves. The bottom shelf had boxed goods for purchase by customers. The middle shelf had unboxed goods which could be inspected by customers. The top shelf was a "warehoused" merchandise area not intended for the customer's use. Plaintiff's injury was allegedly sustained from a boxed can opener which fell from the "warehoused" merchandise shelf.

There is conflicting evidence as to whether plaintiff touched any of the shelves, or any products thereon, before the can opener fell. According to plaintiff, she did not touch anything. However, two of defendant's witnesses offered testimony suggesting that plaintiff did touch the shelving system or the products it contained. Susan Sebastian, a sales clerk for defendant, testified that plaintiff said she was putting a can opener back on the shelf when something hit her on the head:

> Q: Do you remember anything that [plaintiff Marcia Enns] said?
>
> A: Just that something hit her in the head; that she had been looking at a display of the can openers. And I want to say I thought I remember she said she was putting it back or something . . . .
>
> . . .
>
> Q: Sitting here today, do you remember whether or not it was [Marcia] Enns or maybe somebody else in the store who told you that [Marcia] Enns was putting a can opener back?
>
> . . .
>
> A: That's my memory of what she said.

Danny Chadwick, the store's security manager, also testified for defendant. Chadwick, who arrived at the scene several minutes after the event, gave the following testimony:

> Q: State whether or not Miss Enns stated to you that she had touched the can opener.

A: Yes, she did.

Q: And what exactly did she say to the best of your memory?

A: She stated ["]I was putting the can opener back. As I was turning to walk . . . away, I felt something brush the back of my hair and it startled me.["]

Finally, plaintiff, on cross-examination stated, "As I reached back, that's when I got clobbered on the head." Defendant contended that plaintiff's statement that she was "reaching back" suggests that she had physical contact with the shelf, or products thereon.

After both sides had presented their evidence, defendant moved for a directed verdict pursuant to N.C.R. Civ. P. 50(a). The court denied the motion. Plaintiff did not, at this time or later, make the corresponding motion for a directed verdict on the issue of contributory negligence. The court then began the conference on jury instructions; subsequently, during the proceedings of the jury instruction conference, plaintiff took objection to the submission of the issue of contributory negligence to the jury. The court noted plaintiff's objection, but still tendered an issue and instruction on contributory negligence.

The jury held that defendant was negligent, but that plaintiff was contributorily negligent. Plaintiff then moved for a judgment notwithstanding the verdict pursuant to N.C.R. Civ. P. 50(b) and for a new trial pursuant to N.C.R. Civ. P. 59. The court concluded in an order filed 25 February 1993 that plaintiff's objection to the submission of the issue of contributory negligence was the equivalent of a Rule 50(a) motion for a directed verdict, and that therefore the court had jurisdiction to consider the judgment notwithstanding the verdict motion. The court then denied plaintiff's motion for a judgment notwithstanding the verdict on the grounds that defendant's evidence of contributory negligence was legally sufficient to submit the issue to the jury. In its order, the court also denied plaintiff's motion for a new trial. Plaintiff appeals from this order. Defendant cross-assigns as error the trial court's order allowing plaintiff's objection to the issue of contributory negligence to be considered the equivalent of a motion for directed verdict.

Petree Stockton, L.L.P., by Steve M. Pharr and Donald M. Nielsen, for plaintiffs-appellants.

Hutchins, Tyndall, Doughton & Moore, by H. Lee Davis, Jr. and Laurie L. Hutchins, for defendant-appellee.

JOHNSON, Judge.

I.

[1] We first address defendant's cross-assignment of error to the trial court's conclusion as a matter of law that plaintiff's objection to the submission of contributory negligence is the equivalent of a motion for directed verdict. We agree with defendant.

Motions for judgments notwithstanding the verdict are based on N.C.R. Civ. P. 50(b)(1), which states that "a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict[.]" Clearly, from the plain meaning of this Rule, a motion for judgment notwithstanding the verdict cannot be allowed unless a proper motion for directed verdict was entered earlier in the trial. Rule 50(a) sets out the guidelines for motions for directed verdict. By this rule, motions for directed verdict must "state the specific grounds therefor." N.C.R. Civ. P. 50(a). Further, the motion for directed verdict must be made "at the close of all the evidence." N.C.R. Civ. P. 50(b)(1). The rationale behind these timing and specificity requirements is to give the opposing side a chance to correct any curable errors of proof. *Feibus & Co. v. Construction Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981). Therefore, it is important that the directed verdict be in its proper form and at the proper time in order to serve the purpose of allowing for any corrections in the record by the opposing party.

Plaintiff's objections to the issue of contributory negligence made at the conference or to the jury instructions are not the equivalent of a motion for directed verdict made pursuant to Rule 50(a). Plaintiff could have made a proper motion at the close of evidence, as is required under N.C.R. Civ. P. 50(b)(1), but did not do so. Plaintiff's objection during the jury instruction conference would not allow defendant a proper chance to correct any errors in its proof of contributory negligence. Thus, the trial court erred in holding that plaintiff's objection to the contributory negligence issue was the equivalent of a directed verdict.

II.

[2] Plaintiff, in addition to assigning as error the trial court's denial of the judgment notwithstanding the verdict motion, also assigned as error the submission of the issue of contributory negligence. This

assignment of error is based on plaintiff's objection during the court's conference on jury instructions. Accordingly, we reach the substantive issue of whether contributory negligence should have been submitted to the jury on the basis of the evidence presented at trial and agree with plaintiff that the contributory negligence was improperly submitted to the jury.

Review of the appropriateness of submission of contributory negligence is discussed in *Jones v. Holt*, 268 N.C. 381, 150 S.E.2d 759 (1966). *Holt* was an automobile accident case in which contributory negligence was submitted to the jury. The Court held that the "burden of proof being upon the defendant, the issue of contributory negligence should not be submitted to the jury if the evidence is not sufficient to support an affirmative finding." *Id.* at 384, 150 S.E.2d at 762. The defendant's evidence must be considered in a light most favorable to him. *Id.* As well, the plaintiff's evidence, except insofar as it tends to support the defendant's proof of contributory negligence, must be disregarded. *Id.* Finally, all "reasonable inferences" in favor of the defendant's proof must be drawn from the evidence. *Id.* Construing the evidence in this favorable manner, "the issue may not properly be submitted to the jury unless there is evidence from which the inference of contributory negligence may be drawn by men of ordinary reason, *evidence which merely raises a conjecture being insufficient.*" *Id.* (emphasis added).

In order to prove contributory negligence satisfactorily enough to allow it to be submitted to the jury, the defendant must show that the plaintiff's failure to perform a legal duty proximately resulted in injuries. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980). The legal duty in this case is the duty to exercise reasonable care in protecting oneself against injury. *Id.* "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 . . . he is guilty of contributory negligence." *Id.* at 673, 268 S.E.2d at 507, *quoting Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965). *Smith* uses an objective standard, meaning that the plaintiff "may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety." *Id.* Such disregard of a legal duty is contributory negligence if there is proximate cause between the conduct and the injury.

Applying the rule of contributory negligence to the instant case, it is necessary to interpret all evidence and reasonable inferences therefrom in the light most favorable to defendant. Susan Sebastian's testimony only establishes at best that plaintiff touched a can opener on the display or attempted to put a can opener back on the shelf. Danny Chadwick's testimony establishes the same fact. As well, the reasonable inference from plaintiff's "reaching back" statement during cross-examination is that she was touching an object on the shelf. The conclusion from Susan Sebastian's, Danny Chadwick's, and plaintiff's testimony is that plaintiff made physical contact with one of the can openers on the shelf.

Defendant incorrectly asserts that this conclusion is an adequate basis to support a submission of contributory negligence. Defendant must show that plaintiff disregarded her legal duty to exercise due care for herself. This burden is not met by merely showing that plaintiff touched one of the can openers on the shelf; it is common practice for shoppers to touch merchandise before buying. Defendant has not offered any evidence that plaintiff unreasonably placed herself in danger. No evidence was offered to show that plaintiff, for example, attempted to remove the bottom can opener from a stack of can openers, or jostled or bumped the shelf. Thus, defendant offers no evidence that plaintiff disregarded her legal duty to protect herself as a reasonable person would. Only by pure conjecture could a jury conclude contributory negligence from evidence that plaintiff touched the product.

Defendant relies on cases which suggest that consumers must exercise reasonable care when shopping. *Bodenheimer v. Food Stores*, 255 N.C. 743, 122 S.E.2d 715 (1961). *Bodenheimer*, the only North Carolina case cited by defendant which concerns both falling products and contributory negligence, states that the plaintiff "did not see any loose bottles about the rack. If she could not see it, there is nothing to indicate the management was negligent in failing to discover it." *Id.* at 744, 122 S.E.2d at 716. Defendant relies on *Bodenheimer* to show that consumers have a legal duty to exercise reasonable care while shopping. However, defendant's proof of contributory negligence is inadequate because it did not show such a failure to exercise reasonable care while shopping.

Defendant also relies on "slip and fall" cases to argue that contributory negligence should have been submitted to the jury. In *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E.2d 559

(1981), the plaintiff slipped in the defendant's store and was injured. Evidence was presented by both sides on the issue of the plaintiff's contributory negligence. The jury concluded that the defendant was negligent. The trial court granted the defendant's motion for a judgment notwithstanding the verdict on the grounds that the plaintiff was contributorily negligent. After this Court affirmed the trial court's decision, the Supreme Court reversed and reinstated the jury verdict. The Court stated that the "basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for her own safety." *Id.* at 468, 279 S.E.2d at 563. The Court found that there was sufficient evidence to reasonably infer that the danger of slipping would not have been seen by a person exercising ordinary care. *Id.* Defendant contends that *Norwood* suggests that the trial court should allow the jury latitude to resolve discrepancies in the evidence concerning contributory negligence. However, in *Norwood* the jury chose between reasonable inferences either favoring the plaintiff or the defendant. In the instant case, there are no reasonable inferences favoring defendant on the issue of contributory negligence. As stated above, any inferences of contributory negligence based on defendant's evidence would be pure conjecture.

Defendant argues that submission of the issue of contributory negligence to the jury is necessary to avoid strict liability in this case. This argument is mistaken. Defendant's negligence and plaintiff's contributory negligence are entirely separate questions for the jury to address. Accordingly, whether plaintiff was found contributorily negligent or not, or whether the jury was even instructed to decide the issue or not, there is no impact on the jury's decision concerning defendant's negligence. Plaintiff must still prove defendant had a legal duty, failed to fulfill this duty, and that such failure proximately caused injury. The issue of plaintiff's contributory negligence is a separate question from plaintiff's proof of these three elements. Accordingly, the failure to submit the issue of contributory negligence will not alter the proof required of plaintiff, and as a result will not create strict liability.

We also note that plaintiff objects to the jury instructions on contributory negligence. Because plaintiff does not assign the jury instructions as error, we do not reach this issue. *See Koufman v. Koufman*, 330 N.C. 93, 408 S.E.2d 729 (1991).

III.

[3] Plaintiff also assigns error to the trial court's failure to allow her to amend the complaint under N.C.R. Civ. P. 15(b). Rule 15(b) states that

> [i]f evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

This Court considered facts similar to this case in *Paris v. Kreitz*, 75 N.C. App. 365, 331 S.E.2d 234, *disc. review denied*, 315 N.C. 185, 337 S.E.2d 858 (1985). In *Paris*, the plaintiff moved to amend his complaint to include a punitive damages cause of action concerning an altercation between the parties that was not the subject of the original complaint. The trial court denied the motion. Despite the fact that the plaintiff had put the defendant on warning of such an action by including the words "reckless and wanton disregard" in his complaint, this Court held that allowing the plaintiff's amendment would have "severely prejudiced defendants. 'Despite the broad remedial purposes of this provision, however, Rule 15(b) does not permit judgment by ambush.' " *Id.* at 375, 331 S.E.2d at 242, *quoting Eudy v. Eudy*, 288 N.C. 71, 76, 215 S.E.2d 782, 786 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). *Paris* further holds that when an "issue purportedly raised by the evidence was not tried by the consent of the parties, it was not error for the court to refuse to amend the proceedings." *Id.* at 376, 331 S.E.2d at 242. Applying *Paris* to the instant case, there was no warning in the complaint of a punitive damages claim. As well, there was no consent by defendant to such a claim. Accordingly, it was within the discretion of the trial court to deny plaintiff's motion to amend to add a claim for punitive damages based upon gross negligence.

As we noted earlier, whether plaintiff was found contributorily negligent or not, there is no impact on the jury's decision concerning defendant's negligence. The issue of plaintiff's contributory negligence was a separate question from plaintiff's proof of defendant's negligence. Accordingly, we remand this action for a new trial solely on the issue of damages. *See Jacobs v. Locklear*, 310 N.C. 735, 314 S.E.2d 544 (1984), where our Supreme Court noted that the trial court

erred as a matter of law in submitting the issue of contributory negligence to the jury, and the Court remanded the case and ordered a new trial for the plaintiff on the issue of damages only. (*See also Whiteside v. McCarson*, 250 N.C. 673, 110 S.E.2d 295 (1959), where the defendant was found to be negligent and the plaintiff found not to be contributorily negligent; our Supreme Court noted that a partial new trial is properly granted where the error or reason for the new trial is confined to an issue which is entirely separable from the others.)

New trial on the issue of damages.

Judge WYNN concurs.

Judge ORR concurs in part and dissents in part.

Judge ORR concurring in part, dissenting in part.

I concur in the majority's conclusion that the trial court erroneously submitted the issue of plaintiff's contributory negligence to the jury; I respectfully dissent, however, from the majority's decision to remand this case for a new trial only on the issue of damages, as I believe that the only remedy available to plaintiff is a new trial on all the issues. On all other issues raised by this appeal, I concur. *See Powell v. Shull*, 58 N.C. App. 68, 293 S.E.2d 259, *disc. review denied*, 306 N.C. 743, 295 S.E.2d 479 (1982) (where trial court erred in submitting issue of contributory negligence to the jury, plaintiff was entitled to a new trial on all issues).

IN THE MATTER OF MARK MERRITT JONES

No. 9414SC71

(Filed 1 November 1994)

Constitutional Law § 354 (NCI4th)— defendant in one case witness in another—refusal to answer questions on cross-examination—contempt—privilege against self-incrimination infringed

The trial court's order holding appellant in contempt for refusal to answer two questions on cross-examination when he was a defense witness in a murder case and when appellant had a charge of first-degree murder pending against him infringed on his privilege against self-incrimination.

Am Jur 2d, Criminal Law §§ 703, 937.

Supreme Court's views regarding proceedings to which Fifth Amendment's privilege against self-incrimination applies. 65 L. Ed. 2d 1306.

Judge JOHN concurring in the result in part, dissenting in part.

Appeal by Mark Merritt Jones from order entered 20 September 1993 in Durham County Superior Court by Judge J.B. Allen, Jr. Heard in the Court of Appeals 6 October 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General Gayl M. Manthei, for the State.

Mark E. Edwards for appellant Mark Merritt Jones.

GREENE, Judge.

Mark Merritt Jones (Mr. Jones) appeals from a 20 September 1993 order in Durham County Superior Court, holding him in contempt of court for a period of 60 days for refusal to answer two questions on cross-examination while testifying as a defense witness.

In the case of *State of North Carolina v. Ernest King*, Case No. 92 CRS 16778, 92 CRS 18804, the defense called Mr. Jones as a witness in Ernest King's murder trial to rebut the testimony of a prosecution witness who had testified to seeing Ernest King commit the murder. Before Mr. Jones testified, the following exchange took place between his counsel, Mr. Mark Edwards (Mr. Edwards) and the court:

> MR. EDWARDS: Judge, I would ask the Court's indulgence in interposing any objections I feel may be appropriate based on Mr. Jones' fifth amendment right. I have discussed that with him and I think he understands what we are trying to avoid have happen here. He plans to testify about this event. I am just trying to make sure he doesn't say anything about his own pending charges.
>
> COURT: All right. . . .

During cross-examination of Mr. Jones at Ernest King's trial, the following exchange took place between Mr. Jones, Mr. Edwards, the court, and Mr. Hardin for the State:

Q. Do you know somebody by the name of Deca?

A. No.

MR. EDWARDS: Your Honor, I object and I would advise Mr. Jones not to answer this question.

COURT: I believe he done answered it no. Didn't you say no?

. . . .

BY MR. HARDIN:

Q. Well, isn't it true in the past you owed some New York boys money for drugs?

MR. EDWARDS: Your Honor, I object and I advise him not to answer the question.

. . . .

(Jury absent.)

MR. EDWARDS: . . . My objection goes back to the question right before that inquiring of whether Mr. Jones knew Deca. Deca is a street name for a person. He has been charged with murder. And I believe—

COURT: I think he answered that and said no.

MR. EDWARDS: Yes, he did.

COURT: Before I could rule on your objection.

MR. EDWARDS: Yes, sir. I think the line of inquiry the State is going into now I think regards their theory of prosecution on the murder case. I believe that the theory is that Mr. Jones owed Deca money and that was part of the reason or part of the motive for what happened so that's the reason why I am objecting to this. I'm afraid we're getting into the area of the facts of his particular case.

. . . .

MR. HARDIN: Mark Jones owed New York people money for drugs. Now, in terms of the specifics about Deca I believe that that was part of it. My contention would be that if he owes what are classified as the New York boys for drugs that that is relevant in terms of his motivation to lie for other New York boys that are part of that very broad group. That is the basis of the question.

. . . .

> COURT: All right. Outside the presence of the jury the Court does find . . . as a fact that prior to this stage of the trial there is evidence . . . that tends to show that Mark Jones who is the witness on the stand is charged with first degree murder and the DA's office will be prosecuting him as a capital offense case. . . . The Court does find as a fact that Mr. Hardin as an officer of the Court has stated in the presence of the Court and outside the presence of the jury that the district attorney's office has reason to believe and will tend to prove at the trial of State versus Mark Jones that Mark Jones did have—did owe some money for New York people for drugs and the Court does find that this is cross examination. . . . And I don't know what your answer is, Mr. Jones, but I am ordering you to answer that question when the jury comes back. If you fail to answer it you will be subject to contempt of court.

Mr. Jones refused to answer the question, and the court concluded "that this is contempt of court. The Court orders that he serve 30 days in jail. This sentence to begin at the expiration of any and all sentence he gets for the charges pending against him at this time." Subsequently, Mr. Jones refused to answer the question, "[i]sn't it true that you have got a reputation yourself for robbing drug dealers." The court stated

> Mr. Jones, I want to advise you outside the presence of the jury that I rule that that is a proper question for cross examination. You have testified that Eric Shaw, one of the state's witnesses, has a reputation for robbing drug dealers and robbing other people and I rule that this is a proper question and I will tell you that if you do not answer it it will be another 30 days.

After Mr. Jones refused to answer the question, the court found Mr. Jones in contempt of court and sentenced him to another 30 days in jail "to begin at the expiration of the 30 days on the question isn't it true that you owe New York people drug money."

The issue presented is whether the trial court's order holding Mr. Jones in contempt for refusal to answer two questions on cross-examination when he was a defense witness in a murder case and when Mr. Jones had a charge of first degree murder pending against him infringes on his privilege against self-incrimination.

The privilege against self-incrimination, which is guaranteed by the Fifth and Fourteenth Amendments, applies to both civil and criminal proceedings "wherever the answer might tend to subject to crim-

inal responsibility him who gives it," *McCarthy v. Arndstein*, 266 U.S. 34, 40, 69 L.Ed. 158, 161 (1924), and "should be liberally construed." *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 189 (1964). The privilege against self-incrimination extends "not only to answers that would in themselves support" a criminal conviction, but also "embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant" for a crime. *Hoffman v. United States*, 341 U.S. 479, 486, 95 L.Ed. 1118, 1124 (1951). This protection also extends to "evidence which an individual reasonably believes could be used against him in a criminal prosecution." *Trust Co. v. Grainger*, 42 N.C. App. 337, 339, 256 S.E.2d 500, 502, *cert. denied*, 298 N.C. 304, 259 S.E.2d 300 (1979) (*quoting Maness v. Meyers*, 419 U.S. 449, 461, 42 L. Ed. 2d 574, 585 (1975)). "It is well established that the privilege protects against real dangers, not remote and speculative possibilities," *Zicarelli v. Investigation Comm'n*, 406 U.S. 472, 478, 32 L. Ed. 2d 234, 240 (1972), and "a witness may not arbitrarily refuse to testify without existence in fact of a real danger, it being for the court to determine whether that real danger exists." *Trust Co.*, 42 N.C. App. at 339, 256 S.E.2d at 502. In order to sustain the privilege, however, it "need be evident only from the implications of the question and in the setting in which it is asked." *State v. Ballard*, 333 N.C. 515, 520, 428 S.E.2d 178, 181, *cert. denied*, — U.S. —, 126 L. Ed. 2d 438 (1993).

> When the claim (of the privilege) is made, if it is immediately clear that an answer might tend to incriminate him, the claim should be sustained. Otherwise, the judge may, in the absence of the jury, inquire into the matter to the minimum extent necessary to determine that a truthful answer *might* tend to incriminate, and should deny the claim only if there is no such possibility.

Trust Co., 42 N.C. App. at 341, 256 S.E.2d at 503 (*quoting* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 57 at 179-80).

Although a witness is entitled to assert the privilege as described above, the trial court nonetheless retains the discretion to strike the witness's direct testimony "in whole or in part" when the witness invokes the privilege on cross-examination in response to questions relating to the details of her direct examination. *State v. Ray*, 333 N.C. 463, 470, 444 S.E.2d 918, 923 (1994). The reason for this rule is "there may be a substantial danger of prejudice" to the party cross-examining the witness because asserting the privilege deprives, in some instances, the cross-examining party the right to test the truth

of the testimony offered by the witness asserting the privilege. *Id.* (little danger of prejudice exists where privilege invoked in response to questions relating to collateral matters).

In this case, the trial court, out of the presence of the jury, allowed Mr. Edwards to explain why an answer to the question "[i]sn't it true in the past you owed some New York boys money for drugs" could incriminate Mr. Jones. After Mr. Edwards explained that this question is linked to the prosecution's theory of motive in Mr. Jones' murder case and after hearing from Mr. Hardin the court found as a fact that "Mr. Hardin, as an officer of the Court has stated in the presence of the Court and outside the presence of the jury that the district attorney's office has reason to believe and will tend to prove at the trial of State versus Mark Jones that Mark Jones did have—did owe some money for New York people for drugs." Based on these circumstances, Mr. Jones' answer "would furnish a link in the chain of evidence needed to prosecute" him on his murder charge; therefore, it was reasonable for Mr. Jones to believe his answer "could be used against him in a criminal prosecution." For these reasons, we reverse the trial court's order holding Mr. Jones in contempt for refusing to answer the question "[i]sn't it true in the past you owe some New York boys money for drugs."

As to the second question, Mr. Jones contends that "[e]ven if he had no charges of any type pending against him, the question clearly carries an allegation of criminal activity and as such could reasonably be seen as incriminating if answered in the affirmative." We agree.

Although having a reputation for robbing drug dealers is not in and of itself a crime and would not, by itself, support a criminal conviction, under the liberal construction given the privilege against self-incrimination, it was reasonable for Mr. Jones to believe that his answer to the question "[i]sn't it true that you have got a reputation yourself for robbing drug dealers" "could be used against him in a criminal prosecution." In the event Mr. Jones were charged with any crime, evidence that he had previously answered in the affirmative the question "[i]sn't it true that you have got a reputation yourself for robbing drug dealers," would seriously undermine his credibility, and we are not prepared to say that "there is no . . . possibility" Mr. Jones' answer to this question would incriminate him. Mr. Jones was therefore entitled, based on the privilege against self-incrimination, to refuse to answer the two questions at issue in this case, and the trial court erred in holding Mr. Jones in contempt for refusal to answer.

Although the trial court may have been able to strike Mr. Jones' direct testimony, that is an issue not raised in this appeal, and we do not address it. For these reasons, the trial court's order holding Mr. Jones in contempt and sentencing him to 60 days imprisonment is

Reversed.

Judge WYNN concurs.

Judge JOHN concurs in the result in part and dissents in part.

Judge JOHN concurring in the result in part, dissenting in part.

I concur in the result of that portion of the majority opinion reversing the trial court's finding of contempt with respect to the question, "Well, isn't it true in the past you owed some New York boys money for drugs?" However, I believe it was proper to hold Mark Merritt Jones (Jones) in contempt for refusing to answer the question, "[i]sn't it true that you have got a reputation yourself for robbing drug dealers," and respectfully dissent from reversal of the trial court's action in that regard.

The majority, conceding that having a reputation for criminal activity is violative of no criminal statute, does not attempt to base its holding upon the theory that Jones' response to the question at issue would either have supported a criminal conviction or "furnish[ed] a link in the chain of evidence" against him in a criminal prosecution. Instead, although accurately stating the responsibility for deciding whether an *actual* potential for incrimination exists rests with the trial court, *Trust Co.*, 42 N.C. App. at 339, 256 S.E.2d at 502, the majority appears to find the perception of the witness, rather than the determination of the court, to be controlling ("it was reasonable for *Mr. Jones* to believe that his answer to the question . . . 'could be used against him in a criminal prosecution' "). I disagree with such reliance upon the witness' subjective belief. "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified. . . ." *Hoffman v. United States*, 341 U.S. 479, 486, 95 L.Ed. 1118, 1124 (1951). Further, I find no basis for the able and experienced trial judge to have perceived the existence of a "real danger," *Trust Co.*, 42 N.C. App. at 339, 256 S.E.2d at 502, as opposed to a "remote and speculative danger," *Zicarelli v. Investigation Comm'n*, 406 U.S. at 478,

32 L.Ed.2d. at 240, for self-incrimination by Jones in the event of an affirmative answer.

The majority correctly writes that in order to sustain the privilege, the incriminating tendency of an answer must be evident " 'from the implications of the question and in the setting in which it is asked.' " Upon examination of the nature and setting of the question at issue, it appears that evidence of an affirmative response by Jones would under nearly all circumstances be *inadmissible,* and hence have no incriminating effect or tendency, in any subsequent criminal prosecution against him.

Rule 404 of the North Carolina Rules of Evidence prohibits introduction of evidence concerning a defendant's character to show conformity with the crime charged. N.C. Gen. Stat. § 8C-1, Rule 404(a) (1992). The sole pertinent exception to this general prohibition is occasioned by a defendant's introduction of a relevant "good" character trait; in that event, the prosecution *may* rebut with evidence of a countervailing "bad" character trait, N.C. Gen. Stat. § 8C-1, Rule 404(a)(1) (1992), that is directed at the specific "good" character trait offered by the defendant. *State v. Lynch*, 334 N.C. 402, 411, 432 S.E.2d 349, 353 (1993).

Accordingly, any testimony by Jones at the trial below that he indeed had a reputation for "robbing drug dealers" would be inadmissible in the prosecution's case-in-chief during any subsequent trial against him. Such evidence *might* be admissible *only* if the *prosecution elected* to present rebuttal evidence of this "bad" character trait to counter evidence of the corresponding "good" character trait of *not* having that reputation, should *defendant have elected* to present such evidence, and which rebuttal evidence of the prosecution the *trial judge determined* was relevant and *further determined* was not unfairly prejudicial under N.C.R. Evid. 401 and 403.

Moreover, contrary to the majority's assertion, I do not believe such evidence could be used to impeach Jones' credibility pursuant to Rule 608(a) if he elected to testify in his own behalf at such trial. Under the Rule, credibility may be attacked only with reputation evidence for truthfulness or untruthfulness. N.C. Gen. Stat. § 8C-1, Rule 608(a)(1) (1992).

In sum, neither the record *sub judice* nor the testimony presented at the *voir dire* below suggest any reasonable basis for the trial court to discern the potential occurrence of any of the eventualities, much less all, which *might* lead to the introduction of evidence defendant

had a "reputation for robbing drug dealers" at some subsequent criminal prosecution. For it to have done so would have been rank speculation as opposed to determination of a "real danger" of incrimination.

I therefore vote to affirm the finding of Jones in contempt based upon his refusal to answer the question concerning his reputation for "robbing drug dealers."

JEFFREY K. FISH, PLAINTIFF v. STEELCASE, INC., EMPLOYER, WAUSAU INSURANCE COMPANIES, CARRIER, DEFENDANTS

No. 9310IC1074

(Filed 1 November 1994)

1. **Workers' Compensation § 165 (NCI4th)— specific traumatic incident—injury at cognizable time required—no specific hour or day of injury required**

The specific traumatic incident provision of N.C.G.S. § 97-2(6) requires the plaintiff to prove an injury at a cognizable time but does not compel the plaintiff to allege the specific hour or day of the injury.

Am Jur 2d, Workers' Compensation §§ 246-250.

2. **Workers' Compensation § 167 (NCI4th)— back injury occurring during normal work routine**

Nothing in N.C.G.S. § 97-2(6) precludes compensation for a back injury which occurs in the normal work routine, and the Industrial Commission's interpretation of the statute requiring an unusual occurrence or departure from ordinary duties was error.

Am Jur 2d, Workers' Compensation §§ 246-250.

3. **Workers' Compensation § 166 (NCI4th)— injury during judicially cognizable time period**

The Industrial Commission erred in finding that plaintiff's injury did not occur at a judicially cognizable time where plaintiff presented evidence that he suffered a specific injury while pushing a desk in "mid-April" and that the injury was not the result of a gradual deterioration.

Am Jur 2d, Workers' Compensation §§ 246-250.

FISH v. STEELCASE, INC.

[116 N.C. App. 703 (1994)]

Appeal by plaintiff from an Order and Award entered 23 July 1993 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 August 1994.

Mraz & Dungan, by John A. Mraz, for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson and Jeffrey A. Doyle, for defendant appellees.

COZORT, Judge.

In this case, the Industrial Commission denied workers' compensation benefits to an employee, finding the employee was unable to prove the specific date of the incident which caused plaintiff's back injury. We find the Commission decided the case under a misapprehension of the law, and we remand the case to the Commission for a decision under the proper legal standard. The facts and procedural history follow.

The defendant employer ("Steelcase") is a manufacturer of office equipment. Plaintiff is employed on "final repair," where he is responsible for inspecting desks on the conveyor line. The desks are manually pushed from the rollers of the main conveyor line to the inspection line. There is no power on the rollers, and the employees on final repair must be careful not to push the desks off their pallets. Once on the inspection line, the desks are inspected, "touched-up," and readied for shipping. The inspectors then push the desks back onto the main line.

Plaintiff had no history of back problems. At some time during the month of April 1989, plaintiff was pushing a desk weighing approximately 400-450 pounds from the inspection line to the main line when he felt a "pull" in the lower right side of his back. Plaintiff continued with his duties because he did not think the injury was serious enough for him to stop working. Plaintiff also failed to inform the plant nurse of his condition; however, on the next day, he informed his supervisor, Jerry Logan, that he was experiencing back trouble. Logan informed the plaintiff that he would have to determine himself whether the pain was too great for him to continue working. Logan and another employee stated that plaintiff had informed them of his back injury in mid-April. Neither could specify the exact date that the plaintiff informed them of his condition.

Plaintiff's condition worsened, forcing him to visit his family physician on 24 April 1989. The injury was diagnosed as a back strain, and the doctor placed the plaintiff on medication. Plaintiff returned to work, but by 19 May 1989 the pain was radiating down his right leg. On 22 May and 24 May 1989 plaintiff visited the plant nurse, and he was sent home from work on the 24th. The nurse reported that the plaintiff informed her that the pain had been present for "one plus month." Plaintiff was referred to an orthopedic surgeon on 30 May 1989 who diagnosed a herniated disc which was surgically repaired by a neurosurgeon on 24 August 1989. Plaintiff was released to return to work on 1 November 1989 with a disability rating of 10%. Plaintiff pursued benefits from his medical carrier and signed an indemnification agreement indicating that if he recovered from a workers' compensation claim, the medical carrier would be reimbursed.

The defendant employer's carrier denied liability, and plaintiff requested a hearing before the Industrial Commission. The case was heard by Deputy Commissioner Charles Markham, who filed an opinion dated 17 June 1991 denying plaintiff's claim. The opinion contained the following pertinent findings:

> 2. At an indeterminate time in mid-April, plaintiff was pushing a desk weighing 400 to 450 pounds when he felt a pull in the lower right side of his back, one to three inches above his belt line. His back had never hurt before, as far as he could remember.
>
> * * * *
>
> 5. Jeff Laughter, a fellow employee of plaintiff, remembered that on a day in April, 1989 plaintiff came to him and said he pulled his back pushing a unit on the line. Plaintiff also told another employee, Bass (who was ill the day of the hearing). At the hearing, Laughter could not remember the exact date this happened. His memory was refreshed by hearing the date April 17 mentioned at the hearing. He had earlier identified the date as April 17, because this happened on a Tuesday and it was two or three days before plaintiff told him he was seeking a doctor. April 17, 1989 was a Monday. Plaintiff saw his doctor April 24. Laughter's testimony is insufficient to support a finding that the incident occurred on April 17.
>
> * * * *
>
> 8. Plaintiff visited defendant's plant nurse May 22, 1989 with the same complaints he had mentioned to Dr. Morrison. She

noted his back condition had been "present for one plus month", which would be consistent with an onset of pain during the period plaintiff had described to Dr. Morrison.

* * * *

15. Plaintiff's Form 18, prepared by his girl friend, dated June 10, 1989, and filed with the Industrial Commission June 15, listed April 17, 1989 as the date of his allegedly compensable injury. This was the first written notice of his claimed injury. He stated his disability began May 24. On the indemnifying agreement on May 31, he stated that his disability began "about a month ago".

16. Dr. Harley's record of examination May 30 stated: "This 28 year old man was working at Steel Case approximately a month ago (i.e., the beginning of May), pushed a desk and developed pain in the lower right back into his right leg".

17. On August 2, 1989, plaintiff told defendant carrier's adjuster that the [*sic*] after the desk pushing incident, which ruptured a disc, the pain got worse and worse. This was about five or six weeks after he pushed the desk. If May 20 is the date on which the possibility of a disc was first apparent, and the pain got worse, the pushing episode could have occurred between April 8 and April 15.

* * * *

19. There is no indication how plaintiff finally established April 17 as the day he pushed the desk, other than talking to Laughter and Bass. Laughter was confused about the date involved.

* * * *

21. Plaintiff's accident, if one occurred, came while he was engaged in his normal work routine of pushing desks. It did not involve any departure from his ordinary duties.

22. In view of the variety of reports plaintiff gave, as to the date he pushed the desk with disabling consequences, prior to his decision to claim workers' compensation, his claim and later testimony that April 17, 1989 was the date cannot be accepted as credible. Accordingly he has not sustained his burden of establishing that his injury occurred at a cognizable, i.e., a judicially determinable time.

The Deputy Commissioner concluded:

> 1. Plaintiff did not sustain an injury by accident arising out of and in the course of his employment, G.S. 97-2(6), as there was no accident involved. To prove that an accident occurred, plaintiff must show that he was affected by unusual and unexpected circumstances constituting a departure from his normal work routine . . . .
>
> 2. In the case of a back injury, under G.S. 97-2(6) as amended, plaintiff must show that his injury arose out of a specific traumatic incident, which has been judicially interpreted to mean that the injury must have occurred at a cognizable time, that is, at a judicially determinable time, and did not develop gradually. . . . Here, by the plaintiff's own contemporaneous accounts, the incident could have occurred at any time between April 8 and the beginning of May, and the onset of his pain was gradual.
>
> 3. Plaintiff has satisfied neither of the two alternate requirements needed to support a finding that his back injury occurred by accident. G.S. 97-2(6).

Plaintiff appealed to the Full Commission, which, on 23 July 1993, adopted the opinion of the Deputy Commissioner. Plaintiff timely appealed to this Court. On appeal, plaintiff contends that the Industrial Commission erred in not ruling (1) that his injury arose out of and in the course of employment, and (2) that it was a direct result of a specific traumatic incident of his work. We agree.

For purposes of workers' compensation, N.C. Gen. Stat. § 97-2(6) defines a back injury as one arising "out of and in the course of the employment, and . . . the direct result of a specific traumatic incident of the work assigned . . . ." N.C. Gen. Stat. § 97-2(6) (1993 Cum. Supp.). Prior to its amendment in 1983, this statute required that there be some type of unusual circumstance for a back injury to be compensable under the Workers Compensation Act. *Bradley v. E.B. Sportswear, Inc.*, 77 N.C. App. 450, 335 S.E.2d 52 (1985). With the 1983 amendment, the Legislature intended to relax this requirement. *Id.* at 452, 335 S.E.2d at 53. The amended statute provides two theories on which a back injury claimant can proceed: (1) that claimant was injured by accident; or (2) that the injury arose from a specific traumatic incident. *Richards v. Town of Valdese*, 92 N.C. App. 222, 224, 374 S.E.2d 116, 118 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989).

An accident is an "unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Adams v. Burlington Industries Inc.*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983) (quoting *Hensley v. Cooperative*, 246 N.C. 274, 278, 98 S.E.2d 289, 292 (1957)). Because plaintiff has not alleged that his injury was the result of an accident, the only issue in this case is whether the plaintiff presented sufficient evidence to support a finding of a specific traumatic incident.

[1] While the case law interpreting the specific traumatic incident provision of N.C. Gen. Stat. § 97-2(6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury. As we stated in *Richards*, the General Assembly did not intend to limit the definition of specific traumatic incident to an instantaneous occurrence. *Richards*, 92 N.C. App. at 225, 374 S.E.2d at 118-19. Events which occur contemporaneously, during a cognizable time period, and which cause a back injury, fit the definition intended by the legislature. *Id.* at 225, 374 S.E.2d at 119. To hold otherwise would defeat the purpose of the amendment.

The issue in this case is whether plaintiff presented credible evidence that the injury occurred at a judicially cognizable time. The Full Commission adopted the Deputy Commissioner's conclusions that, as a matter of law, plaintiff sustained a back injury neither as a result of an accident, nor as a result of a specific traumatic injury. The conclusion that plaintiff suffered no injury as a result of a specific traumatic injury is error, and the opinion and award must be reversed and the cause remanded.

The findings of fact by the Industrial Commission are conclusive on appeal, if there is any competent evidence to support them, and even if there is evidence that would support contrary findings. *Richards*, 92 N.C. App. at 225, 374 S.E.2d at 118. Conclusions of law based on these findings, however, are subject to review by the appellate courts. *Id.* We find the Commission erred in two respects. First, the Commission appears to have applied the pre-1983 interpretation of N.C. Gen. Stat. § 97-2(6). Finding of Fact #21 states:

> 21. Plaintiff's accident, if one occurred, came while he was engaged in his normal work routine of pushing desks. It did not involve any departure from his ordinary duties.

[2] Nothing in N.C. Gen. Stat. § 97-2(6) precludes compensation for a back injury which occurs in the normal work routine. The 1983

amendment allows for coverage when a specific traumatic incident occurs within the normal work routine. The Industrial Commission's interpretation of the statute requiring an unusual occurrence or departure from ordinary duties misapprehends current law.

[3] Second, the Commission erred in finding the injury did not occur at a judicially cognizable time. In the present case, the plaintiff presented evidence that he suffered a specific injury which can be placed in a judicially cognizable time period and that the injury was not the result of a gradual deterioration. The Deputy Commissioner found that the plaintiff identified "mid-April" as the time of injury. Other findings place the incident at some time between 8 April and 1 May. Even though there are a variety of possible dates for the specific traumatic incident, the plaintiff's evidence, if believed, satisfies the judicially cognizable time requirement.

To justify its denial of the plaintiff's claim, the Industrial Commission relied on the plaintiff's inability to name the specific date on which the injury occurred. The final finding of fact states that plaintiff's claim that the injury occurred on 17 April 1989 "cannot be accepted as credible."

This finding is simply a misunderstanding of the burden the plaintiff must meet to prove a back injury. *Judicially cognizable* does not mean "ascertainable on an exact date." Instead, the term should be read to describe a showing by plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred. The evidence must show that there was some event that caused the injury, not a gradual deterioration. If the window during which the injury occurred can be narrowed to a judicially cognizable period, then the statute is satisfied.

We therefore hold the Commission erred by applying the incorrect legal standard to the evidence presented. The cause is remanded to the Commission for a determination under the correct legal standard.

Reversed and remanded.

Judges EAGLES and LEWIS concur.

TINA MINKS, PETER J. MINKS, III BY HIS GUARDIAN AD LITEM, TINA MINKS, AND PETER J. MINKS, II, PLAINTIFFS/APPELLANTS v. NORTH CAROLINA HIGHWAY PATROL, DEFENDANT/APPELLEE

No. 9310IC1036

(Filed 1 November 1994)

Sheriffs, Police, and Other Law Enforcement Officers § 21 (NCI4th)— highway patrol trooper's high speed chase— failing to slow down negligence as matter of law

In an action to recover for injuries sustained by plaintiff and her child who were struck by a trooper engaged in a high speed chase, the evidence was insufficient to support the deputy commissioner's finding that plaintiff failed to keep a proper lookout. Therefore, the deputy commissioner's finding that "the collision would have been avoided had Trooper Sanborn managed to steer more to the left," when taken into account with the particular circumstances of the accident which indicated that the trooper had not seen the vehicle he was chasing at ninety m.p.h., was unaware of how far ahead of him it may have been, and had observed plaintiff's vehicle some 500 feet away in the center turn lane positioning itself to make a left turn, mandated the conclusion that the trooper was negligent as a matter of law by failing to slow down when he saw plaintiff's vehicle positioning itself to pull out into his lane of travel.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90 et seq.

Appeal by plaintiffs from decision and order entered 2 June 1993 by the Industrial Commission. Heard in the Court of Appeals 24 August 1994.

Voerman & Carroll, P.A., by Cynthia Carroll, for plaintiffs-appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General Elisha H. Bunting, for defendant-appellee.

WYNN, Judge.

On 19 September 1988, Trooper Carl Sanborn worked for defendant, North Carolina Highway Patrol, and was patrolling Highway 70, a four-lane divided highway between New Bern and Havelock. Trooper

Sanborn pulled a driver over for speeding in the westbound lane of Highway 70. As he was speaking with the driver an off-duty Havelock police officer, Wade Von Beltenburg, stopped and informed Trooper Sanborn that he had observed what he thought was a drunk driver heading west on the highway and gave Trooper Sanborn a description of the vehicle which included its make, color, and license plate.

Trooper Sanborn returned to his patrol car and pulled onto the highway to catch up with the vehicle Officer Von Beltenburg had described. The blue light on the patrol car's dashboard was on and Trooper Sanborn accelerated until he was going about ninety miles per hour, passing several vehicles. Trooper Sanborn then saw a 1976 Chrysler New Yorker, driven by plaintiff Tina Minks, pull into the cross-over roadway between the east and west-bound lanes approximately 500 feet ahead. Plaintiff did not see the patrol car nor notice that its blue light was flashing. Plaintiff testified that the oncoming traffic was at least 300 yards away when she began to cross the highway. The road was straight and the weather was clear.

Trooper Sanborn first thought plaintiff was going to stop so he steered his car to the right, but plaintiff continued across the highway. Trooper Sanborn slammed on his brakes and skidded towards the intersection. His patrol car struck plaintiff's car behind the back door and knocked it off the highway. Plaintiff's car was half way off of the highway at the time of the collision. Plaintiff, her infant son, and Trooper Sanborn were all injured as a result of the collision.

Plaintiff, her son, and her husband brought this action under the Tort Claims Act, N.C. Gen. Stat. § 143-291. After a hearing, the deputy commissioner found as fact that Trooper Sanborn had a duty to apprehend drunk drivers and remove them from the highway; that he had acted as a reasonably prudent person would have acted under the circumstances in discharging his official duties; that had plaintiff maintained a proper lookout, she would have seen Trooper Sanborn's patrol car; that plaintiff created an emergency situation by pulling onto the highway; and that the collision could have been avoided if Trooper Sanborn had managed to steer more to the left, but that he reacted as a reasonably prudent person. The deputy commissioner concluded that Trooper Sanborn was not negligent and denied plaintiffs' claims. Plaintiffs appealed to the Full Commission. After a hearing, the Commission adopted the deputy commissioner's decision and order. From this holding, plaintiffs appeal.

Plaintiffs argue that the Industrial Commission erred by concluding that the accident was not the result of any negligence on the part of Trooper Sanborn. We agree.

A finding of fact by the Industrial Commission in a proceeding under the Tort Claims Act is conclusive on appeal when supported by competent evidence. *Bailey v. North Carolina Dept. of Mental Health*, 272 N.C. 680, 159 S.E.2d 28 (1968); *Price v. North Carolina Dept. of Correction*, 103 N.C. App. 609, 406 S.E.2d 906 (1991). Negligence and contributory negligence are mixed questions of law and fact, and the reviewing court must determine whether the Commission's findings support its conclusions. *Barney v. North Carolina State Highway Commission*, 282 N.C. 278, 284, 192 S.E.2d 273, 277 (1972); *Bolkhair v. North Carolina State University*, 321 N.C. 706, 365 S.E.2d 898 (1988).

In order to recover under the Tort Claims Act, plaintiffs must show that their injuries were the proximate result of a negligent act by a state employee acting within the course and scope of his employment. N.C. Gen. Stat. § 143-291 (1993); *Alliance Co. v. State Hosp. at Butner*, 241 N.C. 329, 85 S.E.2d 386 (1955). It is undisputed that Trooper Sanborn was a state employee acting within the scope of his employment at the time of the collision. Under the Act, negligence is determined by the same principles applicable to private parties. *Bolkhair*, 321 N.C. at 709, 365 S.E.2d at 900.

When the plaintiff's injuries are caused by a collision with an officer's vehicle involved in a chase, "[t]he officer is held to the standard of care that a reasonably prudent person would exercise in the discharge of his duties of a like nature and under like circumstances." *Bullins v. Schmidt*, 322 N.C. 580, 582, 369 S.E.2d 601, 603 (1988). If the officer complies with the standard, then he is exempt from the statutory speed laws. *Id*; *see* N.C. Gen. Stat. § 20-145 (1993). The officer does not enjoy any special immunity in the negligent operation of his vehicle, but the standard of care takes into account his official duties and the particular circumstances under which he must act. *Goddard v. Williams*, 251 N.C. 128, 133-4, 110 S.E.2d 820, 824 (1959) (quoting *McKay v. Hargis*, 351 Mich. 409, 417, 88 N.W.2d 456, 460 (1958)); *Collins v. Christenberry*, 6 N.C. App. 504, 170 S.E.2d 515 (1969); *see* Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts*, § 19.42.47 at 336 (1991).

In the instant case, the deputy commissioner made the following findings:

5. Mrs. Minks pulled her car onto the highway. It appeared to Trooper Sanborn that the car paused as though it might stop, so he steered his car to the right, but the car then continued across the highway. He slammed on brakes and began skidding towards the intersection and to the right. Although the Minks vehicle was about half way off of the highway at the time of the collision, the patrol car struck it behind the back door and knocked it off of the highway. Mrs. Minks, her baby and Trooper Sanborn were all injured as a result of the accident.

6. As a highway patrolman, Trooper Sanborn had a duty to apprehend drunk drivers and remove them from the highways. He had reasonable grounds on this occasion to believe that there was a drunk driver further west on Highway 70, and he was in pursuit of that driver when the accident in question occurred. It was necessary for him to exceed the speed limit in order to catch up with the car under suspicion. Trooper Sanborn also had a duty to other motorists to exercise due care for their safety as he was pursuing this car. He acted as a reasonably prudent person discharging official duties would have acted under the circumstances.

7. However, had Mrs. Minks been keeping a proper lookout before she pulled onto the highway, she should have observed that the patrol car was approaching at a rapid speed and that she could not safely cross the highway at that time. She created an emergency situation when she pulled out, and, although the collision would have been avoided had Trooper Sanborn managed to steer more to the left, he reacted as a reasonably prudent person when confronted with such an emergency. The accident occurred within a few seconds.

The deputy commissioner then concluded that plaintiffs were not injured as a result of any negligence on the part of Trooper Sanborn. The Full Commission reviewed this decision and noted that there was a dispute regarding whether Trooper Sanborn's blue light was on at the time of the accident. In adopting the deputy commissioner's decision, the Full Commission held that Trooper Sanborn's testimony was more credible.

The application of particular facts to the reasonableness standard is nearly always a question of fact, not of law. *Bolkhir*, 321 N.C. at 712, 365 S.E.2d at 902; *Hulcher Brothers & Co. v. North Carolina Dept. of Transp.*, 76 N.C. App. 342, 332 S.E.2d 744 (1985). "Only when the facts are such that reasonable minds can reach but one conclusion does

the question become one of law." *Hulcher*, 76 N.C. App. at 343, 332 S.E.2d at 745.

While Trooper Sanborn's conduct of engaging in high speed pursuit of a vehicle that he has not seen and is unaware how far ahead it may be is questionable, we find that there was competent evidence to support the deputy commissioner's finding that Trooper Sanborn acted reasonably in beginning the high speed chase.

There is no evidence in the record, however, to support the deputy commissioner's finding that "had Mrs. Minks been keeping a proper lookout before she pulled onto the highway, she should have observed that the patrol car was approaching at a rapid rate of speed and that she could not cross the highway at that time." The only testimony on this point was by Mrs. Minks who testified on cross-examination:

> Q. Did you come to a stop at that median cross-over area before you proceeded?
>
> A. Yes, I did.
>
> Q. You said that at the time that you saw the vehicles they were around three hundred yards down the road? That's when you began to —
>
> A. No, I waited for the white truck to pass and then I looked, and the traffic behind it was a long ways down—at least three hundred yards away. And I proceeded to cross it.

Trooper Sanborn testified that he was five hundred feet away from Mrs. Minks when he saw her pull out to cross the highway. Mrs. Minks testified that she looked before crossing the highway and her testimony is uncontradicted. There is no evidence to support a finding that Mrs. Minks failed to keep a proper lookout before she pulled onto the highway. *See Myrick v. Peeden*, 113 N.C. App. 638, 439 S.E.2d 816, *disc. review denied*, 336 N.C. 781, 447 S.E.2d 476 (1994); *Snead v. Holloman*, 101 N.C. App 462, 400 S.E.2d 91 (1991).

Thus we are left with the deputy commissioner's finding that "the collision would have been avoided had Trooper Sanborn managed to steer more to the left." We conclude that this finding when taken into account with the particular circumstances of the accident which indicate that Trooper Sanborn had not seen the vehicle he was chasing at ninety miles per hour; was unaware how far ahead of him it may have been; and had observed plaintiff's vehicle some 500 feet away in the

center turn lane positioning itself to make a left turn, mandates the conclusion that Trooper Sanborn was negligent as a matter of law by failing to slow down when he saw Mrs. Minks's vehicle positioning itself to pull out into his lane of travel. The decision and order of the Industrial Commission is

Reversed.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. PETER KENNETH LUNDIN, DEFENDANT

No. 931SC1065

(Filed 1 November 1994)

Criminal Law § 1098 (NCI4th)— same evidence used to find guilt and aggravating factor—new sentencing hearing

Defendant is entitled to a new sentencing hearing for voluntary manslaughter where the trial court's basis for the aggravating factor of malice was that the killing resulted from manual strangulation, evidence of which was necessary to prove the unlawful killing, and this same evidence could not be used to support an aggravating factor.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 13 July 1993 by Judge William C. Griffin in Dare County Superior Court. Heard in the Court of Appeals 29 August 1994.

Defendant was charged in a true bill of indictment with the murder of his mother, Anna Schaftner Lundin. On 13 July 1993, he pled guilty pursuant to a plea arrangement to the lesser charge of voluntary manslaughter. In sentencing defendant, the trial court found as a nonstatutory aggravating factor that the act was committed with malice and found as a nonstatutory mitigating factor that defendant's continued exposure to stress and conflict created by his mother's alcoholism contributed to and mitigated the commission of the offense. The court found the aggravating factor outweighed the mitigating factor and sentenced defendant to the maximum term of imprisonment of twenty years. From the judgment entered, defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Melissa L. Trippe and Associate Attorney General Virginia A. Gibbons, for the State.

Aycock, Spence & Butler, by W. Mark Spence, for defendant appellant.

ARNOLD, Chief Judge.

Defendant argues that the trial court erred in imposing the maximum sentence and finding as an aggravating factor that the act was committed with malice. Specifically, he contends that the court erred in finding malice when its stated reason for doing so was that the act was committed by manual strangulation, and that absent evidence of manual strangulation, no evidence supports a finding of malice.

Defendant pled guilty to voluntary manslaughter, which is defined as "the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation." *State v. Brown*, 64 N.C. App. 578, 579, 307 S.E.2d 831, 832 (1983). Following his plea, the trial court held a sentencing hearing, at the conclusion of which the trial court found as a nonstatutory aggravating factor "that the act was committed with malice by its very nature." Defendant objected that the court's finding was not based on sufficient evidence to support it. Following defendant's objection, the court responded "I said I believe that manual strangulation supports that finding." Based on the court's comments, defendant contends that the basis for the aggravating factor was that the killing resulted from manual strangulation, evidence of which was necessary to prove the unlawful killing, and that this same evidence could not be used to support an aggravating factor. We agree.

"Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." N.C. Gen. Stat. § 15A-1340.4(a)(1) (1988). In *State v. Heidmous*, this Court held that the trial court erred in finding as a factor in aggravation for a charge of voluntary manslaughter that the "[d]efendant, with malice, intentionally shot and killed her husband with a deadly weapon to wit: a shotgun." 75 N.C. App. 488, 491, 331 S.E.2d 200, 201 (1985). We stated that, standing alone, a finding of malice would have been proper. *Id.* at 492, 331 S.E.2d at 202. However, the trial court also found, within the same aggravating factor, that the defendant killed the victim with a deadly weapon. *Id.* Based on *State v. Green*, 62 N.C. App. 1, 301 S.E.2d 920, *modified on other grounds and aff'd*, 309 N.C. 623, 308

S.E.2d 326 (1983), we reasoned that since evidence of the use of a deadly weapon was necessary to prove the unlawful killing, use of the weapon could not also be used as an aggravating circumstance. *Id.* Although we noted that the trial court most likely intended to find only malice as an aggravating factor, we remanded the case for resentencing, stating that "we are not in a position to second guess the meaning of an obviously ambiguous aggravating factor." *Id.* at 492-493, 331 S.E.2d at 202.

This case differs from *Heidmous* in that (1) the court's comments about manual strangulation supporting the finding were not directly coupled with the court's finding of malice, and (2) the court's comments were not included in the written findings. We do not believe these differences warrant distinguishing this case from *Heidmous.* Had this defendant been tried by a jury, they would necessarily have found, in order to convict him, that the unlawful killing resulted from manual strangulation. As such, use of manual strangulation to find malice would have been improper. *See State v. Evangelista*, 319 N.C. 152, 165, 353 S.E.2d 375, 384 (1987) (stating that "[f]or the jury to convict the defendant of involuntary manslaughter . . . it necessarily found that the defendant was armed with and discharged a firearm. Therefore, the possession and discharge of the firearm in effect became an element of the offense . . . ."). Furthermore, we do not believe the court's comments can be disregarded as mere surplusage simply because they were not directly coupled with the court's statement finding malice and did not appear in the written findings. While the court was not required to state a basis for its findings in aggravation and mitigation, such a statement, once made, cannot be ignored.

Contrary to defendant's contention that no other evidence supports a finding of malice, the evidence in this case provides ample support for a finding of malice. " 'Malice is not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.' " *State v. Moore*, 275 N.C. 198, 206, 166 S.E.2d 652, 657 (1969) (quoting *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922)).

Until her disappearance in April 1991, the victim lived in Haywood County with defendant and her husband. On 1 November 1991 her body was discovered at the National Seashore Park. An autopsy disclosed that the cause of death was strangulation. The victim's neighbors and mailman told investigating officers that the victim had

been regularly abused both physically and verbally by defendant and his father over the past several years. In addition, the neighbors stated that the victim had come to their home on more than one occasion bleeding from cuts to her face and once had a swollen leg that she thought might have been broken. One neighbor, Ms. Hartzell, said that the victim told her she was afraid her husband and son would kill her if Ms. Hartzell moved away. The victim was in fact killed by defendant within a week or two after Ms. Hartzell moved away from the area.

The victim had a drinking problem and, according to defendant, had been drinking on the day he killed her. The victim allegedly approached defendant with a pair of scissors and said she was going to cut his hair. Defendant said he did not want his hair cut but the victim insisted, grabbed him by the hair, and would not let go. Defendant then grabbed the victim by her shirt collar and pulled until he felt her go limp. He laid her on the floor and saw her open her eyes. Defendant left the home for a while and when he returned, he discovered she was dead. He wrapped the body in a blanket and plastic bags, secured it with rope and duct tape, transported the body from Haywood County to the Outer Banks, and buried it. After his arrest, defendant allegedly told his cellmate that he killed the victim and that, although his father was not present at the time of the murder, he and his father had previously talked of killing the victim because she was difficult to get along with and an alcoholic.

The circumstances surrounding the killing, and the lack of just cause, excuse, or justification for the killing do support a finding of malice. But, because the court erred in basing its finding on the evidence of strangulation, we must remand this case for resentencing. *See State v. Davy*, 100 N.C. App. 551, 397 S.E.2d 634, *disc. review denied*, 327 N.C. 638, 398 S.E.2d 871 (1990).

Remanded for resentencing.

Judges MARTIN and THOMPSON concur.

GASTON GRADING AND LANDSCAPING, PLAINTIFF v. LEWIS YOUNG AND WIFE, JUANITA YOUNG AND CROWDERS MOUNTAIN DEVELOPMENT CORPORATION, DEFENDANTS

No. 9427SC38

(Filed 1 November 1994)

1. Liens § 22 (NCI4th)— obligation asserted but not enforced by first lien—no enforcement by second lien—mistake in second lien—method of correcting

Plaintiff was not entitled to enforce by means of its second lien the obligation which was asserted but not enforced in its first lien; furthermore, plaintiff's second claim of lien contained incorrect statements concerning the date of first furnishings and the alleged amount owed, and the appropriate way to correct those errors was to cancel the second lien and substitute a new claim of lien containing the correct information which plaintiff failed to do within the prescribed time. N.C.G.S. § 44A-12.

Am Jur 2d, Mechanics' Liens §§ 167-237.

2. Liens § 23 (NCI4th)— purchase money deed of trust—priority over lien

Under the doctrine of instantaneous seisin, defendants' purchase money deed of trust would have priority over plaintiff's claim of a materialmen's lien.

Am Jur 2d, Mechanics' Liens §§ 263-283.

Appeal by plaintiff from order entered 11 October 1993 by Judge Jesse B. Caldwell, III in Gaston County Superior Court. Heard in the Court of Appeals 28 September 1994.

J. Boyce Garland, Jr. for plaintiff-appellant.

Blair Conaway Bograd & Martin, by Bentford E. Martin, for defendants-appellees Lewis Young and Juanita Young.

JOHNSON, Judge.

On 22 June 1992 plaintiff Gaston Grading and Landscaping (Gaston) attempted to enforce a contractor's lien against real property then owned by Crowders Mountain Development Corporation (CMDC). The property was encumbered by two purchase money deeds of trust in favor of defendants Lewis and Juanita Young

(Youngs). The property consists of approximately 266 acres of real estate acquired by the Youngs. The Youngs constructed and operated an 18-hole golf course known as Crowders Mountain Golf Course upon the property, and also built a house there.

In March 1989, the Youngs sold and deeded approximately 84 acres of property to CMDC, and simultaneously recorded a purchase money deed of trust on that property to secure CMDC's payment of the purchase price, thus giving the Youngs a security interest in the said 84 acres. In May 1990, the Youngs sold and deeded to CMDC the remainder of the property, 182 acres, and as part of that transaction, also recorded a purchase money deed of trust upon all the property to secure CMDC's payment of the $2,250,000 purchase price. The $2,250,000 purchase money note given by CMDC to the Youngs in May 1990 represented the balance purchase price for all the property, including the 84 acres deeded to CMDC in March 1989 and the May 1990 purchase money deed of trust securing the note covering all 266 acres of the property.

On 10 April 1990, Gaston filed a claim of lien against the 84 acres of property. The claim of lien was for $77,910 and alleged that Gaston had first supplied labor or materials to the property identified in the lien on 3 February 1989, and had last furnished labor or materials there on 22 February 1990. Gaston did not file suit to enforce this claim of lien within 180 days of 22 February 1990, as required by North Carolina General Statutes § 44A-13 (1989).

On 20 May 1992, Gaston filed a second claim of lien, this time against all of the property. In the second lien, Gaston alleged that it was owed the sum of $128,585 by CMDC, that it had first furnished labor and materials to the property on 3 February 1989, and that it had last furnished labor or material to the property on 26 March 1992. Gaston filed this action to enforce the second lien on 22 June 1992.

Due to defaults by CMDC under its purchase money note and deed of trust to the Youngs, the Youngs commenced foreclosure proceedings in June 1992; however, in July 1992, CMDC filed a bankruptcy petition, which temporarily stayed the foreclosure proceedings. In January 1993, CMDC's bankruptcy petition was dismissed by the United States Bankruptcy Court for CMDC's failure to file a plan of reorganization. That same month, the Youngs reinstituted foreclosure proceedings and had a receiver appointed to hold and manage the property pending completion of the foreclosure. The Youngs then reacquired the property at the foreclosure sale held on 8 March 1993.

The issue on appeal is whether the trial court erred in granting summary judgment for defendants on the basis that plaintiff does not have an enforceable lien as a matter of law under North Carolina General Statutes § 44A-8 (1989). We find that the trial court did not err in granting summary judgment.

The North Carolina Rules of Civil Procedure provide that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." North Carolina General Statutes § 1A-1, Rule 56(c) (1990). Summary judgment allows the disposition prior to trial of an unfounded claim or defense. *Gray v. Hager*, 69 N.C. App. 331, 317 S.E.2d 59 (1984).

[1] In the case *sub judice*, plaintiff has conceded that its second lien, filed on 20 May 1992, included the same work, amount and alleged date of first furnishing, 3 February 1989, as contained in its first lien. Plaintiff also conceded that it is not entitled to enforce by means of its second lien the obligation which was asserted but not enforced in its first lien. Thus, there is no genuine issue of material fact regarding the content of the second claim of lien on its face.

Plaintiff's second claim of lien contains incorrect statements concerning the date of first furnishings to establish the lien's priority date, and the alleged amount owed; thus, the claim is defective. Plaintiff is required to state the items so that third parties would be on notice of the existence of a lien:

> [T]here must be a substantial compliance with the statute, i.e., a statement in sufficient detail to put interested parties, or parties who may become interested, on notice as to labor performed or materials furnished, the time when the labor was performed and the materials furnished, the amount due therefor, and the property on which it was employed. . . . The claim of lien is the foundation of the action to enforce the lien, and if such lien is defective when filed, it is no lien.

Lumber Co. v. Builders, 270 N.C. 337, 341, 154 S.E.2d 665, 668 (1967).

North Carolina General Statutes § 44A-12(d) (1989) states:

> No Amendment of Claim of Lien.—A claim of lien may not be amended. A claim of lien may be cancelled by a claimant or his authorized agent or attorney and a new claim of lien substituted therefor within the time herein provided for original filing.

Consequently, if plaintiff wished to correct the mistakes of its second lien, plaintiff was required to cancel the second lien and substitute a new claim of lien containing the correct information. Plaintiff failed to do so within the prescribed time and thus, its claim of lien is void.

This Court has said that a lien claimant is bound by the claim of lien which is actually filed, and the claim of lien may not be amended. *Brown v. Middleton*, 86 N.C. App. 63, 356 S.E.2d 386 (1987). In addition, our Supreme Court has said that a defect in a claim of lien cannot be corrected by alleging the necessary facts in pleadings in the action to enforce the lien. *Lumber Co. v. Builders*, 270 N.C. 337, 154 S.E.2d 665.

Unlike other cases in which this Court and the North Carolina Supreme Court have reviewed, there is no obvious clerical error. *See Canady v. Creech*, 288 N.C. 354, 218 S.E.2d 383 (1975); *Brown v. Middleton*, 86 N.C. App. 63, 356 S.E.2d 386. In the case *sub judice*, plaintiff intentionally attempted to revive its failed first claim of lien by listing the same date of their first furnishing and the amount listed in the prior lien. In so doing, plaintiff has failed to comply with North Carolina General Statutes § 44A-12. Therefore, plaintiff has a defective claim of lien.

[2] Furthermore, under the doctrine of instantaneous seisin, defendants' purchase money deed of trust recorded in March 1989 covering the 84 acres would have priority over the claim of lien. The doctrine of instantaneous seisin provides:

> when a deed and a purchase money deed of trust are executed, delivered, and recorded as part of the same transaction, the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to all others. *E.g.*, *Supply Co.* [*v. Riverbank*], 231 N.C. 213, 56 S.E.2d 431 [1949]. It would thus subordinate a previously existing materialman's lien. The policy supporting the doctrine is that a vendor who parts with property and supplies the purchase price does so on the basis of having a first priority security interest in the property. The vendor who advances purchase money relies on the assurance that he or she will be able to foreclose on the land if the purchase price is not repaid. It is thus equitable and just that the vendor have a first priority security interest and be protected from the possibility of losing both the land and the money in the transaction.

Carolina Builders Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 232, 324 S.E.2d 626, 631, *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985). *See also Slate v. Marion*, 104 N.C. App. 132, 408 S.E.2d 189 (1991).

In March of 1989, defendants recorded a deed of trust which secured CMDC's payment of the purchase price for the property; the deeds of trust were executed and given by CMDC as part of the same transaction by which CMDC acquired title, as they represented the purchase price; and the deeds of trust were recorded simultaneously with the Youngs' deeds to CMDC. Accordingly, their security interest is superior to plaintiff's claim of lien and they are entitled to priority over plaintiff's lien claims.

The trial court's grant of summary judgment for defendants was without error. Thus, the decision of the trial court is affirmed.

Affirmed.

Judges GREENE and LEWIS concur.

GERTIE MAE BOOMER, ADMINISTRATRIX OF THE ESTATE OF JOYCE BOOMER FORBES, DECEASED, PLAINTIFF v. SHERWOOD WATSON CARAWAY, DEFENDANT

No. 933SC1232

(Filed 1 November 1994)

Judgments § 326 (NCI4th); Limitations, Repose, and Laches § 9 (NCI4th)— no affirmative duty to have settlement for minors approved—no estoppel to assert statute of limitations—running of statute against minors

Defendant was not estopped from asserting the statute of limitations in a wrongful death action, since the plaintiff-administratrix rather than the defendant had an affirmative duty to seek judicial approval of a settlement benefiting deceased's minor children; furthermore, a statute of limitation which has run against an administratrix has also run against the minor beneficiaries of a wrongful death settlement or recovery. N.C.G.S. § 28A-13-3(a)(23).

Am Jur 2d, Judgments §§ 207 et seq.; Limitation of Actions §§ 422 et seq.

Appeal by plaintiff from judgment entered 3 September 1993 by Judge Herbert O. Phillips, III in Pamlico County Superior Court. Heard in the Court of Appeals 13 September 1994.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr. and Glenn C. Veit, for plaintiff-appellant.

Dunn, Dunn & Stoller, by David A. Stoller and Andrew D. Jones, for defendant-appellee.

LEWIS, Judge.

Plaintiff's intestate died from injuries received in an automobile accident with defendant on 31 August 1988. Plaintiff's attorney at the time, Samuel L. Whitehurst, and defendant's liability insurance carrier agreed to settle plaintiff's wrongful death claim, and on 31 October 1988 defendant's insurance company issued a check for $25,000 payable to plaintiff and her attorney. On 1 November 1988 plaintiff executed a release.

It is undisputed that Whitehurst embezzled the proceeds of the settlement and was subsequently disbarred. In May 1991 plaintiff retained her present counsel and filed an action against Whitehurst. Plaintiff initially recovered $11,369 through the North Carolina State Bar, which had imposed a restraining order on Whitehurst's trust account. The parties reached a consent judgment of $100,000 with a cash settlement of $22,000. However, Whitehurst did not carry professional liability insurance and subsequently filed for bankruptcy.

Plaintiff instituted the present action on 7 August 1992, asserting negligence on behalf of defendant and demanding compensatory and punitive damages in excess of $10,000. In his answer to the complaint, defendant pled the two-year wrongful death statute of limitations and the release signed by plaintiff on 1 November 1988. Defendant moved for judgment on the pleadings and for Rule 11 sanctions. Defendant also alleged contributory negligence and asserted entitlement to a credit for the $25,000 already paid to plaintiff and Whitehurst. The trial court granted defendant's motion for summary judgment on 3 September 1993, and plaintiff now appeals.

It is clear that plaintiff's action was filed after the applicable statute of limitation had expired. N.C.G.S. § 1-53(4) (1983) provides that wrongful death actions must be brought within two years from the death of the decedent. The decedent in this case died on 2 Sep-

tember 1988, and plaintiff filed this action on 7 August 1992, clearly beyond the two-year period.

On appeal, plaintiff argues that defendant should be estopped from asserting the statute of limitation as a defense because of the provisions of N.C.G.S. § 28A-13-3(a)(23) (Cum. Supp. 1993). That statute provides that a wrongful death settlement "shall be subject to the approval of a judge of superior court unless all persons who would be entitled to receive any damages . . . are competent adults and have consented in writing." *Id.* The beneficiaries of the settlement in the case at hand are the decedent's two minor children. The settlement, therefore, should have been approved by a judge. Plaintiff points out that neither party moved for a court order approving the settlement. Plaintiff asserts that by failing to obtain judicial approval defendant enabled plaintiff's attorney to take the money, and defendant should therefore be estopped from now asserting the statute of limitation. Plaintiff asserts that defendant's conduct in failing to seek approval "induced Mrs. Boomer to believe that the claim of the Estate had been concluded, and resulted in her failure to file a lawful claim within" the limitation period.

The statute, however, does not stipulate which party has the responsibility of obtaining judicial approval, and we find nothing to support plaintiff's contention that defendant had a duty to obtain judicial approval. Plaintiff cites the case of *Bowling v. Combs*, 60 N.C. App. 234, 298 S.E.2d 754, *disc. review denied*, 307 N.C. 696, 301 S.E.2d 389 (1983), in support of her position. In *Bowling*, the Court stated that the original administrator failed to fulfill his statutory duties because he neglected to seek either judicial approval of or written consent to a wrongful death settlement. *Id.* at 237, 298 S.E.2d at 756. This failure to accord the beneficiary her "statutory protections" constituted a justification for equitable relief. *Id.* Plaintiff asserts that in the case at hand, defendant's failure to seek judicial approval likewise constitutes a legitimate reason for equitable relief. We disagree. The *Bowling* Court specifically stated that "[w]hen Bowling [the administrator] settled the wrongful death claim with defendants without either approval by a superior court judge or Benton's [the beneficiary's] written consent, he failed to exercise the powers granted him as administrator by G.S. 28A-13-3(a)(23) in conformity with its express provisions." *Id.* We believe the only conclusion to be drawn from *Bowling* is that the administrator-plaintiff, not the defendant, has a duty to seek judicial approval.

Furthermore, *Bowling* did not involve a statute of limitation issue. In *Bowling*, the administrator had filed a complaint within the statutory period, and later settled the action. When the new administratrix was appointed several years later, she simply adopted the complaint and proceeded to trial. *Id.* at 236, 298 S.E.2d at 756. In the case at hand, no complaint was ever filed within the statutory period.

We note that application of the statute of limitation in this case might cause some concern since the beneficiaries of the estate are minors. Generally, a statute of limitation does not begin to run against a minor until the minor reaches age 18. N.C.G.S. § 1-17 (Cum. Supp. 1993). *See Jefferys v. Tolin*, 90 N.C. App. 233, 368 S.E.2d 201 (1988) (if guardian appointed for minor, limitation period runs from time of appointment). The general rule, however, is not applicable in the case at hand, because the minor children are not plaintiffs. The plaintiff in this case is the administratrix of the estate, who acts " 'in the capacity of a trustee or agent of the beneficiary of the estate.' " *Bowling*, 60 N.C. App. at 237, 298 S.E.2d at 756 (quoting *Harrison v. Carter*, 226 N.C. 36, 40, 36 S.E.2d 700, 703 (1946)). In *Fortune v. First Union National Bank*, 87 N.C. App. 1, 359 S.E.2d 801 (1987), *rev'd on other grounds*, 323 N.C. 146, 371 S.E.2d 483 (1988), this Court stated that "[w]here a trust has a claim against a third party, and the trustee is competent to sue, a statute of limitations will be deemed to have run against all beneficiaries, regardless of minority, when it has run against the trustee." *Id.* at 7, 359 S.E.2d at 805. Since the *Bowling* Court stated that an administratrix acts as a trustee for the estate in commencing a wrongful death action, we believe the rule stated in *Fortune* applies. Thus, if the statute of limitation has run against the administratrix, it has also run against the minor beneficiaries of a wrongful death settlement or recovery.

While we are sympathetic to plaintiff's situation, we conclude that the trial court correctly ordered summary judgment in favor of defendant. Without evidence that defendant had an affirmative duty to seek judicial approval of the settlement, we cannot find that defendant is estopped from asserting the statute of limitation. To extend the rule of minority rights to trustees, administrators and executors would be to make settlements uncertain and unduly hazard reliance on judgments. We note that plaintiff has successfully recovered some money from the wrongdoer in this case; she has recovered over $11,000 from Whitehurst's trust account, a $22,000 cash settlement, and a consent judgment of $100,000.

Because plaintiff's contentions are without merit, we find it unnecessary to address defendant's procedural arguments. The trial court did not err in entering summary judgment in favor of defendant.

Affirmed.

Judges JOHNSON and GREENE concur.

RUBY MAE MOORE, PETITIONER/APPELLEE v. ROBERT F. HODGES, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA, AND THE N.C. DIVISION OF MOTOR VEHICLES, RESPONDENT/APPELLANT

No. 946SC327

(Filed 1 November 1994)

Automobiles and Other Vehicles § 92 (NCI4th)— probable cause to believe petitioner driving while impaired—refusal to submit to chemical analysis

The uncontradicted and manifestly credible testimony of the investigating trooper that petitioner was involved in a one-car accident at 1:30 a.m., admitted that the accident was her fault, admitted she had been drinking earlier that evening, smelled of alcohol, had mumbled speech, and registered .10 or higher on the alcosensor test was sufficient to establish probable cause for the trooper to believe that petitioner had been driving while impaired, and the uncontradicted evidence further showed that petitioner willfully refused to submit to chemical analysis when requested; therefore, the trial court erred in reversing the one-year revocation of petitioner's driving privileges based on petitioner's willful refusal to submit to a chemical analysis.

Am Jur 2d, Automobiles and Highway Traffic §§ 122 et seq.

Suspension or revocation of driver's license for refusal to take sobriety test. 88 ALR2d 1064.

Appeal by respondent from order entered 15 November 1993 by Judge Napoleon B. Barefoot in Hertford County Superior Court. Heard in the Court of Appeals 26 September 1994.

Overton, Jones and Carter, P.A., by Larry S. Overton and Bruce L. Daughtry, for petitioner appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Bryan E. Beatty, for respondent appellant.

COZORT, Judge.

Respondent Commissioner of Motor Vehicles appeals from an order reversing the one-year revocation of petitioner's driving privileges based on petitioner's willful refusal to submit to a chemical analysis. Respondent contends the court erred by concluding: (1) that the charging officer did not have reasonable grounds to believe petitioner had committed the offense of driving while impaired; and (2) that petitioner did not willfully refuse to submit to the chemical analysis. We agree with respondent and therefore reverse.

Respondent revoked petitioner's driver's license for one year based on petitioner's alleged willful refusal on 10 January 1993 to submit to a chemical analysis of her blood. Petitioner filed for a *de novo* hearing in superior court to review the revocation of her license. The evidence presented at the *de novo* hearing consisted solely of the testimony of Trooper Dwayne W. Banks and shows the following: At approximately 1:30 a.m. on 10 January 1993, Trooper Banks arrived at the scene of a one-car accident and observed petitioner's vehicle in the ditch on the right side of the road. Petitioner was lying down in the back of a rescue squad vehicle and was being treated for lacerations to her face. Banks stepped into the rescue squad vehicle to look at the people involved in the accident and to ask their names.

About forty-five minutes later, Banks went to the hospital where petitioner had been taken and spoke with the passenger who had been in the vehicle. He spoke with petitioner who was lying on a table in the emergency room. After being informed of her rights in accordance with *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966), petitioner told Banks that as she was travelling north on U.S. 13 she reached down to pick up a pen from the car floor, at which point the car ran off the road and hit a culvert. When Banks asked whether she had anything to drink that evening or that day, petitioner stated that she had some liquor earlier. Banks noticed that petitioner was "real talkative" and had a faint odor of alcohol about her person. Banks testified that petitioner's speech was mumbled but that she seemed coherent, able to understand her rights as they were read to her, and able to understand why Banks was questioning her.

Banks administered to petitioner an alcosensor test, which yielded a result higher than .10. After informing petitioner of the results of the alcosensor test, Banks charged her with driving while impaired. Banks informed petitioner of her rights concerning submission to a chemical analysis and gave her a copy of the rights form, which she signed. Banks asked petitioner to submit to a chemical analysis of her blood, and she initially agreed. As the doctor prepared to take her blood, petitioner had a discussion with her father and brother, who were present in the emergency room, about whether she should take the test. After the discussion, petitioner told Banks she was not going to take the test. Banks testified that petitioner did not appear confused about his request that she submit to chemical analysis and that her answers were responsive to his questions.

On cross-examination, Banks testified that petitioner was lying down at all times when he questioned her, both in the rescue squad vehicle and at the hospital; that he did not write down petitioner's answer concerning what she had to drink that night; and that he did not write down the numerical reading on the alcosensor. Banks did write in his notes, however, that the alcosensor test was "positive" and explained that a notation of "negative" would mean that the result was below .10.

By order entered 15 November 1993, the superior court restored petitioner's driving privileges. In so ruling, the court made limited findings of fact from which it concluded:

> 1. Based upon the information available to the Trooper at the time he saw the Petitioner at the hospital and at the scene of the accident, he did not have probable cause to believe she was subject to an impairing substance at any relevant time after driving a motor vehicle.
>
> 2. The Petitioner did not willfully refuse to submit to a chemical analysis upon the request of the charging officer as required by N.C.G.S. Sec. 20-16.2(d)(5).

Respondent contends the evidence does not support the conclusions reached by the court and, to the contrary, shows that the charging officer had probable cause to believe that petitioner had been driving while impaired and that petitioner willfully refused to submit to the chemical analysis.

In determining whether a charging officer had reasonable grounds to believe a petitioner committed an implied consent offense

within the meaning of N.C. Gen. Stat. § 20-16.2 (1993), the term "reasonable grounds" should be viewed as synonymous with "probable cause." *Rock v. Hiatt*, 103 N.C. App. 578, 584, 406 S.E.2d 638, 642 (1991); *In re Gardner*, 39 N.C. App. 567, 571, 251 S.E.2d 723, 726 (1979). Probable cause exists if the facts and circumstances at that moment within the charging officer's knowledge and of which the officer had reasonably trustworthy information are such that a prudent man would believe that the suspect had committed or was committing an offense. *Rock v. Hiatt*, 103 N.C. App. at 584, 406 S.E.2d at 642.

> In determining whether probable cause exists in any particular case, it is the function of the trial court, if there be conflicting evidence, to find the relevant facts. Such factual findings, if supported by competent evidence, are binding on appeal. However, whether the facts so found by the trial court *or shown by uncontradicted evidence* are such as to establish probable cause in a particular case, is a question of law as to which the trial court's ruling may be reviewed on appeal.

In re Gardner, 39 N.C. App. at 571, 251 S.E.2d at 726 (emphasis added).

Respondent contends the uncontradicted and manifestly credible testimony of Trooper Banks showing that petitioner was involved in a one-car accident at 1:30 a.m., admitted that the accident was her fault, admitted she had been drinking earlier that evening, smelled of alcohol, had mumbled speech, and registered .10 or higher on the alcosensor is sufficient to establish probable cause for Banks to believe that petitioner had been driving while impaired. We agree. We note that N.C. Gen. Stat. § 20-16.3(d) (1993) specifically provides that the results of an alcohol screening test may be used by a law enforcement officer, a court, or an administrative agency in determining whether there are reasonable grounds to believe that the driver has committed an implied consent offense under N.C. Gen. Stat. § 20-16.2. The alcosensor is an approved alcohol screening test. N.C. Admin. Code tit. 15A, r. 19B.0503(a) (February 1976). Thus, it is permissible to consider the results of the alcosensor test in determining whether Trooper Banks had reasonable grounds to believe petitioner had committed an implied consent offense.

We find *Richardson v. Hiatt*, 95 N.C. App. 196, 381 S.E.2d 866, *modified*, 95 N.C. App. 780, 384 S.E.2d 62 (1989), particularly instructive. In *Richardson*, this Court found the charging officer had rea-

sonable grounds to believe the petitioner had been driving while impaired where the petitioner was involved in a one-car accident in the middle of the afternoon on a clear day, the petitioner claimed he feel asleep at the wheel, and the officer detected a strong odor of alcohol about the petitioner. This Court concluded that the evidence surrounding the accident and the petitioner's reason for its occurrence, coupled with the strong odor of alcohol about petitioner, gave the charging officer reasonable grounds to arrest the petitioner for driving while impaired. *Richardson*, 95 N.C. App. at 200, 381 S.E.2d at 868.

The evidence in the present case is even more compelling than *Richardson*. We find the evidence surrounding petitioner's accident, including the reason for its occurrence, taken with the odor of alcohol about petitioner, her mumbled speech, her admission that she had been drinking liquor earlier, and the results of the alcosensor test clearly sufficient to give Trooper Banks reasonable grounds to believe that petitioner had been driving while impaired. The uncontradicted evidence further shows that petitioner willfully refused to submit to chemical analysis when requested. We therefore reverse the order entered and remand the cause for entry of an order reinstating respondent's revocation of petitioner's driving privileges.

Reversed and remanded.

Judges JOHNSON and WYNN concur.

THE COMMUNITY BANK, PLAINTIFF-APPELLANT v. RICHARD E. WHITLEY, WANDA M. WHITLEY, AND MARINELAND OUTDOOR CENTER, INCORPORATED, DEFENDANTS-APPELLEES

No. 9317SC1215

(Filed 1 November 1994)

Appeal and Error § 118 (NCI4th)— denial of summary judgment—appeal interlocutory

Plaintiff's appeal of denial of its summary judgment motion is dismissed as interlocutory.

Am Jur 2d, Appeal and Error § 104.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

Appeal by plaintiff from order entered 24 August 1993 by Judge James A. Beaty, Jr., in Surry County Superior Court. Heard in the Court of Appeals 3 October 1994.

In July of 1992, plaintiff sued defendants to recover over $250,000.00 following defendants' default on several promissory notes. The notes represented sums the Bank loaned defendants to purchase and operate Marineland, a boat dealership. Shortly after plaintiff brought this action, the trustee filed three foreclosure actions on the deeds of trust securing the notes. Before any property was foreclosed upon, however, the trial court granted defendants' motion to consolidate the foreclosures and the underlying action, thereby preventing plaintiff from proceeding with the foreclosures.

In response to plaintiff's complaint, defendants alleged counterclaims grounded in fraud, negligent misrepresentation, and unfair business practices. These counterclaims arose from the plaintiff's involvement, through the actions of its president, in the Whitleys' purchase of Marineland from Albert Hicks. More specifically, the Whitleys alleged that plaintiff's president made fraudulent statements and inducements to not only encourage the Whitleys to buy Marineland, but also to get them to obtain financing for the purchase through the Bank.

In its reply, plaintiff denied the counterclaims and asserted the affirmative defenses of res judicata, collateral estoppel, and judgment and satisfaction. These defenses were based on an earlier action between the Whitleys and Albert Hicks, Marineland's prior owner. In that suit, the Whitleys made similar counterclaims against Hicks after he sued them to recover monies due following the sale. The suit ended with a consent judgment and a cash payment to the Whitleys.

On 18 January 1993, plaintiff moved for summary judgment arguing that it should be allowed to proceed with the foreclosures. The trial court denied the motion. Plaintiff moved for summary judgment a second time on 20 July 1993, this time arguing that the counterclaims were barred by res judicata, collateral estoppel, and judgment and satisfaction. Again, the trial court denied its motion.

From the order denying its second motion for summary judgment, plaintiff appeals.

House & Blanco, P.A., by John S. Harrison, for plaintiff appellant.

Donnelly & DiRusso, by Gus L. Donnelly, for defendant appellees.

PER CURIAM.

Plaintiff appeals the denial of its motion for summary judgment. Typically, "the denial of a motion for summary judgment is a nonappealable interlocutory order." *Northwestern Financial Group v. County of Gaston*, 110 N.C. App. 531, 535, 430 S.E.2d 689, 692, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). Despite this general rule, this Court will address the merits of such an appeal if "a substantial right of one of the parties would be lost if the appeal were not heard prior to the final judgment." *Id.* Our Supreme Court has stated that "the denial of a motion for summary judgment based on the defense of res judicata may affect a substantial right." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (italics omitted). A substantial right is likely to be affected where a possibility of inconsistent verdicts exists if the case proceeds to trial, but the facts of this case would not lead to such an outcome. Further, we do not believe these facts present a compelling case for premature review. Accordingly, plaintiff's appeal is dismissed as interlocutory.

Dismissed.

Panel consisting of: Chief Judge ARNOLD, Judges COZORT and LEWIS.

IN RE GREEN

[116 N.C. App. 734 (1994)]

IN THE MATTER OF:	)	
	)	
	)	ORDER
ANDRE GREEN	)	
	)	
	)	
JUVENILE ANDRE GREEN BY AND THROUGH HIS ATTORNEY APPEALED	)	

No. COA94-1405
(Filed 6 January 1995)

The petition filed in this cause on 20 December 1994 and designated "Petition for Writ of Mandamus or , in the Alternative, a Writ of Prohibition to: The Honorable Donald W. Stephens Superior Court Judge Tenth Judicial District" and the motion filed in this cause on 6 January 1994 and designated "State's Motion to Dismiss Appeal" are decided as follows:

The Order of transfer appealed from by the juvenile is not a "final order of the court in a juvenile matter" as defined in N.C. Gen. Stat. 7A-666 (1989). Therefore, the juvenile has no right to appeal the discretionary order pursuant to that statute. The State's motion to dismiss the appeal in this case is hereby ALLOWED.

Because no appeal in this case remains pending before this Court, the relief requested by the juvenile, a writ of prohibition directing a stay of further proceedings in Superior Court, Wake County, is not warranted. The petition is hereby DENIED. It is further ordered that this order be published in its entirety in the NC COURT OF APPEALS REPORTS.

This the 6th day of January, 1995.

JOHN H. CONNELL
Clerk of North Carolina
Court of Appeals

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 OCTOBER 1994

BARTLETT v. BROOKE No. 9318DC1064	Guilford (84CVD4591)	Dismissed
BREWINGTON v. MULLINS No. 9312SC1076	Cumberland (93CVS2155)	Affirmed
BUCHANAN v. ATLANTIC INDEMNITY CO. No. 9328SC1241	Buncombe (92CVS4702)	Reversed & Remanded
CAROLINA MEADOWS v. EQUITY ASSOC. No. 9315SC811	Chatham (91CVS597)	Affirmed
CONCRETE SERVICES OF ROCKY MOUNT v. CAKE INDUSTRIES No. 936DC1218	Halifax (91CVD993)	Reversed & Remanded
CUMBERLAND COUNTY CITIZENS FOR SOUND GOVERNMENT v. CUMBERLAND COUNTY No. 9412SC157	Cumberland (92CVS7090)	Appeal Dismissed
DICKERSON v. KEEVER No. 949DC337	Person (90CVD293)	Affirmed
HARWOOD v. PEACOCK No. 9322SC1167	Davidson (93CVS386)	Affirmed
IN RE HARVEY No. 9329DC109	McDowell (90J15)	Affirmed
IN RE JONES No. 9422DC250	Iredell (91J83) (91J84)	Affirmed
IN RE WILLIAMS No. 9311DC1231	Lee (93J36)	Vacated & Remanded
J. W. COOK & SONS v. HILL No. 9313SC1176	Columbus (92CVS904)	Affirmed
MAXWELL v. CONSUMERS LIFE INS. No. 9312SC1195	Cumberland (92CVS4566)	Remanded

MAY v. BIZON TALENT MANAGEMENT INT'L. No. 9310SC1237	Wake (92CVS916)	Affirmed in part, Reversed in part
STATE v. HOOD No. 9427SC340	Gaston (92CRS14465) (92CRS14466) (92CRS14467) (92CRS14468)	No Error
STATE v. HUSKEY No. 9427SC156	Gaston (92CRS14521) (92CRS14522) (92CRS14523) (92CRS14524) (92CRS25929)	No Error
STATE v. JOHNSON No. 935SC986	New Hanover (91CRS22495) (91CRS22496) (91CRS23413)	No Error
STATE v. ROBERTS No. 9326SC1131	Mecklenburg (92CRS50043)	No Error
STATE v. SANDERS No. 9427SC353	Gaston (92CRS14504) (92CRS14505) (92CRS14506) (92CRS14507)	No Error
STATE v. SLOAN No. 9326SC948	Mecklenburg (92CRS082749) (92CRS082750) (92CRS092751)	No Error
UNITED AGENCIES v. R & E ELECTRONIC No. 935SC1234	New Hanover (93CVS1425)	Affirmed

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BHATTI v. BUCKLAND No. 9215SC76	Alamance (87CVS1179)	Affirmed
CEDAR HOLLOW DEV. v. INVESTORS TITLE INS. CO. No. 9318SC1172	Guilford (91CVS10486)	Affirmed
CENTIMARK CORP. v. HAMLIN ROOFING CO. No. 9410SC484	Wake (93CVS2764)	Appeal Dismissed

CHRISTENSEN v. CHRISTENSEN No. 9310DC1071	Wake (91CVD10796)	Affirmed
FORD MOTOR CREDIT v. O'BARR No. 9310SC1217	Wake (92CVS8371)	Affirmed
IN RE HAILEY No. 9322DC75	Davidson (92J47)	Affirmed
LAWRENCE v. TISE No. 9328DC1134	Buncombe (89CVD1919) (90CVD2948)	Affirmed
N.C. FARM BUREAU MUT. INS. CO. v. INTEGON GENERAL INS. CO. No. 9323SC1183	Wilkes (93CVS67)	Affirmed
PATTERSON v. AT&T TECHNOLOGIES No. 9221SC1168	Forsyth (88CVS2765)	New Trial
STATE v. BERKEBILE No. 9418SC443	Guilford (93CRS27055)	No Error
STATE v. BYERS No. 9426SC369	Mecklenburg (93CRS75974)	No Error
STATE v. CALDWELL No. 9421SC410	Forsyth (93CRS26044) (93CRS26045) (93CRS26330) (93CRS26331) (93CRS26332) (93CRS26333)	Affirmed
STATE v. CHARLES No. 9422SC470	Davidson (93CRS11626) (93CRS11627)	No Error
STATE v. CLINTON No. 9318SC1124	Guilford (92CRS5626)	No Error
STATE v. FARRIS No. 948SC551	Lenoir (92CRS6124)	No Error
STATE v. GOODSON No. 9426SC292	Mecklenburg (93CRS25699)	No Error
STATE v. GRIFFIN No. 9426SC425	Mecklenburg (92CRS074542) (92CRS074545) (92CRS074546) (92CRS074547)	Appeal Dismissed

STATE v. HORTON No. 948SC356	Wayne (93CRS999) (93CRS1000)	No Error
STATE v. MATTHEWS No. 9410SC376	Wake (92CRS77902) (92CRS77903) (92CRS77904)	No Error
STATE v. MERCER No. 9412SC283	Cumberland (91CRS47243)	No Error
STATE v. MITCHELL No. 9410SC422	Wake (93CRS76776) (93CRS76778)	No Error
STATE v. MOORE No. 947SC448	Wilson (93CRS9463) (93CRS9464) (93CRS9465)	Remanded for Resentencing
STATE v. SWANSON No. 9312SC1098	Cumberland (92CRS37242)	No Error
STATE v. UPCHURCH No. 9410SC493	Wake (93CRS69540)	No Error
STATE v. WASHINGTON No. 9421SC479	Forsyth (93CRS39698)	No Error
STATE v. WHITE No. 9421SC409	Forsyth (90CRS45418)	No Error
STATE v. WHITE No. 944SC464	Sampson (93CRS939)	No Error
STATE v. WILSON No. 9326SC941	Mecklenburg (92CRS59329)	No Error
STATE v. WORIAX No. 9310SC1114	Wake (92CRS61500)	No Error
TRIPLE E ASSOC. v. TOWN OF MATTHEWS No. 9426SC131	Mecklenburg (93CVS13150	Reversed & Remanded
WILLIAMS v. DOROTHEA DIX HOSPITAL No. 9410IC314	Ind. Comm. (112399)	Appeal Dismissed
WILLIAMS v. FORT BRAGG FEDERAL CREDIT UNION No. 9412SC261	Cumberland (91CVS6293)	Affirmed
WILLOUGHBY v. CARPENTER No. 9420SC462	Anson (92CVS231)	Appeal Dismissed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

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TOPICS COVERED IN THIS INDEX

ACCORD AND SATISFACTION

APPEAL AND ERROR

CORONERS AND MEDICAL EXAMINERS

§ 32 (NCI4th). Liability of medical examiner for wrongful autopsy

A trial court erred when ruling on a motion to dismiss in a wrongful autopsy action by entering conclusions of law in his order denying defendant Hjelmstad's motion to dismiss without entering findings of fact and by concluding that Hjelmstad acted outside the scope of his duties as a medical examiner and was not entitled to immunity, which had the same effect as granting a motion for summary judgment on the issue of liability. **Epps v. Duke University,** 305.

The trial court correctly denied defendant Hjelmstad's motion to dismiss a wrongful autopsy action where the complaint contained allegations that Hjelmstad acted outside the scope of his official duties and, although defendant Hjelmstad contended that he was entitled to immunity as the medical examiner, the Court of Appeals could not conclude from the allegations in the complaint that Hjelmstad was sued only in his capacity as medical examiner. **Ibid.**

CORPORATIONS

§ 208 (NCI4th). Claims against dissolved corporations as consequence of entire asset purchase

The trial court erred when it granted summary judgment for defendant ADtec Sales, Inc. in an products liability action involving a trampoline where ADtec contended that it had not manufactured the trampoline but plaintiffs forecast evidence that ADtec was a mere continuation of the manufacturer. **Bryant v. Adams,** 448.

CRIMINAL LAW

§ 25 (NCI4th). Mental capacity as affected by intoxicating liquor or drugs, generally

Evidence of defendant's intoxication was insufficient to require the trial court in a burglary prosecution to instruct the jury on misdemeanor breaking and entering. **State v. Howie,** 609.

§ 33 (NCI4th). Compulsion and government authorization generally

The trial court properly instructed the jury as to compulsion in accordance with *State v. Kearns,* 27 N.C. App. 354. **State v. Barnes,** 311.

§ 133 (NCI4th). Acceptance of guilty plea

The trial court did not err by failing to investigate a discrepancy between one of defendant's answers on his written transcript of plea and his response in open court where the trial court made the inquiry required by G.S. 15A-1022 and determined that the guilty plea was the product of defendant's informed choice and that there was a factual basis for the plea. **State v. Washington,** 318.

§ 172 (NCI4th). Pleas of mental incapacity to plead or stand trial; defendant's right to examination and hearing

The trial court did not err in denying defendant's motion for further mental evaluation and a continuance where the court granted defendant a hearing on mental capacity and found that defendant was competent to stand trial. **State v. O'Neal,** 390.

CRIMINAL LAW — Continued

§ 261 (NCI4th). Particular grounds for continuance; insufficient time to prepare defense generally

The trial court did not err in denying defendant's motion to continue in order to allow defendant's counsel time to prepare for the DNA evidence presented by the State. **State v. Hill,** 609.

§ 307 (NCI4th). Consolidation of multiple offenses against property

Consolidation of charges of first-degree burglary and larceny was not prejudicial where the offenses were similar and involved the same pattern of operation. **State v. Howie,** 609.

§ 394 (NCI4th). Consolidation of particular offenses; multiple drug charges or offenses

The trial court did not err in granting the State's motion to join for trial 11 September 1992 charges against defendant of maintaining a dwelling for keeping and selling marijuana and possession of marijuana with the intent to sell and deliver and a 12 October 1992 charge for selling marijuana to a minor. **State v. Styles,** 479.

§ 767 (NCI4th). Instruction on burden and sufficiency of proof of insanity defense

The trial court erred by refusing to instruct the jury to consider the principle of diminished capacity in evaluating the charge against defendant of assault with a deadly weapon with intent to kill inflicting serious injury. **State v. Williams,** 225.

§ 777 (NCI4th). Instructions on alibi generally

The trial did not err in refusing to instruct on the defense of alibi where defendant offered no evidence that he was elsewhere when the crimes occurred but merely challenged his identification by the State's witnesses. **State v. Hill,** 573.

§ 786 (NCI4th). Instructions on duress generally

The trial court properly instructed the jury as to compulsion in accordance with *State v. Kearns,* 27 N.C. App. 354, where the defense initially requested that the judge instruct the jury as to coercion or duress and counsel for defendant withdrew the request after the State asked the court to give the instruction in accordance with *Kearns.* **State v. Barnes,** 311.

§ 1067 (NCI4th). Sentencing hearing; evidence of victim

The trial court did not commit reversible error by allowing victim impact statements as to sentence. **State v. Williams,** 225.

§ 1079 (NCI4th). Consideration of aggravating and mitigating factors generally; discretion of trial court

Where the sentencing court makes findings of aggravating and mitigating factors even though it is not required to do so, the findings may be disregarded as mere surplusage. **State v. Washington,** 318.

§ 1084 (NCI4th). Consideration of aggravating and mitigating factors; required findings where sentence imposed on the basis of plea arrangement as to sentence

The trial court was not required to make findings of aggravating or mitigating factors where the term, though exceeding the total of the presumptive terms for the consolidated offenses, was imposed pursuant to a plea arrangement as to sentence. **State v. Washington,** 318.

CRIMINAL LAW — Continued

The defendant was not entitled to appeal as a matter of right and his appeal was dismissed where defendant had pled guilty pursuant to a plea arrangement in which his exposure would be limited to 40 years on condition that he testify truthfully if necessary against other defendants and the trial court imposed a sentence in excess of the presumptive term. Defendant's guilty plea limiting exposure to 40 years amounts to a plea arrangement as to sentence and the trial court need not make findings as to aggravating or mitigating factors if it imposes a prison term pursuant to any plea arrangement as to sentence. **State v. Williams,** 354.

§ 1098 (NCI4th). Aggravating factors; prohibition on use of evidence of element of offense

Defendant is entitled to a new sentencing hearing for voluntary manslaughter where the trial court's basis for the aggravating factor of malice was that the killing resulted from manual strangulation, evidence of which was necessary to prove the unlawful killing. **State v. Lundin,** 715.

§ 1105 (NCI4th). Nonstatutory aggravating factors; reference to pending charges

No error will be found where the record does not affirmatively show that the trial court considered other charges pending against defendant in imposing the sentence in this case. **State v. Westall,** 534.

§ 1123 (NCI4th). Nonstatutory aggravating factors; premeditation

The trial court did not err when it found premeditation and deliberation as a nonstatutory aggravating factor for second-degree murder where the only evidence in support of such factor was defendant's own testimony at a separate trial of his codefendants. **State v. O'Neal,** 390.

§ 1140 (NCI4th). Nonstatutory aggravating factors; defendant hired or paid to commit offense

The evidence was not sufficient to support the nonstatutory aggravating factor of pecuniary gain where defendant was convicted of being an accessory after the fact to murder where there was no evidence showing that defendant's reliance upon Vick caused her to assist Vick in his escape. **State v. Barnes,** 311.

§ 1171 (NCI4th). Statutory aggravating factors; great monetary loss or taking of property of great monetary value or involvement of large amount of contraband generally

The trial court did not err by considering the unusually large amount of drugs found at the crime scene as an aggravating factor in sentencing defendant for second-degree murder and assault with a deadly weapon. **State v. Williams,** 225.

§ 1189 (NCI4th). Statutory aggravating factors; prior convictions; commission of joinable offense

The trial court erred in using evidence supporting a joined offense in aggravation of defendant's consolidated sentence. **State v. Williams,** 225.

§ 1284 (NCI4th). Ancillary nature of habitual felon indictment

Convictions for felony murder and for two escapes while serving the sentence for murder could properly serve as the underlying felony supporting defendant's conviction as an habitual felon, and indictments separate from the indictment charging defendant with the principal felony were sufficient to charge defendant as an habitual felon. **State v. Netcliff,** 396.

DEEDS

§ 87 (NCI4th). Enforcement of specific restrictive covenants; covenants relating to type of residence

The evidence was sufficient for the jury on the issue of unreasonableness and bad faith on the part of plaintiff homeowners association's architectural review committee in an action to require defendant homeowners to remove vinyl siding and restore their home to its original condition. **Raintree Homeowners Assn. v. Bleimann,** 561.

§ 95 (NCI4th). Enforcement of restrictive covenants; jury instructions

The trial court did not err in refusing to give plaintiff's requested instruction with regard to the validity of conditions and restrictions in the subdivision covenants and with regard to the jury's not substituting their opinion about vinyl siding for the opinion of the architectural review committee. **Raintree Homeowners Assn. v. Bleimann,** 561.

DISCOVERY AND DEPOSITIONS

§ 21 (NCI4th). Depositions on oral examination generally

There is no distinction between a discovery deposition and a trial deposition under Rule of Civil Procedure 32. **Robertson v. Nelson,** 324.

DIVORCE AND SEPARATION

§ 19 (NCI4th). Particular rights affected by separation agreement; partition

Petitioner waived her right to partition a house owned by the parties as tenants in common and occupied by respondent where the parties' separation agreement provided that respondent would remain in the house and be responsible for making mortgage payments, and respondent has made all of the required payments. **Diggs v. Diggs,** 95.

§ 135 (NCI4th). Distribution of marital property; court's duty to value property

The evidence was sufficient to support the trial court's finding as to the value of a residential subdivision based on an appraiser's report. **Sharp v. Sharp,** 513.

The trial court did not err in finding that two wetland lots owned by a partnership in which plaintiff held 25% interest had no value. **Ibid.**

§ 140 (NCI4th). Valuation of property; professional practices; partnerships

The trial court did not err in applying an average of methodologies to value plaintiff's partnership interest in his law firm. **Sharp v. Sharp,** 513.

The trial court did not err by finding as fact that the deduction of taxes at a 40% rate in the capitalization of earnings and capitalization of excess earnings analysis of the value of plaintiff's law partnership was properly treated as an expense of the practice. **Ibid.**

§ 152 (NCI4th). Contributions to spouse's education or career

The trial court sufficiently considered as a distributive factor the financial contributions of each spouse to the marriage during the time plaintiff was in law school. **Sharp v. Sharp,** 513.

DIVORCE AND SEPARATION – Continued

§ 155 (NCI4th). Distribution of marital property; maintenance or development of property after separation

The trial court did not fail to consider post-separation appreciation of marital property in the hands of plaintiff where the referee considered the post-separation appreciation and depreciation of marital assets in his report and recommended an unequal distribution to the trial court, and the trial court adjusted the distribution to give defendant an even greater share. **Sharp v. Sharp,** 513.

The trial court's findings that the proceeds from the sale of lots in a residential subdivision were both income from the partnership which developed the property and liquidation of an asset were not inconsistent with each other. **Ibid.**

§ 156 (NCI4th). Dissipation or neglect of property after separation

The evidence was sufficient to support the referee's finding that there was no evidence of any pre-separation or post-separation waste of marital assets by plaintiff. **Sharp v. Sharp,** 513.

The trial court did not err in failing to find as a fact that plaintiff's poor management practices of a restaurant were directly responsible for the decline in the value of the business after the date of separation. **Ibid.**

§ 168 (NCI4th). Pension, retirement, or deferred compensation benefits; determination of award

The trial court did not err in an equitable distribution action in its calculation of plaintiff's share of defendant's pension benefits. **Barlow v. Barlow,** 257.

§ 408 (NCI4th). Effect of separation agreements; modification of agreed upon child support

Defendant's tender of checks and plaintiff's endorsement and negotiation of them did not constitute an accord and satisfaction with respect to the amount of child support. **Bromhal v. Stott,** 250.

§ 450 (NCI4th). Review of support order generally

Defendant's assignment of error pertaining to a child support order was not reviewable on appeal until entry of a final order on plaintiff's claim for permanent alimony. **Gillespie v. Gillespie,** 660.

§ 453 (NCI4th). Child support; jurisdiction after divorce

The trial court was authorized to apportion the parties' uninsured medical expenses and activity fees where the court was authorized by a consent order for child custody and support to settle disputes concerning how the parties were to apportion medical expenses and activity fees. **Meehan v. Meehan,** 622.

§ 528 (NCI4th). Counsel fees and costs; amount of award generally

The trial court did not err in ordering defendant to pay $8,000 and plaintiff to pay $19,912 in expert witness fees; a consent order entered by the referee stating that the parties would not be ordered to pay more than $21,000 in expert witness fees did not deprive the court of its authority to award reasonable compensation to an expert witness appointed by consent of the parties. **Sharp v. Sharp,** 513.

The trial court did not err in ordering the parties to bear equal responsibility for the referee fee of over $13,000. **Ibid.**

DIVORCE AND SEPARATION — Continued

§ 547 (NCI4th). Counsel fees and costs; child custody and support; effect of prior agreement

The trial court did not err in awarding attorney's fees to plaintiff in an action to enforce the child support provision of a separation and property settlement agreement where the agreement provided for the recovery of such fees in an action to enforce provisions of the agreement. **Bromhal v. Stott,** 250.

EASEMENTS

§ 30 (NCI4th). Creation of easements; use that is adverse, hostile, or under claim of right

The trial court did not err by granting a directed verdict on the issue of a prescriptive easement on a cartway claim where defendants Wilson, who were asserting the cartway claim as a part of a larger processioning proceeding, presented no evidence to rebut the presumption that any past use of the cartway was permissive and there was evidence that it was permissive. **Nichols v. Wilson,** 324.

§ 60 (NCI4th). Implied easements; ways of necessity

Even though plaintiff had a permissive use of a right-of-way over defendant's lands, plaintiff was entitled to an easement by necessity where the court found that the tracts of plaintiff and defendant were once held in common ownership that was severed by conveyance, and that as a result of the conveyance plaintiff had no access to a public highway except over defendant's property. **Whitfield v. Todd,** 335.

EMINENT DOMAIN

§ 195 (NCI4th). Issues regarding right to jury trial generally

The trial court did not err in denying defendant's request for a jury trial on the issue of the ownership of a right of way on defendant's property in a hearing pursuant to G.S. 136-108 to resolve preliminary questions as to land being condemned by the DOT and its title before the jury trial on the issue of damages. **Dept. of Transportation v. Wolfe,** 655.

§ 265 (NCI4th). Validity of easement where judgment not recorded

The DOT owned a right of way to Highway 321 across defendant's property where the DOT acquired the right of way in 1949, the DOT was not required to record deeds of easement or rights of way executed prior to 1 July 1959, and defendant had notice of the right of way in his deeds and other deeds in his chain of title. **Dept. of Transportation v. Wolfe,** 655.

EQUITY

§ 3 (NCI4th). Particular conduct as invoking clean hands doctrine

The trial court was not granting equitable relief sought by plaintiff when it ordered defendants to vacate unhabitable premises so that the doctrine of clean hands was inapplicable. **Creekside Apartments v. Poteat,** 26.

ESTOPPEL

§ 15 (NCI4th). Conduct of party to be estopped; acceptance of benefits

The trial court's conclusion in an action on a note that plaintiff was not estopped from invoking its rights under the agreement by previous acceptance of late payments

EVIDENCE AND WITNESSES — Continued

§ 1209 (NCI4th). Admissions and declarations of criminal defendant

The trial court's instruction in a prosecution for first-degree sex offenses against three children that there was some evidence "which tends to show that the defendant may have admitted a fact relating to the crime charged in this case" was supported by evidence that defendant said "Who, Brooks?" when informed that he was being arrested for statutory rape, and the instruction did not constitute an expression of opinion. **State v. Figured,** 1.

§ 1235 (NCI4th). Custodial interrogation defined

The trial court in a prosecution in which defendant was convicted of being an accessory to murder correctly concluded that defendant's incriminating statement to officers was made voluntarily where she was never taken into custody or deprived of her freedom. **State v. Barnes,** 311.

§ 1357 (NCI4th). Proof of entire statement or conversation containing confession generally

The trial court did not err in a murder prosecution in which defendant was convicted of being an accessory by admitting only a portion of defendant's confession where defendant offered the statement into evidence. **State v. Barnes,** 311.

§ 1652 (NCI4th). Admission of photographs to illustrate testimony generally

Before and after photographs of defendants' home were properly admitted to illustrate testimony that defendants' replacement of wood siding on their home with vinyl siding did not change the appearance of the home. **Raintree Homeowners Assn. v. Bleimann,** 561.

§ 1656 (NCI4th). Photographs; propriety of admission where witness had already testified as to subject matter of photograph

The trial court did not err in excluding testimony and photographs regarding skid marks found at an accident scene where testimony of other witnesses was identical to the excluded testimony and a witness testified as to the subject matter of the photographs. **Bowden v. Bell,** 64.

§ 1782 (NCI4th). Exhibiting defendant to show physical characteristics

The trial court did not err in forcing defendant to exhibit to the jury a tattoo on his arm for the purpose of corroborating a witness's identification of defendant. **State v. Netcliff,** 396.

The trial court did not err in requiring defendant to place over his head a stocking recovered from the car of his codefendant to aid the jury in assessing the credibility of the victim's identification of defendant. **State v. Westall,** 534.

§ 1934 (NCI4th). Private writings and documents generally

A memorandum of a meeting in which members of the architectural review committee of plaintiff homeowners association explained their reasons for disapproving defendant homeowners' application for permission to replace wood siding on their home with vinyl siding was relevant to the issue of whether the committee acted reasonably and in good faith, but the trial court's exclusion of this evidence was not prejudicial error. **Raintree Homeowners Assn. v. Bleimann,** 561.

§ 1942 (NCI4th). Private writings and documents; letters

The trial court properly excluded letters to defendant homeowners indicating plaintiff homeowners association's legal position in an action to enjoin defendants

EVIDENCE AND WITNESSES — Continued

§ 2227 (NCI4th). Expert testimony as to bullet, shot, or projectile

The trial court did not err in allowing a detective to state his opinion with respect to the force of the pellet gun used by defendant and the damage which could be caused by a projectile fired from it. **State v. Westall,** 534.

§ 2278 (NCI4th). Expert testimony; cause of injury, disease or condition

The trial court did not err in refusing to allow two doctors to offer their opinions regarding the relationship of plaintiff's injuries to the first collision in an action in which the issue at trial was whether this accident or a second accident was the proximate cause of plaintiff's injuries. **Richardson v. Patterson,** 661.

§ 2334 (NCI4th). Sexual abuse of children; expert testimony as opinion on ultimate issue to be decided

The opinion of an expert in psychology and child sex abuse that three children had been sexually abused was admissible, but the expert's opinion that the children were sexually abused by defendant was incompetent, although the admission of such opinion did not constitute prejudicial error. **State v. Figured,** 1.

§ 2888 (NCI4th). Cross-examination as to particular matters; religious belief

The defense opened the door to the prosecution's questioning of a witness concerning the solemnity and sincerity with which he took the oath, including questions as to what the Bible meant to him and what significance swearing on the Bible had for him. **State v. Westall,** 534.

§ 3104 (NCI4th). Corroboration generally

Testimony regarding statements made by plaintiff were substantially consistent with plaintiff's deposition testimony and were admissible as corroborative evidence. **Bowden v. Bell,** 64.

EXECUTORS AND ADMINISTRATORS

§ 8 (NCI4th). Priorities in granting letters of administration

The clerk and the trial court erred in determining that "next of kin" and "heir" are synonymous under G.S. 28A-4-1, the statute establishing the priority for letters of administration. **In re Bryant,** 329.

The clerk and the court erred in failing to find that petitioner was the next of kin to the decedent where respondent admitted that petitioner is the mother of the decedent. **Ibid.**

FALSE IMPRISONMENT

§ 9 (NCI4th). Detention of suspected shoplifter

The trial court did not err in concluding that plaintiff was falsely imprisoned and did not voluntarily consent to the search of her shopping bag and her person where she was detained by a store manager, two security guards and a police officer. **Mullins v. Friend,** 676.

Defendant department store manager was not immune from plaintiff's suit for false imprisonment under G.S. 14-72.1(c) where defendant did not have probable cause to believe that plaintiff had committed a crime at the store. **Ibid.**

INSURANCE — Continued

§ 896 (NCI4th). General liability insurance; what constitutes "occurrence" within meaning of policy; duty to defend

Defendant insurer, which provided plaintiff with general liability and property insurance coverage, was not under a duty to defend plaintiff in an action by neighbors of his self-storage business alleging breach of restrictive covenants since the injuries alleged by the neighbors were not accidental. **Smith v. Nationwide Mut. Fire Ins. Co.,** 134.

INTEREST AND USURY

§ 19 (NCI4th). Penalty for usury generally; forfeiture of interest

Plaintiff's claim for double recovery for any usurious interest paid on a promissory note failed where (1) plaintiff's complaint was filed more than two years after the execution of the note and was barred by the statute of limitations, and (2) plaintiff did not actually pay any of the interest himself. **Adams v. Beard Development Corp.,** 105.

JUDGES, JUSTICES, AND MAGISTRATES

§ 1 (NCI4th). Assignment and transfer of judges

A commission issued by the Chief Justice transferring a district court judge to another district for "one day, or until the business is disposed of" assigned the judge to the district until matters before him were concluded. **Lockert v. Lockert,** 73.

A commission issued by the Chief Justice temporarily assigning a district court judge to another district was not invalid for an equitable distribution case because it was signed on 13 September 1990 and the judge initially presided over preliminary matters in the case on 11 September 1990 since the commission merely memorialized the judge's assignment to the district. **Ibid.**

A commission issued by the Chief Justice assigning a judge to another district "to begin on September 11, 1990 and continue one day, or until the business is disposed of" authorized the judge to preside over the actual trial of an equitable distribution proceeding in November 1990 where the judge initially presided over preliminary matters in the case on 11 September 1990. **Ibid.**

A commission assigning a district court judge to another district to hear an equitable distribution case was not required to contain a finding that the case was "exceptional" to be valid. **Ibid.**

JUDGMENTS

§ 36 (NCI4th). Entry of judgment out of county, district, or term generally

The trial court's dismissal of defendant's appeal from an equitable distribution judgment was not void because it was signed outside the county, out of district, and out of session, since there was an indication of consent on the record. **Lockert v. Lockert,** 73.

§ 38 (NCI4th). Propriety of order signed and entered out of session where decision made during session

A district court judge has the authority to enter an order out of session as long as the trial on the merits, to which the order relates, was conducted at a regularly scheduled trial session. **Ward v. Ward,** 643.

KIDNAPPING AND FELONIOUS RESTRAINT — Continued

restraint defendant must have employed in the kidnapping was an inherent part of the crime of first-degree rape. **State v. Hill,** 573.

LABOR AND EMPLOYMENT

§ 190 (NCI4th). Inherently dangerous work generally

Deceased's job of re-roofing defendant's steep roof on a windy day was not an inherently dangerous activity so that plaintiff could not recover from defendant for breaches of non-delegable duties of safety. **Canady v. McLeod,** 82.

LANDLORD AND TENANT

§ 60 (NCI4th). Remedy for breach of implied warranty of habitability; damages recoverable in rent abatement actions

Where the trial court found that premises leased to defendants were "unfit and unhabitable as a matter of law because of cockroach infestation and the presence of safety hazards and unauthorized persons in vacant apartments," the court erred in denying defendants' counterclaims for breach of implied warranty of habitability and for damages for violation of G.S. 42-42 of the Residential Rental Agreement Act. **Creekside Apartments v. Poteat,** 26.

Plaintiff's difficulty in operating an apartment complex would not excuse a breach of G.S. 42-42, plaintiff's reasonable efforts to repair would not allow the trial court to deny rent abatements, and the trial court erred in failing to determine the exact period for which the premises were unfit and unhabitable. **Ibid.**

The trial court did not err in ordering defendants to vacate premises and in holding that defendants' counterclaims for possession were moot where the court found that the premises were unfit for human habitation, and the city code provided that any building found by the inspector to be unfit for habitation could not be occupied. **Ibid.**

LIENS

§ 9 (NCI4th). Liens on personal property; persons entitled to lien; amount of lien

The clerk of court did not err in ordering defendant subcontractor, who repaired plaintiff's transformer under an agreement with the contractor, to relinquish possession of the transformer upon plaintiff owner's tender of $100 pursuant to G.S. 44A-2(a)(3) where this was the amount of the asserted lien set forth in the complaint and defendant failed to file within three days following service of the complaint a statement alleging a contrary amount of lien. **Peace River Electric Cooperative v. Ward Transformer Co.,** 493.

The amount of defendant's lien was limited by G.S. 44A-2(a)(3) to $100 since third-party defendant, which contracted to repair plaintiff's transformer, was a "legal possessor" rather than an "owner" of the transformer, and defendant subcontractor, which actually repaired the transformer, was an independent contractor rather than an agent of third-party defendant. **Ibid.**

Defendant subcontractor was disqualified from asserting any equitable remedy where it failed to contest the amount of the lien claimed by plaintiff in the manner prescribed by statute. **Ibid.**

LIMITATIONS, REPOSE, AND LACHES — Continued

§ 60 (NCI4th). Insurance

The trial court did not err by entering judgment on the pleadings in defendant's favor based on the statute of limitations where plaintiff's complaint sets out facts amounting to a claim of subrogation in which plaintiff took the place of the business and the statute of limitations had run as to the business. **Aetna Casualty and Surety Co. v. Anders,** 348.

§ 80 (NCI4th). Payment bonds

The statute providing that the limitation period for instituting suit against a surety runs from the longer period of one year from the last day on which labor was performed or material was furnished or one year from the date of final settlement with the contractor, G.S. 44A-28(b), is a statute of repose rather than limitation. **Tipton & Young Construction Co. v. Blue Ridge Structure Co.,** 115.

§ 119 (NCI4th). Postponement or suspension of statute; tolling; disability or incapacity; cumulative disabilities

The statute of repose for a products liability action, G.S. 1-50(6), is tolled by the operation of G.S. 1-17, the statutory provision which allows a minor to bring suit within three years of the date upon which the minor reaches majority. **Bryant v. Adams,** 448.

§ 152 (NCI4th). Mode or manner of raising defense of statute

Statutes of repose are conditions precedent which must be specially pled. **Tipton & Young Construction Co. v. Blue Ridge Structure Co.,** 115.

MORTGAGES AND DEEDS OF TRUST

§ 17 (NCI4th). Equity lines of credit

The trial court did not err by allowing a foreclosure where respondents, the Wrights, are the present owners of a residence previously owned by the Kaseys, a home equity line of credit taken out by the Kaseys was not cancelled after closing, and the Kaseys withdrew money from the line of credit after the closing and declared bankruptcy. **Raintree Realty and Construction v. Kasey,** 340.

MUNICIPAL CORPORATIONS

§ 96 (NCI4th). Extension of utilities and services to annexed territory generally

A city was not statutorily required to provide to owners of property being involuntarily annexed, as a part of the mailing of notice of the public hearing on annexation, a form for requesting the extension of water and sewer lines to their property or notice of their right to request such a form. **Barnhardt v. City of Kannapolis,** 215.

§ 105 (NCI4th). Annexation report; necessity of map relating to proposed services to annexed area

The evidence supported the trial court's findings that disputed lines on proposed water and sewer maps in an annexation report were city boundary lines, and that the city thus did not fail to install water and sewer lines in substantial conformity with the maps. **Barnhardt v. City of Kannapolis,** 215.

MUNICIPAL CORPORATIONS — Continued

§ 123 (NCI4th). Grounds for attack on annexation generally

A claim by owners of annexed property that defendant city was statutorily required, without request, to provide them with a form for the extension of water and sewer lines and notice that they could request such extensions was a challenge to the city's compliance with statutory annexation provisions and was barred by the 30-day limit set forth in G.S. 160A-50(a). **Barnhardt v. City of Kannapolis,** 215.

§ 444 (NCI4th). Effect of procuring liability insurance generally

Plaintiff failed to state a claim for false imprisonment against defendant police officer in his official capacity where plaintiff failed to allege the municipality's waiver of immunity by the purchase of liability insurance. **Mullins v. Friend,** 676.

§ 459 (NCI4th). Sufficiency of evidence in relation to performance of governmental function or immunity

Defendant police officer was not liable in his individual capacity for false imprisonment where he acted in accordance with his good faith belief that plaintiff had concealed merchandise. **Mullins v. Friend,** 676.

NEGLIGENCE

§ 28 (NCI4th). Contributory negligence generally

Plaintiff's action against a homeowner for wrongful death of her intestate who fell from a roof was barred by deceased's contributory negligence in consuming alcohol provided by the homeowner. **Canady v. McLeod,** 82.

§ 98 (NCI4th). Sufficiency of evidence; proximate cause; warnings

The trial court erred by granting summary judgment dismissing plaintiffs' negligence claims against the sellers of a trampoline where a question of fact existed involving warnings given by the sellers. **Bryant v. Adams,** 448.

§ 109 (NCI4th). Premises liability; contributory negligence

The trial court erred in submitting the issue of contributory negligence to the jury in an action to recover for injuries sustained by plaintiff when she was struck in the head by merchandise falling off a shelf in defendant's store. **Enns v. Zayre Corp.,** 687.

§ 150 (NCI4th). Allegations of negligence involving sidewalks

The trial court properly granted summary judgment for defendants (city and county) in plaintiff's action to recover for personal injuries when she fell on a sidewalk at a county courthouse where plaintiff alleged only that she thought a twig on the sidewalk caused her fall, and plaintiff failed to allege that either of defendants was on notice of the condition. **Nicholson v. County of Onslow,** 439.

NUISANCE

§ 11 (NCI4th). Summary judgment; sufficiency of evidence

The trial court erred by granting summary judgment for defendant Foust Oil Company on a nuisance action arising from leaking underground storage tanks owned by a third party to which Foust had delivered gasoline. **Jordan v. Foust Oil Company,** 155.

PARENT AND CHILD

§ 101 (NCI4th). Termination of parental rights; neglect; evidence held sufficient

The evidence was sufficient to authorize termination of respondents' parental rights where respondents did not attempt to correct the conditions which led to findings of neglect on four earlier occasions by obtaining continued counseling, a stable home, stable employment, and parenting classes until DSS informed them that termination proceedings were being pursued. **In re Davis,** 409.

§ 111 (NCI4th). Termination procedures; jurisdiction

The district court which obtained jurisdiction over respondent's neglected children in 1991 had jurisdiction over a motion to set aside documents signed by respondent and entitled "Parent's Release, Surrender, and General Consent to Adoption" where no adoption petition had been filed in the case. **In re Maynard,** 616.

§ 116 (NCI4th). Termination procedures; right to counsel and guardian ad litem, generally; fees

Respondent was entitled to counsel when she signed surrender documents which directly related to neglect proceedings. **In re Maynard,** 616.

Petitioner's continuing discussions, during supervised visitation, urging the reluctant respondent to sign papers surrendering her parental rights without her counsel being present or having any knowledge of the discussions violated respondent's right to counsel. **Ibid.**

§ 121 (NCI4th). Termination of parental rights; adjudicatory hearing generally

The trial court in a proceeding for termination of parental rights erred in improperly combining the two stages of the termination hearing by exercising its discretion during the adjudicatory stage instead of in the dispositional stage. **In re Carr,** 403.

§ 125 (NCI4th). Termination of parental rights; taking evidence, finding facts, and adjudicating existence of grounds; burden of proof, generally

The trial court did not err by refusing to allow the guardian ad litem's expert witness in clinical social work to testify regarding the mother's mental health and capacity to parent her minor child. **In re Carr,** 403.

Respondent mother could be compelled to testify in a proceeding to terminate parental rights even in the absence of a subpoena. **In re Davis,** 409.

PARTITION

§ 36 (NCI4th). Authority following equitable distribution in divorce proceeding

Where the parties' separation agreement, incorporated into their divorce decree, barred an equitable distribution proceeding, the superior court had jurisdiction to partition property included in the separation agreement. **Diggs v. Diggs,** 95.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS

§ 96 (NCI4th). Liability of primary physician for those assisting him

The trial court erred in granting summary judgment for defendant attending physicians on the issue of negligent supervision of resident physicians who were

PLEADINGS — Continued

statute of limitation and the statute of repose pursuant to G.S. 1-17, and where the victim's parents cannot meet the test for relation back of claims. **Bryant v. Adams,** 448.

PROCESS AND SERVICE

§ 94 (NCI4th). Service by publication; sufficiency of evidence to show exercise of due diligence to discover defendant's address, whereabouts, and the like

Plaintiff deed of trust holder did not exercise due diligence or make a reasonable and diligent effort in attempting to serve defendant partner in the debtor-partnership with notice of a foreclosure hearing, could thus not rely on notice by posting, and was not entitled to recover deficiencies from defendant following the foreclosure sales. **Barclays American/Mortgage Corp. v. BECA Enterprises,** 100.

§ 131 (NCI4th). Service on domestic corporations; service on Secretary of State

Substitute service of process on the Secretary of State as agent for the corporate defendant was ineffective and violated defendant's due process rights where plaintiff's attorney had actual knowledge of the address where the corporate defendant could be served but did not attempt to serve defendant at that address. **Interior Distributors, Inc. v. Hartland Construction Co.,** 627.

PRODUCTS LIABILITY

§ 3 (NCI4th). Who is manufacturer

The trial court properly allowed the jury to decide whether defendant crane manufacturer was the apparent manufacturer of a boom brake cylinder on a crane which failed where defendant sold the cylinder to the crane owner, but the trademark of the third-party defendant was on the cylinder. **Haymore v. Thew Shovel Co.,** 40.

§ 5 (NCI4th). Strict liability

Summary judgment was properly granted for the seller on the issue of strict liability arising from an injury suffered on a trampoline. **Bryant v. Adams,** 448.

§ 17 (NCI4th). Plaintiff's contributory negligence

The issue of contributory negligence was properly for the jury in an action arising from an injury suffered on a trampoline. **Bryant v. Adams,** 448.

§ 29 (NCI4th). Construction machinery and components thereof

In an action to recover for injuries sustained when the brake on a crane malfunctioned, the trial court did not err in refusing to give plaintiff's proposed instruction that defendants admitted that the presence of foreign substances in the canister of a boom brake cylinder would constitute negligence by defendants. **Haymore v. Thew Shovel Co.,** 40.

RAPE AND ALLIED OFFENSES

§ 105 (NCI4th). Sufficiency of evidence; first-degree sexual offense generally

The evidence was sufficient for the jury in a prosecution for first-degree sexual offenses against three children. **State v. Figured,** 1.

ROBBERY

§ 80 (NCI4th). Sufficiency of evidence to show dangerous character of weapon or that weapon was firearm

The evidence was sufficient to permit the jury to decide whether defendant committed robbery with a dangerous weapon or the lesser offense of common law robbery where it tended to show that defendant placed a pellet gun into the victim's back, pointed directly at her kidney, and that the projectile from such a pistol very likely would have resulted in a life-threatening injury to the victim had defendant fired the weapon. **State v. Westall,** 534.

§ 116 (NCI4th). Jury instructions; requirement that victim's life be endangered by use or threatened use of firearm or other dangerous weapon

The trial court's instructions defining "dangerous weapon" in a prosecution for armed robbery with a pellet gun were not confusing and erroneous because the court inadvertently omitted the word "death" from its pattern jury instruction that a weapon is dangerous when it is likely to cause serious bodily injury since serious bodily injury is synonymous with endangering or threatening life. **State v. Westall,** 534.

SALES

§ 106 (NCI4th). Buyer's duty to notify seller of breach discovered after acceptance

The trial court erred in an action arising from an injury suffered on a trampoline by granting summary judgment for the sellers on the implied warranty of merchantability where there was an issue of fact as to whether the notice given to defendants as required by G.S. 25-2-607(3)(a) was seasonable. **Bryant v. Adams,** 448.

§ 138 (NCI4th). Privity regarding implied warranty

The trial court erred in an action arising from an injury suffered on a trampoline by granting summary judgment for the sellers on the implied warranty of merchantability. **Bryant v. Adams,** 448.

§ 144 (NCI4th). Breach of express warranty

The trial court did not err in an action arising from an injury suffered on a trampoline by granting summary judgment for the sellers on plaintiffs' breach of warranty claims where the only express warranties which plaintiffs claim were made were printed on sales literature which applied only to round trampolines and the trampoline on which plaintiff was injured was not round. **Bryant v. Adams,** 448.

§ 145 (NCI4th). Breach of implied warranties

The trial court erred in an action arising from an injury suffered on a trampoline by granting summary judgment for the sellers on plaintiffs' claim for breach of the implied warranty of merchantability where plaintiffs alleged that the warranty was breached because the trampoline was sold with no instructions for proper use, no warnings of potential hazards, virtually no safety instructions, and was not fit for foreseeable users. **Bryant v. Adams,** 448.

SCHOOLS

§ 86 (NCI4th). Tuition and fees; free tuition, generally

Although defendant and her daughter were domiciled outside plaintiff board of education's administrative unit, plaintiff was not entitled to recover out-of-district tuition from defendant where the daughter resided within that unit. **Chapel Hill-Carrboro City Schools System v. Chavioux,** 131.

SEARCHES AND SEIZURES

§ 48 (NCI4th). Search of area within arrestee's control; premises at which arrest made

The trial court in a murder and assault trial properly admitted evidence seized from defendant's residence, where the crimes occurred, pursuant to an emergency warrantless search which closely followed an initial sweep by the first responding officers. **State v. Williams,** 225.

§ 57 (NCI4th). Observation of objects in plain view; officer effecting arrest

Officers lawfully entered defendant's trailer to effect an arrest pursuant to valid warrants, and items observed by the officers in plain view in defendant's bedroom were lawfully seized and admissible into evidence. **State v. Hill,** 573.

§ 105 (NCI4th). Hearsay statements of informants; affidavits containing double hearsay

An affidavit was insufficient to establish probable cause for issuance of a warrant to search defendant's apartment for marijuana where it contained only double hearsay that a confidential informant had stated that two other men had seen large quantities of marijuana in the apartment, and a statement that the informant "has given me reliable information in the past." **State v. Styles,** 479.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

§ 2 (NCI4th). Hiring and discharge from employment

A disciplinary hearing for two police officers is remanded for a new hearing where the Mecklenburg County Civil Service Board failed to follow the Police Civil Service Rules which required that testimony be under oath and that the witnesses be subject to cross-examination by counsel for the accused officers. **McLean v. Mecklenburg County,** 431.

§ 21 (NCI4th). Liability for death or injury caused by law enforcement officer

The evidence in an action to recover for injuries sustained by plaintiff and her child when they were struck by a trooper engaged in a high-speed chase was insufficient to support a finding that plaintiff failed to keep a proper lookout and mandated the conclusion that the trooper was negligent as a matter of law by failing to slow down when he saw plaintiff's vehicle positioning itself to pull out into his lane of travel. **Minks v. N. C. Highway Patrol,** 710.

§ 23 (NCI4th). Civil rights violations

The trial court properly denied defendants' motion for summary judgment based upon qualified immunity in plaintiff's civil rights action for money damages against defendant police officers in their individual capacities where plaintiff alleged that defendants violated her Fourth and Fourteenth Amendment rights by taking her to jail

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS —Continued

solely for being intoxicated in a public place, and there were disputed issues of fact as to whether defendants had probable cause to believe that plaintiff was in need of assistance pursuant to G.S. 122C-303. **Davis v. Town of Southern Pines,** 663.

SOCIAL SERVICES AND PUBLIC WELFARE

§ 20 (NCI4th). Food stamp program generally

A vehicle cannot be excluded from an applicant's eligibility determination as an "inaccessible resource" even if the sale of the vehicle would not provide any significant return to the applicant. **Alexander v. N.C. Department of Human Resources,** 15.

STATE

§ 23 (NCI4th). Sovereign immunity; applicability to state officers and to individual state employees

The Alexander County Environmental Health Supervisor was protected by sovereign immunity where plaintiff's allegations of negligence against him related to his official duties. **Robinette v. Barriger,** 197.

§ 31 (NCI4th). Liability under State Tort Claims Act; negligent acts generally

A DEHNR employee's conduct in holding meetings and revoking improvement permits in connection with plaintiff's efforts to develop property in Alexander County was not malicious, wanton, and reckless. **Robinette v. Barriger,** 197.

§ 38 (NCI4th). Industrial Commission as court for negligence claims against state

The Alexander County Health Department was a state agency, defendant health department employee was an agent of the state, and the Industrial Commission had exclusive jurisdiction of a negligence action alleging damages to plaintiff because of delays in the permitting process for development of property in the county. **Robinette v. Barriger,** 197.

TAXATION

§ 82 (NCI4th). Valuation of real property generally

A decline in the value of downtown property and a change in federal tax laws were economic changes affecting the county in general so that appellants were not entitled to a revaluation of their property in a nonreappraisal year. **In re Appeal of Hotel L'Europe,** 651.

§ 87 (NCI4th). Valuation of real property; sufficiency of evidence

There was sufficient evidence to support the Property Tax Commission's findings of total accrued depreciation where the Commission's finding that improvements on the property were affected by functional and economic obsolescence which the County did not consider was supported by competent, material and substantial evidence. **In re Appeal of Stroh Brewery,** 178.

TAXATION —Continued

§ 99 (NCI4th). Duties as to appeals from appraisals and assessments

The Property Tax Commission did not err in denying the County's motion to dismiss an appeal from the Forsyth County Board of Equalization and Review's affirmation of Forsyth County's valuation of property owned by the Stroh Brewery Company where the County had moved to dismiss because Stroh's out-of-state attorney was not licensed to practice law in North Carolina. The question of the right of the attorney to file the notice of appeal is a collateral matter, unrelated to the merits of the appeal before the Commission. **In re Appeal of Stroh Brewery,** 178.

The Property Tax Commission did not err by not considering evidence of asbestos contamination as a factor allegedly affecting the "true value" of taxpayer's property where the taxpayer failed to inform the county of this contamination until nearly sixteen months after the effective date of the appraisal and almost four months following conclusion of the tax year in question. **MAO/Pines Assoc. v. New Hanover County Bd. of Equalization,** 551.

§ 173 (NCI4th). Soft drink tax

Registration of a product eligible for exemption from the soft drink tax does not operate retroactively. **John R. Sexton & Co. v. Justus,** 293.

Plaintiff's fruit and vegetable juice concentrates were exempt from the soft drink tax even though they were not registered where the Soft Drink Tax Act did not clearly require registration at the relevant time period. **Ibid.**

TORTS

§ 12 (NCI4th). Construction and interpretation of release

Where plaintiff released the tortfeasor in an automobile accident, she could not assert a claim against the UIM carrier because of the derivative nature of the UIM carrier's liability. **Spivey v. Lowery,** 124.

A document signed by plaintiff was effective as a release of defendant from liability from any claims arising out of the welding of the gas pedal of plaintiff's car. **Sims v. Gernandt,** 299.

§ 21 (NCI4th). Grounds for relief from release; mistake

A release of defendant mechanic from liability for any claims arising from the welding of the gas pedal of plaintiff's car could not be set aside for mutual mistake where plaintiff failed to assert that defendant was mistaken about the extent of the alleged damage from his welding. **Sims v. Gernandt,** 299.

§ 23 (NCI4th). Grounds for relief from release; failure to read release

Plaintiff was not entitled to set aside a release of defendant automobile mechanic from liability for repairs to her car on the ground of improper inducement where plaintiff failed to allege that defendant procured her signature on the release by fraud, and plaintiff admitted that she signed the release without reading it. **Sims v. Gernandt,** 299.

TRESPASS

§ 17 (NCI4th). Damages generally

The trial court properly denied defendant's motions for directed verdict and judgment n.o.v. on the issue of punitive damages in an action to recover for trees and shrubs defendant cut from plaintiffs' property when he knew he was trespassing on their property. **Lee v. Bir,** 584.

§ 28 (NCI4th). Unlawful cutting or removal of trees or shrubbery; value of trees or shrubbery; computation of damages

The jury could consider the aesthetic value and replacement cost in a trespass action for the unauthorized cutting of trees and shrubs from plaintiffs' property. **Lee v. Bir,** 584.

§ 46 (NCI4th). Sufficiency of evidence to support summary judgment

The trial court erred by granting summary judgment for defendant Foust Oil Company on a trespass claim arising from leaking underground storage tanks owned by a third party to which Foust had delivered gasoline. **Jordan v. Foust Oil Company,** 155.

TRIAL

§ 19 (NCI4th). Grounds for continuance; matters involving discovery and depositions

The trial court did not abuse its discretion by denying plaintiffs' motion under G.S. 1A-1, Rule 56(f) to continue the discovery period where, although there was outstanding discovery, it was unrelated to the grounds on which summary judgment was granted, and the discovery period provided by local rules had expired. **Bryant v. Adams,** 448.

§ 151 (NCI4th). Relief from stipulation

Defendant was bound by stipulations as to the value of real property on the date of the hearing before the referee where defendant did not seek to set aside her stipulations and present evidence to the trial court as to the value of the property two years later at the date of distribution. **Sharp v. Sharp,** 513.

§ 265 (NCI4th). Necessity of statement of specific grounds for directed verdict

The trial court erred in holding that plaintiff's objection to the submission of contributory negligence was the equivalent of a motion for directed verdict. **Enns v. Zayre Corp.,** 687.

§ 464 (NCI4th). Comment by judge on verdict prohibited

Though the trial court's remarks to the jury after their verdict was reached were inappropriate under Rule 51(c), they did not constitute reversible error. **Haymore v. Thew Shovel Co.,** 40.

§ 533 (NCI4th). Conduct of experiments by juror

The trial court did not abuse its discretion by denying defendant's motion for a new trial based on juror misconduct where plaintiff alleged that defendant had engaged in willful and wanton, negligent and reckless conduct in striking plaintiff during a movie stunt; the foreperson sent a note to the judge during deliberations expressing concern that one juror had visited a karate school, discussed the case with an instructor, had watched news reports of the trial, and discussed it with her husband;

WILLS

§ 164 (NCI4th). Effect of anti-lapse statute

The anti-lapse statute applied where John Daniel left all of his real and personal property to his brothers, "or to the survivor"; both brothers predeceased him, leaving children; a sister who had been left nothing also predeceased the testator and left a child, who would take under intestate succession; and the inclusion of the "survivor" language indicates merely that the testator did not contemplate that both of his brothers would predecease him rather than an intent contrary to the anti-lapse statute. **Early v. Bowen,** 206.

WORKERS' COMPENSATION

§ 62 (NCI4th). Employer's misconduct tantamount to intentional tort; "substantial certainty" test

Even if defendant homeowner was the deceased roofer's employer at the time the roofer fell from the roof of a house, evidence that defendant provided the roofers with alcoholic beverages was insufficient to show that he engaged in conduct knowing that it was substantially certain to cause serious injury or death, and the roofer's death was within the exclusive coverage of the Workers' Compensation Act. **Canady v. McLeod,** 82.

Plaintiff could not maintain a civil action against her employer for injuries to her hand sustained when she reached under a safety gate into a molding machine to remove plastic parts allegedly at the instruction of her supervisor because the evidence was insufficient to show that the employer engaged in misconduct knowing it was substantially certain to cause serious injury or death. **Echols v. Zarn, Inc.,** 364.

§ 69 (NCI4th). Exclusion of other remedies against fellow employees; willful, wanton, or reckless conduct as tantamount to intentional tort

The trial court did not abuse its discretion by denying defendant's motion for judgment notwithstanding the verdict in an action to recover damages for injuries sustained during the filming of a movie where plaintiff had received workers' compensation benefits and thereafter filed this action alleging that defendant, a fellow employee of Cannon Films, Inc., had engaged in willful and wanton, negligent and reckless conduct in striking plaintiff. **Pinckney v. Van Damme,** 139.

The threshold question in determining whether an employee may maintain a common law action against a co-employee for injuries arising out of and in the course of the employee's employment is whether the co-employee's injurious conduct was willful, wanton, or reckless. **Echols v. Zarn, Inc.,** 364.

The trial court properly granted summary judgment for defendant supervisor in plaintiff's action to recover for injuries to her hand sustained when she reached under a safety gate into a molding machine allegedly at the instruction of defendant supervisor since the actions of defendant failed to rise to the level of willful conduct. **Ibid.**

§ 165 (NCI4th). Back injury as "injury by accident" generally; specific traumatic incident causing back injury

The specific traumatic incident provision of G.S. 97-2(6) requires plaintiff to prove an injury at a cognizable time but does not compel plaintiff to allege the specific hour or day of the injury. **Fish v. Steelcase, Inc.,** 703.

WORKERS' COMPENSATION — Continued

§ 166 (NCI4th). Time of onset of pain as indicia of injury from specific traumatic incident

The Industrial Commission erred in finding that plaintiff's injury did not occur at a judicially cognizable time where plaintiff presented evidence that he suffered a specific injury while pushing a desk in "mid-April" and that the injury was not the result of a gradual deterioration. **Fish v. Steelcase, Inc.**, 703.

§ 167 (NCI4th). Back injury sustained during "normal work routine"

Nothing in G.S. 97-2(6) precludes compensation for a back injury which occurs in the normal work routine or requires an unusual occurrence or departure from ordinary duties. **Fish v. Steelcase, Inc.**, 703.

§ 273 (NCI4th). Persons entitled to death benefits; children as dependents

The only minor child of the decedent at the time of his work-related death was entitled to receive the entire compensation payable under G.S. 97-38, even after the minor child turned 18, to the exclusion of an adult child of the decedent. **Allen v. Piedmont Transport Services**, 234.

§ 285 (NCI4th). Scheduled and unscheduled injuries arising out of same accident generally

Where plaintiff presented unrebutted evidence that he was unable to earn the same wages he had earned before the injury, plaintiff was entitled to elect benefits under G.S. 97-30 rather than benefits for permanent partial disability of his foot under G.S. 97-31. **Shaw v. United Parcel Service**, 598.

§ 296 (NCI4th). Employee's conduct subsequent to injury as bar to compensation; refusal of medical treatment

The Industrial Commission did not err in continuing plaintiff's compensation for temporary total disability rather than ordering plaintiff to undergo doctor-recommended surgery where there was no evidence that defendant employer ever requested that the Commission order plaintiff to undergo surgery; nor did the Commission err in failing to conclude that plaintiff was not entitled to continued compensation on the ground that plaintiff violated an order of a deputy commissioner that he cooperate with a vocational rehabilitation specialist chosen by defendant. **Maynor v. Sayles Biltmore Bleacheries**, 485.

§ 405 (NCI4th). Sufficiency of Industrial Commission's findings of fact generally

The Industrial Commission did not err in adopting the findings of fact and conclusions of law of the deputy commissioner which were adopted from a proposed opinion and award written by defendant's attorney. **Rierson v. Commercial Service, Inc.**, 420.

§ 471 (NCI4th). Industrial Commission's authority to assess costs and attorney's fees against parties

The Industrial Commission properly declined to award attorney's fees where the parties prosecuted and defended this matter with reasonable grounds. **Shaw v. United Parcel Service**, 598.

ZONING

§ 46 (NCI4th). Group homes and similar uses

Defendant board of adjustment did not err when it interpreted a city's zoning ordinance to require that a group home be "primarily" for rehabilitation. **Taylor Home of Charlotte v. City of Charlotte,** 188.

A zoning board of adjustment did not err in deciding that a facility for people with full-blown AIDS was not a group home permitted in a single-family residential area by the local zoning ordinance. **Ibid.**

§ 72 (NCI4th). Denial of special use permit; evidence of adverse effect on traffic and safety

The denial of petitioner's special use permit application to replace a four-foot fence with a six-foot fence to enclose his yard and dog was supported by evidence of potential safety problems for neighbors, children, and other passers-by, and by evidence of the adverse impact on the values of adjoining properties. **Wolbarsht v. Bd. of Adjustment of City of Durham,** 638.

§ 93 (NCI4th). Spot zoning prohibited

An amendment which rezoned two tracts of land from residential and agricultural to industrial special use constituted illegal spot zoning. **Budd v. Davie County,** 168.

§ 113 (NCI4th). Standing to appeal to board of adjustment

Adjacent property owners had standing to appeal the decision of the local zoning administrator concluding that a facility to house people with full-blown AIDS was a group home and that the permit to build the facility was properly issued. **Taylor Home of Charlotte v. City of Charlotte,** 188.

§ 116 (NCI4th). Standing to seek judicial review of zoning matters

Plaintiff had standing to bring a declaratory judgment action to challenge the validity of an amendment to a county zoning ordinance where plaintiff was an adjacent property owner who had an easement interest in part of the rezoned land. **Budd v. Davie County,** 168.

WORD AND PHRASE INDEX

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