NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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GERALD ARNOLD

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JACK COZORT[1]
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RALPH A. WALKER
LINDA M. McGEE

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R. A. HEDRICK

Former Judges

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SYDNOR THOMPSON[3]

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FRANCIS E. DAIL

Clerk

JOHN H. CONNELL

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1. Appointed Acting Director of the Administrative Office of the Courts effective 18 September 1995.
2. Recalled 1 September 1995.
3. Served as Judge of Court of Appeals 26 August 1994 - 30 December 1994.

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1. Appointed and sworn in 11 August 1995 to succeed George R. Greene who retired 31 March 1995.
2. Retired 30 June 1995 and sworn in as Emergency Judge 5 July 1995.
3. Appointed and sworn in 7 July 1995.
4. Appointed and sworn in 10 March 1995 to succeed Robert E. Gaines who retired 28 February 1995.
5. Appointed and sworn in 12 May 1995 to succeed Robert D. Lewis who retired 31 March 1995.
6. Sworn in as Special Judge 1 September 1995.
7. Deceased 14 October 1995.
8. Recalled to the Court of Appeals 1 September 1995.

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1. Appointed and sworn in 23 June 1995.
2. Appointed and sworn in 1 August 1995.

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10	C. COLON WILLOUGHBY, JR.	Raleigh
11	THOMAS H. LOCK	Smithfield
12	EDWARD W. GRANNIS, JR.	Fayetteville
13	REX GORE	Bolivia
14	JAMES E. HARDIN, JR.	Durham
15A	STEVE A. BALOG	Graham
15B	CARL R. FOX	Chapel Hill
16A	JEAN E. POWELL	Raeford
16B	L. JOHNSON BRITT III	Lumberton
17A	BELINDA J. FOSTER	Wentworth
17B	CLIFFORD R. BOWMAN	Dobson
18	HORACE M. KIMEL, JR.	Greensboro
19A	MARK L. SPEAS	Concord
19B	GARLAND N. YATES	Asheboro
19C	WILLIAM D. KENERLY	Concord
20	KENNETH W. HONEYCUTT	Monroe
21	THOMAS J. KEITH	Winston-Salem
22	EUGENE T. MORRIS, JR.	Lexington
23	RANDY LYON	Wilkesboro
24	JAMES T. RUSHER	Boone
25	DAVID T. FLAHERTY, JR.	Lenoir
26	PETER S. GILCHRIST III	Charlotte
27A	MICHAEL K. LANDS	Gastonia
27B	WILLIAM CARLOS YOUNG	Shelby
28	RONALD L. MOORE	Asheville
29	JEFF HUNT	Rutherfordton
30	CHARLES W. HIPPS	Waynesville

1. Appointed as Acting District Attorney 30 August 1995.

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3A	ROBERT L. SHOFFNER, JR.	Greenville
3B	HENRY C. BOSHAMER	Beaufort
12	PAUL F. HERZOG	Fayetteville
14	ROBERT BROWN, JR.	Durham
15B	JAMES E. WILLIAMS, JR.	Carrboro
16A	J. GRAHAM KING	Laurinburg
16B	ANGUS B. THOMPSON	Lumberton
18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27A	KELLUM MORRIS	Gastonia
28	J. ROBERT HUFSTADER	Asheville

ORDER

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

UNITED STATES CONSTITUTION CITED AND CONSTRUED

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

TONI DAVENPORT BOST, PLAINTIFF v. HENRY CHRISTIAN VAN NORTWICK, DEFENDANT AND IN RE SARA YVONNE VAN NORTWICK AND IN RE CHRISTIAN OLIVER VAN NORTWICK

No. 9311DC995

(Filed 15 November 1994)

1. Parent and Child § 97 (NCI4th)— termination of parental rights—noncustodial parent—best interest of children—sufficiency of evidence

The trial court abused its discretion in concluding that it was in the best interest of the children to terminate respondent's parental rights where respondent father, the noncustodial parent, suffers from alcoholism and was unable to maintain permanent employment up until 1992, was financially inattentive to the children up to 1992, and was unable to maintain permanent relationships and visited the children sporadically; petitioner mother maintained steady employment, remarried a business owner who made financial contributions while the father was not paying child support and who wished to adopt the children; the children, petitioner, and her new husband formed a happy, financially stable family unit to which respondent has become a disruption; and respondent has ceased consuming alcohol, attended Alcoholics Anonymous, obtained employment, begun paying child support, and visited the children. A finding that the children are well settled in their new home does not alone support a finding that it is in the best interest of the children to terminate respondent's parental rights, while the guardian ad litem and the court

appointed psychologist agreed that it would be in the best interest of the children not to terminate respondent's parental rights.

Am Jur 2d, Parent and Child § 11.

2. Parent and Child § 107 (NCI4th)— termination of parental rights—nonsupport—evidence insufficient

There was insufficient evidence to support the trial court's finding that substantial grounds existed for terminating respondent's parental rights pursuant to N.C.G.S. § 7A-289.32(5) where the court found that defendant willfully failed without justification to pay child support for a year preceding the filing of the petition in 1992, but there was overwhelming evidence that respondent was unable to pay due to his financial status and his alcoholism and that respondent decided to remain sober in 1990, regained his driver's license in 1992, and began paying child support in 1992.

Am Jur 2d, Parent and Child § 11.

3. Parent and Child § 102 (NCI4th)— termination of parental rights—noncustodial parent—abandonment

Respondent's inability to pay child support due to his dependency on alcohol and related financial problems does not support a finding of willful abandonment; during the relevant time, the six consecutive months preceding the filing of the petition, respondent visited the children during the Christmas holiday, attended three soccer games, and told petitioner that he wanted to pay his back child support. Also, respondent lived in Greenville while his children lived in Sanford, did not have a driver's license from 1985 until March of 1992 and was not able to drive to see the children on his own, and his actions did not evince a settled purpose to forego all parental duties and relinquish all parental claims to the children. N.C.G.S. § 7A-289.32(8).

Am Jur 2d, Parent and Child § 11.

4. Parent and Child § 100 (NCI4th)— termination of parental rights—noncustodial parent—neglect

Assuming that evidence that respondent failed to visit his children on a regular schedule and was sporadic with support payments supports a finding of neglect, the record shows a considerable change in conditions such that a finding of neglect at the time of the hearing is not supported by clear, cogent and con-

vincing evidence. Respondent decided to cease consuming alcohol in 1990 and began attending Alcoholics Anonymous, had been alcohol free for over two years at the time of the termination proceeding, was employed in a steady job for the first time in a number of years, and had attended soccer games after he regained his driver's license and expressed the wish to resume visitation with the children. N.C.G.S. § 7A-289.32(2).

Am Jur 2d, Parent and Child § 11.

5. Divorce and Separation § 372 (NCI4th)— visitation—suspension—change of circumstances—evidence insufficient

The trial court's decision to suspend respondent's visitation rights with his children was not supported by the facts, the law, or public policy where the court based its findings of a substantial change in circumstances on the termination of respondent's parental rights, reversed elsewhere in this opinion; the expressed desire of the children to not visit with respondent and to be adopted by their stepfather, which does not support a finding of changed circumstances and a conclusion that it is in the best interest of the children to suspend respondent's visitation rights; and the finding that respondent has been absent from his children's lives, which was not supported by the evidence where the record showed that respondent had visited the children during the Christmas holiday in 1990, that he had seen the children in 1991 at a dance recital, a baseball game, and during the Christmas holiday, and that he had gone to three of the children's soccer games in 1992.

Am Jur 2d, Divorce and Separaration §§ 1011 et seq.

Judge WYNN concurring with a separate opinion.

Judge JOHNSON dissenting.

Appeals by respondent and guardian ad litem from orders entered 19 May 1993 by Judge A. A. Corbett, Jr. in Lee County District Court. Heard in the Court of Appeals 23 May 1994.

Petitioner Toni Davenport Bost and Respondent Henry Christian Van Nortwick were married in May, 1979 and separated on 1 October 1982. Two children were born of this marriage, Sara Yvonne Van Nortwick, born 17 May 1980, and Christian Oliver Van Nortwick, born 12 May 1982. The parties were divorced by a judgment entered 26

April 1984, and petitioner was granted primary custody of the minor children by a consent judgment entered 21 July 1983.

On 22 May 1992, petitioner filed a petition to terminate the parental rights of respondent with regards to the minor children pursuant to Article 24B of Chapter 7A of the North Carolina General Statutes. On 22 June 1992, respondent filed a response to the petition asking the court to appoint an independent guardian ad litem to represent the interests of the children and to deny the petition. Thereafter, respondent filed a motion in the cause to expand his visitation rights with the minor children, and petitioner filed a motion to suspend respondent's visitation rights with the minor children.

On 31 August 1992, Judge A. A. Corbett, Jr. entered an order granting petitioner's motion to suspend respondent's visitation on a temporary basis pending recommendations to be made by a court appointed psychologist, Dr. Linda Silber. Subsequently, by order entered 6 January 1993, April S. Stephenson was appointed as guardian ad litem of the minor children.

Respondent's motion to enlarge his visitation rights and the petition to terminate respondent's parental rights came on for hearing in Lee County District Court during the special terms held 29 January 1993, 24 February 1993, and 2 April 1993. On 19 May 1993, Judge A. A. Corbett, Jr. entered an order terminating respondent's parental rights as to the minor children. Also on this date, Judge Corbett entered an order denying respondent's motion to enlarge his visitation rights and granting petitioner's motion to suspend respondent's visitation rights and a supplemental order prohibiting respondent from having any contact with the minor children.

Respondent moved for the court to alter or amend its order denying visitation, for a new trial, and to suspend any adoption proceedings. In open court, Judge Corbett denied respondent's motions to amend and for a new trial and granted respondent's motion to stay any adoption proceedings of the children.

From the order terminating respondent's parental rights, respondent and guardian ad litem appeal. From the order denying respondent's motion for visitation, respondent appeals.

Staton, Perkinson, Doster, Post, Silverman and Adcock, by Jonathan Silverman, for petitioner plaintiff-appellee.

Wyrick, Robbins, Yates & Ponton, L.L.P., by Robert A. Ponton, Jr. and Pamela P. Keenan; and Armstrong & Armstrong, P.A., by Marcia H. Armstrong, for respondent-appellant.

April E. Stephenson for appellant guardian ad litem.

ORR, Judge.

[1] The facts of this case present this Court with a not uncommon scenario wherein a non-custodial parent lives in a community separate and apart from the community in which his ex-spouse, the custodial parent, and his children live. In this case, in addition, the ex-spouse subsequently has remarried and formed a happy, financially stable family unit that includes the custodial parent, her new spouse, and the children. This new family unit no longer needs the financial or emotional support of the non-custodial parent and has come to view the non-custodial parent as an intrusion upon the day-to-day activities and interactions of this new family unit. Subsequently, the custodial parent has sought to terminate the non-custodial parent's parental rights.

The specific facts of this case are such that the respondent father admittedly suffers from alcoholism and up until 1992 has been unable to maintain permanent employment. Further, the facts show that up until 1992 respondent has been financially inattentive to his children due to his alcoholism and lack of gainful employment. Defendant has not been able to maintain permanent relationships due to his alcoholic condition, and over the years he has sporadically visited his children, failing to see his children at all in 1988, the year respondent was convicted of driving while his license was permanently revoked and respondent ceased driving. Also in 1988, respondent moved to Greenville, North Carolina, to live with his mother; petitioner and the children, however, remained in Sanford.

The facts also show, however, that in 1990, respondent decided to cease consuming alcohol and began attending Alcoholics Anonymous. Further, respondent has been employed as an agricultural chemical salesman for SMI, a company out of Valdosta, Georgia, since March, 1992. Subsequently, in June, 1992, respondent paid $750.00 in back child support, and on 22 July 1992 respondent paid $7,750.00 in back child support. In addition, respondent visited the children once

in 1989, once in 1990, three times in 1991, and three times in 1992 prior to petitioner filing this action in May, 1992. Based on her review of these and other facts, the guardian ad litem appointed to represent the interests of the children in this case recommended that it would not be in the best interest of the children to terminate respondent's parental rights.

The facts concerning petitioner mother, on the other hand, show that since her divorce from respondent in 1984, she has maintained steady employment with her family business located in Lee County and that on 3 December 1988, petitioner was remarried to Jim Bost, whom she had known since childhood. Jim Bost is the sole owner of a food processing company located in Lee County, and the trial court found that while respondent was not paying child support, "Mr. Bost did willingly make financial contributions to the household for the benefit of the children and between [petitioner] and [Mr. Bost] there are adequate financial resources to meet the financial needs of the children in the future, including college educations."

The trial court also found that Mr. Bost, petitioner, and the children reside in a four bedroom, five bathroom home situated in Lee County, surrounded by twenty acres of land, which home adjoins a residential neighborhood where the children have numerous friends. The court further found:

> Each of the children has developed a happy and secure relationship with their family as they know it, with this family being [petitioner] as mother, Jim Bost as father, the Davenports[, petitioner's parents,] as the paternal [sic] grandparents and Pete Bost[, Mr. Bost's mother,] as the maternal [sic] grandmother. The children identify with the Davenports and Bosts as their aunts and uncles and see the Bost children as their cousins. Each of the children wants to stay within this family network and considers [respondent's] presence in their lives to be a painful disruption.

Additionally, the court found that petitioner and Mr. Bost want Mr. Bost to adopt the children and that "Mr. Bost will in fact adopt the children at such time as it is legally proper to do so." Thus, this Court is presented with a situation wherein the petitioner mother and children have formed a happy, financially stable family unit with petitioner's new husband, and subsequently, respondent, the natural father of the children, has become a disruption to this new family unit.

Article 24B of Chapter 7A of the North Carolina General Statutes governs termination of parental rights. "Under the requirements of Chapter 7A, the trial court must make a two-step inquiry. First, it must consider whether substantial grounds exist for the termination of parental rights." *In re McMahon*, 98 N.C. App. 92, 94, 389 S.E.2d 632, 633 (1990). Second, upon a finding that substantial grounds exist for termination of parental rights, the court must "determine whether the termination of parental rights is in the best interest of the child." *Id.*; N.C. Gen. Stat. § 7A-289.31.

N.C. Gen. Stat. § 7A-289.31 states:

> (a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child *unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.*
>
> (b) Should the court conclude that irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the child require that such rights should not be terminated, the court shall dismiss the petition, but only after setting forth the facts and conclusions upon which such dismissal is based.

(Emphasis added.) Thus, "upon a finding that grounds exist to authorize termination, the trial court is never required to terminate parental rights under any circumstances, but is merely given the discretion to do so." *In re Tyson*, 76 N.C. App. 411, 419, 333 S.E.2d 554, 559 (1985). "[W]here there is a reasonable hope that the family unit within a reasonable period of time can reunite and provide for the emotional and physical welfare of the child, the trial court is[, therefore,] given discretion not to terminate rights." *In re Montgomery*, 311 N.C. 101, 108, 316 S.E.2d 246, 251 (1984).

In the present case, the trial court terminated respondent's parental rights based on willful failure to support the children, willful abandonment of the children, neglect, and on its finding that terminating respondent's parental rights was in the best interest of the children. In reviewing this case to determine whether the trial court properly granted petitioner's wish to terminate respondent's parental rights, we must keep in mind that the overriding consideration is the

welfare or best interest of the children, in light of all the circumstances. *See Phelps v. Phelps*, 337 N.C. 344, 446 S.E.2d 17 (1994).

The best interest of the children is " ' ". . .'the polar star by which the discretion of the court is guided.' " ' " *Id.* at 354, 446 S.E.2d at 23 (quoting *Hinkle v. Hinkle*, 266 N.C. 189, 197, 146 S.E.2d 73, 79 (1966)). In the case *sub judice*, the trial court concluded,

> [g]iven that the children are thriving under their present circumstances, the presence of a complete family structure able to meet the emotional and economic needs of the children, the expressed desire of the children not to see their father, their desire to be adopted by Jim Bost and the pain and disruption involved with any attempt at reestablishing a relationship, the [c]ourt finds as a fact that it would not be in the best interest of the children to follow the Guardian Ad Litem's reccommendations [sic] and furthermore that termination is in their best interest.

Based on our review of the record, we find that the trial court abused its discretion in concluding that it was in the best interest of the children to terminate respondent's parental rights.

First, a finding that the children are well settled in their new family unit made up of petitioner, Mr. Bost, and the children, does not alone support a finding that it is in the best interest of the children to terminate respondent's parental rights. In *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), a recent decision involving a custody dispute between the biological parents of the child and persons with whom the biological mother had placed the child, our Supreme Court focused on the paramount right of a child's natural parents to the custody, care and nurturing of that child to award custody of the child to the natural parents. The Court stated:

> Although a trial court "might find it to be in the best interest of a legitimate child of poor but honest, industrious parents" that his custody be given to a more affluent person, such a finding "could not confer a right as against such parents who had not abandoned their child, even though they had permitted him to spend much time" with the more affluent person. . . . Instead, "parents' paramount right to custody would yield only to a finding that they were unfit custodians because of bad character or other, special circumstances. . . . ."

Id. at 403, 445 S.E.2d at 904 (citation omitted). Similarly, in the present case, the finding that Mr. Bost could provide a more stable envi-

ronment and better financial situation for Sara and Christian than respondent, does not mandate that respondent's rights as the natural father of Sara and Christian be terminated. Certainly in a situation where the custodial parent does not remarry and therefore needs the financial support of the non-custodial parent, the custodial parent would normally not seek to terminate the parental rights of the non-custodial parent. In such a situation, the custodial parent would be most likely to oppose any attempt to terminate the non-custodial parent's parental rights, as this would terminate the non-custodial parent's financial obligations to the children.

Further, the expressed wish of a child is never controlling on a court. As stated by our Supreme Court in *Clark v. Clark*, 294 N.C. 554, 576-77, 243 S.E.2d 129, 142 (1978):

> "When the child has reached the age of discretion, the court may consider the preference or wishes of the child to live with a particular person. A child has attained an age of discretion when it is of an age and capacity to form an intelligent or rational view on the matter. The expressed wish of a child of discretion is, however, never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference. . . . The preference of the child should be based upon a considered and rational judgment, and not made because of some temporary dissatisfaction or passing whim or some present lure."

On the other hand, our review of the guardian ad litem's report and the report of the court appointed psychologist, Dr. Silber, show that these two experts agree that it would be in the best interest of the children not to terminate respondent's parental rights. After interviewing respondent, the guardian ad litem found:

> In March, 1992, [respondent] got his driver's license back and started to come to Sanford on Sundays to watch his children's soccer games. [Respondent] says that Sara would introduce him as her Dad to her friends. It was at this time [respondent] told [petitioner] that he wanted to pay his back child support and set up regular visitation and in May, 1992, [respondent] says [petitioner] froze him out of their lives.
>
> [Respondent] states that he is concerned that his children are being brainwashed by [petitioner].
>
> [Respondent] says that he had a good loving relationship with his children and that he wants that relationship with them again.

> He knows the process will be slow, but . . . he wants to make it work! [Respondent] says "I hurt my children bad[ly,] and I want to make that up to them."
>
> [Respondent] has plans to move to Sanford to facilitate his visitation with his children and so that visiting with them will not take them away from their friends and activities.
>
> . . .
>
> . . . [Respondent] has paid fifteen thousand ($15000.00) in child support since July, 1992.

The guardian ad litem also interviewed petitioner and made the following findings:

> [Petitioner] says that [respondent's] parental rights should be terminated because of a pattern [respondent] followed for ten (10) years: he wouldn't show up for scheduled visitation, he was not stable and between 1985 and the spring of 1991 [respondent] saw the children eight (8) times.

Further, petitioner told the guardian ad litem that she started dating Mr. Bost in 1985 and married him in 1988. She stated that the children call Mr. Bost dad and get along well with him. Petitioner also told the guardian ad litem that respondent "missed some of the children's birthdays and was absent four (4) Christmases; that he brought Christmas presents and saw the children last Christmas, but missed the past Christmas completely."

Based on her interview with Sara, the guardian ad litem found that Sara did not want to visit respondent "because her friends are . . . in Sanford." Sara also told the guardian ad litem that respondent did not send her a birthday card or gift for her last birthday. Similarly, Christian told the guardian ad litem that he did not want to see respondent on the weekends "because he doesn't want to be away from his friends and family." Both children told the guardian ad litem that they call Mr. Bost "Dad" and that they want Mr. Bost to adopt them.

The guardian ad litem also reviewed Dr. Newmark's report, a clinical psychologist who evaluated respondent, and found the following findings by Dr. Newmark important:

> 1. [Respondent's] biggest disappointment has been the limited contact with his children;

2. no evidence of a high potential for violence or assault;

3. [respondent] is able to control his substance abuse;

4. [respondent] fully accepts responsibility for his conflicts and behaviors and in no way attempts to project the blame on others;

5. no sign that he is at risk for dangerous or risk-taking behavior;

6. there are no contradictions to [respondent] having visitation rights with his children.

Subsequently, based on these findings and on her review of Dr. Silber's report, the guardian ad litem concluded:

> I understand [petitioner's] desire to have one complete family unit and to have stability in her children's lives. I also appreciate the children's reluctance to open themselves up to possible disappointment from their father and their desire not to have to go to Greenville and miss their friends and activities here in Sanford. But the fact remains that [respondent] is here, expressing a desire to have a relationship with his children and wanting somehow to make his previous mistakes up to his children. He has sought relief from the court and had made a substantial effort to make up his child support arrearage.
>
> As the court is aware, terminating a parent's rights is a drastic measure, which can have far reaching and devastating effects. My recommendation is that [respondent's] parental rights not be terminated, and that the parties attempt a reasonable visitation schedule with family counseling with psychiatrists for all involved, including [petitioner]. If, after all of this, the children on their own, decide to sever the relationship with their father, this will be their decision and no one elses [sic].

(Emphasis in original.)

Dr. Silber also interviewed the parties. After interviewing respondent, she found that respondent is aware that there is a lack of trust in his relationship with his children and that he let his relationship deteriorate due to his serious drinking problem. Respondent also indicated, however, that he had quit drinking and that he "wants to enhance [the children's] lives and is willing to visit with them for whatever period of time it takes in Sanford until they feel comfortable in his presence." Respondent also perceives petitioner "as an obstacle in his being able to establish a more positive relationship with the

children and feels she has many excuses for why the children are unavailable to him. He states that this occurred prior to his severing the relationship with them and worries this could happen again."

In her interview with Dr. Silber, petitioner indicated that she wants to sever respondent's relationship with the children so that Mr. Bost could adopt them. She told Dr. Silber many times that "they want to 'be a family' and she largely seems to view [respondent] as an intrusion in their lives." Petitioner also mentioned that she feared that respondent would hurt the children emotionally if he started drinking again and missing visitations.

Dr. Silber also interviewed Sara and found that she remembers her visits with respondent and stated that she always looked forward to these visits in the past. Sara was, however, disappointed by respondent four years ago when he stopped calling her or visiting her. Dr. Silber found:

> Sara clearly has strong affect about her father that is both positive and negative. She recalls an early good relationship with him but she has been hurt over this loss. She is afraid if she resumes a relationship with [respondent] she could be opening herself up to being vulnerable and getting hurt again. Clearly trust is a major issue as a result of the father's previous disruption and disappearance.
>
> [Sara] is clearly a child who has considerable affect and anxiety about [respondent]. For the most part she is very accommodating and particularly wants to please her mother and stepfather. She also acknowledges some fear that it would be difficult to get to know [respondent] again because she "doesn't know him all that well". Psychologically this is a sensitive child who is very much a people-pleaser. She likes to avoid conflict, negative issues, or emotions. She is particularly guarded and protective of her mother's feelings. Although she verbally states she does not want any contact with her father, several times she spontaneously would bring him up in ways which would say this is still very much an open wound for her.

Further, during her first interview with Christian, Dr. Silber asked him if there was anything he would do to change his family with regards to respondent, and Christian "immediately displayed curiosity and stated he wished he could see [respondent] more. He stated part of this was because he doesn't know him very well but he, like his sister,

was adamant that he did not want to go to Greenville." Between the first and following visits, however, Christian was more guarded. Christian retracted his position and told Dr. Silber that he did not want to see respondent. Christian gave the same reasons for not wanting to see respondent as Sara gave, that he did not want to be away from his friends, that he would not have as much time with petitioner and Mr. Bost, and that he had his own activities. Dr. Silber perceived that Christian was "feeling a lot of pressure" from his family as the words he used were much the same as Sara's words, "which was not the case in the first interview."

Based on these interviews, Dr. Silber concluded:

> While the children feel close and bonded with the [petitioner and Mr. Bost] they clearly know that their biological father wants to become a part of their lives. Currently they do not want this to happen but the ultimate impact of such a decision must be weighed as they become adults. Should they as young adults choose to resume a relationship with their father of their own volition, would they be resentful of their mother whom they might perceive as depriving them of the relationship with the father? Would they be resentful of the missed opportunities of knowing him during these years? These are strong possibilities.

Dr. Silber also concluded that "[i]f the father were to get involved in [the children's] lives only to disappoint them again, [the children] will have a clear sense that this is a result of his problems, not theirs. They would know for themselves the strengths and weaknesses of each parent." Further, Dr. Silber concluded that although it would take some time to rebuild trust, it is possible that the children's lives could be enhanced by a relationship with their father. Additionally, Dr. Silber also concluded that no evidence existed to show respondent poses any harm or physical danger to the children "nor is this likely to be the case unless he should resume his drinking." Our review of this evidence, in light of the paramount rights of the natural parent to help raise and support his children, shows that the trial court abused its discretion in concluding that it was in the best interest of the children to terminate respondent's parental rights.

Additionally, we find that the trial court erred in concluding that grounds for terminating respondent's parental rights existed under N.C. Gen. Stat. § 7A-289.32. A finding as to the presence of one of these grounds must be based on "clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7A-289.30(e). "This intermediate standard is

greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *In re Montgomery*, 311 N.C. at 109-10, 316 S.E.2d at 252.

N.C. Gen. Stat. § 7A-289.32 provides in pertinent part:

> The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . .
>
> (2) The parent has . . . neglected the child. The child shall be deemed to be . . . neglected if the court finds the child to be . . . a neglected child within the meaning of G.S. 7A-517(21).
>
> . . .
>
> (5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.
>
> . . .
>
> (8) The parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. . . .

WILLFUL FAILURE TO PAY CHILD SUPPORT

[2] First, we hold that the trial court erred in concluding that respondent willfully failed without justification to pay child support pursuant to N.C.G.S. § 7A-289.32(5). The word "willful" as applied in termination proceedings under Chapter 7A has been defined as " 'disobedience which imports knowledge and a stubborn resistance,' 'doing the act . . . without authority—careless whether he has the right or not—in violation of law.' " *In re Roberson*, 97 N.C. App. 277, 280, 387 S.E.2d 668, 670 (1990) (citation omitted). "Willful" has also been defined as "doing an act purposely and deliberately." *Id.* at 281, 387 S.E.2d at 670.

On the issue of respondent's "willful" failure to pay child support "without justification" the trial court found:

> The court is satisfied that, [respondent] has a serious drinking problem and that in 1985 his driver's license was permanently revoked, which things significantly disrupted his life and impaired his ability to have a relationship with his children and to provide support pursuant to this court's [o]rder. However, the court is also persuaded and finds as a fact that during August 1990 [respondent] attempted to begin his sobriety and became very actively involved in a[n] entrepenurial [sic] project to mass produce pre[-]formed grits. This project required a great deal of intellectual stamina, physical endurance and tenacity. Apparently [respondent] applied all these skills and traits rather successfully and has brought his project to the point where some think it will soon reach fruition. [Respondent,] however, did not apply himself with the same diligence, tenacity and ingenuity to maintaining a relationship with his children after August 1990 or to paying his child support obligation as required by this court. Had [respondent] applied himself with the same energy to his children as he had to developing his grits project, he would not have been in a position where his child support obligation was $15,200.00 in arrears on the date the petition to terminate was filed nor would he be in a position where his children no longer wish to see him and want to be adopted by Jim Bost. Therefore the problems specified above are the result of choices that he willfully, deliberately, intentionally and voluntarily made rather than the result of problems with alcoholism or the lack of a driver[']s license.

(Emphasis added.)

Thus, although the trial court found that respondent had a serious drinking problem that impaired his ability to pay child support, the court based its conclusion that respondent "willfully, deliberately, intentionally and voluntarily" chose not to pay child support on its findings that respondent decided to remain sober and commit himself to a business endeavor in 1990. The court reasoned that respondent could have applied the same intellectual stamina, physical endurance and tenacity that he applied to the pre-formed grits project to paying child support. We do not agree that these findings support a conclusion that respondent willfully failed to pay child support.

Instead, our review of the record shows that overwhelming evidence existed which showed that respondent was unable to pay child support, due both to his financial status and his alcoholism. In *In re Roberson*, 97 N.C. App. at 281-82, 387 S.E.2d at 670, this Court recog-

nized that "a respondent-parent's psychological or emotional illness might rebut what a petitioner's evidence had shown to be willful behavior."

Further, although the *Roberson* Court found that N.C.G.S. § 7A-289.32(5) does not contain a "requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period[,]" the Court also found that "[r]espondent could have rebutted petitioner's evidence of his ability to pay by presenting evidence that he was in fact unable to pay support . . . ." *In re Roberson*, 97 N.C. App. at 281, 387 S.E.2d at 670. Thus, in an action to terminate parental rights, the respondent parent may present evidence to prove he was unable to pay child support in order to rebut a finding of willful failure to pay under N.C.G.S. § 7A-289.32(5).

In the present case, the record is replete with evidence that respondent suffered from severe alcoholism and that because of this condition, respondent was unable to maintain permanent employment for an extended period of time and to therefore pay child support. In 1985, respondent lost his driver's license due to his alcohol related driving offenses, and in 1988 he was convicted of driving while his license was permanently revoked and spent thirty days in jail. Thereafter, respondent ceased driving and moved to Greenville, North Carolina, where he moved from job to job due to his alcohol dependency.

Specifically, the evidence shows, as the trial court found, that respondent started working as a chef at the Greenville Country Club in January, 1989 and that he was fired in March, 1989 for drinking. Respondent was unemployed from March, 1989 until the beginning of 1990 when he was employed at the Plant and See Nursery. Respondent testified that the people he worked with at Plant and See were his drinking friends and that in August, 1990, he "reached [the] bottom" and realized that he "couldn't live at the rate [he] was going much longer." Respondent attended Alcoholics Anonymous that month and quit his job in September.

Although respondent decided to cease consuming alcohol in 1990, respondent was still having problems maintaining permanent employment at this time. The evidence shows, and the trial court found, that after respondent quit his job at Plant and See, just before Christmas, he tried to begin his own catering business. In the middle of January and February, however, the business slowed down, and

respondent did not generate enough income to rent space for his business. Respondent had to, therefore, terminate the catering business. Then at the beginning of 1991, respondent worked for four to six months with Cypress Glenn Methodist Retirement Home in Greenville. Thereafter, respondent picked up odd jobs.

It was not until March, 1992 when respondent's license was restored, that he obtained employment on a permanent basis as an agricultural chemical salesman for SMI working on commission. Undisputed evidence contained in the guardian ad litem's report also shows that at this time, respondent told petitioner that "he wanted to pay his back child support and set up regular visitation . . . ." Thereafter, petitioner filed her petition to terminate respondent's parental rights.

Our review of this evidence shows that respondent presented plentiful evidence of his inability to pay child support in the year prior to the filing of the petition to terminate his parental rights due to his inability to maintain employment, caused by both his alcoholism and lack of a driver's license. The record clearly shows that respondent tried to get back on his feet after he decided to remain sober in 1990 but that he experienced numerous failed attempts at maintaining gainful employment. Although we note that respondent became actively involved in his pre-formed grits endeavor in 1990, the record is silent as to any financial gain he had from this project at any time prior to the filing of the petition to terminate his parental rights.

Further, the undisputed evidence shows that when respondent finally did regain his driver's license in March, 1992 and began a job earning a steady income, he indicated to petitioner that he wished to begin paying child support again, and he did begin paying child support in June, 1992, paying a lump sum of $750.00 in June and $7,750.00 in July, 1992. Thus, our review of the record and the evidence contained therein shows that the trial court's finding that respondent "willfully" failed to pay child support "without justification" for a year preceding the filing of the petition to terminate his parental rights was not supported by clear, cogent and convincing evidence.

"Manifestly, the termination of parental rights is a grave and drastic step[,]" and "[p]arental rights are to be protected regardless of the economic situation of the individual parent." *In re Dinsmore*, 36 N.C. App. 720, 726-27, 245 S.E.2d 386, 389 (1978). We hold that the trial court erred in finding a willful failure by respondent to pay child support without justification.

WILLFUL ABANDONMENT

[3] Next, we hold that the trial court erred in concluding that respondent "willfully abandoned" the children for a period of at least six consecutive months preceding the filing of the petition pursuant to N.C. Gen. Stat. § 7A-289.32(8). " ' "[A]bandonment imports any wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child . . . ." ' " *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982) (citations omitted).

> Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. . . .

Pratt v. Bishop, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted). Further, "[a]bandonment requires a wilful intent to escape parental responsibility and conduct in effectuation of such intent." *Id.* at 502, 126 S.E.2d at 608 (citation omitted). In this context, "[t]he word 'willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986).

In the present case, in support of its conclusion that respondent abandoned the children, the trial court found that "[r]espondent made a deliberate decision to devote his attention to his entrepenurial [sic] endeavors and in the process paid no child support for at least three years prior to the filing of the petition and withheld his presence, love, care and affection from the children as well."

As discussed previously, the finding that respondent willfully failed to pay child support is not supported by clear, cogent, and convincing evidence. Further, the law in North Carolina is such that "a mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment. Explanations could be made which would be inconsistent with a wilful intent to abandon." *Pratt*, 257 N.C. at 501-02, 126 S.E.2d at 608. Our review of respondent's inability to pay child support due to his dependency on alcohol and related financial problems does not support a finding of willful abandonment.

Additionally, we do not find support for the trial court's finding that respondent willfully "withheld his presence, love, care and affection from the children" during the relevant statutory time period. The relevant time period under N.C. Gen. Stat. § 7A-289.32(8) is the "six consecutive months immediately preceding the filing of the petition" to terminate parental rights, which would be from 22 November 1991 to 22 May 1992 in the present case. During this time, however, the trial court found that respondent visited the children during the Christmas holiday and that in March, 1992, respondent attended three of the children's soccer games. The undisputed evidence also shows that at that time, respondent told petitioner that he wanted to pay his back child support and set up regular visitations.

We also note that during the relevant time, respondent lived in Greenville, North Carolina and his children lived in Sanford, North Carolina and that respondent did not have a driver's license from 1985 until March, 1992, so that he was unable to drive to see his children on his own until that time. We do not find that respondent's actions evince a settled purpose to forego all parental duties and relinquish all parental claims to the children. Accordingly, we reverse the trial court's conclusion that respondent willfully abandoned his children.

NEGLECT

[4] Finally, we hold that the trial court erred in determining that respondent neglected his children as defined in N.C. Gen. Stat. § 7A-517(21) by not providing proper care, supervision or discipline for the children and concluding that based on this neglect, grounds for terminating respondent's parental rights existed under N.C. Gen. Stat. § 7A-289.32(2).

Under N.C. Gen. Stat. § 7A-289.32(2), parental rights may be terminated if the parent has neglected the child as defined under N.C. Gen. Stat. § 7A-517(21). N.C. Gen. Stat. § 7A-517(21) defines "Neglected Juvenile,":

> A juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

"[T]ermination of parental rights for neglect may not be based solely on conditions which existed in the distant past but no longer

exist." *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 231-32 (1984). "The trial court must . . . consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232 (citation omitted). Further, "[t]he determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding.*" *Id.* (emphasis in original).

In the present case, respondent is an admitted recovering alcoholic. The undisputed evidence shows that since 1987, throughout his battle with alcoholism, respondent has failed to visit his children on a regular schedule and has been sporadic with support payments, failing to pay any child support in 1989, 1990, and 1991. Assuming *arguendo* that these findings support a finding of neglect, our review of the record shows a considerable change in conditions such that a finding of neglect at the time of the hearing is not supported by clear, cogent and convincing evidence.

In August, 1990, the trial court found that respondent decided to cease consuming alcohol and began attending Alcoholics Anonymous. Further, the trial court found that three individuals who worked closely with respondent in 1991 indicated that since August, 1991, respondent has not been intoxicated or used alcohol in their presence. The record also shows that after respondent regained his license in March, 1992, he attended three of the children's soccer games and expressed his wishes to resume visitation with his children.

At the time of the termination proceedings, respondent was employed in a steady job for the first time in a number of years, and he had been alcohol free for over two years. Additionally, at the time of the hearing, respondent had reduced his child support arrears from $15,200 to $2,200, and he testified that since June, 1992, he had been paying $750 a month in child support, $500 in arrears and $250 to keep current. Based on these findings, we conclude that at the time of the hearing, insufficient evidence existed to support a finding of neglect within the meaning of N.C. Gen. Stat. § 7A-289.32(2).

Thus, our review of the record shows insufficient evidence to support the trial court's finding that substantial grounds exist for terminating respondent's parental rights pursuant to N.C. Gen. Stat. § 7A-289.32. Accordingly, for the foregoing reasons, we reverse the trial court's termination of respondent's parental rights as to his two minor children and remand this case for dismissal of the petition for

termination of parental rights pursuant to N.C. Gen. Stat. § 7A-289.31(c) which provides, "[s]hould the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition . . . ."

SUSPENSION OF VISITATION

[5] Respondent also appeals from the trial court's order granting petitioner's motion filed pursuant to N.C. Gen. Stat. § 50-13.7 to suspend respondent's visitation rights provided for in the order of 22 May 1989. N.C. Gen. Stat. § 50-13.7(a) provides that "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." " '[C]ustody' as used in G.S. 50-13.7 was intended to encompass visitation rights as well as general custody." *Clark*, 294 N.C. at 576, 243 S.E.2d at 142.

Under N.C. Gen. Stat. § 50-13.7(a), " '[c]hanged circumstances' means a 'substantial change of circumstances affecting the welfare of the child . . . .' " *Correll v. Allen*, 94 N.C. App. 464, 468, 380 S.E.2d 580, 583 (1989) (citation omitted). "A trial court's 'findings of fact modifying a child custody order are conclusive on appeal if supported by competent evidence, . . . even though there is evidence to the contrary.' " *Hamilton v. Hamilton*, 93 N.C. App. 639, 642, 379 S.E.2d 93, 94 (1989).

In the present case, the trial court based its finding of a "substantial change in circumstance[s]" on its findings that since the entry of the last visitation order of 22 May 1989, (1) the court terminated respondent's parental rights, (2) the children have expressed their desire not to visit with respondent and to be adopted by Jim Bost, and (3) respondent has been absent from the children's lives. Based on these findings, the trial court concluded that it would be in the best interest of the children to have respondent's visitation rights suspended.

Based on our holding above that the trial court improperly terminated respondent's parental rights, the trial court's first finding is no longer supported by the evidence. Further, based on our review of the record, we find that the trial court's third finding that respondent has been absent from the children's lives since the entry of the 22 May 1989 visitation order is unsupported by the evidence. In fact, the trial court found and the record shows that in 1990, respondent visited the children during the Christmas holiday, that during 1991, respondent

saw the children in May at a dance recital, at one of Christian's baseball games, and during the Christmas holiday, and that in 1992 respondent came to three of the children's soccer games in March.

Further, we find that in light of all of the evidence contained in the record, the finding that the children have expressed their desire not to visit with respondent and to be adopted by Jim Bost does not support a finding of changed circumstances and a conclusion that it is in the best interest of the children to suspend respondent's visitation rights. As set out above, " '[t]he expressed wish of a child of discretion is . . . never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference.' " *Clark*, 294 N.C. at 577, 243 S.E.2d at 142.

In the present case, our review of the record, especially in light of the reports of the court appointed psychologist, who found that although it would take some time to rebuild the trust between respondent and his children, the children's lives could be enhanced by a relationship with respondent, and of the guardian ad litem, who recommended that respondent's "parental rights not be terminated, and that the parties attempt a reasonable visitation schedule with family counseling with psychiatrists for all involved, including [petitioner,]" shows insufficient evidence to support a finding of a change in circumstances to suspend defendant's visitation rights.

We agree with the guardian ad litem that under the circumstances of this case, "[i]f, after all of this, the children on their own, decide to sever the relationship with their father [at the age of majority], this will be their decision and no one elses [sic]." (Emphasis in original.) Accordingly, we reverse the order of the trial court suspending respondent's visitation rights.

From the trial court's perspective and in fact the petitioner's perspective, the easiest solution to this case and the troubled relationship that has existed between the respondent father and his ex-wife and children would be to terminate the father's parental rights. Permanently severing respondent's right to foster and re-establish his relationship with his children might well be the expedient and most comfortable course of conduct to pursue, but under the facts of this case, this Court concludes that such a decision is neither supported by the facts or law nor furthers the policy of this State to give fundamental recognition and support to the bonds that exist between natural parents and their children. Despite his past failings and faults,

this Court sees no merit to a decision that precludes a good faith effort by the father to re-kindle the love and affection that once existed between him and his children.

Accordingly, we reverse the orders of the trial court terminating respondent's parental rights and suspending respondent's visitation rights.

Reversed.

Judge WYNN concurs with separate opinion.

Judge JOHNSON dissents with separate opinion.

Judge WYNN concurring.

I agree that plaintiff has not established the existence of any of the grounds for termination of defendant's parental rights by clear, cogent, and convincing evidence as required by N.C. Gen. Stat. § 7A-289.30(e) and that the trial court therefore erred by terminating defendant's parental rights.

The trial court found the following grounds for termination under N.C. Gen. Stat. § 7A-289.32: neglect, willful abandonment of the children, and willful failure to support the children. The trial court did not make any findings that defendant had neglected the children as of the time of the termination proceeding which is the proper period of inquiry under the statute. *See In re Parker*, 90 N.C. App. 423, 368 S.E.2d 879 (1988). The petition for termination was filed on 22 May 1992, therefore defendant could not be found to have willfully abandoned his children for six consecutive months preceding the petition when he attended their soccer games in March, 1992. N.C. Gen. Stat. § 7A-289.32(8) (1989).

The trial court also concluded that defendant willfully failed, without justification, to pay for the care, education and support of the children. In *In re Roberson*, 97 N.C. App. 277, 387 S.E.2d 668 (1990), this Court defined "willful" to mean, *inter alia*, " 'disobedience which imports knowledge and a stubborn resistance.' " *Id.* at 280, 387 S.E.2d at 670 (quoting *Jones v. Jones*, 52 N.C. App. 104, 110, 278 S.E.2d 260, 264 (1981)). The trial court's findings of fact do not reveal that defendant's conduct rose to the level of "willful" failure to pay child support. Therefore, I agree that the trial court's order should be reversed.

I note further the problematical nature of this termination proceeding where there was not a simultaneous petition for adoption of the children by the plaintiff's new husband. Defendant has presented evidence he is now willing and able to meet his support obligations. If the children are not adopted and defendant father's parental rights are terminated, only the mother would be legally and financially responsible for the children, an untoward result when defendant has rehabilitated himself and is willing to support the children.

Judge JOHNSON dissenting.

I respectfully dissent. I, like the trial judge, recognize that defendant/respondent's alcoholism has "significantly disrupted his life and impaired his ability to have a relationship with his children and to provide support" pursuant to court order. However, I, like the trial judge, believe that in the years immediately preceding plaintiff/petitioner's petition for termination of defendant/respondent's parental rights, defendant/respondent's accrued arrearages and lack of a relationship with his children were "the result of choices that he willfully, deliberately, intentionally and voluntarily made rather than the result of problems with alcoholism or the lack of a drivers [sic] license."

Because the court may terminate parental rights upon a finding of any one of the grounds listed in North Carolina General Statutes § 7A-289.32 (Cum. Supp. 1993), I only address North Carolina General Statutes § 7A-289.32(5). As the majority notes, North Carolina General Statutes § 7A-289.32(5) states:

> [The court may terminate the parental rights upon a finding of . . . the following:]
>
> . . .
>
> (5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.

All findings of fact made as a result of an adjudicatory hearing terminating parental rights must be based on clear, cogent, and convincing evidence. North Carolina General Statutes § 7A-289.30(e)

(1989). If the court determines the existence of any of the conditions authorizing a termination of parental rights then the court shall issue an order terminating parental rights, unless the court determines that the best interests of the child require otherwise. North Carolina General Statutes § 7A-289.31(a) (1989).

In the order terminating the parental rights of defendant/respondent in the case *sub judice*, the trial court found the following:

> 18. On December 6, 1985 this court entered its child support order requiring Respondent to pay child support in the amount of $250.00 per month and this Order has remained in effect continually since that time.
>
> 19. Petitioner alleged in her petition that [defendant/respondent] was $15,200.00 in arrears in his child support obligation at the time the Petition was filed. On or about June 18, 1992, [defendant/respondent] filed a response to the Petition and admitted that he failed to pay child support as required by the court's support Order entered December 6, 1985 for a period of time. Respondent further stated in his verified Motion in the Cause for Determination of Prospective Child Support that because of unemployment, dependency upon alcohol and lack of financial means that he has failed to pay support in . . . accord with the prior Orders of this court.
>
> 20. As of May 22, 1992, the date the Petition was filed, Respondent was in arrears in his child support obligation in the amount of $15,200.00. Respondent made no child support payments during 1992 prior to May 22, 1992, and made no child support payments during 1991, 1990 and 1989.
>
> 21. Between January 1, 1989, and June 18, 1992, Respondent, in addition to failing to pay the Court ordered child support, also failed to provide any other form of financial assistance for the children.
>
> 22. Prior to the time that Respondent ceased paying child support all together, he had a history of being sporatic [sic] in his support payments. This Court has issued Orders to show cause relating to Respondent's failure to pay child support during December 1983, July 12, 1984 ($450.00 arrearage), November 7, 1985 ($650.00 arrearage), February 20, 1986 ($1075.00 arrearage), March 4, 1986 ($1125.00 arrearage), and October 10, 1986 ($500.00 arrearage). Respondent was gainfully employed during these periods of time

and could have made child support payments on a regular basis but elected not to do so.

. . .

33. The Petition to Terminate Parental Rights was filed by [petitioner] on May 22, 1992. On June 2, 1992, [defendant/respondent] paid $750.00 in child support to the Lee County Clerk of Superior Court. This was the first payment that [defendant/respondent] made towards child support in at least three years and also the first financial contribution for the children of any kind in the preceding three years. Thereafter on July 22, 1992, [defendant/respondent] paid $7,750.00 towards his child support obligation with this payment being made to the Lee County Clerk of Superior Court. These funds were obtained through a loan [defendant/respondent] obtained using his mother to co-sign for the loan. Respondent made a number of promises between August 1990 and May 22, 1992, to begin to pay child support but never followed through despite the fact that he was working during this period and could have paid support.

. . .

78. The court is satisfied that [defendant/respondent] has a serious drinking problem and that in 1985 his driver's license was permanently revoked, which things significantly disrupted his life and impaired his ability to have a relationship with his children and to provide support pursuant to this court's Order. However, the court is also persuaded and finds as a fact that during August 1990 [defendant/respondent] attempted to begin his sobriety and became very actively involved in [an] entrepreneurial project to mass produce preformed grits. This project required a great deal of intellectual stamina, physical endurance and tenacity. Apparently [defendant/respondent] applied all these skills and traits rather successfully and has brought his project to the point where some think it will soon reach fruition. [Defendant/respondent,] however, did not apply himself with the same diligence, tenacity and ingenuity to maintaining a relationship with his children after August 1990 or to paying his child support obligation as required by this court. . . . Therefore the [accrued arrearages and defendant/respondent's lack of a relationship with his children] are the result of choices that he willfully, deliberately, intentionally and voluntarily made rather than the result of problems with alcoholism or the lack of a drivers [sic] license.

The trial court concluded as law "that the grounds to terminate [defendant/respondent's] parental rights exists as provided for in G.S. 7A-289.32(5). On the date the Petition was filed, Respondent owed $15,200 in child support, made no payments since 1989, despite his promises to do so, and elected to spend his time on his entrepreneurial project rather [than] earning wages to care for his children." I agree with the trial court and find that plaintiff/petitioner has shown by clear, convincing and cogent evidence that defendant/respondent "willfully failed without justification" to pay child support per the terms of the child support agreement.

Having found as such, the inquiry is now to determine if "the best interests of the child require that the parental rights of such parent not be terminated." North Carolina General Statutes § 7A-289.31(a). I recognize that both defendant/appellant and the guardian ad litem find the testimony of Dr. Linda Silber, the child psychologist appointed by the court, persuasive in that Dr. Silber did not recommend termination of defendant/respondent's parental rights. I further recognize that it was also the minor children's guardian ad litem's opinion that the best interests of the minor children would not be served by terminating defendant/respondent's parental rights. Nonetheless, having reviewed the record in its entirety, I believe the trial court had ample evidence to support its decision to terminate defendant/respondent's parental rights. Irrespective of defendant's child support arrearages, this evidence includes the findings that defendant/respondent infrequently visited the minor children during the years 1987 to 1992; that from 1987 through the date of the last hearing in this matter, defendant/respondent did not write any letters to his minor children or have phone conversations of any length with his minor children on a regular basis; that from 1987 to July 1992, defendant/respondent never sought the assistance of any court to help him maintain a relationship with his children; that defendant/respondent applied himself with tenacity and clarity to his entrepreneurial project, but that he did not apply this same tenacity and sense of purpose to maintaining a relationship with his children; and that defendant/respondent could have maintained relationships with his minor children through letter writing, telephone calls and visitations, but chose not to do so. And, although clearly not determinative of this issue, I finally note that the court found that the minor children testified to the court that they have no desire to see or get to know defendant/respondent; that both of the minor children have developed happy and secure relationships living with their mother

and her husband, Jim Bost; and that the minor children want to be adopted by Mr. Bost and Mr. Bost will in fact adopt the minor children at a time when it is legally proper to do so.

In child custody matters, "wide discretion is vested in the trial judge. *He has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion.*" *In re Custody of Pitts*, 2 N.C. App. 211, 212, 162 S.E.2d 524, 525 (1968) (emphasis added). I find no abuse of discretion performed by the trial judge herein.

I would affirm the decision of the trial court.

EUGENE K. FRANKLIN, DAVID L. FRANKLIN, CO-EXECUTORS OF THE ESTATE OF HENRY B. FRANKLIN, AND WAVA K. FRANKLIN, PLAINTIFFS v. WINN DIXIE RALEIGH, INC., DEFENDANT

No. 9310SC1039

(Filed 15 November 1994)

1. Process and Service § 20 (NCI4th)— negligence action—erroneous corporate name—sufficiency of process—motion to amend—substitution of parties

The trial court did not err by granting defendant's motion to dismiss for insufficiency of process in a negligence action where the action occurred at a Winn-Dixie grocery store in Raleigh, the defendant named in the original summons and complaint was Winn-Dixie Stores, Inc., the store was owned by Winn-Dixie Raleigh, Inc., and Winn-Dixie Stores, Inc. and Winn-Dixie Raleigh, Inc. were separate and distinct corporations. Winn-Dixie Stores, Inc. was the correct name of the wrong corporate party defendant; plaintiffs simply sued the wrong corporation. Plaintiffs' attempt to amend the original summons was prohibited because it constituted a substitution or entire change of parties. N.C.G.S. § 1A-1, Rule 4.

Am Jur 2d, Process §§ 94 et seq.

Necessity and sufficiency of service of process under due process clause of Federal Constitution's Fourteenth Amendment—Supreme Court cases. 100 L. Ed. 2d 1015.

2. Process and Service § 20 (NCI4th)— negligence action—erroneous corporate name—service of process—sufficiency

The trial court did not err by dismissing plaintiffs' negligence action for insufficient service of process where the accident occurred in a Winn-Dixie Store in Raleigh, the store was owned by Winn-Dixie Raleigh, Inc., plaintiffs initially brought action against Winn-Dixie Stores, Inc., alias and pluries summonses naming Winn-Dixie Raleigh, Inc. as the defendant were ineffective attempts at amending the original summons, and plaintiffs never served a summons and complaint on Winn-Dixie Raleigh, Inc. at a time when Winn-Dixie Raleigh, Inc. was a named defendant in the case. If the summonses themselves were void, then the service of those summonses was also invalid.

Am Jur 2d, Process §§ 94 et seq.

Necessity and sufficiency of service of process under due process clause of Federal Constitution's Fourteenth Amendment—Supreme Court cases. 100 L. Ed. 2d 1015.

3. Limitations, Repose, and Laches § 149 (NCI4th)— negligence action—erroneous corporate name—statute of limitations—no relation back

The trial court did not err by dismissing a negligence action based on the running of the statute of limitations where plaintiffs filed their original summons and complaint on 24 August 1992, the last date on which they could file a timely claim; they sued and served the wrong party since both the summons and complaint named Winn-Dixie Stores, Inc. as the defendant; plaintiffs filed an amended complaint naming Winn-Dixie of Raleigh, Inc. as the defendant seven months after the original complaint was filed and the statute of limitations had run; and plaintiffs served no corresponding summons on anyone, contending that the amended complaint merely corrected the name of a party already in court and thus related back. However, plaintiffs' complaint does not relate back because defendant Winn-Dixie Raleigh would be unfairly prejudiced in that it would lose the benefit of the statute of limitations and the failure to name Winn-Dixie Raleigh originally was solely attributable to plaintiffs.

Am Jur 2d, Limitation of Actions §§ 217 et seq.

Judge WYNN dissenting.

Appeal by plaintiffs from order entered 2 July 1993 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 24 August 1994.

This appeal arises from a negligence action filed 24 August 1992 by the plaintiffs against the defendant for injuries sustained by the decedent, Henry B. Franklin ("Mr. Franklin"). Plaintiffs' complaint alleged that on 22 August 1989, while grocery shopping, Mr. Franklin sustained severe and permanent injuries when he slipped on cole slaw lying in an aisle near a cash register at the Winn Dixie grocery store located at 651 Western Boulevard Extension in Raleigh, North Carolina. Plaintiffs further alleged these injuries eventually caused Mr. Franklin's death on 1 April 1991.

This case raises basic issues of civil procedure involving whether the trial court erred in dismissing plaintiffs' original and amended complaints for insufficiency of process, insufficiency of service of process and violation of the statute of limitations. After considering each of these issues, we reject all of plaintiffs' arguments and affirm the trial court's dismissal. The facts pertinent to this appeal are best understood through the following chronology of the procedural history:

1. On 24 August 1992, plaintiffs filed a complaint ("original complaint") (dated 21 August 1992), naming "Winn Dixie Stores, Inc." as the defendant.

2. On 24 August 1992, a summons was issued. The caption of the summons identified "Winn Dixie Stores, Inc." as the defendant and was directed to "Winn Dixie Stores, Inc." The name and address of the defendant as specified on the summons was Crawford and Company, 4208 Six Forks Road, Raleigh, NC 27619. This summons was defective because it did not specify the county in which the action was filed. No one completed the return of service on the reverse of the summons.

3. On 24 August 1992, an alias and pluries summons was issued. This summons identified "Winn Dixie Stores, Inc." as the defendant and was directed to "Winn Dixie Stores, Inc." The name and address of the defendant was again listed as that of Crawford and Company, 4208 Six Forks Road, Raleigh, NC 27609.

The return of service on the reverse of the summons shows that on 27 August 1992, it was served on "Winn Dixie Stores, Inc." by leaving a copy of the summons and complaint at the "dwelling house or usual place of abode of the defendant named above with a person of

suitable age and discretion then residing therein" with "Jack Ferrell/General Adjuster".

4. On 29 September 1992, a second alias and pluries summons was issued. This summons identified the defendant as "Winn-Dixie Raleigh, Inc.", but is still directed to "Winn Dixie Stores, Inc." The name and address of the defendant on this summons was C T Corporation System, 225 Hillsborough Street, Raleigh, NC 27603.

The return of service on the reverse of the summons shows that it was served on 1 October 1992 on "Winn Dixie Stores of Raleigh, Inc." by delivering a copy of the summons and complaint to C T Corporation System Registered Agent, c/o Ron Strickland "as the defendant is a corporation".

5. On 26 October 1992, defendant "Winn Dixie Stores, Inc." filed a Motion to Dismiss, pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(4) and (5), requesting that the complaint be dismissed for insufficiency of process and insufficiency of service of process.

6. On 23 December 1992, a third alias and pluries summons was issued. This summons identified the defendant as "Winn-Dixie Raleigh, Inc." and was directed to "Winn-Dixie Raleigh, Inc." This time, the name and address of the defendant was listed as Winn-Dixie Raleigh, Inc., c/o C T Corporation System, 225 Hillsborough Street, Raleigh, NC 27603.

7. Also on 23 December 1992, a fourth alias and pluries summons was issued. This summons identified the defendant as "Winn-Dixie Stores, Inc." and was directed to "Winn-Dixie Stores, Inc." The name and address of the defendant was Winn-Dixie Stores, Inc., c/o C T Corporation System, 225 Hillsborough Street, Raleigh, NC 27603.

8. Plaintiffs served the third and fourth alias and pluries summonses with a copy of the original complaint attached to each on the defendants listed in each summons by certified mail, return receipt requested. Signed receipts indicate that both sets of summonses were delivered on 30 December 1992 to the addresses specified. On 25 January 1993, plaintiffs filed an Affidavit of Service by certified mail for each of the summonses delivered 30 December 1992.

9. By letter dated 31 December 1992, Barry L. Ingle of C T Corporation System notified plaintiffs' attorney that C T Corporation System was returning the third and fourth summonses and complaints that it received by certified mail. Mr. Ingle stated that:

> We are unable to accept service for a corporation by the name of WINN-DIXIE STORES, INC. as it is not on record with the SECRETARY OF STATE. We would like to accept the service for WINN-DIXIE RALEIGH, INC., however, the Complaint was for WINN-DIXIE STORES, INC.
>
> We must be provided with the name of the corporation to be served as it is registered to do business with the SECRETARY OF STATE OF NORTH CAROLINA.
>
> Should you make this determination that CT is the registered agent, please address it to the full corporate name, return it to us and we will be glad to forward it on.

10. By affidavit dated 24 March 1993, E. D. Whitley, Safety Manager for Winn-Dixie Raleigh, Inc. stated that "[o]n August 22, 1989, and since that date, Winn-Dixie Stores, Inc. and Winn-Dixie Raleigh, Inc. have been and are separate and distinct corporations." Mr. Whitley further stated that:

> On August 22, 1989, Winn-Dixie Stores, Inc. did not own, lease or operate the Winn-Dixie store located at 651 Western Boulevard Extension in Raleigh, North Carolina. Rather, the lessee and operator of the Winn-Dixie store located at 651 Western Boulevard Extension in Raleigh, North Carolina, on that date was Winn-Dixie Raleigh, Inc. Winn-Dixie Stores, Inc. has never owned, leased or operated the store at that location.

11. On 20 April 1993, plaintiffs filed an Amended Complaint naming "Winn Dixie Raleigh, Inc." as the defendant. Pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure, plaintiffs served a copy of the Amended Complaint and Notice of Filing Amended Complaint on Winn Dixie Raleigh, Inc., c/o C T Corp. System, 225 Hillsborough Street, Raleigh, NC 27603, and on Mr. Reid Russell, attorney for Defendant "Winn-Dixie Raleigh, Inc." The Notice stated the following:

> The purpose of this amended complaint is to change the word "Stores" to "Raleigh" in the name of defendant as designated when the original complaint was filed. Plaintiffs make this filing on N.C.G.S. § 1A-1, Rule 15(a), where it is stated: "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . ." Defendant has filed no responsive pleading, but a Rule 12 motion. Such motion is not a responsive pleading. See, Johnson v. Bollinger, 86 N.C. App. 1, 7 (1987).

The Amended Complaint, in all other respects, was identical to the original complaint.

12. On 19 May 1993, Defendant Winn Dixie Raleigh, Inc. filed a Motion to Dismiss the Amended Complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(4) and (5) for insufficiency of process and insufficiency of service of process, respectively, and pursuant to N.C. Gen. Stat. § 1-52 on the ground that the statute of limitations had run on this action.

13. On 2 July 1993, Judge Gregory A. Weeks entered an Order allowing both of defendant's motions and dismissed plaintiffs' original and amended complaints with prejudice. Judge Weeks made no findings of fact in his Order. From this Order, plaintiffs appeal.

Marvin Schiller and William E. Moore, Jr. for plaintiff-appellants.

Patterson, Dilthey, Clay & Bryson, L.L.P., by G. Lawrence Reeves, for defendant-appellee.

ORR, Judge.

I.

[1] Plaintiffs' first assignment of error is that the trial court erred in granting the defendant's motion to dismiss for insufficiency of process. The sufficiency of process for any civil action filed in North Carolina is governed by N.C. Gen. Stat. § 1A-1, Rule 4. Rule 4(a) states that "[u]pon the filing of the complaint, summons shall be issued forthwith . . . ." N.C. Gen. Stat. § 1A-1, Rule 4(a) (1990). Rule 4(b) states that a summons "shall be directed to the defendant or defendants." N.C. Gen. Stat. § 1A-1, Rule 4(b) (1990).

On the significance of a summons, this Court has stated:

> The summons constitutes the means of obtaining jurisdiction over the defendant. . . . The summons, not the complaint, constitutes the exercise of the power of the State to bring the defendant before the court. As such, defects in the summons receive careful scrutiny and can prove fatal to the action.

Lantham v. Cherry, 111 N.C. App. 871, 873, 433 S.E.2d 478, 480 (1993), *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994) (quoting *Childress v. Forsyth County Hospital Auth.*, 70 N.C. App. 281, 285, 319 S.E.2d 329, 332 (1984), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 484 (1985)).

> Where there is a defect in the process itself, the process is generally held to be either voidable or void. Where the process is voidable, the defect generally may be remedied by an amendment because the process is sufficient to give jurisdiction. Where the process is void, however, it generally cannot be amended because it confers no jurisdiction.

Harris v. Maready, 311 N.C. 536, 542, 319 S.E.2d. 912, 916 (1984).

Rule 4(i) permits trial courts to allow the amendment of any process "unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued." N.C. Gen. Stat. § 1A-1, Rule 4(i) (1990); *Harris*, 311 N.C. at 545, 319 S.E.2d at 918. "Material prejudice" in this context "refers primarily to the interposition of the statute of limitations." 1 G. Gray Wilson, *North Carolina Civil Procedure*, § 4-10, p. 44. The power of the court to allow amendment of process is discretionary and permits amendment to correct a misnomer or mistake in the name of a party. *Harris*, 311 N.C. at 542, 319 S.E.2d at 918. When "the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit." *Id.* at 919 (citing *Bailey v. McPherson*, 233 N.C. 231, 235, 63 S.E.2d 559, 562 (1951)). However, "if the amendment amounts to a substitution or entire change of parties, however, the amendment will not be allowed." *Id. (*citing *Hogsed v. Pearlman*, 213 N.C. 240, 195 S.E. 789 (1938)). Our Supreme Court has stated that "[s]ubstitution in the case of a misnomer is not considered substitution of new parties, but a correction in the description of the party or parties actually served." *Blue Ridge Electric Membership Corporation v. Grannis Bros., Inc.*, 231 N.C. 716, 720, 58 S.E.2d 748, 751 (1950). Thus, resolution of plaintiffs' assignments of error turns on whether plaintiffs naming "Winn Dixie Stores, Inc." as the defendant in the original summons and complaint was a misnomer.

The record shows by the affidavit of E.D. Whitley, Safety Manager, for Winn-Dixie Raleigh, Inc., that "Winn-Dixie Stores, Inc." was not a corporate entity on record with the Secretary of State. It further shows that at no time pertinent to this action did Winn-Dixie Stores, Inc. ever own, lease or operate the store located at 651 Western Boulevard Extension. Moreover, while Winn-Dixie Stores, Inc. and Winn-Dixie Raleigh, Inc. are both Florida corporations authorized to

do business in North Carolina, they have been and were separate and distinct corporations at the time the cause of action accrued.

Therefore, we hold that the named defendant in the original summons and complaint, "Winn Dixie Stores, Inc.", was not a mistake or misdescription permitting the amendment of the summons. Rather, Winn Dixie Stores, Inc. was the correct name of the wrong corporate party defendant, a substantive mistake which is fatal to this action. Quite simply, plaintiffs sued the wrong corporation.

Plaintiffs contend that they were entitled to correct their original defective summons by alias and pluries summons. They rely on *Latham v. Cherry*, 111 N.C. App. 871, 433 S.E.2d 478 (1993) and *Anderson Trucking Service, Inc. v. Key Way Transport, Inc.*, 94 N.C. App. 36, 379 S.E.2d 665 (1989). As defendant correctly points out, plaintiffs' reliance on these cases is misplaced.

In *Latham*, this Court said that "[a] party may correct a failed or defective original service by . . . application for alias and pluries summons within ninety days of original issue. . . ." *Latham*, 111 N.C. App. at 873, 433 S.E.2d at 480; *see* N.C. Gen. Stat. § 1A-1, Rule 4(d) (1990) (emphasis added). The issue in *Latham* was defective service, not defective process. In *Anderson*, again the issue before the court was whether service was defective. *Anderson*, 94 N.C. App. at 44, 379 S.E.2d at 670. N.C. Gen. Stat. § 1A-1, Rule 4(d), on which plaintiffs rely, "pertains to the extension of time for 'service' of a summons which has been properly issued against a named defendant." *Roshelli v. Sperry*, 63 N.C. App. 509, 511, 305 S.E.2d 218, 219, *review denied*, 309 N.C. 633, 308 S.E.2d 716 (1983). Rule 4(d) of the North Carolina Rules of Civil Procedure provides that:

> When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:
>
> . . .
>
> (2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.
>
> . . .

N.C. Gen. Stat. § 1A-1, Rule 4(d) (1990). This provision relates only to defective original service, not defective original process. Plaintiffs' repeated issuance and service of alias and pluries summonses was not only consistently defective, but also ineffective to confer jurisdiction over the defendant Winn Dixie Raleigh, Inc.

In *Roshelli*, the plaintiff filed a complaint against Lawrence F. Sperry seeking recovery under the family purpose doctrine for personal injuries received on 31 March 1978 in an automobile accident allegedly caused by the defendant's daughter, Beverly N. Sperry. On the date the complaint was filed, 27 March 1981, a summons was issued in the name of Beverly Sperry. A summons in the name of the defendant, Lawrence F. Sperry was issued on 7 April 1981, after the limitations period had expired. On appeal from the defendant's motion for summary judgment, the plaintiff contended that because the 7 April 1981 summons issued in the name of Lawrence Sperry was endorsed by the clerk, it related back to the 27 March 1981 issuance of the original summons in the name of Beverly Sperry, a nonparty. This Court held that the clerk's endorsement of the summons directed to Lawrence Sperry after the limitations period had run did not cause the endorsed summons to relate back to the issuance within the limitations period of original summons directed to Beverly Sperry. "The purpose of Rule 4(d) is only to keep the action alive by means of an endorsement on the original summons or by issuance of an alias or pluries summons in situations where the original, properly directed summons was not yet served." *Roshelli*, 63 N.C. App. at 511, 305 S.E.2d at 219. When an original summons is issued in the name of a person other than the defendant and not a party to the action, Rule 4(d) does not apply. *Id.*

In the case at bar, plaintiffs' attempt to amend the original summons was prohibited because it constituted "a substitution or entire change of parties." *Harris*, 311 N.C. at 546, 319 S.E.2d at 918. Accordingly, we affirm the trial court's decision to grant defendant's motion to dismiss for insufficiency of process.

II.

[2] Plaintiffs next contend that the trial court erred in granting defendant's motion to dismiss for insufficiency of service of process. We disagree.

"The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him."

Wearring v. Belk Brothers., Inc., 38 N.C. App. 375, 376, 248 S.E.2d 90, 90 (1978); *see* N.C. Gen. Stat. § 1A-1, Rule 4(b) (1990). The statutory method for service of process on a corporation is set forth in Rule 4(j)(6). In pertinent part, Rule 4(j)(6) states that to effect service on a corporation, a summons and complaint must be delivered, in person or by registered or certified mail, to an officer, director, or managing agent of the corporation, by leaving copies in the office of such persons. N.C. Gen. Stat. § 1A-1, Rule 4(j)(6) (1990) (emphasis added).

As demonstrated in the preceding argument, the 29 September 1992 and the 23 December 1992 alias and pluries summonses naming "Winn-Dixie Raleigh, Inc." as the defendant were ineffective attempts at amending the original summons. Interestingly, plaintiffs cite several Court of Appeals cases which support the defendant's contention that service was insufficient. All of the cases on which plaintiffs base their contention that service of process was sufficiently accomplished in this case make it clear that service is complete on the day summons and complaint are delivered to the addressee. *See Taylor v. Brinkman*, 108 N.C. App. 767, 425 S.E.2d 429, *review denied*, 333 N.C. 795, 431 S.E.2d 30 (1993) (". . . service of process attempted by registered or certified mail, as permitted by N.C.G.S. § 1A-1, Rule 4(j)(1)(c), is 'complete on the day the summons and complaint are delivered to the address thereon' " (quoting *Lynch v. Lynch*, 303 N.C. 367, 370, 279 S.E.2d 840, 843 (1981)).

The defendant Winn Dixie Raleigh, Inc. did not become a party defendant in this case until 20 April 1993, the date plaintiffs filed their Amended Complaint. At no time on or after the filing of the Amended Complaint did the plaintiffs serve a summons in the name of Winn Dixie Raleigh, Inc. The September and December summonses which named Winn Dixie Raleigh, Inc. as the defendant were both issued when the defendant named in the then pending original complaint was Winn Dixie Stores, Inc. In short, plaintiff has simply never served a summons and complaint on Winn Dixie Raleigh, Inc. at a time when Winn Dixie Raleigh, Inc. was a named defendant in this case.

As defendant succinctly states in its brief, "[i]t is axiomatic that if the summonses themselves were void, then the service of those summonses was also invalid." Accordingly, we affirm the trial court's dismissal of the plaintiff's suit on the ground of insufficiency of service of process.

III.

[3] Plaintiffs' final assignment of error is the crucial issue presented in this case. Here, the issue before the court is whether the trial court erred in dismissing their lawsuit against Winn-Dixie Raleigh, Inc. on the grounds that the statute of limitations had run. The statute of limitations for personal injury due to negligence is three years. N.C. Gen. Stat. § 1-52(16) (Supp. 1993).

Plaintiffs filed their original summons and complaint on 24 August 1992, the last date on which they could file a timely claim. However, they sued and served the wrong party since both the original summons and complaint named Winn-Dixie Stores, Inc. as the defendant. On 20 April 1993, over seven months after the original complaint was filed and the statute of limitations had run, plaintiffs filed an amended complaint naming "Winn-Dixie Raleigh, Inc." as the defendant. Plaintiffs served no corresponding summons on anyone. They contend that the amended complaint merely corrected the name of a party already in court and thus relates back to the date of the original complaint. In other words, they argue that they properly extended the statute of limitations by the clerk's issuance of a corrected alias and pluries summons and subsequent amendment to the complaint in order to properly accomplish service of process on defendant Winn-Dixie Raleigh, Inc. Plaintiffs' argument on this issue is also without merit.

Unless relation back occurs, the statute of limitations is a defense for defendants. Rule 15(c) of the North Carolina Rules of Civil Procedure states the following:

> 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 to the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (1990).

In *Ring Drug Company, Inc. v. Carolina Medicorp Enterprises, Inc.*, 96 N.C. App. 277, 385 S.E.2d 801 (1989), this Court noted that on three other occasions it had decided whether Rule 15(c) would permit a complaint to be amended to add a new party defendant after the limitations period had expired. In all three cases, this Court decided the issue against the plaintiffs. *See Teague v. Asheboro Motor Company*, 14 N.C. App. 736, 189 S.E.2d 671 (1972); *Callicutt v. American*

Honda Motor Company, Inc., 37 N.C. App. 210, 245 S.E.2d 558 (1978); *Stevens v. Nimocks*, 82 N.C. App. 350, 346 S.E.2d 180, *cert. denied*, 318 N.C. 511, 349 S.E.2d 873 (1986). "Whether a complaint will relate back with respect to a party defendant added after the applicable limitations period depends on whether that new defendant had notice of the claim so as not to be prejudiced by the untimely amendment." *Ring*, 96 N.C. App. at 283, 385 S.E.2d at 806.

In *Ring*, the court adopted the federal test for determining when a party defendant may be added after the limitations period has run. Relation back will occur under the federal rule when

> 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. (citing *Schiavone v. Fortune*, 477 U.S. 21, 29, 106 S.Ct. 2379, 2384, 91 L. Ed. 2d 18, 27 (1986)).

> If some nexus among defendants will permit the trial judge to infer that the new defendant had notice of the original claim so as not to be prejudiced by the amendment, *Callicut*, 37 N.C. App. at 213, 245 S.E.2d at 560, Rule 15(c) will allow a complaint to be amended so as to add a new party, expiration of the statute of limitations notwithstanding. The statute of limitations should furnish the defendant at bar, however, when a plaintiff's use of Rule 15(c) would circumvent any other procedural requirement, *see Stevens*, 82 N.C. App. at 352, 346 S.E.2d at 181, or when the plaintiff's failure to name the defendant originally is solely attributable to the plaintiff.

Ring, 96 N.C. App. at 283, 385 S.E.2d at 806.

Applying the federal test to the present case, we hold that the trial judge correctly ruled that the statute of limitations was a bar to the instant case. Plaintiffs' amended complaint does not relate back because defendant Winn Dixie Raleigh, Inc. would be unfairly prejudiced by allowing the amendment to relate back; and plaintiffs' failure to name Winn-Dixie Raleigh, Inc. originally was solely attributable to the plaintiffs. By allowing the amended complaint to relate back, defendant would lose the benefit of the statute of limitations as

a bar to plaintiffs' cause of action. This is particularly evident since, after being informed by Winn-Dixie Stores, Inc. that they were not the proper defendant, plaintiffs' waited over six months to file the amended complaint. Therefore, defendant properly asserted the statute of limitations as a bar to plaintiffs' effort to "correct the name of the party already in court." The amended complaint filed on 19 April 1993 initiated a new action. The commencement of this action occurred more than three years after the accident on 24 August 1992 and is barred by N.C. Gen. Stat. § 1-52.

Summarizing, we agree with the defendant that the record does not demonstrate that plaintiffs' failure to name Winn-Dixie Raleigh, Inc. as the defendant resulted from a misnomer. Rather, it shows plaintiffs' unjustified failure to name Winn-Dixie Raleigh, Inc. as the party defendant in a timely fashion.

Plaintiffs filed their original summons and complaint on 24 August 1992, the last date on which they could file a timely claim. Yet, it was not until plaintiffs filed the amended complaint, more than three years after Mr. Franklin's accident, that the proper corporate defendant "Winn Dixie Raleigh, Inc." was named. To this day, as required by the North Carolina Rules of Civil Procedure, plaintiffs have never served the defendant Winn Dixie Raleigh, Inc., through the proper agent designated to receive service, C T Corporation System, with a summons accompanied by a complaint naming it as a defendant. Under these circumstances, the defendant has never been a party to this action. Plaintiffs' original and alias and pluries summonses conferred no jurisdiction over the defendant because the original summons was void and could not be amended. The named defendant in the original summons and complaint, "Winn-Dixie Stores, Inc.", was the correct name of the wrong corporate party defendant, a substantive mistake which is fatal to this action. For the foregoing reasons, we affirm the order of the trial court dismissing plaintiffs' action.

Affirmed.

Judge JOHNSON concurs.

Judge WYNN dissents with separate opinion.

Judge WYNN dissenting.

I respectfully dissent from Part III of the majority's opinion because I believe our Rules of Civil Procedure should permit plaintiffs to amend their complaint.

This entire pleading imbroglio would have been avoided if plaintiffs had simply filed their complaint and served "Winn Dixie Raleigh, Inc." as the defendant instead of "Winn Dixie Stores, Inc." Plaintiffs would then be allowed to proceed with their suit. Since plaintiffs identified the defendant by its general corporate name rather than the specific name of the owner of the Raleigh store, the majority holds that plaintiffs' action must be dismissed. I believe, however, that the purpose of our Rules of Civil Procedure is to resolve controversies on the merits rather than on pleading technicalities. *See Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The majority notes that plaintiffs have never properly served defendant, Winn Dixie Raleigh, Inc., and then concludes that the defendant thus has never been made a party to this action. In fact, defendant Winn Dixie Raleigh, Inc. appeared before the trial court to argue its motion to dismiss plaintiffs' complaint on the grounds of insufficiency of process, insufficiency of service, and that the statute of limitations expired. By arguing the statute of limitations defense, defendant made a general appearance in the action and therefore waived any objections to defective service. *Four County Agricultural Credit Corp. v. Satterfield*, 218 N.C. 298, 10 S.E.2d 914 (1940); *Williams v. Williams*, 46 N.C. App. 787, 266 S.E.2d 25 (1980).

Plaintiffs filed their original complaint on 24 August 1992, within the applicable three-year limitations period, and named Winn Dixie Stores, Inc. as the defendant. After learning that the proper defendant was Winn Dixie Raleigh, Inc., plaintiffs filed their amended complaint on 20 April 1993 pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(c) which 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.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (1990). Plaintiffs argue that under Rule 15(c) their amended complaint relates back to the date of their initial complaint and is not barred by the statute of limitations.

North Carolina's Rule 15(c) is modeled after Sec. 203(e) of the New York Civil Practice Law and Rules. *Stevens v. Nimocks*, 82 N.C. App. 350, 354, 346 S.E.2d 180, 182, *cert. denied*, 318 N.C. 511, 349 S.E.2d 873 (1986); 1 G. Gray Wilson, *North Carolina Civil Procedure*, § 15-12 at 296 (1989). At the time of its adoption in 1967, our Rule 15(c) was more liberal than its federal counterpart since "[i]n North Carolina even a new cause of action can be said to relate back for amendment purposes." *Humphries v. Going*, 59 F.R.D. 583, 585 (E.D.N.C. 1973). The test for whether an amendment will relate back to the original filing date depends upon whether the original pleading gave the defendant sufficient notice of the proposed claim. *Mauney v. Morris*, 316 N.C. 67, 340 S.E.2d 397 (1986); *Burcl v. North Carolina Baptist Hosp., Inc.*, 306 N.C. 214, 293 S.E.2d 85 (1982). Whether a plaintiff can amend the complaint to add a new defendant depends on whether the new defendant had notice of the claim so as not to be prejudiced by the untimely amendment. "If some nexus among defendants will permit the trial judge to infer that the new defendant had notice of the original claims so as not to be prejudiced by the amendment, . . . Rule 15(c) will allow a complaint to be amended so as to add a new party, expiration of the limitations period notwithstanding." *Ring Drug Co., Inc. v. Carolina Medicorp Enterprises, Inc.*, 96 N.C. App. 277, 283, 385 S.E.2d 801, 805 (1989) (citation omitted). *Ring Drug* adopted the federal test set forth by the United States Supreme Court in *Schiavone v. Fortune* which provides that relation back will occur when:

> 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.

Ring Drug, 96 N.C. App. at 277, 385 S.E.2d at 806 (citing *Schiavone v. Fortune*, 477 U.S. 21, 29, 91 L. Ed. 2d 18, 27 (1986)).

The rigid *Schiavone* test was widely criticized as too restrictive a reading of Federal Rule Civ. Proc. 15(c). *See* Joseph P. Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 Notre Dame L. Rev. 720 (1988); Robert D. Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again*, 61 S. Cal. L. Rev. 671

(1988); Joseph Dornfried, Schiavone v. Fortune: *Notice Becomes a Threshold Requirement for Relation Back under Federal Rule 15(c)*, 65 N.C. L. Rev. 598 (1987). In response to this criticism, Federal Rule 15(c) was amended in 1991 to specifically prevent the harsh result of the Schiavone test. *See Advisory Committee Notes to Rule 15*, reprinted in 12 Charles A. Wright, Arthur R. Miller, and Frank W. Elliott, *Federal Practice and Procedure*, Appendix C (1994). The amendment provides that if the party to be added to the action received notice of the action within the period provided for service under Rule 4 so as not to be prejudiced in maintaining a defense, and knew or should have known that but for a mistake concerning the identity of the proper party, the action would have named that party, then relation back is proper. 6A Wright, Miller, and Mary Kay Kane, § 1498 (Supp. 1994); 3 James W. Moore et al., *Moore's Federal Practice* § 15.01[15] (Supp. 1994). Therefore, the notice required under Federal Rule 15(c) is no longer tied to the governing statute of limitations period, but rather to the federal service period of 120 days. 6A Wright, Miller and Kane, at § 1498 (Supp. 1994).

In North Carolina, the period for service of process is 30 days. N.C. Gen. Stat. § 1A-1, Rule 4 (1990). In *Crossman v. Moore*, 115 N.C. App. 372, 444 S.E.2d 630, *review allowed*, 337 N.C. 690, 448 S.E.2d 519 (1994) this Court ruled that even though Federal Rule 15(c) has been amended, this Court was still bound by the decision in *Ring Drug* which relied on the now invalid federal test in interpreting our Rule 15(c). *Crossman*, 115 N.C. App. at 376, 444 S.E.2d at 632.

North Carolina's Rule 15(c) is clear that so long as the original pleading gives notice of the transactions or occurrences to be proved by the amended pleading, the amended pleading will relate back to the date of the original pleading. N.C. Gen. Stat. § 1A-1, Rule 15(c) (1990). Therefore, it is illogical to rely on a now abandoned federal test to interpret our own clear rule. The instant case is the third reported decision this year which presents a Rule 15(c) problem. *See Medford v. Haywood County Hosp. Foundation, Inc.*, 115 N.C. App. 474, 444 S.E.2d 699 (1994) (Plaintiff filed complaint against Haywood County Hospital Foundation, trial court denied motion to amend complaint to change name of defendant to Haywood County Hospital); *Crossman*, 115 N.C. App. at 374, 444 S.E.2d at 631 (Plaintiff filed complaint against Van Dolan Moore and Dolan Moore Company, trial court refused to allow amendment naming Van Dolan Moore II as defendant to relate back).

This situation can be easily remedied by modifying the test in *Ring Drug* in accordance with the 1991 amendment to Federal Rule 15(c). If a party to be added to an action received notice of the institution of the action within the period for service provided by Rule 4 so as not to be prejudiced in maintaining a defense, and knew or should have known that but for a mistake concerning the identity of the proper party the action would have named that party, then the amendment should relate back to the time of the original pleading. Applying this interpretation to the instant case, I conclude that since plaintiffs served their initial complaint incorrectly naming "Winn Dixie Stores, Inc." as defendant upon C T Corporation System which was the registered agent for both Winn Dixie Stores, Inc. and Winn Dixie Raleigh, Inc., then the proper defendant, Winn Dixie Raleigh, Inc., received notice of the action so as not to be prejudiced in maintaining a defense. *See Anderson Trucking Service v. Key Way Transport*, 94 N.C. App. 36, 379 S.E.2d 665 (1989) (Service upon a registered agent was effective service upon the company).

My conclusion is consistent with the purpose of the Rules of Civil Procedure which is to insure a speedy trial by disregarding technicalities and form and instead proceed directly to the merits of an action, unlike the hoary system of pleading the rules replaced. *See Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E.2d 420 (1972). Because I believe the majority elevates form over substance, I respectfully dissent.

DAVID LINER, AS ADMINISTRATOR OF THE ESTATE OF AMBRA D. RICHARDSON AND VERONICA RICHARDSON v. RONALD AND LINETTA BROWN

No. 9321SC1118

(Filed 15 November 1994)

1. Parent and Child § 2 (NCI4th)— wrongful death—decedent's aunt—not in loco parentis

The trial court erred in a wrongful death action by granting summary judgment for defendants based on parental immunity because they claimed to be *in loco parentis* to decedent where the decedent, Ambra, was the child of Veronica Richardson and Dennis Richardson, who are divorced; Ambra was adjudicated to be a dependent and neglected juvenile and placed in the legal and physical custody of the Forsyth County Department of Social Services; Ambra was placed with her paternal aunt, Linetta

Brown; and she drowned in the Browns' swimming pool. Whether defendants stood *in loco parentis* is a question of intent to assume parental status and depends on all the facts and circumstances of the case. Here, DSS had both legal and physical custody, with a ninety day review having been ordered, having as an essential goal reuniting the parent and child; defendants were aware that they were obliged at all times to surrender Ambra's placement with them should the court reinstate custody with the mother or should DSS choose a different placement; and Ms. Richardson continued to love and care for Ambra's well-being as evidenced by her actions. The mere fact that defendants were obligated to provide and did provide a stable environment for Ambra for a two month period does not transform the relationship into one of parent-child.

Am Jur 2d, Parent and Child §§ 75 et seq.

Liability of parent or person *in loco parentis* for personal tort against minor child. 19 ALR2d 423.

2. Parent and Child § 13 (NCI4th)— wrongful death—parent-child immunity—paternal aunt—temporary custody and control

Summary judgment should not have been granted for defendants in a wrongful death action where defendants claimed parental immunity, even if they stood *in loco parentis* to the victim, because extension of the parent-child immunity doctrine to one having temporary custody and control of a child would not further the policies underlying the doctrine.

Am Jur 2d, Parent and Child §§ 138 et seq.

Family relationship other than that of parent and child or husband and wife between tortfeasor and person injured or killed as affecting right to maintain action. 81 ALR2d 1155.

Judge JOHN concurring in part and concurring in part only in the result.

Appeal by plaintiff and defendants from judgment entered 21 July 1993 in Forsyth County Superior Court by Judge Melzer Morgan. Heard in the Court of Appeals 23 August 1994.

Crawford Whitaker & Hough, P.A., by William A. Hough, III and David R. Crawford, for plaintiff-appellant/appellee David Liner, as Administrator of the Estate of Ambra D. Richardson.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks and Richard J. Votta, for defendant-appellants/appellees.

GREENE, Judge.

David Liner (Liner), as administrator for the estate of Ambra D. Richardson (Ambra), appeals from a judgment entered in Forsyth County Superior Court on 21 July 1993, granting Ronald and Linetta Brown's (defendants) motion for summary judgment based on parental immunity in Liner's claim for wrongful death. Defendants appeal from that part of the judgment denying their motion for summary judgment as to the claim of Veronica Richardson (Ms. Richardson) for negligent infliction of emotional distress.

Ms. Richardson and Dennis Richardson (Mr. Richardson) are the divorced parents of Ambra, born 7 June 1987. Mr. Richardson is the brother of defendant Linetta Brown. By order dated 27 April 1990, Judge Loretta C. Biggs (Judge Biggs) adjudicated Ambra to be a dependent and neglected juvenile, placed her in the legal and physical custody of the Forsyth County Department of Social Services (DSS), and gave DSS "placement responsibility for said minor" with the "cause [to] be reviewed within ninety days of the April 25, 1990, hearing." In addition, Judge Biggs ordered Ms. Richardson, beginning on 27 April 1990 and "continuing until further order of the Court," to "pay to the Clerk of Superior Court of Forsyth County . . . the sum of $30.00 per week for the support and maintenance of Ambra Dean Richardson. Said Clerk shall remit said payments to the minor's caretaker at the following address: Mrs. Linetta Brown . . . ." Judge Biggs ordered Mr. Richardson to "continue to make without fail his $30.00 per week child support payment for the support and maintenance of" Ambra. Judge Biggs also found that Ambra "has been placed by the DSS with her paternal aunt, Linetta Brown, since the DSS assumed custody of the minor . . . [and] [i]t is the DSS's intent to maintain temporary placement of the minor with Mrs. Brown."

In March of 1990, DSS temporarily placed Ambra in the home of defendants, who were not licensed foster parents, and this arrangement continued after Judge Biggs' 27 April 1990 order. Ambra had spent weekends with defendants for about eighteen months prior to

March of 1990. On 21 June 1990, Ambra drowned in defendants' swimming pool.

On 19 June 1992, Liner and Ms. Richardson (plaintiffs) filed a complaint in Forsyth County Superior Court, Liner alleging wrongful death and Ms. Richardson alleging negligent infliction of emotional distress. On 17 August 1992, defendants filed an answer and defenses, stating that "[o]n the occasion referred to in the complaint the defendants stood in loco parentis to Ambra D. Richardson who had been placed with defendants and lived with the defendants, with the defendants functioning as [her] parents" so that "the doctrine of parental immunity is applicable to any claims against the defendants for bodily injury to or the wrongful death of Ambra . . . and also is applicable to the derivative claim of Veronica Richardson for alleged emotional distress resulting from [Ambra's] death."

In her affidavit, Ms. Richardson stated:

> 7. Throughout the time from April 25, 1990 through June 21, 1990, I:
>
> a. regularly visited with Ambra or attempted to regularly visit with Ambra;
>
> b. tried to see that Ambra received proper psychological care; and,
>
> c. stayed in constant touch with [DSS] regarding Ambra's welfare; and,
>
> 8. It was my intention after consenting to relinquish the custody of Ambra on April 25, 1990 to do everything in my power to continue to provide love, affection and support to Ambra, to comply fully with the terms of all Court Orders pertaining to me, and to seek reinstitution of my custody over Ambra upon review of the case by the Court.

Ms. Richardson stated in her deposition that she visited Ambra "several times a week" at defendants' house or at day care, and she "raised some [C]ain [with DSS] about Ambra having two black eyes, a swollen nose, and her left cheek swollen and blue after [defendants] had her. And [she] went down to the daycare . . . and [she] took pictures of" Ambra. From March until 21 June 1990, Ms. Richardson paid child support "through the child support office over at the courthouse" and had paid for Ambra's support "through June 22nd." Ms. Richardson stated her "psychological evaluation had come in the day

before [Ambra] died that did state [she] was a proper and fit mother to raise [her] child." She was "pending the starting of parenting classes which [DSS] wanted [her] to do."

Mr. Brown stated in his affidavit that after Ambra was adjudicated a neglected and dependent juvenile, he and Mrs. Brown "naturally wished to continue [their] growing relationship with Ambra and to have her live on a continuous basis as a part of [their] family." "In every respect during this period of time, we were the persons who served and functioned as Ambra's parents."

On 14 October 1992, plaintiffs filed a motion for summary judgment and submitted defendants' affidavits and Ms. Richardson's affidavit and deposition in support. On 2 April 1993, defendants filed a motion for summary judgment. By judgment signed 21 July 1993, the trial judge found and concluded that "[t]he defendants' motion for summary judgment as to the claim of Veronica Richardson for negligent infliction of severe emotional distress should be and the same hereby is denied." The trial judge granted defendants' motion for summary judgment as to the wrongful death claim because defendants were "in loco parentis to the decedent and, therefore, [are] entitled to parental immunity which bars [Liner's] claim."

We first dismiss defendants' appeal as to Ms. Richardson's claim for negligent infliction of emotional distress because a denial of a motion for summary judgment is not appealable. *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1978).

The issues presented are (I) whether defendants stood *in loco parentis* to Ambra; and (II) if so, whether they are entitled to parental immunity as to the wrongful death claim.

I

[1] This Court has defined the term *in loco parentis* to mean "in the place of a parent" and has defined "person *in loco parentis*" as "one who has assumed the status and obligations of a parent without a formal adoption." *Shook v. Peavy*, 23 N.C. App. 230, 232, 208 S.E.2d 433, 435 (1974); *see also Howard v. United States*, 2 F.2d 170, 174 (1924) (person *in loco parentis* is one "assuming the parental character or discharging parental duties"); Black's Law Dictionary 787 (6th ed. 1990) (person *in loco parentis* is one "charged, factitiously, with a parent's rights, duties, and responsibilities"); N.C.G.S. § 7A-517(16.1) (1993) (*in loco parentis* defined in juvenile code as one, other than parents or legal guardian, who has assumed status and obligation of

a parent without being awarded legal custody by a court). A person does not stand *in loco parentis* "from the mere placing of a child in the temporary care of other persons by a parent or guardian of such child. This relationship is established only when the person with whom the child is placed intends to assume the status of a parent—by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance." *State v. Pittard*, 45 N.C. App. 701, 703, 263 S.E.2d 809, 811, *disc. rev. denied*, 300 N.C. 378, 267 S.E.2d 682 (1980); *see* 67A C.J.S., *Parent and Child* §§ 153-158, at 548-55 (1978); 59 Am. Jur. 2d, *Parent and Child* § 75, at 217-18 (1987); 3 Robert E. Lee, *North Carolina Family Law* § 238, at 98-100 (1963). Therefore, whether defendants stood *in loco parentis* to Ambra at the time of her death is a question of intent "to assume parental status" and depends on all the facts and circumstances of this case. *See Hush v. Devilbiss Co.*, 259 N.W.2d 170, 174 (Mich. App. 1977) (intent to assume parental status can be inferred from parties' acts and declarations).

The facts and circumstances of this case do not support a determination that defendants stood *in loco parentis* to Ambra. Although Mrs. Brown was Ambra's aunt, DSS had both legal and physical custody of Ambra pursuant to Judge Biggs' 27 April 1990 order. Judge Biggs ordered the matter to be reviewed in ninety days, when one of the essential aims of such a review hearing—"to reunite the parent(s) and the child, after the child has been taken from the custody of the parent(s)"—would be considered. *In re Shue*, 311 N.C. 586, 596, 319 S.E.2d 567, 573 (1984). Defendants were therefore aware they were obliged, at all times, to surrender Ambra's placement with them should the court reinstate custody with Ms. Richardson or should DSS choose a different placement for Ambra. Furthermore, during the two months Ambra lived with defendants, Ms. Richardson regularly visited Ambra and made payments "for the support and maintenance of Ambra" to the clerk of court who in turn was to deliver such payments to Mrs. Brown pursuant to Judge Biggs' 27 April 1990 order. Ms. Richardson continued to love and care for Ambra's well-being as evidenced by her photographing the bruises she noticed on Ambra's body after being placed in defendants' care and contacting DSS about the bruises. Ms. Richardson also obtained a psychological evaluation showing she was a fit parent, tried to insure "that Ambra received proper psychological care," and was about to begin parenting classes requested by DSS. The mere fact defendants were obligated to provide and did in fact provide a stable environment for Ambra for a two

month period does not transform the relationship of defendants with Ambra into one of parent-child. Defendants, like foster parents, have a "unique responsibility clearly differ[ing] from the supervisory functions of a natural parent." *Andrews v. County of Otsego*, 446 N.Y.S.2d 169, 173 (1982). Defendants, like foster parents, "must strive to provide a stable environment and at the same time, encourage, rather than discourage, the relationship of the foster child and natural parent and ease the return of the child to the natural parent." *Id; see also* N.C.G.S. §§ 7A-517(5) & (16.1) (in juvenile code, our legislature, while specifically including foster parents within definition of caretaker, did not include foster parents within definition of *in loco parentis*). For these reasons and from all the facts and circumstances of this case, defendants did not intend to assume the status of Ambra's parents and did not stand *in loco parentis* to Ambra; therefore, summary judgment in favor of defendants should be reversed. *See Mayberry v. Pryor*, 374 N.W.2d 683 (Mich. 1985) (in accord with *Andrews*).

II

[2] Even if we determined defendants stood *in loco parentis* to Ambra, they are not entitled to claim immunity based on the parent-child immunity doctrine. North Carolina recognizes the parent-child immunity doctrine that an unemancipated minor child cannot maintain an action based on ordinary negligence against his or her natural parent; however, the doctrine does not apply where it "has been specifically abolished or amended by the legislature." *Doe v. Holt*, 332 N.C. 90, 93, 418 S.E.2d 511, 513 (1992) (our Supreme Court recognized that parent-child immunity doctrine does not bar tort claims for injuries unemancipated minors have suffered as a result of a parent's willful and malicious conduct); *see* N.C.G.S. § 1-539.21 (1993) (abolishes parent-child immunity doctrine where injury to child arises out of operation of motor vehicle owned or operated by child's parent). Defendants argue that the parent-child immunity doctrine extends to those standing *in loco parentis*; therefore, "as a result of their parental relationship with [Ambra], the wrongful death claims asserted by the plaintiff in behalf of her estate are barred as a matter of law by the doctrine of parental immunity." We disagree.

The parent-child immunity doctrine is intended to serve several public policies, foremost among them "maintenance of family harmony." *Doe*, 332 N.C. at 95, 418 S.E.2d at 514. The policy seeks to preserve parental authority and security of the home and protect the financial resources of the family. *Small v. Morrison*, 185 N.C. 577,

584-85, 118 S.E. 12, 15-16 (1923). In North Carolina, the parent-child immunity doctrine extends to stepparents standing *in loco parentis*, *Morgan v. Johnson*, 24 N.C. App. 307, 210 S.E.2d 503 (1974); *Mabry v. Bowen*, 14 N.C. App. 646, 188 S.E.2d 651 (1972), because applying the parent-child immunity doctrine to the stepparent situation, which is more permanent in nature than those having temporary custody and control, furthers the public policies underlying the doctrine.

Where, however, the interests of the natural parent and child are united, and the child was only with defendants on a temporary basis, it is difficult to see how the policies of avoiding "potential strife between parent and child," of protecting the family's financial resources, and of preserving parental authority and security of the home apply. *Andrews*, 446 N.Y.S.2d at 174. The "rationale behind the rule loses its persuasive force as one considers situations involving other than the actual parent." *Gulledge v. Gulledge*, 367 N.E.2d 429, 431 (Ill. App. 1977) (parental immunity does not extend to those having temporary control and custody of minor such as grandparents or others). Because extension of the parent-child immunity doctrine to one having temporary custody and control of a child would not further the policies underlying the doctrine, defendants are not entitled to enjoy immunity from Liner's wrongful death claim based on the doctrine. *See* Romualdo P. Eclavea, Annotation, *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases*, 6 A.L.R. 4th 1066 (1981) (discussion of courts that extend parent-child immunity doctrine to persons standing *in loco parentis* and courts that do not). For these reasons, defendants cannot claim they were immune from Liner's wrongful death claim on behalf of Ambra even if we determined defendants stood *in loco parentis* to Ambra, and summary judgment should not have been granted for defendants based on parental immunity.

Dismissed in part, reversed in part.

Judge McCRODDEN concurs.

Judge JOHN concurs in part and concurs in part only in the result with separate opinion.

Judge JOHN concurring in part and concurring in part only in the result.

I concur in the majority's dismissal of defendants' appeal as to plaintiff's negligent infliction of emotional distress claim, but specifi-

cally disagree with and do not join the majority holding that parent-child immunity may not be afforded to persons standing *in loco parentis*. Nonetheless, because I believe the circumstances of the case *sub judice* raise an issue of fact as to whether defendants stood *in loco parentis* to the minor child Ambra, I am compelled to concur in the result reversing allowance of defendants' motion for summary judgment as to plaintiffs' wrongful death claim. However, my vote is to reverse and remand for determination by the trier of fact as to the issue of defendants' status.

Although defendants neither possessed an official governmental license as foster parents nor received any compensation or reimbursement for their care of the child, I believe the majority properly characterizes their relationship vis-a-vis Ambra as that of foster parents. However, the majority suggests that in view of the terminable nature of defendants' association with Ambra and the "temporary" nature of foster care in general, *see* 3 Robert E. Lee, *North Carolina Family Law*, § 238, at 190-91 (4th ed. 1981), neither defendants nor any foster parent could intend *permanently* to assume parental obligations and thus could never stand *in loco parentis*. The majority further relies upon the temporary nature of foster parent status to deny parent-child immunity even to a foster parent who may truly stand *in loco parentis*. In each respect, I must disagree.

First, the very nature of an *in loco parentis* relationship, contrary to natural parenthood or adoption, affixes "rights and duties temporary [as opposed to permanent] in nature," *Miller v. Miller*, 97 N.J. 154, 162, 478 A.2d 351, 355 (1984) (citing *Schneider v. Schneider*, 25 N.J. Misc. 180, 52 A.2d 564 (1947) and *D. v. D.*, 56 N.J. Super. 357, 153 A.2d 332 (1959)). Indeed, we have previously specifically recognized this impermanence. *See Duffey v. Duffey*, 113 N.C. App. 382, 385, 438 S.E.2d 445, 447 (1994) (although an *in loco parentis* relationship "[t]ypically . . . terminates upon divorce," stepfather held to stand *in loco parentis* beyond divorce from mother under circumstances of the case). Additionally, the *in loco parentis* association "exists at the will of the party assuming the obligations of a parent [and] may be abrogated by such party at any time." 67A C.J.S. *Parent & Child* § 154 (1978). Thus, emphasis upon the characteristic impermanence of foster care to support exclusion of foster parents from *in loco parentis* status, itself impermanent, is circuitous at best.

Further, despite the "temporary" nature of *in loco parentis*, both the consequent rights and duties are, "as the words imply, substan-

tially the *same* as between parent and child . . . ." 59 Am. Jur. 2d *Parent and Child* § 75 (1987) (emphasis added). Because an *in loco parentis* relationship arises only "when one is willing to assume all the obligations *and to receive all the benefits* associated with one standing as a natural parent to a child," 67A C.J.S. *Parent & Child* § 154 (1978) (emphasis added), imposition of every duty of parenthood without affording those protections recognized in the law is neither consistent nor fair. *See London Guarantee & Accident Co. v. Smith*, 242 Minn. 211, 215, 64 N.W.2d 781, 784 (1954) (stepfather who voluntarily assumed *in loco parentis* position is entitled to same protections and benefits as a natural parent).

As a natural extension of the foregoing principles, this Court, as the majority correctly concedes, has acknowledged *in loco parentis* status and application of parental immunity to circumstances involving stepparents, *see Mabry v. Bowen*, 14 N.C. App. at 647, 188 S.E.2d at 651-52 and *Morgan v. Johnson*, 24 N.C. App. at 308, 210 S.E.2d at 504; *see also Dodson v. McAdams*, 96 N.C. 128, 132, 2 S.E. 453, 453 (1887) (It is "settled law" that the relationship of *in loco parentis* may exist between grandparent and grandchild.).

In addition, other jurisdictions have rejected automatic exclusion of foster parents from the position of *in loco parentis* and accorded them parent-child immunity as well. *See In re Diana P.*, 120 N.H. 791, 796, 424 A.2d 178, 181 (1980), *cert. denied*, 452 U.S. 964, 69 L.Ed.2d 976 (1981) ("To conclude that foster parents can never stand *in loco parentis* to a child in their care would be unrealistic"); *Mathis v. Ammons*, 453 F.Supp. 1033, 1035 (E.D. Tenn. 1978) (uncle stood *in loco parentis* to child who resided with and was cared for by him; to rule otherwise "might have the effect of discouraging the . . . voluntary and unselfish . . . caring for a child in need of parental support and guidance . . . ."); *Brown v. Phillips*, 178 Ga. App. 316, 317, 342 S.E.2d 786, 788 (1986) (where natural parents' custodial rights had been "severed" by the juvenile court and child was placed in custody of county department of family and children services, to allow parents to sue foster parents standing *in loco parentis* for alleged negligence would violate state public policy favoring parental immunity); *Hush v. Devilbiss Co.*, 77 Mich. App. 639, 646-47, 259 N.W.2d 170, 173 (1977) (one "who voluntarily assumes parental responsibility and attempts to create a home-like environment for a child should be granted immunity from judicial interference to the same extent as a natural parent"); *Mitchell v. Davis*, 598 So.2d. 801, 804 (Ala. 1992) ("foster parents should be afforded some protection by the parental

immunity doctrine"); *Rutkowski v. Wasko*, 286 A.D. 327, 331, 143 N.Y.S.2d 1, 4 (1955) ("[n]o good reason" exists why parent-child immunity should be applied to a natural parent and not in the case of one standing *in loco parentis*).

Moreover, as stated in an early decision of this Court, abolishment of parent-child immunity is "for our Legislature or for our Supreme Court," *Evans v. Evans*, 12 N.C. App. 17, 18 , 182 S.E.2d 227, 228, *cert. denied and appeal dismissed*, 279 N.C. 394, 183 S.E.2d 242 (1971), *cert. denied*, 405 U.S. 925, 30 L.Ed.2d 797 (1972), and not for this Court, however meritorious we might find such action. *Mabry*, 14 N.C. App. at 647, 188 S.E.2d at 652; *see also Mayberry v. Pryor*, 422 Mich. 579, 593, 374 N.W.2d 683, 689 (1985) ("The clear judicial trend is to abolish or limit the availability of the parental immunity defense to both parents and other caretakers alike."); *Lee v. Mowett Sales Company, Inc.*, 316 N.C. 489, 494, 342 S.E.2d 882, 885 (1986) ("If the doctrine is to be abolished . . . , it should be done by legislation and not by the Court"); Harlin Ray Dean, Jnr., *It's Time to Abolish North Carolina's Parent-Child Immunity, But Who's Going to Do It?—Coffey v. Coffey and North Carolina General Statutes Section 1-539.21*, 68 N.C.L. Rev. 1317 (1990).

Absent abolition of parent-child immunity, and bearing in mind we are bound by this Court's previous decisions involving step-parents, *see In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), I submit that foster parents may, under appropriate circumstances, stand *in loco parentis*, and if so situated are entitled to the rights and benefits of natural parents, including parent-child immunity.

Among factors which have been recognized as applicable to a determination of whether a party stands *in loco parentis* are "the age of the child; the degree to which the child is dependent on the person claiming to be standing *in loco parentis*; the amount of support, if any, provided; the extent to which duties commonly associated with parenthood are exercised," *Hush*, 77 Mich. App. at 649, 259 N.W.2d at 174-75; the amount of time the child has lived with the person and the degree to which a "psychological family" has developed, *In re Diana P.*, 120 N.H. at 796, 424 A.2d at 180.

In the case *sub judice*, particularly in view of the relatively short period of time the child lived with defendants on a full-time basis, I believe consideration of the foregoing factors raises an issue of fact as to whether defendant foster parents stood *in loco parentis* to

Ambra. *See State v. Hunter* 48 N.C. App. 656, 662, 270 S.E.2d 120, 123 (1980) (evidence, *inter alia*, that child, his mother, and defendant lived together from September 1978 to January 1979 appropriate for jury determination of whether defendant was a person acting *in loco parentis*).

Concerning such determination, the majority cites Michigan authority for the proposition that the "[i]ntent to assume parental status can be inferred from [the parties'] acts and declarations," *Hush*, 77 Mich. App. at 649, 259 N.W.2d at 174, but follows with a recitation of certain acts and declarations of the child's *natural mother* as bearing upon the determination of whether the *defendant foster parents* stood *in loco parentis* to Ambra. I agree it is established that the requisite "intention may be shown by the acts and declarations of the persons *alleged to stand* in [the] relationship [of *in loco parentis*]." 67A C.J.S. *Parent & Child* § 154 (1978) (emphasis added). However, the acts or sentiments of a natural parent do not appear to have been determined relevant either by the Michigan court cited or indeed by any other authority. If so, certain other uncontradicted evidence in the case *sub judice* would be pertinent—for example, Ms. Richardson's refusal to remove her boyfriend from her home following a child abuse investigation concerning Ambra and her later consent to placing custody of the child in DSS.

In sum, I conclude that under our existing law foster parents and those similarly situated may stand *in loco parentis* to a minor child and avail themselves of the parent-child immunity doctrine during the duration of that relationship. Further, the evidence of defendants' status in the case *sub judice* was not conclusive as a matter of law, and there remains an issue of fact as to whether defendant foster parents stood *in loco parentis* to Ambra. Accordingly, I concur in the result of reversal of the trial court's summary judgment in favor of defendants, but rather vote to remand for resolution of the *in loco parentis* issue by the trier of fact.

JUANITA MADDEN, PLAINTIFF-APPELLEE v. CAROLINA DOOR CONTROLS, INC., DEFENDANT-APPELLANT

No. 9328SC1302

(Filed 15 November 1994)

1. Negligence § 151 (NCI4th)— automatic door—res ipsa loquitur—evidence sufficient

The trial court did not err by denying defendant Carolina Door's motions for directed verdict and judgment notwithstanding the verdict or new trial where plaintiff was injured when she was knocked to the ground by an automatic door at a supermarket for which defendant Carolina Door Controls had the service contract. All of the evidence, viewed most favorably for the plaintiff, permitted the jury to infer negligence by defendant Carolina in that it is undisputed that plaintiff's injuries were caused by the automatic door when it prematurely closed; the automatic doors do not ordinarily close and knock people down after they have been checked and serviced without some negligent act or omission; defendant Carolina warranted that its servicing and safety checks were performed in such a manner so as to make the automatic doors safe for their ordinary use; defendant Carolina had such control and management of the maintenance of the automatic door that it had superior means for determining the cause of the sudden closure; and the possibility of negligence by the supermarket was eliminated.

Am Jur 2d, Negligence §§ 1819 et seq., 2023 et seq.

2. Trial § 546 (NCI4th)— motion for new trial—discretion of trial court—appellate review

An assignment of error to a trial court's denial of a new trial following a negligence action was denied where there was no evidence of any abuse of discretion by the trial court. The trial court's decision on motion for new trial is not reviewable on appeal absent manifest abuse of discretion.

Am Jur 2d, New Trial §§ 549 et seq.

3. Appeal and Error § 156 (NCI4th)— instructions—failure to object—no error

Defendant could not assign error to a jury charge in a negligence action where it failed to object to the instructions as given.

Where a party fails to object to jury instructions, it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error. N.C. R. App. P. 10(b)(2).

Am Jur 2d, Appeal and Error §§ 562 et seq.

4. Evidence and Witnesses § 762 (NCI4th)— automatic door—negligence action—lack of guardrails—evidence cumulative and not prejudicial

There was no prejudicial error in a negligence action arising from an injury suffered in an automatic door where the court admitted testimony concerning the lack of guardrails and that the doors were unsafe and defendant contended that the testimony was unduly prejudicial and led to confusion of issues, but it was evident from the testimony and facts of the case that the door was unsafe. The testimony regarding the lack of guardrails was cumulative and there was no prejudice from its admission. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Appeal and Error § 806.

Appeal by defendant from Order entered 2 September 1993 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 15 September 1994.

On 2 February 1990, the plaintiff, Juanita Madden, entered Ingles #5 Supermarket located at 1070 Haywood Road in Asheville, North Carolina. She entered the "IN" door, an automatic door, located on the Haywood Road side of the store. As plaintiff was entering the store, she stepped on a safety mat, which is designed to hold the door in the open position until the immediate area is cleared, when suddenly, and without warning, the door prematurely closed with such force that it knocked her on the ground. As a result, Mrs. Madden sustained severe physical injuries.

On 15 November 1990, Mrs. Madden timely filed a complaint for negligence and damages suffered when she was hit by the automatic door. On 15 January 1991, Defendant, Ingles Markets, Inc. ("Ingles"), answered and denied negligence. On 10 July 1991, Plaintiff moved to have Defendant Carolina Door Controls, Inc. ("Carolina") added as a necessary party to the action. Carolina had a service contract with Ingles to repair the automatic doors at Ingles #5. The service contract was on a per call basis, in which Carolina was only required to perform work on the automatic doors when notified by Ingles. Carolina

did not provide regular, routine maintenance on the doors. On 20 November 1991, the Court ordered Carolina to be added as a necessary party, and on 11 February 1992, plaintiff filed an amended complaint adding Carolina to the negligence action. Subsequently, Carolina answered denying any negligence on its part. Plaintiff later voluntarily dismissed Ingles from the action. The case against Carolina proceeded to trial before Judge C. Walter Allen. Without objection, the trial court instructed the jury on the doctrine of *res ipsa loquitur*. The jury returned a verdict of negligence against defendant Carolina and awarded damages in the amount of $300,000. Defendant Carolina moved to set aside the verdict and to grant a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure and moved for judgment notwithstanding the verdict pursuant to Rule 50(c). On 2 September 1993, Judge Allen, in a written Order, denied all of Carolina's motions. From the Judgment entered on 18 August 1993 and the Order entered 2 September 1993 denying Carolina's motions, Carolina appeals.

Lindsay and True, by Ronald C. True, for plaintiff-appellee.

Tate, Young, Morphis, Bach & Farthing, L.L.P., by Edwin G. Farthing and Paul E. Culpepper, for defendant-appellant.

ORR, Judge.

I.

[1] The first issue presented is whether the trial court erred by denying defendant Carolina Door Control, Inc.'s motion for directed verdict and post-trial motions for judgment notwithstanding the verdict or new trial, on the grounds that there was no evidence presented to establish negligence on the part of Defendant Carolina and that the charge on the doctrine of *res ipsa loquitur* was improper under the facts presented.

"Defendant's motions for directed verdict and for judgment notwithstanding the verdict present the same question for review, namely, whether the evidence taken in the light most favorable to plaintiff was sufficient to entitle the plaintiff to have a jury pass on it." *City of Charlotte v. Skidmore, Owings and Merrill, et. al.*, 103 N.C. App. 667, 677, 407 S.E.2d 571, 578 (1991). "All the evidence which supports the claim of the party opposing the motion must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be

drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor." *Id.* "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." *Snead v. Holloman*, 101 N.C. App. 462, 463, 400 S.E.2d 91, 92 (1991). A motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict actually returned by the jury, *Summey v. Cauthen*, 283 N.C. 640, 648, 197 S.E.2d 549, 554 (1973), and is technically a renewal of the motion for directed verdict. *Harvey v. Norfolk Southern Railway Company, Inc.*, 60 N.C. App. 554, 555, 229 S.E.2d 664, 665 (1983).

"The doctrine of *res ipsa loquitur* is merely a mode of proof and when applicable it is sufficient to carry the case to the jury on the issue of negligence. However, the burden of proof on such issue remains upon the plaintiff." *Sharp v. Wyse*, 317 N.C. 694, 697, 346 S.E.2d 485, 487 (1986) (quoting *Lea v. Carolina Power and Light Co.*, 246 N.C. 287, 290, 98 S.E.2d 9, 11 (1957)) (citations omitted). "*Res ipsa loquitur* (the thing speaks for itself) simply means that the facts of the occurrence itself *warrant an inference of defendant's negligence, i.e.*, that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking." *Sharp*, 317 N.C. at 697, 346 S.E.2d at 487 (quoting *Kekelis v. Whitin Machine Works*, 273 N.C. 439, 443, 160 S.E.2d 320, 323 (1968)) (citations omitted).

> *Res ipsa loquitur*, in its distinctive sense, permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the accident is sufficient to carry the case to the jury on the bare question of negligence. But where the rule does not apply, the plaintiff must prove circumstances tending to show some fault or omission or commission on the part of the defendant *in addition to* those which indicate the physical cause of the accident. (Emphasis added.)

Id.

Defendant Carolina argues that plaintiff presented no evidence of negligence on the part of Defendant Carolina. On the contrary, the record and trial transcript show that there was ample evidence from which a jury could infer that the defendant was negligent. Plaintiff's evidence tends to show the following: There are two mats used in the

automatic operation of the door at the Ingles market where Mrs. Madden was injured. The outer mat is the approach mat and when stepped on with twenty-five foot pounds of weight, metal contacts within the mat are engaged sending an electrical signal to a motor which causes the door to open. The inner mat is the safety mat and when stepped on with twenty-five foot pounds of weight, an electrical signal is transmitted to the motor by the contacts in that mat. The door is then held open until the person passing through the portal has safely cleared the area. After the area is cleared, the door closes at a controlled rate of speed. The force of the closing spring is regulated through the motor by a control. There is a mechanism built into the control so that the motor acts as a brake and the closing speed is regulated at a smooth, steady rate. In the event the contacts in the safety mat are worn or do not properly engage, the door will close prematurely; however, forty pounds of pressure, such as provided by an hand, arm or elbow, will stop it if the closing regulator is correctly set to industry standards.

Ingles has a contract with defendant to service its automatic doors at various stores in Buncombe County. All service is done on a "per call" basis, and Defendant Carolina warrants to the general public that its servicing is done in a "safe and workmanlike manner."

On 26 January, 1990, defendant's service technician was called to service the "IN" door on the Haywood Road side of Ingles #5 because, as noted on the service report, "the door would not open all the way." At that time, a complete safety check was performed on both the "IN" and "OUT" doors. On 1 February 1990, the same technician returned to repair loose glass in the "OUT" door on the Haywood Road side of the store. Preventive maintenance was again performed on both doors. On 2 February 1990, plaintiff attempted to enter Ingles #5 through the Haywood Road door, when the automatic door prematurely closed, knocking Mrs. Madden down and seriously injuring her.

On 12 February 1990, Mr. Douglas Alderman, a service technician for Defendant Carolina, was called to Ingles to service the "IN" door that knocked Mrs. Madden down located on the Haywood Road side because the door would not hold open. When Mr. Alderman performed a pressure test on the safety mat, he found a less-sensitive spot which caused the door to close. He installed a new mat and threw away the defective one.

That plaintiff's injuries were caused by the automatic "IN" door when it prematurely closed is undisputed. On cross-examination of

its own employee, Defendant Carolina's witness testified that if the door is in the process of closing, it can be stopped with a hand, arm or elbow. Thus, if the safety mat fails, the door is apparently still safe because the speed at which the door closes is regulated, and if properly set, the door will stop upon meeting minimal resistance. In the instant case, the door did not stop and Mrs. Madden was seriously injured. Whether it was the defective mat or an improperly set door regulator, or both, that caused the door to prematurely close at such a rate as to knock plaintiff down, the operation and maintenance of the door were in the superior knowledge and management of Defendant Carolina. The mechanism controlling the automatic door is encased in an inaccessible housing above the door, and all of the evidence tends to show that only defendant Carolina was authorized and did in fact service this device.

Thus, all the evidence, viewed most favorably for the plaintiff, permitted the jury to infer negligence on the part of defendant Carolina. The automatic door caused plaintiff's injuries; the automatic doors do not ordinarily close and knock people down after they have been checked and serviced without some negligent action or omission; Defendant Carolina warranted that its servicing and safety checks were performed in such a manner so as to make the automatic doors safe for their ordinary use; Defendant Carolina had such control and management of the maintenance of the automatic door that it had superior means for determining the cause of the sudden closure on Mrs. Madden; and the possibility of negligence on the part of Ingles was eliminated.

[2] Defendant Carolina also argues the trial court erred in denying a new trial on all issues. We disagree. "It is within the discretion of this Court whether to grant a new trial." *City of Charlotte*, 103 N.C. App. at 685, 407 S.E.2d at 582. The trial court's decision on motion for new trial is not reviewable on appeal absent manifest abuse of discretion. *Mumford v. Hutton & Bourbonnais Company*, 47 N.C. App. 440, 445, 267 S.E.2d 511, 514 (1980). There is no evidence of any abuse of discretion in the record before this Court. This assignment is denied.

[3] Finally, Defendant Carolina contends that it was not proper for the trial court to instruct the jury on the doctrine of *res ipsa loquitur* and further that the facts of this case do not invoke the doctrine of *res ipsa loquitur*. We find that this assignment of error is without merit and should be overruled.

Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides as follows:

> (2) *Jury Instructions; Findings and Conclusions of Judge.* A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. Rule 10(b)(2) (1994).

Thus, where a party fails to object to jury instructions, "it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error." *Dailey v. Integon General Insurance Corporation*, 75 N.C. App. 387, 399, 331 S.E.2d 148, 156, *review denied*, 314 N.C. 664, 336 S.E.2d 399 (1985). The trial transcript shows that defendant Carolina failed to object to the instructions as given. Therefore, under the provisions of Rule 10(b)(2), it is conclusively presumed that the instructions conformed to the issues presented at trial. Defendant Carolina can not assign as error the charge to the jury on the doctrine of *res ipsa loquitur* or that the instant case is not a *res ipsa* case. We find no error.

II.

[4] Defendant's second issue presented is whether the trial court erred by allowing evidence concerning the lack of guardrails and the unsafe nature of the doors on the ground that this evidence was unduly prejudicial and lead to confusion of the issue. Defendant Carolina's employee, Mr. Alderman, testified, over counsel's objection, regarding the lack of guardrails at the doors and the unsafe nature of the doors as evidenced by a notation on a service report.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. R. Evid. Rule 403 (1994). Whether evidence should be excluded as unduly prejudicial or confusing rests within the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). The trial court's ruling in this regard may only be reversed for an abuse of discretion that "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d

139, 145 (1988). Even if the trial court erred in the admission of the witness' testimony, that error "is not grounds for granting a new trial or for setting aside a verdict unless the admission amounts to the denial of a substantial right." N.C. Gen. Stat. § 1A-1, Rule 61 (1990); *Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864, *review denied*, 314 N.C. 336, 333 S.E.2d 496 (1985).

> 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 have likely ensued had the error not occurred. (Citations omitted.) "The admission of incompetent testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative. (Citations omitted.)"

Id. (quoting *Hasty v. Turner*, 53 N.C. App. 746, 750, 281 S.E.2d 728, 730-31 (1981)).

Mr. Alderman testified that "[e]ach door had one guardrail. It is recommended that each door have two guardrails; one on each side of the safety mat." In response to a question regarding whether Mr. Alderman made any notation about the missing guardrail in his service report, he responded by saying, "I wrote that 'guardrail missing; doors are unsafe.' "

There is sufficient evidence from which a jury can infer negligence on the part of Defendant Carolina with the testimony concerning the lack of guardrails. Moreover, it was evident from the testimony and facts of this case that the door that injured Mrs. Madden was unsafe. Thus, the admission of the testimony regarding the lack of guardrails was cumulative and served only to corroborate competent evidence already before the jury. Defendant Carolina cannot show prejudice, and we hold the admission of the evidence was at most harmless error.

No error.

Judges EAGLES and JOHN concur.

PEGGY JOYCE SMITH CAUDILL, INDIVIDUALLY, AND HAROLD J. SMITH, JR., AS EXECUTOR OF THE ESTATE OF KITTY SMITH NOECKER, PLAINTIFFS v. GLADYS KINSEY SMITH, INDIVIDUALLY, AND AS THE ADMINISTRATRIX OF THE ESTATE OF THOMAS K. SMITH, DEFENDANTS

No. 934SC1293

(Filed 15 November 1994)

1. Deeds § 120 (NCI4th)— undue influence—sufficiency of evidence

Evidence was sufficient to permit the jury reasonably to infer that defendant procured a deed by means of undue influence where it tended to show that plaintiff was old and physically and mentally weak; the deed was different from and effectively revoked a portion of plaintiff's will; and defendant procured the deed's execution.

Am Jur 2d, Deeds §§ 204-210.

2. Evidence and Witnesses § 924 (NCI4th)— statements by grantor—admissibility

In an action to have a deed declared void on the ground that it was obtained by undue influence, statements made by plaintiff, who was deceased at the time of trial, were not inadmissible hearsay, since evidence of declarations of the grantor which disclosed his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show that he did or did not act freely and voluntarily, is competent as substantive proof of undue influence, and all the challenged testimony here concerned plaintiff's state of mind regarding defendant and tended to show that plaintiff did not freely and voluntarily deed the remainder interest in the property to defendant.

Am Jur 2d, Evidence §§ 667, 696.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition. 75 ALR Fed 170.

3. Evidence and Witnesses § 200 (NCI4th)— undue influence in executing deed—mental condition of grantor—evidence admissible

In an action to set aside a deed based on undue influence, the trial court did not err in admitting the testimony of the grantor's attendant and physician regarding her mental condition, since there was no merit to defendant's contention that this testimony was irrelevant and too remote in time to be admissible.

Am Jur 2d, Evidence § 556.

4. Wills § 67 (NCI4th)— undue influence—instructions proper

The trial court's instruction to the jury on undue influence was proper and did not prejudice defendant, though it was not the same as that requested by defendant which was based on the North Carolina Pattern Jury Instruction on undue influence in the execution of wills.

Am Jur 2d, Wills § 1090.

Appeal by defendant from judgment filed 1 April 1993 by Judge Ernest B. Fullwood in Duplin County Superior Court. Heard in the Court of Appeals 14 September 1994.

Burrows & Hall, by Fredric C. Hall, for plaintiffs-appellees.

White & Allen, P.A., by David J. Fillippeli, Jr. and John R. Hooten, for defendant-appellee.

LEWIS, Judge.

Kitty Smith Noecker commenced this action to have declared void a deed in which she transferred real property to her brother, Thomas K. Smith. After the filing of the complaint, but before trial, both parties died and the substitutions named above were made. For purposes of this opinion, Kitty Smith Noecker will be referred to as "plaintiff," and Thomas K. Smith will be referred to as "defendant." The jury found that the deed was executed as a result of the undue influence of defendant, and judgment was entered for plaintiff. From the judgment, defendant appeals.

I.

[1] Defendant's first contention on appeal is that the trial court erred in denying his motions for directed verdict and judgment notwithstanding the verdict, because there was insufficient evidence of undue influence to go to the jury.

To prove undue influence in the execution of a document, a party must show that something operated upon the mind of the person allegedly unduly influenced which had a

> controlling effect sufficient to destroy the person's free agency and to render the instrument not properly an expression of the person's wishes, but rather the expression of the wishes of another or others. "It is the substitution of the mind of the person exercising the influence for the mind of the [person executing the instrument], causing him to make [the instrument] which he otherwise would not have made."

Hardee v. Hardee, 309 N.C. 753, 756, 309 S.E.2d 243, 245 (1983) (quoting *In re Will of Turnage*, 208 N.C. 130, 131, 179 S.E. 332, 333 (1935)). While there is no test by which the sufficiency of the evidence of undue influence can be measured with mathematical certainty, several factors have been identified as bearing on the question, including:

> 1. Old age and physical and mental weakness of the person executing the instrument.
>
> 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
>
> 3. That others have little or no opportunity to see him.
>
> 4. That the instrument is different and revokes a prior instrument.
>
> 5. That it is made in favor of one with whom there are no ties of blood.
>
> 6. That it disinherits the natural objects of his bounty.
>
> 7. That the beneficiary has procured its execution.

Id. at 756-57, 309 S.E.2d at 245. Finally, we note that " '[u]ndue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence.' " *Id.* at 757, 309 S.E.2d at 246 (quoting *In re Will of Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910)).

In the present case, the evidence supporting plaintiff's claim tended to show that on 5 November 1990 plaintiff, then aged 90, conveyed to defendant by gift deed a remainder interest in three tracts of real property located in Duplin County, reserving a life estate for herself. In the absence of the deed, the property would have been disposed of pursuant to plaintiff's will, which was executed on 11 June 1986. Under the will, the property would have gone to defendant for life, with the remainder in fee to Peggy Caudill, plaintiff's niece.

At the time the gift deed was executed, plaintiff had suffered three strokes and was confined to a wheelchair. Her eyesight was poor, and she needed help from her live-in attendant, Magdalene Smith (hereinafter "Smith"), in order to read her mail and other papers. In 1987, plaintiff had begun having episodes of hallucinations and confusion. In September and October 1990, plaintiff was confused and at times did not recognize family members. During October 1990, defendant visited with plaintiff at her house about two or three times a week.

On 30 October, Smith drove plaintiff to Attorney William Allen's office at the direction of defendant. There, plaintiff executed a power of attorney, naming defendant as her sole attorney-in-fact. Smith testified that at Allen's office, defendant told her that anybody could talk plaintiff into anything and he was tired of it and wanted it changed. Smith also testified that defendant had been upset with a previous power of attorney which had named him and another individual as attorneys-in-fact. Christine Williams, a friend of plaintiff, testified that on 5 October, she and plaintiff discussed defendant's authority as attorney-in-fact, and that plaintiff expressed her displeasure with the arrangement. Plaintiff told her that defendant was making her sign five blank checks at a time and that "some of them were coming through her bank statement that she didn't know anything about." Plaintiff told Williams that she did not want anyone "messing with [her] checks," that defendant could not "keep his fingers out of [her] business," and that defendant was "worrying a four letter word out of [her]."

Regarding plaintiff's will, Smith testified that she overheard a conversation between plaintiff and defendant in October of 1990. Defendant told plaintiff that "he knew about her will and he didn't like it the way it was, . . . and he didn't have nothing to even show he was going to get anything." He stated, "I want something—I want you to sign something showing I do have that." On 4 November, defendant

told Smith to drive plaintiff to Attorney Allen's office the next day to sign some papers, and on 5 November plaintiff executed the deed in question at Allen's office. Sometime after 5 November, plaintiff received the deed in the mail from Allen. After Smith had read the deed to plaintiff about three times, plaintiff responded, "Do you mean to tell me that's all that's in there and Peggy is not in there at all?" Plaintiff then instructed Smith to telephone Allen for her. On the phone, plaintiff told Allen that she wanted the deed to be just like her will with respect to the property. That is, defendant would have a life estate, and plaintiff's niece, Peggy, would have the remainder interest.

From the foregoing evidence, the jury could have found several of the badges of undue influence. The evidence showed that plaintiff was old and physically and mentally weak; the deed was different from and effectively revoked a portion of plaintiff's will; and defendant procured the deed's execution. We conclude that, taken together, the facts and circumstances were sufficient to permit the jury reasonably to infer that defendant procured the 5 November 1990 deed by means of undue influence.

II.

[2] Defendant's next contention is that the trial court erred in allowing plaintiff's witnesses to testify to statements made by plaintiff, who was deceased at the time of trial, because the statements were inadmissible hearsay. First, defendant argues that certain testimony by Janie Turner, a friend of plaintiff, should have been excluded. Specifically, Turner testified that plaintiff told her that she did not like the power of attorney that she had granted and that she did not want anyone writing checks on her account.

The testimony of Christine Williams, another friend of plaintiff, included statements of plaintiff similar to those testified to by Turner. In addition, Williams testified that plaintiff told her that she thought the power of attorney she had signed was just another one of the deeds she had been signing, as plaintiff had recently been selling some of the land she owned.

Magdalene Smith, plaintiff's attendant, testified that plaintiff told her that she wanted to leave her property to her brother for life, and then to her niece, Peggy. Plaintiff told Smith not to tell defendant about the terms of plaintiff's will, because if he found out, he would not leave plaintiff alone until he got everything she had. Smith also testified to a conversation between plaintiff and defendant where

plaintiff told defendant she was not going to leave her property to him and that she was not responsible for educating his children. Finally, Smith testified that, upon hearing her read the deed to plaintiff, plaintiff stated that the terms of the deed were not what she intended and that she wanted the property to go to her niece, Peggy.

We believe that the rule announced in *In re Will of Ball*, 225 N.C. 91, 33 S.E.2d 619 (1945), is applicable to the case at hand. There the Court held: "Evidence of declarations of the testator which disclose his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show he did or did not act freely and voluntarily, is competent as substantive proof of undue influence." *Id.* at 94, 33 S.E.2d at 622. In the present case, all of the challenged testimony concerned plaintiff's state of mind regarding defendant and tended to show that plaintiff did not freely and voluntarily deed the remainder interest in the property to defendant. Accordingly, the statements testified to were admissible as tending to prove undue influence. We note that the Dead Man's Statute, N.C.G.S. § 8C-1, Rule 601(c) (1992), is not at issue here, because the challenged testimony did not come from interested witnesses.

III.

[3] Defendant next argues that the trial court erred in admitting the testimony of Magdalene Smith and W.T. Parrott, plaintiff's physician, regarding plaintiff's mental condition. Dr. Parrott testified that in 1989 and 1990, plaintiff had periods of hallucinations and confusion. Smith testified about plaintiff's September 1990 confusion and disorientation.

Defendant first contends that this testimony was irrelevant, as summary judgment had been granted for defendant on the issue of plaintiff's mental capacity. We disagree. The mental condition of the person executing the document is perhaps the strongest factor in resolving the question of undue influence. *In re Will of Ricks*, 292 N.C. 28, 37, 231 S.E.2d 856, 863 (1977). Moreover, a finding against the plaintiff on the issue of mental capacity does not necessarily preclude a finding of mental weakness on the issue of undue influence. *See Hardee*, 309 N.C. at 758, 309 S.E.2d at 246. Accordingly, defendant's contention that the mental condition of plaintiff was irrelevant is without merit.

Defendant also argues that the evidence of mental weakness was irrelevant because the testimony did not specifically center on plain-

tiff's condition on the date the deed was executed. Further, even if the testimony was relevant, defendant contends, its relevance was substantially outweighed by the danger of confusion of the issues or misleading the jury, and the testimony should have been excluded under N.C.G.S. § 8C-1, Rule 403 (1992). We note that whether to exclude relevant evidence under Rule 403 is a matter left to the discretion of the trial court. *Matthews v. James*, 88 N.C. App. 32, 39, 362 S.E.2d 594, 599 (1987), *disc. review denied*, 322 N.C. 112, 367 S.E.2d 913 (1988).

Evidence of a decedent's mental capacity at other times is admissible if it bears on the issue of the decedent's mental capacity at the time he executed the document. *Id.* at 40, 362 S.E.2d at 599-600. Evidence of his mental condition before the critical time is admissible, if it is not too remote to justify an inference that the same condition existed at the latter time. *Id.* at 40, 362 S.E.2d at 600. Whether the evidence is too remote depends on the circumstances of the case interpreted by "the rule of reason and common sense." *Id.* (quoting *In re Will of Hargrove*, 206 N.C. 307, 312, 173 S.E. 577, 579-580 (1934)).

In the case at hand, the deed was executed on 5 November 1990. Smith testified to plaintiff's mental condition as of September 1990, and Dr. Parrott testified to the period around 1989-1990. This testimony was not too remote to justify an inference that the same condition existed on 5 November 1990, nor was it so remote as to confuse or mislead the jury.

IV.

[4] Defendant's final argument on appeal is that the trial court erred in its instruction to the jury on undue influence. Defendant submitted an instruction similar to North Carolina Pattern Jury Instruction 860.20, "WILLS—UNDUE INFLUENCE," in that, among the factors listed for the jury's consideration were: (1) whether the instrument is made in favor of one with whom there are no ties of blood, or not; and (2) whether it disinherits the natural objects of the drafter's bounty, or not. The trial court's instruction was, instead, based on N.C.P.I. 505.30, entitled "RESCISSION OF WRITTEN INSTRUMENT—UNDUE INFLUENCE," which is similar to 860.20, but does not include the two factors listed above. We note that there is no pattern instruction specifically relating to the setting aside of a deed based on undue influence.

This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions. *In re Will of Leonard*, 71 N.C. App. 714,

717, 323 S.E.2d 377, 379 (1984). Although the pattern instruction given by the trial court was not the same as that requested by defendant, it did include among the list of factors to be considered: "any other factors which you find from the evidence may be relevant." We conclude that, while the trial court could have properly given N.C.P.I. 860.20, *see Hardee*, 309 N.C. at 756-757, 309 S.E.2d at 245, the instruction that was given was proper and did not prejudice defendant.

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

No error.

Judges JOHNSON and GREENE concur.

MAX MILLER, JR., PLAINTIFF v. GUSSIE W. MILLER, DEFENDANT

No. 931SC1197

(Filed 15 November 1994)

1. Negotiable Instruments and Other Commercial Paper § 14 (NCI4th); Estates § 51 (NCI4th)— promissory note—right of survivorship created—note not part of testator's estate

The promissory note at issue which was executed by payor and his wife and made payable to testator and his wife "or their survivor" created a right of survivorship between testator and defendant, his wife; since testator predeceased defendant, plaintiff was the sole surviving payee on the note and was entitled to both the note and the remaining proceeds from the note, and the promissory note was not part of testator's estate.

Am Jur 2d, Bills and Notes § 117; Cotenancy and Joint Ownership §§ 3-21.

2. Estates § 51 (NCI4th)— automatic right of survivorship—appropriate language in promissory note

N.C.G.S. § 41-2, which abolished the presumption of automatic right of survivorship and required a signed written agreement, did not apply to the promissory note in question since the promissory note contained the specific language necessary to create a

right of survivorship in property held by joint tenancy where it was made payable to testator and his wife "or their survivor."

Am Jur 2d, Cotenancy and Joint Ownership §§ 3-21.

3. Husband and Wife § 30 (NCI4th); Estates § 51 (NCI4th)— interest in promissory note—effect of premarital agreement on ownership

Defendant wife's survivorship interest in a promissory note payable to testator and defendant "or their survivor" was not defeated by a premarital agreement in which she released all rights in testator's property which she "might have by reason of the marriage," since defendant's rights to the promissory note and proceeds from the note were not rights which defendant claimed merely by reason of her marriage to testator; rather, it was the language of the promissory note itself which created defendant's rights in the note.

Am Jur 2d, Cotenancy and Joint Ownership §§ 3-21; Husband and Wife §§ 277-295, 300-315.

4. Estoppel § 20 (NCI4th)— failure to show reliance—no estoppel

Defendant was not equitably estopped from claiming the proceeds of a promissory note on which she was a joint payee and which she listed as an asset of her husband's estate, since plaintiff did not prove his reliance on defendant's conduct, and defendant's actions did not change the fact that by the terms of the note itself, plaintiff had no interest in the promissory note or its proceeds.

Am Jur 2d, Estoppel and Waiver §§ 134 et seq.

Comment Note.—Quantum or degree of evidence necessary to prove an equitable estoppel. 4 ALR3d 361.

Appeal by plaintiff from judgment entered 17 August 1993 by Judge William C. Griffin in Pasquotank County Superior Court. Heard in the Court of Appeals 1 September 1994.

Max L. Miller, Sr., testator, and his first wife, Angelina F. Miller, owned of a tract of land in Pasquotank County. Subsequent to testator's divorce from his first wife, testator became sole owner of that property. Testator and Gussie W. Miller, defendant, entered into a premarital agreement in which defendant released all rights in testator's

property "which [defendant] might have by reason of the marriage." On 15 May 1989, testator sold the property in Pasquotank County to M. Jack Morris, Jr. and wife, Alice B. Morris, in exchange for a purchase money deed of trust for the sum of $35,000.00. In connection with the purchase money deed of trust, Jack and Alice Morris signed a promissory note dated 15 May 1989 for the sum of $35,000.00 made payable to "Max L. Miller, Sr. and wife, Gussie Miller, or their survivor." After the sale of the property, testator established an account with Edward D. Jones and Company in the name of Max L. Miller, Sr. and Max L. Miller, Jr. The $10,000.00 down payment check, which check was made payable to testator and Gussie Miller, was deposited in this account. The check was endorsed by both testator and defendant prior to deposit.

On 21 August 1991, testator executed a last will and testament which contained the following bequest:

> The property on Blount Road has been sold to Mr. Jack Morris who resides on Blount Road. I financed the sale of this property and there are five more payments to be made at five thousand dollars each plus interest. Upon my death, each payment shall be made to my son. It is also my desire that my son inherit the picture of the SS Pioneer Commander and the half ton Dodge pickup.

Pursuant to this bequest, plaintiff claims the remaining proceeds from the promissory note.

Plaintiff, Max Miller, Jr., filed a declaratory judgment action against defendant, Gussie W. Miller, to determine the respective rights of the parties to the purchase money promissory note and proceeds of the note. Defendant filed a motion for summary judgment. On 17 August 1993, the trial court entered an order finding defendant to be the sole owner of the promissory note and entitled to the remaining balance on the note. Plaintiff appeals.

Twiford, Morrison, O'Neal & Vincent, by Branch W. Vincent, III, for plaintiff-appellant.

White, Hall & Dixon, by John H. Hall Jr., for defendant-appellee.

EAGLES, Judge.

[1] Plaintiff appeals from the trial court's granting of defendant's summary judgment motion. Plaintiff contends that summary judg-

ment should not have been granted because the testator devised the remaining proceeds of the promissory note to plaintiff under his will. Plaintiff alleges that defendant has no right to the promissory note because the property which was sold in exchange for the promissory note was owned by testator alone. Therefore, plaintiff contends testator's will should control the disposition of the proceeds because testator alone was entitled to the proceeds of the sale which are represented by the promissory note.

Initially, we note that plaintiff has not sought to reform the note. Furthermore, while plaintiff argues on appeal that the language "or their survivor" makes the note "confusing at best," there is no evidence in the record that plaintiff presented this argument to the trial court. Consequently, the terms of the promissory note are taken as provided and control the outcome here.

Regarding G.S. 1A-1, Rule 56, our Supreme Court has stated:

> The party moving for summary judgment must establish the lack of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972).

Branks v. Kern, 320 N.C. 621, 623-24, 359 S.E.2d 780, 782 (1987).

> In ruling on summary judgment, a court does not resolve questions of fact but determines whether there is a genuine issue of material fact. . . . Thus a defending party is entitled to summary judgment if he can show that claimant cannot prove the existence of an essential element of his claim [citation omitted], or cannot surmount an affirmative defense which would bar the claim.

Ward v. Durham Life Insurance Co., 325 N.C. 202, 209, 381 S.E.2d 698, 702 (1989), *quoting Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). Defendant contends that the trial court properly granted summary judgment because defendant established that plaintiff had no right to the promissory note or the proceeds of the note. Consequently, defendant argues that the terms of testator's last will and testament and the pre-marital agreement are immaterial.

According to the terms of the promissory note, testator and defendant are joint payees with a right of survivorship. Under the Uniform Commercial Code, if an instrument is payable to two or more

persons jointly, it is payable to all of them and may be negotiated, discharged or enforced only by all of them. G.S. 25-3-116. *See* Gerry W. Beyer, *Pay to the Order of Whom?—The Case of the Ambiguous Multiple Payee Designation*, 21 U. Toledo Law Review 685 (1990). Joint instruments protect the payees by preventing the one who has possession from misappropriating the interest of the one who is out of possession. Beyer, *supra.* G.S. 25-3-110, entitled "Payable to Order" provides in section (1)(d) that:

> (1) An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as "exchange" or the like and names a payee. It may be payable to the order of
>
> . . . .
>
> (d) two or more payees together or in the alternative.

Comment number one to this section states:

> [Section (1)(d)] eliminates the word jointly which has carried a possible implication of a right of survivorship. Normally an instrument payable to "A and B" is intended to be payable to the two parties as tenants in common, and there is no survivorship in the absence of express language to that effect.

(Emphasis added). This comment explains that, although the designation to "A and B" does not create a right of survivorship, express language can be included to create a right of survivorship in a negotiable instrument which is payable to two or more payees jointly.

The promissory note at issue, executed by Jack Morris and his wife, is payable to "Max L. Miller, Sr. and wife, Gussie Miller, or their survivor." The language "or their survivor" creates a right of survivorship between testator and defendant. Since testator predeceased defendant, defendant is the sole surviving payee on the note and is entitled to both the note and the remaining proceeds from the note.

Because defendant became the sole owner of the note upon testator's death, the promissory note is not part of testator's estate. Testator's estate included only those assets in which decedent had a legal or equitable interest at the time of his death. G.S. 28A-15-1. In North Carolina, joint property subject to a right of survivorship is not part of a decedent's estate. In *In Re Estate Of Francis*, 327 N.C. 101, 394 S.E.2d 150 (1990), our Supreme Court held that proceeds held in a

joint account with right of survivorship, established pursuant to G.S. 41-2.1, passed to the surviving joint tenant. The Court stated that "[u]pon the death of the co-tenant, the funds pass to the surviving joint tenant . . . pursuant to the statutorily authorized written agreement and not by the terms of the decedent's will . . . ." *In Re Estate Of Francis*, 327 N.C. 101, 109, 394 S.E.2d 150, 155 (1990). "Under common law principles applicable to joint tenancies the survivor takes the entire property, free and clear of the claims of heirs or creditors of the deceased tenant, and the personal representative of such tenant has no right, title or interest therein." *Wilson County v. Wooten*, 251 N.C. 667, 670, 111 S.E.2d 875, 877 (1960). *See Bowling v. Bowling*, 243 N.C. 515, 91 S.E.2d 176 (1956); *In re Estate of Connor*, 5 N.C. App. 228, 168 S.E.2d 245 (1969). Therefore, the promissory note did not become part of testator's estate but became the sole property of defendant upon testator's death.

[2] Plaintiff responds that G.S. 41-2 abolished the presumption of automatic right of survivorship in joint tenancies. Plaintiff contends that this statute requires a signed, written agreement providing for the right of survivorship to create a survivorship provision. Plaintiff is correct that survivorship is not automatic in a joint tenancy. However, G.S. 41-2 which defines survivorship in joint tenancy provides: "[n]othing in this section prevents the creation of a joint tenancy with right of survivorship in real or personal property if the instrument creating the joint tenancy expressly provides for a right of survivorship, and no other document shall be necessary to establish said right of survivorship." The promissory note contains the specific language necessary to create a right of survivorship in property held by joint tenancy. Since the promissory note effectively created a joint tenancy with right of survivorship, the promissory note became defendant's sole property upon testator's death.

[3] Plaintiff contends that under *Harden v. Bank*, 28 N.C. App. 75, 220 S.E.2d 136 (1975), defendant's interest in the promissory note is defeated by the premarital agreement. In *Harden*, husband and wife signed a premarital agreement similar to the agreement signed by testator and defendant. Thereafter, husband and wife opened a joint bank account. Upon husband's death, wife sought a one-half interest in the bank account. Our court held that the premarital agreement and joint bank account agreement were two separate and enforceable provisions. We agree that here both the premarital agreement and the promissory note are valid and enforceable. However, the premarital agreement does not defeat defendant's rights in the promissory note.

According to the premarital agreement defendant released all rights in testator's property "which [defendant] might have by reason of the marriage." However, defendant's rights to the promissory note and proceeds from the note are not rights which defendant claims merely by reason of her marriage to testator. It is the language of the promissory note itself which creates defendant's rights in the note. Thus, while both the premarital agreement and the promissory note are enforceable, the premarital agreement does not defeat defendant's rights created under the promissory note.

Next, plaintiff argues that the court erred in granting summary judgment because there is no evidence that testator intended to make a gift of the proceeds from the promissory note to defendant. However, the issue here is not whether testator intended to make a gift of the proceeds, but rather whether the promissory note created a joint tenancy with a right of survivorship. *Fast v. Gulley*, 271 N.C. 208, 155 S.E.2d 507 (1967). Since, we have held that the promissory note created a joint tenancy with right of survivorship, defendant was not required to present evidence of testator's intent to make a gift of the proceeds.

Plaintiff argues that the promissory note is not a negotiable instrument because it lacks the requisites for negotiability. While we agree, this does not change the result. This promissory note is not a negotiable instrument since it is payable to the two named payees without the addition of the words "or order," or any similar words of negotiability. *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972); G.S. 25-3-104; G.S. 25-3-110. Even so, Article 3 of the Uniform Commercial Code applies to this promissory note except that no holder of the note could be a holder in due course. G.S. 25-3-805. For the purposes of this appeal, the rights of the parties are to be determined as if the note is a negotiable instrument. *Savings & Loan Assoc. v. Trust Co.*, *supra*.

[4] Finally, plaintiff contends that defendant should be equitably estopped from claiming the proceeds of the note for two reasons. First, defendant, as executrix of decedent's estate identified the $25,000.00 remaining on the note as an item due the deceased and, second, defendant waived any right to make a claim against decedent's estate property or estate under the premarital agreement. We are not persuaded that defendant is equitably estopped.

Plaintiff's equitable estoppel argument fails because plaintiff has not proven reliance. "It is essential that the person asserting the

estoppel shows that he or she acted in reliance on the conduct of the person against whom estoppel is asserted, not merely that he or she was aware of certain facts which in retrospect might support the assertion of estoppel." *Deal v. N.C. State University*, 114 N.C. App. 643, 442 S.E.2d 360, *disc. review denied*, 336 N.C. 779, 447 S.E.2d 419 (1994) (emphasis added). Additionally, defendant's actions did not change the fact that by the terms of the note itself plaintiff had no interest in the promissory note or its proceeds. Defendant's act of listing the promissory note as an asset of the estate could not transform the promissory note into an asset of the estate. "Equity does not estop one from asserting his legal rights to enable another to make a profit which he could not otherwise obtain." *Booher v. Frue*, 98 N.C. App. 570, 580, 394 S.E.2d 816, 821 (1990), *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990), *citing Herring v. Volume Merchandise, Inc.*, 252 N.C. 450, 113 S.E.2d 814 (1960). In conclusion, we note that since defendant's ownership of the note is independent from the assets of testator's estate, defendant here is not making a claim against testator's estate in contravention of the premarital agreement.

Affirmed.

Judges ORR and JOHN concur.

STATE OF NORTH CAROLINA v. MARTIN A. HATCHER

No. 9318SC1191

(Filed 15 November 1994)

Constitutional Law § 169 (NCI4th)— no submission of lesser offenses—hung jury—defendant not acquitted of lesser offenses—subsequent trial not double jeopardy

When the trial court elected not to submit the lesser-included offense of attempted second-degree rape and the offense of assault on a female to the jury (assault on a female not being a lesser-included offense of second-degree rape, but submitted pursuant to N.C.G.S. § 15-144.1), defendant was not acquitted of those charges, given that the trial later resulted in a mistrial

because of a hung jury, and given that defendant was indicted only on second-degree rape.

Am Jur 2d, Criminal Law §§ 258 et seq.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial. 98 ALR3d 997.

Former jeopardy as bar to retrial of criminal defendant after original trial court's *sua sponte* declaration of a mistrial—state cases. 40 ALR4th 741.

Supreme Court's views as to application, in state criminal prosecutions, of double jeopardy clause of Federal Constitution's Fifth Amendment. 95 L. Ed. 2d 924.

Appeal by the State from order entered 20 September 1993 *nunc pro tunc* 7 September 1993 by Judge Russell G. Walker, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 28 September 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Jeffrey P. Gray, for the State-appellant.

Tharrington, Smith & Hargrove, by Wade M. Smith, Roger W. Smith, Melissa H. Hill, and E. Hardy Lewis, for defendant-appellee.

JOHNSON, Judge.

Defendant Martin A. Hatcher was indicted on 26 November 1990 in 90CRS39878 with the second degree rape of Loretta Gail Williams, alleged to have occurred on 27 April 1990. The case came on for trial at the 16 March 1992 Criminal Session of Guilford County Superior Court. A jury was empaneled and sworn and the case tried over a two week period with twenty-eight witnesses testifying for the State and twenty-five witnesses testifying for defendant; the State in rebuttal presented four witnesses and defendant in rebuttal presented one witness. The prosecuting witness, Ms. Williams, testified that the rape occurred during a neurological examination of her by defendant, a doctor; she testified that during a point in the examination when she was bending over from the waist, defendant penetrated her vagina from behind with his penis. Defendant denied raping Ms. Williams.

At the conclusion of the evidence, the trial court conducted a charge conference. During the charge conference, the following exchange took place:

THE COURT: . . . I assume under the substantive issues it would be guilty of second degree rape. Does either side contend there is any lesser included?

MR. WALL [defendant's attorney]: We do not, Judge.

MR. CARROLL [prosecutor]: State doesn't.

THE COURT: Everybody is in agreement it would be second degree rape or—guilty of second degree rape or not guilty.

MR. CARROLL [prosecutor]: State agrees with that.

Following the charge conference and the closing arguments of counsel, the trial court instructed the jury on second degree rape. After deliberating for two days, on 1 April 1992 the jury announced that it was unable to reach a unanimous verdict and the trial court declared a mistrial.

On 20 April 1992, the prosecutor indicted defendant on two additional charges, those being attempted second degree rape of Ms. Williams on 27 April 1990 (92CRS20413) and assault on a female on Ms. Williams on 27 April 1990 (92CRS20404). The Grand Jury returned true bills in each case.

Prior to trial, defendant moved to dismiss the charges of attempted second degree rape (92CRS20413) and assault on a female (92CRS20404) on the grounds of double jeopardy or for failure to join offenses. The State responded to this motion with a written memorandum of law filed 25 June 1993 and defendant filed an amended motion to dismiss on the grounds of double jeopardy and failure to join offenses in a memorandum of law filed 29 July 1993. The State submitted additional cases for the court to consider, and defendant filed a supplement to his memorandum of law on 2 September 1993.

A hearing was held on 16 August 1993 on defendant's amended motion to dismiss; the morning of the hearing, the State voluntarily dismissed the indictment for attempted second degree rape, stating that such indictment was unnecessary to inform defendant of the charge against him because the offense charged in that indictment was implicitly charged in the original indictment for second degree rape. The trial judge heard arguments from counsel and took the matter under advisement; at the 7 September 1993 Criminal Session of Guilford County Superior Court, the trial judge granted defendant's motion to dismiss the indictment for assault on a female. The trial judge also pronounced a dismissal of the indictment for attempted

second degree rape, although the State had already voluntarily dismissed that indictment. In granting defendant's motion to dismiss, the trial judge concluded as a matter of law that defendant had previously been placed in jeopardy for the offense of attempted second degree rape and assault on a female. The State has appealed this order to our Court.

As a preliminary matter, defendant claims there is no statutory basis for a State appeal from an order of the superior court dismissing charges on double jeopardy grounds. It is clear, pursuant to North Carolina General Statutes § 15A-1445(a)(1) (1988), that the State's appeal is subject to dismissal if further prosecution is barred by the Double Jeopardy Clause of the United States Constitution and the "law of the land" clause of the North Carolina Constitution. *State v. Priddy*, 115 N.C. App. 547, 445 S.E.2d 610 (1994). We therefore turn to the merits of this appeal.

The State argues that the trial court erred by granting defendant's motion to dismiss after concluding as a matter of law that defendant had previously been placed in jeopardy for the offenses of attempted second degree rape and assault on a female. The State, noting that it is undisputed that defendant can be retried on the second degree rape charge, questions whether the trial court's decision at the first trial to not submit any lesser included offenses of second degree rape amounted to an "acquittal" of the lesser included offense of attempted second degree rape. The State also questions whether the failure of the court to submit an issue to the jury of assault on a female was tantamount to an "acquittal" of that charge. The State argues that when the trial judge declared a mistrial, "the slate was wiped clean" and that "[t]he original indictment for second degree rape remained valid to re-try the defendant and the State was free to subsequently indict for any other offense arising out of the original occurrence."

Defendant, on the other hand, argues that

> [a]t the end of all the evidence [in the mistrial] . . . the Prosecutor decided to "go for broke" and did not argue that the less serious offenses of attempt and assault on a female should be submitted to the jury. . . . Now the State, enlightened by the experience of the first trial, proposes to subject [defendant] to another trial, and to submit to the second jury the issues of attempt and assault on a female—issues charged in the first trial but not submitted to the jury. The constitutional doctrine of double jeopardy protects citizens from such repeated attempts by the government to gain a conviction.

As a preliminary matter, we restate settled law as to jeopardy, indictments for rape, and jury instructions. Jeopardy attaches "when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn." *State v. Lee*, 51 N.C. App. 344, 348, 276 S.E.2d 501, 504 (1981), *quoting State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977). We further note that "double jeopardy has long been a fundamental prohibition of our common law and is deeply imbedded in our jurisprudence." *State v. Hill*, 287 N.C. 207, 214, 214 S.E.2d 67, 72 (1975). "The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). As to a "hung" jury, "[o]ur cases describe a deadlocked or 'hung' jury as a paradigmatic example of manifest necessity requiring the declaration of a mistrial." *State v. Felton*, 330 N.C. 619, 628, 412 S.E.2d 344, 350 (1992). "[T]he prohibition against double jeopardy does not prevent the second trial of an accused when his previous trial ended in a hung jury." *Id. See also State v. Odum*, 316 N.C. 306, 341 S.E.2d 332 (1986).

We note that in the instant case, the indictment for second degree rape would support a verdict for attempted second degree rape or assault on a female. Although defendant was not indicted for attempted second degree rape and assault on a female, defendant could still have been convicted of any of those charges under North Carolina General Statutes § 15-144.1 (1983). This short form indictment for rape, North Carolina General Statutes § 15-144.1, reads in pertinent part:

> **§ 15-144.1. Essentials of bill for rape.**
>
> (a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. *Any bill of indictment containing the averments and allegations herein named shall be good and suf-*

> *ficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.* (Emphasis added.)

"It is now well-settled that the short-form indictment is sufficient (1) to protect a defendant's right to be advised of the accusations against him and to avoid double jeopardy and (2) to permit the court to enter the appropriate judgment." *State v. Jones*, 317 N.C. 487, 492, 346 S.E.2d 657, 660 (1986) (citations omitted). Thus, an indictment which is "*sufficient* in law as an indictment for rape in the first degree" will support a verdict for any lesser-included offense. *Id.*

Finally, as to jury instructions,

> a judge must declare and explain the law arising upon the evidence. N.C. Gen. Stat. § 15A-1232 [1988]. This duty necessarily requires a judge to charge upon a lesser included offense, even absent a special request, where there is evidence to support it. *State v. Wright*, 304 N.C. 349, 283 S.E.2d 502 (1981). "The sole factor in determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *Id.* at 351, 283 S.E.2d at 503.

State v. Peacock, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985). Further, "the trial court need not submit lesser included degrees of a crime to the jury 'when the State's evidence is positive as to each and every element of the crime charged *and there is no conflicting evidence relating to any element of the charged crime.*' " *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) *and State v. Drumgold*, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979), *quoting State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972) (emphasis in original).

The issue presented herein is the following: when the trial court elected not to submit the lesser included offense of attempted second degree rape and the offense of assault on a female to the jury (assault on a female not being a lesser included offense of second degree rape, but submitted pursuant to North Carolina General Statutes § 15-144.1), was defendant acquitted of those charges (a) given that the trial later resulted in a mistrial because of a hung jury, and (b) given that defendant was indicted only on second degree rape? We find that defendant was not acquitted of the charges of attempted sec-

ond degree rape and assault on a female. *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 is instructive in this matter.

In *Thomas*, the defendant was found guilty of first degree murder. The question on appeal was whether the trial court erred in failing to submit to the jury the alternative verdict of guilty of involuntary manslaughter. Our Supreme Court held that there was error, entitling the defendant to a new trial. In so holding, the Court noted that "[w]hen the case is returned for a new trial, defendant under the present indictment will again be subject to trial and conviction for first degree murder on all theories and on all lesser homicides which may be included under any theory and supported by the evidence." *Id.* at 593, 386 S.E.2d at 561. The dissent in *Thomas* supports a position analogous to defendant in the case herein, that

> [b]y limiting the jury to returning a verdict on the first-degree murder charge only under the felony murder theory, the trial court withdrew the other theories of first-degree murder *and* all lesser homicide offenses included within *those* theories from the jury's consideration. Submission of the first-degree murder charge to the jury *only* upon the felony murder theory was the equivalent of a verdict finding her not guilty on the other theories of first-degree murder supported by the indictment upon which she had been placed in jeopardy, including the theory of premeditated and deliberate first-degree murder. . . . Therefore, submission of the first-degree murder charge against the defendant to the jury only upon the felony murder theory had the effect of acquitting her of premeditated and deliberate first-degree murder and its lesser included offenses of second-degree murder, voluntary manslaughter and involuntary manslaughter. The defendant could not thereafter be placed in jeopardy for any of those lesser offenses—offenses for which she had already been acquitted. (Citations omitted.)

Id. at 600-01, 386 S.E.2d at 565. The majority refuted the dissent, to-wit:

> The dissent's notion that defendant, while convicted of first degree felony murder, has somehow been acquitted of premeditated and deliberated murder and all lesser homicides which might have been included in this latter offense presupposes that defendant has been charged with, and could have been convicted of, two different crimes—first degree felony murder and first degree premeditated and deliberated murder. Defendant was

charged with only one crime, first degree murder; she was convicted of that crime. She has not been acquitted of anything. Premeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes. (Citations omitted.)

Id. at 593, 386 S.E.2d at 560-61.

Notwithstanding that the instant case involves a mistrial of a charge of second degree rape due to a hung jury rather than a new trial after a conviction of first degree murder ordered by an appellate court, we find the reasoning in *Thomas* applicable in the case *sub judice*. As in *Thomas*, in the instant case, defendant, under the present indictment, will again be subject to trial and conviction for second degree rape on all theories and on all lesser included offenses or charges pursuant to North Carolina General Statutes § 15-144.1 which may be included under any theory and supported by the evidence.

Therefore, we find the trial court erred by granting defendant's motion to dismiss after concluding as a matter of law that defendant had previously been placed in jeopardy for the offenses of attempted second degree rape and assault on a female.

Reversed.

Judges GREENE and LEWIS concur.

TAMMY CLARK, As Administratrix of the Estate of TROY SMITH, Plaintiff v. BURKE COUNTY and RALPH E. JOHNSON, In His Capacity As BURKE COUNTY SHERIFF, Defendants

No. 9425SC98

(Filed 15 November 1994)

1. Municipal Corporations § 454 (NCI4th)— governmental immunity—failure to plead waiver through insurance procurement—claim dismissed

Plaintiff's failure to plead waiver of governmental immunity through the purchase of liability insurance subjects her claim against a county for wrongful death occurring during a high-speed chase by a deputy sheriff to dismissal.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 663.

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

2. Sheriffs, Police, and Other Law Enforcement Officers § 35 (NCI4th)— deputy sheriff not county employee—no liability of county

Any injury resulting from a deputy sheriff's actions during a high-speed pursuit of a vehicle in which plaintiffs' intestate was a passenger could not result in liability for Burke County, since the deputy was an employee of the sheriff, an elected official, and not the county.

Am Jur 2d, Sheriffs, Police, and Constables §§ 6-8, 13, 16, 90-180.

3. Sheriffs, Police, and Other Law Enforcement Officers § 13 (NCI4th)— action against sheriff—no governmental immunity

Governmental immunity does not preclude an action against the sheriff and officers sued in their official capacities, since the statutory mandate that the sheriff furnish a bond works to remove the sheriff from the protection of governmental immunity.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

4. Sheriffs, Police, and Other Law Enforcement Officers § 21 (NCI4th)— high-speed chase—deputy's actions not willful and wanton—no gross negligence

In an action to recover for the death of plaintiff's intestate who was a passenger in a vehicle which crashed during a high-speed chase by a sheriff's deputy, the evidence was insufficient to show that the deputy's actions were willful and wanton, rising to the level of gross negligence, where such evidence tended to show that the pursuit occurred just after 4:00 a.m. within the city limits on a two-lane highway; weather conditions were favorable; the highway had one major curve and a couple of hills; the pursuit itself covered only three miles and lasted just a few minutes; the driver never applied his brakes to slow down before entering a

curve; and the deputy never made contact with the vehicle, pulled alongside it, or tried to run it off the road.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

Appeal by plaintiff from order entered 1 October 1993 by Judge Robert E. Gaines in Burke County Superior Court. Heard in the Court of Appeals 4 October 1994.

Plaintiff filed this action in August of 1992 to recover damages for the wrongful death of Troy Smith. In her complaint, plaintiff alleged that Deputy Smith, a member of the Burke County Sheriff's Department, engaged in a high speed pursuit of Vernon Smith's vehicle in which the decedent and Matthew Curry were passengers. Plaintiff further alleged that Deputy Smith forced Vernon Smith's vehicle off the road as it approached a curve leading into a railroad overpass and caused it to crash into a bridge abutment. The crash killed all three occupants. Plaintiff claimed that Deputy Smith's actions were careless, negligent, and grossly negligent. Plaintiff also alleged, among other things, the improper training and supervision of Deputy Smith.

Defendants moved to dismiss plaintiff's complaint. By way of defense, defendants raised Vernon Smith's negligence in operating the vehicle. They also raised the decedent's negligence in entering a vehicle with an intoxicated and negligent driver. In June of 1993, defendants moved for summary judgment. In a supporting affidavit, Deputy Smith relayed his account of the pursuit. In the early morning hours he responded to a call of a disturbance at an arcade. As he neared the arcade, a hysterical female approached him and told him that a man was shooting a gun inside the arcade. Upon arriving at the arcade, another person told him that the gunman had entered his vehicle and was about to flee the scene. Deputy Smith saw the vehicle pull out of the parking lot and, believing that a crime had been committed by one posing a threat to the public, pursued it.

During the pursuit, Deputy Smith remained approximately two car lengths behind and kept his sirens and blue lights activated at all times. After learning that additional officers were en route to assist him in apprehending the vehicle, Deputy Smith continued the pursuit but made no effort to stop the vehicle. He then watched as Vernon Smith's vehicle attempted to round a curve at seventy to seventy-five miles per hour, leave the road, and hit the abutment. At the time of impact, Deputy Smith estimated he was four to five car lengths

behind the vehicle and stated that at no time did he attempt to pass, stop, or force the vehicle off the road.

Defendants submitted additional information in support of their motion. After reviewing all pertinent evidence, the court granted defendants' motion for summary judgment.

From this judgment, plaintiff appeals.

Harris & Graves, by Joseph A. Mooneyham, and Corry, Cerwin & Luptak, by Todd R. Cerwin, for plaintiff appellant.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and Ellen M. Gregg, for defendant appellees.

ARNOLD, Chief Judge.

Plaintiff argues on appeal that the trial court erred in granting defendants' motion for summary judgment. In support of this argument, she contends that the action was not barred by governmental immunity and that her failure to plead waiver of immunity did not justify dismissal. She further contends that Deputy Smith's actions were wilful and wanton, rising to the level of gross negligence, and that Sheriff Johnson's failure to properly train Deputy Smith signified a reckless disregard for the rights of the public.

WAIVER OF IMMUNITY

[1] Plaintiff contends that her failure to plead waiver of immunity through the purchase of liability insurance does not subject her claim to dismissal, and that it is sufficient to present such evidence at trial. She is wrong.

N.C. Gen. Stat. § 153A-435(a) (1991) provides that a county may contract to insure itself and thereby waive its immunity to the extent of the coverage. When suing a county or its officers, agents or employees, the complainant must allege this waiver in order to recover. In *Gunter v. Anders*, this Court upheld the dismissal of plaintiff's action against the Surry County Board of Education after plaintiff failed to allege that the Board had purchased liability insurance and waived its immunity. *Gunter v Anders*, 115 N.C. App. 331, 444 S.E.2d 685 (1994). We held that absent an allegation to the effect that immunity has been waived, the complaint fails to state a cause of action. *Id.* Plaintiff's complaint does not satisfy these pleading requirements and the trial court properly granted summary judgment for Burke County. Plaintiff also argues that the absence of the allega-

tions of waiver is not fatal as long as evidence of waiver is present in the record. This Court addressed and rejected this argument in *Gunter. Id.*

GOVERNMENTAL IMMUNITY

[2] Plaintiff next contends that Burke County is liable, as their employer, for Deputy Smith and Sheriff Johnson's actions. Defendants contend that Burke County cannot be held for alleged negligent acts of Sheriff Johnson and Deputy Smith because the sheriff, as an elected official, is not a Burke County employee.

In *Peele v. Provident Mutual Life Insurance Company*, plaintiff, a dispatcher with the Watauga County Sheriff's Department, filed a wrongful termination suit against Watauga County after the sheriff fired her. *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 368 S.E.2d 892, *appeal dismissed and disc. review denied*, 323 N.C. 366, 373 S.E.2d 547 (1988). Plaintiff, who had been hired by the sheriff, argued that she was a Watauga County employee and should be afforded the protections available to other county employees. This Court stated that "[i]t is clear . . . that plaintiff was an employee of the sheriff and not Watauga County and its Board of Commissioners." *Id.* at 449, 368 S.E.2d at 894. Citing N.C. Gen. Stat. § 153A-103(a), we stated that "the control of employees hired by the sheriff is vested exclusively in the sheriff . . . [and] the individual person is an employee of the sheriff. . . ." *Id.* at 450, 368 S.E.2d at 894. A deputy is an employee of the sheriff, not the county. *Id.* Therefore, any injury resulting from Deputy Smith's actions in this case cannot result in liability for Burke County and summary judgment is therefore affirmed for Burke County.

[3] The next question is whether summary judgment was properly entered for Sheriff Johnson who has been sued in his official capacity as Burke County Sheriff. As this Court stated in *Messick v. Catawba County*, "[g]overnmental immunity . . . does not preclude an action against the sheriff and the officers sued in their official capacities. . . . The statutory mandate that the sheriff furnish a bond works to remove the sheriff from the protective embrace of governmental immunity. . . ." *Messick v. Catawba County*, 110 N.C. App. 707, 715, 431 S.E.2d 489, 494, *disc. review denied*, 334 NC. 621, 435 S.E.2d 336 (1993). In actions against the sheriff, the plaintiff must ordinarily join the surety as a party to the action. *Id.* In *Messick*, however, this Court stated that plaintiff's failure to name the surety as a party is not fatal, but is easily corrected by an amendment to the pleadings. *Id.* In this

case, plaintiff failed to join the surety as a party. Under this Court's decision in *Messick* this omission does not appear to be fatal and can be corrected by an amendment to the pleadings.

STANDARD OF PROOF

[4] In her next argument, plaintiff contends that Deputy Smith's actions were wilful and wanton, rising to the level of gross negligence. She further contends that Sheriff Johnson is responsible for Deputy Smith's actions and that Sheriff Johnson failed to adequately train or supervise Deputy Smith.

In *Bullins v. Schmidt*, our Supreme Court set forth the standard of care to be applied where an injury occurring during a high speed chase does not result from a collision with the officer's vehicle. *Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601 (1988). The Court held that liability will not attach unless the officer is grossly negligent, which the Court defined as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Id.* at 583, 369 S.E.2d at 603. In *Bullins*, the Court held that the officer's conduct did not rise to the level of gross negligence and found it significant that "[t]he pursuit was in the early morning hours along a predominantly rural section of U.S. 220 where traffic was light and the road was dry. The officers continuously used their emergency lights and sirens, kept their vehicles under proper control, and did not collide with any person, vehicle, or object." *Id.* at 584-585, 369 S.E.2d at 604.

In his deposition, Deputy Smith stated that the pursuit occurred just after 4:00 a.m. within the city limits on a two lane highway. Weather conditions were favorable. He stated that the highway, which has a forty-five mile per hour speed limit, has only one major curve and a couple of hills. The pursuit itself covered only three miles and lasted just a few minutes. Deputy Smith stated that Vernon Smith never applied his brakes to slow down and entered the curve at roughly seventy-five miles per hour. As he neared the curve, Deputy Smith slowed slightly and crossed over the center line in an attempt to straighten out the curve. Commenting on the pursuit, Deputy Smith stated that he did not think Vernon Smith's vehicle would stop, nor did he contemplate terminating the pursuit. Lastly, he added that he never made contact with the vehicle, nor did he pull alongside it, try to run it off the road, or pass it.

Gary Long witnessed a brief portion of the pursuit as he walked home after working the night shift at Hanes. Long saw Vernon Smith's

vehicle speed by at approximately seventy to eighty miles per hour followed by the deputy's cruiser at four to five car lengths behind. Long observed the pursuit for only five seconds and, when he last saw the vehicles, noticed that the deputy had narrowed the gap between the vehicles to two car lengths. Just after the vehicles left his view, Long heard the accident.

Randall McCauley, plaintiff's expert in police procedures, testified that in his opinion Deputy Smith's pursuit and failure to terminate pursuit violated generally accepted standards for police pursuits. In explaining his opinion, McCauley stated that upon arriving at the arcade Deputy Smith should have taken a few seconds to ascertain (1) if anyone was hurt, and (2) the identity of the gunman. He agreed, however, that even without this information the initiation of pursuit would not have been improper, though perhaps unnecessary. McCauley believed that Deputy Smith conducted a forced pursuit based on the speed of the vehicles and the distance between them. In addition, he believed that the vehicle passing in a no passing zone and entering the final curve at a high rate of speed amounted to evidence of reckless driving. At that point, Deputy Smith should have terminated the pursuit and relied on vehicle information to attempt an arrest at the driver's home.

McCauley also criticized the department's policy on high speed chases stating that, although it instructed officers to conduct a weighing of the risks versus the seriousness of the crime, it failed to supply the guidance necessary to make the assessment. Such guidance should come in the form of factors like location of the pursuit and traffic, road, and car conditions, all of which provide a mental checklist a deputy should run through in conducting an assessment. Finally, McCauley saw an apparent lack of involvement by Deputy Smith's lieutenant, whom he believed should have told Deputy Smith to terminate the pursuit based on available information.

It seems incredulous to suggest that such evidence might show negligence on Deputy Smith's part, and it certainly does not rise to the level of gross negligence. Moreover, there is no evidence of gross negligence as to Deputy Smith's training and supervision and, given the brevity of the pursuit, it is difficult to appreciate criticism of Smith's lieutenant for not ordering him to stop pursuit. It is not evidence of gross negligence, and indeed many of the allegations against Sheriff Johnson suffer from a lack of support. For example, there is no evidence to support plaintiff's claims that Sheriff Johnson (1) knew

Deputy Smith would drive the cruiser improperly and thus failed to supervise him adequately, (2) entrusted the cruiser to Deputy Smith knowing he was not qualified to drive it in a safe manner during a high speed pursuit, (3) allowed Deputy Smith to drive the cruiser in a high speed pursuit knowing he could easily become outraged and harm others, or (4) failed to enforce high speed pursuit procedures. Unsupported allegations in a complaint do not work to create a genuine issue of material fact. *See Messick*, 110 N.C. App. 707, 431 S.E.2d 489.

The facts here present a deep and tragic loss. Three young lives were lost in an effort to outrun the sheriff. But there is no evidence presented that might show gross negligence on the part of anyone in the sheriff's office.

Affirmed.

Judges COZORT and LEWIS concur.

CATHEY P. GRIGG, AS ADMINISTRATRIX OF THE ESTATE OF MATTHEW E. CURRY, PLAINTIFF v. BURKE COUNTY AND RALPH E. JOHNSON, IN HIS CAPACITY AS BURKE COUNTY SHERIFF, DEFENDANTS

No. 9425SC97

(Filed 15 November 1994)

Appeal by plaintiff from order entered 1 October 1993 by Judge Robert E. Gaines in Burke County Superior Court. Heard in the Court of Appeals 4 October 1994.

Harris & Graves, by Joseph A. Mooneyham, and Corry, Cerwin & Luptak, by Todd R. Cerwin, for plaintiff appellant.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and Ellen M. Gregg, for defendant appellees.

ARNOLD, Chief Judge.

This case has been consolidated for hearing with No. 9425SC98. Both cases arise out of a single accident and present identical issues for review. We now refer to No. 9425SC98 for a complete recitation of the facts and an analysis of the issues presented for review. For the reasons stated in that opinion, the order of the trial court granting summary judgment for defendants is

Affirmed.

Judges COZORT and LEWIS concur.

POST & FRONT PROPERTIES, LTD. v. ROANOKE CONSTRUCTION COMPANY, INC.

No. 945SC35

(Filed 15 November 1994)

1. Fraud, Deceit, and Misrepresentation § 41 (NCI4th)— renovation contract—sufficiency of evidence

Evidence was sufficient to establish plaintiff's fraudulent conduct in entering into a contract for renovation of a building owned by plaintiff partnership where it tended to show that defendant inquired about the availability of construction loan funds because it wanted to insure that there was sufficient money available to pay for repairs it would perform; defendant entered into the contract to make the repairs only after receiving such assurance from plaintiff; after receiving assurance from plaintiff that construction funds were available, defendant performed work on the property with a value of $110,000; and defendant was not paid.

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

2. Partnership § 15 (NCI4th)— partner not joined as party—partner not personally liable

Plaintiff partner was not joined as a party in defendant's counterclaim against the partnership and therefore could not be held personally liable for the obligations of the partnership, and it was not material that he was aware of the filing of the counterclaim against the partnership and that he participated during the trial on behalf of the partnership.

Am Jur 2d, Partnership §§ 633 et seq.

Appeal by plaintiffs Post & Front Properties, Ltd., and Ferd L. Harrison from judgment entered 9 December 1992 and order entered 19 October 1993 in New Hanover County Superior Court by Judge Gregory A. Weeks. Heard in the Court of Appeals 28 September 1994.

Bass, Bryant & Moore, by John Walter Bryant, William E. Moore, Jr., and John K. Fanney, for plaintiff-appellant Post & Front Properties, Ltd.

Smith Debnam Hibbert & Pahl, by Bettie Kelley Sousa, for plaintiff-apellant Ferd L. Harrison.

Kirk, Gay, Kirk, Gwynn & Howell, by Donna S. Stroud and Clarence M. Kirk, for defendant-appellee.

GREENE, Judge.

Post & Front Properties, Ltd. (plaintiff) appeals from a judgment entered after a jury verdict, finding plaintiff liable for damages in fraud and from an order entered denying plaintiff's motions for judgment notwithstanding the verdict and alternatively for a new trial. Ferd L. Harrison (Harrison) also appeals the trial court's judgment finding him personally and individually liable for the damages awarded against plaintiff.

Plaintiff's complaint alleges that Roanoke Construction Company, Inc. (defendant) breached an oral contract to renovate a building owned by the plaintiff. The defendant filed a counterclaim against the plaintiff alleging fraud in the procurement of the contract while claiming that the plaintiff had breached the contract. Both parties claimed that the other party's actions constituted an unfair and deceptive act or practice. Harrison, although present at the trial, was not represented by a lawyer, was not joined as a party and did not receive any service of process.

The evidence, considered in the light most favorable to the defendant, *Douglas v. Doub*, 95 N.C. App. 505, 511, 383 S.E.2d 423, 426 (1989) (standard for evaluating evidence in motion for judgment notwithstanding the verdict), reveals that plaintiff, a partnership, owned a building in Wilmington and was in the process of making renovations to it. Harrison and Samuel B. Ashford (Ashford) are the general partners of the plaintiff. In August 1988, Ashford met with the president of defendant to discuss the possibility of the defendant completing the renovations. During this meeting the president asked Ashford "How much money do you have left in your construction loan?" Ashford replied, "$180,000." The president stated that he asked this question because he wanted to know "how much money . . . that he had left to pay for any work that we did." He also testified that he determined that the $180,000 should have been sufficient to complete the renovations. After this conversation the parties entered into an

oral agreement that defendant would act as the general contractor for the renovations and be paid the cost plus ten percent. Defendant began work on the project in September 1988 and soon thereafter discovered that there was only approximately $12,000 in the plaintiff's construction loan account and that the bank was "not going to give [plaintiff] that." It was also discovered that the bank had in July 1988 authorized foreclosure proceedings on the property because of the delinquent status of the construction loan. Defendant soon thereafter terminated work on the renovations and invoiced the plaintiff in the amount of $110,000, for which it has received no payment.

The jury found for the defendant on the plaintiff's complaint. On the counterclaim, the jury found that Ashford and Harrison had misrepresented to the defendant that sufficient funds were available in the construction loan account to complete the renovations. The jury also awarded the defendant damages in the sum of $74,245 which was trebled by the trial court after it concluded that the acts of the plaintiff constituted an unfair and deceptive act or practice. The final judgment of the trial court in the amount of $222,735 was entered against the plaintiff, Ashford, and Harrison based on the following conclusion:

> 3. Based upon the findings by the jury, Samuel B. Ashford and Ferd L. Harrison, general partners of Plaintiff, are personally liable for the damages awarded in this action, and therefore, Samuel B. Ashford and Ferd L. Harrison are hereby held personally liable, jointly and severally with each other and with Post & Front Properties, Ltd. for the damages awarded to Defendant herein, and this Judgment shall be entered as a matter of record against both Samuel B. Ashford and Ferd L. Harrison, as well as Post & Front Properties, Ltd.

After the entry of the judgment, the plaintiff moved for a judgment notwithstanding the verdict, which motion was denied.

The issues presented are whether (I) the record reveals substantial evidence of plaintiff's fraudulent conduct; and (II) the record supports the entry of a judgment against Harrison individually.

I

PLAINTIFF'S APPEAL

[1] Plaintiff argues that there was insufficient evidence to establish the necessary elements of fraud, and therefore, the trial court should

have granted plaintiff's judgment notwithstanding the verdict. We disagree.

A motion for judgment notwithstanding the verdict (JNOV motion) is a renewal of a directed verdict motion, *see Ace, Inc. v. Maynard*, 108 N.C. App. 241, 245, 423 S.E.2d 504, 507 (1992), *disc. rev. denied*, 333 N.C. 574, 429 S.E.2d 567 (1993), which purpose is to "test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for the [party seeking relief]." *Douglas*, 95 N.C. App. at 511, 383 S.E.2d at 426. To survive plaintiff's JNOV motion, the evidence, considered in the light most favorable to the defendant, giving defendant the benefit of all reasonable inferences, must be substantial. *Id.* That is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hines v. Arnold*, 103 N.C. App. 31, 34, 404 S.E.2d 179, 181-82 (1991); *see also Ace*, 108 N.C. App. at 245, 423 S.E.2d at 507 (applying this standard to motions for judgment notwithstanding the verdict).

The elements of fraud are:

> (1) that the defendant made a false representation as to an existing or past fact which was material to the transaction involved; (2) that defendant either knew the representation was false when it was made or made it recklessly without knowing whether it was true or not; (3) the representation was made with the intention that plaintiff should rely on it; (4) plaintiff did reasonably rely upon it; and (5) was damaged thereby.

Douglas, 95 N.C. App. at 511-12, 383 S.E.2d at 426 (quoting *Harbach v. Lain and Keonig, Inc.*, 73 N.C. App. 374, 379-80, 326 S.E.2d 115, 118-19, *disc. rev. denied*, 313 N.C. 600, 332 S.E.2d 179 (1985)).

In the light most favorable to the defendant, there is substantial evidence in this record that the representation Ashford made to the defendant regarding the monies available in a construction loan account was a knowingly false representation of a material fact, made with the intention that defendant would rely on the representation, that defendant did in fact rely on it and was damaged as a consequence of such reliance. In so holding we reject the arguments of the plaintiff that the representation was not of a material fact, not relied upon by the defendant and that defendant in no event suffered any damages from reliance on the representations. A reasonable juror could conclude from the evidence that the defendant inquired about the availability of the construction loan funds because it wanted to

insure that there was sufficient money available to pay for the repairs and that it entered into the contract only after receiving such assurance. This conclusion supports a determination that the representation was material and relied upon. As for the damages, the evidence is that defendant, after receiving assurance from the plaintiff that construction funds were available, performed work on the property with a value of $110,000 and has not been paid.

Having found that defendant introduced substantial evidence of fraud, justifying the denial of the plaintiff's JNOV motion, and because proof of fraud constitutes an unfair and deceptive act or practice, we also affirm the trial court's determination that the conduct was an unfair and deceptive act or practice, under Chapter 75 of the North Carolina General Statutes. *La Notte, Inc. v. New Way Gourmet, Inc.*, 83 N.C. App. 480, 485, 350 S.E.2d 889, 892 (1986), *appeal dismissed and cert. denied*, 319 N.C. 459, 354 S.E.2d 888 (1987).

The plaintiff also makes several arguments regarding the issues submitted to the jury and the jury instructions. We do not address these issues because the plaintiff did not raise these issues before the trial court, as it was required to do. N.C.R. App. P. 10(b)(1 & 2). The plaintiff finally enters several assignments of error related to various items of evidence which the trial court admitted into evidence over the objection of the plaintiff. We have reviewed these assignments and the arguments made in support of them and determine that no prejudicial error was made by the trial court in the admission of this evidence.

II

HARRISON'S APPEAL

[2] Harrison argues that because he was not made a party to the defendant's counterclaim or served with a copy of a summons, he cannot be held personally liable for the judgment against the partnership. We agree.

The general rule is that "all partners are jointly and severally liable for the acts and obligations of the partnership." N.C.G.S. § 59-45(a) (Supp. 1993); *see* N.C.G.S. § 59-45(b) (Supp. 1993) (partner in limited liability partnership not liable for some obligations of partnership); *see also* N.C.G.S. § 59-303 (1989) (limited partner liability is limited). Nonetheless, a partner is not personally liable, that is liable beyond the assets of the partnership unless the partner is made a

defendant, in his individual capacity, in the action against the partnership *and* is served with process. N.C.G.S. § 1A-1, Rule 4(j)(7)(b) (1990) (summons and complaint must be served on partner); *Stevens v. Nimocks*, 82 N.C. App. 350, 352, 346 S.E.2d 180, 181 (partner must be served to establish individual liability), *cert. denied*, 318 N.C. 511, 349 S.E.2d 873 (1986), *and reconsideration denied*, 318 N.C. 702, 351 S.E.2d 760 (1987); *Harris v. Maready*, 311 N.C. 536, 541, 319 S.E.2d 912, 916 (1984) ("purpose of a service of summons is to give notice to the party against whom a proceeding is commenced"); *Kane v. Bolin Creek West Assocs.*, 95 N.C. App. 135, 138, 381 S.E.2d 832, 834 (1989) (partners individually liable where named party defendants in their "individual capacity" and served with process); N.C.G.S. § 1-113(1) (1983) (where complaint filed "against defendants jointly indebted upon contract," and service had on less than all named defendants, judgment can be enforced "against the joint property of all and the separate property of the defendants served"); N.C.G.S. § 1-113(4) (1983) (where partner not named as defendant in complaint and judgment remains unsatisfied, plaintiff may seek recovery against unnamed partner "upon proving his joint liability").

In this case, Harrison was not joined as a party in the defendant's counterclaim against the partnership, *see* N.C.G.S. § 1A-1, Rule 13(h) (1990) (permitting joinder of parties in counterclaim), and therefore cannot be held personally liable for the obligations of the partnership. It is not material that he was aware of the filing of the counterclaim against the partnership and that he participated during the trial on behalf of the partnership. *Stevens*, 82 N.C. App. at 352-53, 346 S.E.2d at 181. He had no notice of any intention of the defendant to hold him personally liable.

The defendant also argues that there is a stipulation in the pre-trial order which binds Harrison to the judgment. We disagree. The alleged stipulation was contained in an unsigned pre-trial order and in any event there is no evidence that Harrison consented to its entry. Accordingly, the judgment against Harrison must be reversed.

Plaintiff's Appeal: No error.

Harrison's Appeal: Reversed.

Judges JOHNSON and LEWIS concur.

GREGORY v. CITY OF KINGS MOUNTAIN

[117 N.C. App. 99 (1994)]

JEFFREY D. GREGORY, AND WIFE, SONYA L. GREGORY, AND JEFFREY D. GREGORY, AS GUARDIAN AD LITEM FOR JEFFREY GREGORY AND STEPHANIE GREGORY, MINORS, APPELLANTS v. CITY OF KINGS MOUNTAIN, A MUNICIPAL CORPORATION, AND JIMMY MANEY, APPELLEES

No. 9324SC1290

(Filed 15 November 1994)

1. Municipal Corporations § 412 (NCI4th)— city employee—acts performed in official capacity—sovereign immunity applicable

Where plaintiffs asserted claims against defendant gas superintendent in his official capacity as an employee of defendant city, he was shielded from individual liability by the doctrine of sovereign immunity, and because the allegations in the complaint failed to assert liability for negligence against defendant separate from his official duties, the complaint failed to state a claim against him in his individual capacity.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 661 et seq.

2. Municipal Corporations § 415 (NCI4th)— city's operation of natural gas supply utility—proprietary function—no governmental immunity

Defendant city, in operating a natural gas supply utility, was engaged in a proprietary rather than governmental function and therefore was not immune from liability for any torts which were proximately caused by it in providing this service.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 87 et seq.

State's immunity from tort liability as dependent on governmental or proprietary nature of function. 40 ALR2d 927.

Comment Note.—Municipal immunity from liability for torts. 60 ALR2d 1198.

Appeal by plaintiffs from order entered 8 October 1993 by Judge Howard R. Greeson, Jr. in Cleveland County Superior Court. Heard in the Court of Appeals 14 September 1994.

Weaver, Bennett & Bland, P.A., by Michael David Bland and Bill G. Whittaker, for plaintiffs-appellants.

Corry, Cerwin & Luptak, by Todd R. Cerwin, for defendants-appellees.

JOHNSON, Judge.

On or about 27 January 1984, plaintiffs contracted with Corbett H. Nicholson of Nicholson Heating and Air Conditioning Co. to install a heating system in their home in Kings Mountain, North Carolina. During the following week, Nicholson Heating and Air Conditioning Co. installed a natural gas heating system in plaintiffs' home. Neither Corbett H. Nicholson nor plaintiffs obtained a permit from the City of Kings Mountain Building Standards Department prior to the installment of the heating system. There is no indication that a permit was ever issued.

After completing installation of plaintiffs' system, Mr. Nicholson contacted the gas department for the connection from the city's gas line to plaintiffs' system. The connection was made after working hours. At least three employees of the gas department knew that no permit had been issued, and that Mr. Nicholson had not requested an inspection.

Approximately one week following the installation of the heating system, plaintiffs smelled fumes when the gas furnace was operating. Plaintiffs contacted Mr. Nicholson who advised plaintiffs that it was normal to smell fumes when the furnace was operating.

Plaintiffs continued to smell fumes in their residence between January 1984 and August 1987 and contacted the City of Kings Mountain Gas Department on numerous occasions concerning the fume problem. The City of Kings Mountain through its agents examined the exterior lines and connections outside the home on several occasions during this time and did not locate a gas leak. At no time did the agents of Kings Mountain indicate a need or desire to inspect for gas leaks inside plaintiffs' residence.

In August of 1987, plaintiffs again called the City of Kings Mountain Gas Department and finally as a result of that call, Ricky Putnam, an employee of the Department, was sent to examine the heating system. After inspecting the furnace, Mr. Putnam discovered a gas vent going through an open fireplace, possibly eight inches from the bottom of the fireplace, which allowed the fumes that he smelled to

escape into the house. Mr. Putnam then called his immediate supervisor, John Clemmer.

Mr. Clemmer visited plaintiffs' house in August 1987 with Jimmy Maney, gas superintendent for the City of Kings Mountain. After talking to Mr. Putnam and reinspecting the heating system, Mr. Clemmer and/or Jimmy Maney informed plaintiff, Sonya Gregory, that she needed to get Mr. Nicholson to come out and fix the venting.

Plaintiff, Sonya Gregory, called Corbett Nicholson while Putnam, Clemmer and Maney were present and was informed that Mr. Nicholson would be out right away to take care of the problem. Kings Mountain Gas Department employees, Putnam, Clemmer and Maney left the plaintiffs' residence before the arrival of Mr. Nicholson and conducted no further inspection or follow-ups.

Mr. Nicholson's repair consisted of placing duct tape near the vent to slow the leaks. Neither the Kings Mountain Gas Department, the Kings Mountain Building Standards Department, nor defendant, Jimmy Maney, followed up to determine whether the repairs had been made.

Plaintiffs continued experiencing problems with the system and continued complaining about the gas fumes to the City, and on 11 April 1990 they again contacted the Kings Mountain Gas Department. Upon inspection by Ricky Putnam on 11 April 1990, the Kings Mountain Gas Department discovered that the system was in the same state and condition as in August of 1987.

As a result, Mr. Maney contacted the Kings Mountain Building Standards Department. On 11 April 1990, the Standards Department inspected the system and found numerous serious problems with the system's design and installation. As a result, plaintiffs' property was condemned as being dangerous by reason of fire hazard and/or harmful fumes or smoke.

Plaintiffs claim that defendant, City of Kings Mountain, was negligent in failing to require a permit in January of 1984, failing to provide an inspection upon completion of plaintiffs' heating system, failing to require a permit in August of 1987 on the repairs to plaintiffs' heating system, failing to inspect the repair work while in process and upon completion, and failing to take action before 11 April 1990 to inspect the heating system even after numerous complaints, all in violation of applicable State Building Codes and the North Carolina General Statutes. The specific allegations of negli-

gence on the part of defendant Maney are identical to those of the City of Kings Mountain. Plaintiffs allege they have incurred severe injuries as a result of defendants' failure.

On 9 July 1993, defendants filed an answer and motions to dismiss the complaint on the grounds that: (1) the complaint failed to state a claim against defendants pursuant to Rule 12(b)(6); (2) immunity; and (3) the claim is barred by the applicable statute of limitations.

On 8 October 1993, the trial court entered an order granting defendants' motion to dismiss the complaint on two grounds: (1) that defendants are not susceptible to liability in that defendants were performing governmental functions at all relevant times in the complaint; and (2) that plaintiffs' complaint failed to allege a waiver of immunity through the purchase or acquisition of liability insurance.

From the entry of this order, plaintiffs appeal. Plaintiffs argue that the trial court committed reversible error in granting defendants' motion to dismiss plaintiffs' complaint.

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is proper when the complaint on its face reveals that no law supports plaintiff's claim; when some fact essential to plaintiff's claim is missing; or when some fact disclosed in the complaint necessarily defeats the plaintiff's claim. *Hare v. Butler*, 99 N.C. App. 693, 394 S.E.2d 231, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). The complaint should be liberally construed and the court should not dismiss the complaint unless it appears that plaintiff is not entitled to relief under any facts that could be proven. *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 367 S.E.2d 647, *reh'g denied*, 322 N.C. 486, 370 S.E.2d 227 (1988).

Under the doctrine of governmental immunity or sovereign immunity a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function. *Hare*, 99 N.C. App. 693, 394 S.E.2d 231. An action brought against individual officers in their official capacities is an action against the municipality. *Whitaker v. Clark*, 109 N.C. App. 379, 427 S.E.2d 142, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). As to defendant Jimmy Maney, the complaint does not specify in what capacity he is being sued: i.e., whether he is being sued

individually or solely as an official or in both his individual and official capacities. The complaint fails to designate in what capacity defendant Maney is being sued. Plaintiffs do not indicate in the complaint that defendant is being sued in both his individual and official capacity. The general rule is that plaintiffs usually designate in the caption of the complaint whether defendants are being sued in their official or individual capacities. *Whitaker*, 109 N.C. App. at 383, 427 S.E.2d at 144. Since plaintiffs have made no such distinction, we examine the text of the complaint to determine in what capacity defendant Maney is being sued.

[1] Having reviewed the complaint, we find that plaintiffs have only asserted claims against defendant Maney in his official capacity as an employee of the City of Kings Mountain, rather than as an individual. Therefore, defendant Maney is shielded from individual liability by the doctrine of sovereign immunity.

Moreover, because the allegations in the complaint fail to assert liability for negligence against Mr. Maney separate from his official duties, the complaint fails to state a claim against defendant Maney in his individual capacity. Accordingly, the 12(b)(6) motion to dismiss on behalf of Mr. Maney is affirmed.

[2] Next we consider the issue of governmental or sovereign immunity as to the City of Kings Mountain. Municipalities are usually immune from being sued for tort actions. However, governmental immunity does not apply when the municipality engages in a proprietary function as opposed to engaging in a governmental function. Nevertheless, where a municipality engages in a governmental function, govenmental immunity is applicable, and a city may waive its immunity from civil tort liability by purchasing liability insurance. North Carolina General Statutes § 160A-485 (1987). *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994); *Herndon v. Barrett*, 101 N.C. App. 636, 400 S.E.2d 767 (1991); *See Hickman v. Fuqua*, 108 N.C. App. 80, 422 S.E.2d 449 (1992), *disc. review denied*, 333 N.C. 462, 427 S.E.2d 621 (1993).

"Our Courts have long noted that drawing the line between municipal operations which are proprietary and subject to tort liability versus operations which are governmental and immune from such liability is a difficult task." *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 751, 407 S.E.2d 567, 568, *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991). Supplying natural gas to private customers is a

proprietary function similar to supplying sanitary facilities, water, and electricity. *Smith v. Winston-Salem*; *Thomas v. Winston-Salem*, 247 N.C. 349, 100 S.E.2d 835 (1957); *Faw v. North Wilkesboro*, 253 N.C. 406, 117 S.E.2d 14 (1960); *Dale v. Morganton*, 270 N.C. 567, 155 S.E.2d 136 (1967). These services are included within the services designated as public enterprise by the legislature. North Carolina General Statutes § 160A-311 (4) (Cum. Supp. 1993).

North Carolina cities and towns have increasingly competed with private enterprise for the ownership and operation of public enterprises. North Carolina General Statutes § 160A-311(4) defines public enterprise as including the operation of natural gas supplies. Furthermore, our Court has ruled that when municipalities set rates for public enterprise services, they act in a proprietary role. *Pulliam*, 103 N.C. App. at 753, 407 S.E.2d at 570.

The modern trend is to restrict governmental immunity rather than extend its application. Thus, we hold that the City of Kings Mountain in operating a natural gas supply utility was engaged in a proprietary function and, therefore, was not immune from liability for any torts which are proximately caused by it in providing this service. The trial court in the case *sub judice* erred in concluding that defendant City was engaged in a governmental function while operating a natural gas supply utility. Because we have decided that the City of Kings Mountain was not performing a governmental function in operating a natural gas supply utility, but conducting a proprietary function, we need not address the waiver of immunity issue.

For the reasons stated above the order of the trial court in dismissing the complaint against defendant Maney is affirmed; the order of the trial court in dismissing the complaint against the City of Kings Mountain is reversed and remanded.

Affirmed in part, reversed in part and remanded.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA v. BRIAN JEROME WISE

No. 9326SC1088

(Filed 15 November 1994)

Searches and Seizures § 4 (NCI4th)— search of bottle unlawful—denial of motion to suppress error

An officer who stopped the speeding vehicle in which defendant was a passenger did not have probable cause to open an aspirin bottle which defendant handed him and look inside, and the trial court erred in denying defendant's motion to suppress rock cocaine found in the bottle, since there was no warrant to search the bottle; there was no evidence to support any finding that defendant consented to the search of the bottle; and there was no evidence to support the trial court's conclusion that the officer had probable cause to search the bottle.

Am Jur 2d, Searches and Seizures § 32.

Validity, under Federal Constitution, of warrantless search of motor vehicle—Supreme Court cases. 89 L. Ed. 2d 939.

Judge LEWIS dissenting.

Appeal by defendant from denial of Motion to Suppress entered 12 July 1993 in Mecklenburg County Superior Court by Judge Marcus L. Johnson. Heard in the Court of Appeals 30 August 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Claud R. Whitener, III, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender, Julie Ramseur Lewis, for defendant-appellant.

GREENE, Judge.

Defendant appeals the trial court's denial of his motion to suppress cocaine, after which denial he entered a guilty plea to the charge of possession of cocaine.

At approximately 11:00 p.m. on 19 March 1993, North Carolina Highway Patrolman, T.L. Ashby (Ashby), observed a black Ford Escort traveling north on South Boulevard in Charlotte at approximately sixty-two miles per hour in the forty-five mile per hour zone.

Ashby testified that the Escort increased its speed when he turned his car around to follow, and then made a sharp turn into a residential neighborhood. Ashby followed the Escort, with his blue light and siren on, and the car stopped on a poorly lit stretch of the residential street.

Ashby approached the Escort with his flashlight in hand, and found the driver sitting with both hands on the wheel. Ashby saw the defendant, who was sitting in the passenger seat and wearing a jacket with a front, middle pocket, grab his midsection "between his stomach and his belt line" with both hands. Once he saw the defendant's movement, Ashby drew his gun and had defendant place his hands on the dashboard. Once the defendant had his hands visible to Ashby, Ashby requested the driver's operating license and the car registration. The driver of the car told Ashby that he did not have a license with him and the car was actually owned by the defendant, and defendant handed Ashby the registration.

Ashby had the driver step out of the car and the two spoke "for a few seconds," during which the defendant remained in the car with his hands on the dashboard. After handcuffing the driver, Ashby patted down the defendant, reaching from the driver's side of the car, and felt "a round cylinder object" in the area where defendant had grabbed, but determined that it was not a weapon. Then Ashby walked the driver to his patrol car, placed him in the front seat, and went back to the Escort, approaching on the driver's side. Ashby asked the defendant several questions, to which the defendant gave answers corroborating the driver, and then Ashby asked "what he had grabbed," which prompted the defendant to reach inside his jacket and hand Ashby a white, non-transparent Bayer Aspirin bottle. Ashby shook the bottle and it "rattled lightly," sounding as if it had "BBs in it." Ashby testified that he was suspicious because a Bayer aspirin bottle normally has cotton in it so the rattle would not sound the same. Ashby then opened the bottle, shined his flashlight in it, and looked inside, seeing what he determined was rock cocaine. Ashby then arrested the defendant for possession of rock cocaine.

The dispositive issue is whether Ashby had probable cause to open the aspirin bottle and look inside.

The defendant first argues that Ashby did not lawfully obtain possession of the aspirin bottle. He next argues that even if Ashby did have lawful possession of the bottle, he had no authority to open the

bottle and search its contents. Because we agree with the defendant's second argument we do not address his first argument.

It does not necessarily follow that all searches of property lawfully seized are constitutional. *United States v. Jacobsen*, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 94 (1984). In this case, because there was no warrant to search the bottle, the search can be sustained only if the defendant consented to the search or if the officer had probable cause to search the bottle. *State v. Booker*, 44 N.C. App. 492, 493, 261 S.E.2d 215, 216, *appeal dismissed*, 299 N.C. 332, 265 S.E.2d 398 (1980); *see also United States v. Ross*, 456 U.S. 798, 824, 72 L. Ed. 2d 572, 593 (1982) (a warrantless, separate search of a container must be supported by probable cause). In this case, there is no evidence to support any finding that the defendant consented to the search of the bottle. Indeed the trial court did not make such a finding. Furthermore, the findings do not support the trial court's conclusion that the officer had probable cause to search the bottle. Probable cause requires a reasonable belief, based on the totality of the circumstances that the proposed search will reveal the objects sought, in the place that is searched. *State v. White*, 87 N.C. App. 311, 317, 361 S.E.2d 301, 305 (1987), *aff'd in part, vacated and rev'd on other grounds*, *State v. White*, 322 N.C. 770, 370 S.E.2d 390, *cert. denied*, *White v. North Carolina*, 488 U.S. 958, 102 L. Ed. 2d 387 (1988). The facts in this case support nothing more than a suspicion that the defendant was transporting drugs in the aspirin bottle. The aspirin bottle is a container with a legitimate purpose and entitles the defendant to a reasonable expectation of privacy in it, *see State v. Sapatch*, 108 N.C. App. 321, 325, 423 S.E.2d 510, 513 (1992) (search of closed film canisters prohibited), and the circumstances surrounding this search do not justify invading this right to privacy. We therefore reverse the trial court's denial of the motion to suppress, vacate the judgment and commitment entered on the guilty plea and remand.

Reversed and remanded.

Judge JOHNSON concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent. I do not believe that Trooper Ashby needed probable cause to open the bottle and view its contents. After Troop-

er Ashby asked defendant what he had grabbed, defendant did not say anything, but instead pulled the aspirin bottle out of his jacket pocket and handed it to Trooper Ashby. "[W]hen evidence is delivered to a police officer upon request and without compulsion or coercion, the constitutional provisions prohibiting unreasonable search and seizure are not violated." *State v. Small*, 293 N.C. 646, 656, 239 S.E.2d 429, 436 (1977). In this case, there was no evidence that defendant was compelled or coerced into taking the aspirin bottle out of his jacket and giving it to Trooper Ashby. Although Trooper Ashby's question to defendant may not have amounted to a request that defendant hand over the bottle to Trooper Ashby, defendant voluntarily took out the bottle and handed it to Trooper Ashby. I would conclude that in such a case, there has been no unreasonable search and seizure.

Similarly, I do not believe that Trooper Ashby's acts of shaking the bottle and opening it violated the Fourth Amendment. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 94 (1984). Whether a person who invokes the protection of the Fourth Amendment may claim a "reasonable expectation of privacy" depends on (1) whether by his conduct the person has "exhibited an actual (subjective) expectation of privacy," and (2) whether that subjective expectation of privacy is "one that society is prepared to recognize as reasonable." *State v. Tarantino*, 83 N.C. App. 473, 478, 350 S.E.2d 864, 866-67 (1986) (quoting *Smith v. Maryland*, 442 U.S. 735, 740, 61 L. Ed. 2d 220, 226-27 (1979)), *aff'd*, 322 N.C. 386, 368 S.E.2d 588 (1988), *cert. denied*, 489 U.S. 1010, 103 L. Ed. 2d 180 (1989). By his conduct of voluntarily handing over the bottle to Trooper Ashby and saying nothing during the encounter, defendant did not exhibit an actual expectation of privacy in the bottle's not being examined by Trooper Ashby. Thus, there was no "search" within the meaning of the Fourth Amendment. Accordingly, I would affirm the trial court's denial of defendant's motion to suppress.

Furthermore, I believe that Trooper Ashby did have probable cause to open the bottle and examine its contents. The pertinent facts and circumstances are these: The car in which defendant was a passenger attempted to evade Trooper Ashby; defendant grabbed at his midsection when Trooper Ashby approached the car; when asked what he grabbed, defendant handed the bottle to Trooper Ashby; Trooper Ashby was aware that such a bottle was a common means of transporting controlled substances; Trooper Ashby noticed that the label of the Bayer Aspirin bottle was partially torn off; and upon shak-

ing the bottle, Trooper Ashby heard a rattling sound, "as though there were BB's in it."

In *State v. Greenwood*, 301 N.C. 705, 273 S.E.2d 438 (1981), our Supreme Court held that the smell of marijuana gave a police officer probable cause to search an automobile for the contraband. I believe that Trooper Ashby's sense of sound, i.e., hearing what sounded like BB's in an aspirin bottle, considered with the other facts and circumstances set out above, provided probable cause to believe that the bottle contained contraband. Accordingly, I would affirm the trial court's denial of defendant's motion to suppress.

STATE OF NORTH CAROLINA v. SHAWN KYLE WOODING

No. 9418SC44

(Filed 15 November 1994)

Searches and Seizures § 14 (NCI4th)— officer looking through curtains on porch—unlawful search—consent to search tainted—evidence properly excluded

In entering defendant's back porch, leaning over a couch, and looking through a crack in drawn curtains, a police officer violated defendant's right against unreasonable searches and seizures; furthermore, evidence seized from defendant's apartment must be excluded from evidence as the fruit of an illegal search, since defendant's consent to search was given after his unlawful arrest and was tainted by the officer's unlawful search.

Am Jur 2d, Searches and Seizures §§ 36, 37.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest. 89 ALR2d 715.

Validity of consent to search given by one in custody of officers. 9 ALR3d 858.

Comment Note.—"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search. 43 ALR3d 385.

Appeal by State from order entered 10 June 1993 in Guilford County Superior Court by Judge W. Steve Allen. Heard in the Court of Appeals 19 October 1994.

Attorney General Michael F. Easley, by Associate Attorney General Michael S. Fox, for State-appellant.

Law Offices of R. Steve Bowden & Associates, by Bruce A. Lee, for defendant-appellee.

GREENE, Judge.

The State, pursuant to N.C. Gen. Stat. § 15A-979(c), appeals from the trial court's pre-trial order granting defendant's motion to suppress evidence.

The evidence shows that on 22 August 1992, police officer D. N. Pleasants (Pleasants) received two police radio communications. The first radio communication was that a witness at the Southern Lights Restaurant in Greensboro had observed a black man in his 20's, stocky build and wearing a baseball cap, exit a 1980's gray Monte Carlo automobile and hide behind a dumpster near the restaurant. The witness indicated he thought the man lived in one of the apartments located at 109 North Cedar Street. While investigating the suspicious person call at the Southern Lights Restaurant, Pleasants received a second radio communication that there had been a robbery at the Equinox Restaurant in Greensboro. The description of the suspect at the Equinox Restaurant matched the description of the suspicious person at the Southern Lights Restaurant. In response to these broadcasts, Pleasants went to 109 North Cedar Street.

When Pleasants arrived at 109 North Cedar Street, he noticed a gray Monte Carlo parked in front of a building containing four apartments, two at ground level and two upstairs. Before exiting his police vehicle he saw, through an open window in the side of one of the downstairs apartments, a black male matching the earlier descriptions. After exiting the vehicle, he saw this same person, through the same open window, walking around in the apartment and "heard a lot of noise which appeared to [him] to be coins hitting metal." Pleasants testified that the noise was "definitely change being counted, or sifted through." Because his "suspicion" was aroused, Pleasants moved his patrol car to a more secluded area and radioed for another officer to bring the witness from the Equinox Restaurant to the apartment building.

Pleasants then went into the back yard of the apartment building and went onto the back porch of the apartment in which he had earlier observed the black male. To obtain entrance onto this back porch

he walked up a set of stairs, which is shared by the other lower level apartment and walked around a partition which separates the porches of the two lower level apartments. The back porch to the apartment in which the black male had been seen has one window, with a fan in the lower portion of the window and drawn curtains on the top portion of the window. There is also a door leading to the back porch. On 22 August 1992 there was a couch sitting in front of the door and beneath the window. There were also other miscellaneous items, for instance a bicycle, sitting on the porch.

Once on the porch, Pleasants leaned over the couch, getting "pretty close" to the window, and looked into the apartment through a three to four inch opening in the window curtains. Pleasants saw two black males sitting on the floor in the hallway counting money. Pleasants radioed the officer, who was waiting out front in a police vehicle with the witness from the Equinox Restaurant, and informed the officer what he had seen through the window. The witness heard this communication and was therefore made aware of what Pleasants had observed in the apartment. Pleasants also instructed the other several officers present at the apartment to secure the premises. Shortly thereafter, the defendant came out onto the front porch, was stopped by the officers, pursuant to Pleasants radio request, arrested for "suspicion of armed robbery," and placed in the patrol car. After the police knocked on the door of the apartment, the other person came outside. The witness identified the second person to come out of the apartment as the robber. Both men consented to a search of the apartment and the defendant's brother, whose name was on the lease, signed a written consent to search the apartment. Upon searching the premises, the police seized several items of evidence, including a handgun and some money.

The issues are (I) whether Pleasants' action in entering the back porch and looking through the window was an unlawful search under the Fourth Amendment of the United States Constitution or Article I, Section 20 of the North Carolina Constitution; and (II) if so, whether the items seized in a subsequent search of the apartment were seized as the consequence of an independent source, untainted by Pleasants' search.

I

Defendant argues that Pleasants, in looking into the back window of his apartment, conducted an unlawful search of the apartment. We agree.

Whenever a "person exhibits a subjective expectation of privacy in the object of the challenged search, and that expectation is one which society is prepared to recognize as reasonable," the Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution apply. *State v. Tarantino*, 322 N.C. 386, 390, 368 S.E.2d 588, 591 (1988), *cert. denied*, 489 U.S. 1010, 103 L. Ed. 2d 180 (1989); *see State v. Carter*, 322 N.C. 709, 712-13, 370 S.E.2d 553, 555 (1988). In this case, the defendant had a subjective expectation of privacy in the hallway of his apartment and this expectation was reasonable. There was a couch blocking the back door of the apartment and a fan and drawn curtain covering the back window. The back door and window adjoined a private porch. The police officer was able to see into the hallway of the apartment only after walking onto the porch, leaning over the couch and looking through the window. The fact that there was a three to four inch opening in the drawn curtains is "not the kind of exposure which serves to eliminate a reasonable expectation of privacy. To hold otherwise would result in an unfairly exacting standard." *Tarantino*, 322 N.C. at 390, 368 S.E.2d at 591 (Fourth Amendment applies even though barn had small cracks between boards in back wall); *see also California v. Ciraolo*, 476 U.S. 207, 213, 90 L. Ed. 2d 210, 216 (nexus between the outer area and the home, as well as measures taken to ensure privacy are factors in determining defendant's reasonable expectation of privacy), *reh'g denied*, 478 U.S. 1014, 92 L. Ed. 2d 728 (1986).

II

Because we have determined that the search was violative of the defendant's right against unreasonable searches and seizures, the evidence seized must be excluded from evidence, *Murray v. United States*, 487 U.S. 533, 536-37, 101 L. Ed. 2d 472, 480 (1988); *Carter*, 322 N.C. at 716, 370 S.E.2d at 557, unless it would nonetheless have been obtained "independently from lawful activities untainted by the initial illegality." *State v. Wallace*, 111 N.C. App. 581, 589, 433 S.E.2d 238, 243, *cert. denied*, 335 N.C. 242, 439 S.E.2d 161 (1993); *see also State v. Garner*, 331 N.C. 491, 502, 417 S.E.2d 502, 508 (1992) (discussing the inevitable discovery exception to the exclusionary rule).

The State argues that the search of the apartment occurred as a result of a consent to search given after the witness identified one of the persons in the apartment as the robber and is therefore independent of any illegality on the part of officer Pleasants. We disagree.

The defendant was the first person to leave the apartment and he was immediately arrested as a result of the request made by Pleasants after he had looked into the rear window. He was not arrested as a result of the identification by the eyewitness because she did not identify him at the apartment. She identified the other person in the apartment as the robber and he did not exit the apartment until after the defendant had been arrested. Thus the arrest of the defendant was based entirely on Pleasants' unlawful search and was therefore itself unlawful. *See State v. Joyner*, 301 N.C. 18, 21, 269 S.E.2d 125, 128 (1980). Likewise, the consent to search, given by defendant after his arrest, was tainted by the unlawful search. *See State v. Yananokwiak*, 65 N.C. App. 513, 518, 309 S.E.2d 560, 564 (1983) (defendant's consent after officers stormed his home and placed him under arrest was not independent of the unlawful entry). Furthermore, the identification by the witness of the second person in the apartment was made only after the witness had been made aware that Pleasants had seen, through the back window, two people in the apartment counting money. Thus this identification and subsequent consent to search were also tainted by the unlawful search. Accordingly, the trial court properly excluded the evidence seized from the defendant's apartment and the suppression order is

Affirmed.

Judges WYNN and JOHN concur.

ERVIN JAY GOODMAN, PLAINTIFF v. CARL JOSEPH CONNOR, JR. AND MELISSA A. MCNEILL, DEFENDANTS

No. 9313SC1297

(Filed 15 November 1994)

1. Evidence and Witnesses § 1981 (NCI4th)— affidavits excluded—information cumulative or irrelevant—exclusion proper

The trial court in a personal injury action did not err in excluding affidavits by plaintiff, the investigating officer, and the clerk of court, since plaintiff's affidavit was merely cumulative; the other two affidavits simply stated the offense of which defendant was convicted; and the offense of which defendant was

eventually convicted had no bearing on the issue of plaintiff's contributory negligence at the time of the accident.

Am Jur 2d, Evidence §§ 1324 et seq.

2. Automobiles and Other Vehicles § 651 (NCI4th)— intoxicated driver—contributory negligence of plaintiff in riding with defendant

Evidence in a personal injury action was sufficient to show plaintiff's contributory negligence where it tended to show that plaintiff and defendant were drinking together on the afternoon of the accident; defendant driver's outward appearance clearly indicated that he was appreciably under the influence of some intoxicant; and plaintiff nevertheless choose to ride in the car driven by defendant.

Am Jur 2d, Automobiles and Highway Traffic § 606.

Guest's knowledge that automobile driver has been drinking as precluding recovery, under guest statutes or equivalent common-law rule. 15 ALR2d 1165.

Comment Note.—Contributory negligence, assumption of risk or related defenses as available in action based on automobile guest statute or similar common-law rule. 44 ALR2d 1342.

Appeal by plaintiff from orders entered 30 August and 7 September 1993 by Judge Orlando F. Hudson, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 14 September 1994.

Williamson and Walton, by Benton H. Walton, III, for plaintiff-appellant.

Bailey & Dixon, by Gary S. Parsons and Kenyann G. Brown, for defendants-appellees, and Marshall, Williams, & Gorham, by William Robert Cherry, Jr., for State Farm Mutual Automobile Insurance Company, appearing in the name of defendants-appellees.

LEWIS, Judge.

On 18 February 1992, plaintiff was injured while riding as a passenger in a truck driven by defendant Connor and owned by defendant McNeill. Plaintiff filed this action seeking money damages for his

injuries. The trial court granted summary judgment for defendants on 30 August 1993.

The evidence reveals that plaintiff and defendant had been drinking together on the afternoon of 18 February 1992 when they decided to drive to South Carolina. Plaintiff and defendant disagree as to how much they drank that afternoon. According to plaintiff, they purchased a fifth of bourbon and each had two bourbons and Coke containing one ounce of alcohol each. Defendant, on the other hand, contends that they drank a pint of liquor and then bought a fifth of bourbon and drank it. Plaintiff and defendant then decided to drive to South Carolina to visit two sisters. Defendant lost control when the truck hit water in the road, skidded, and ran into some trees.

On appeal, plaintiff contends genuine issues of material fact exist regarding plaintiff's alleged contributory negligence. Plaintiff also contends the court erred in denying the admission of three affidavits into evidence. We will address the second issue first.

[1] Plaintiff contends the court erred in sustaining defendant's objection to three affidavits submitted by plaintiff: the affidavits of plaintiff, Trooper Jimmy Ray Williams, and Linda Proctor, the clerk of superior court. The trial court upheld defendant's objections to the affidavits on the basis of untimely service. We find it unnecessary to resolve the issue of whether the affidavits were timely served, because we find that their exclusion was not prejudicial to plaintiff's case. The exclusion of affidavits is not prejudicial if they could have no material bearing on any issues or if they could not alter the rights of the parties or affect the result of the proceedings. *See Ziglar v. E.I. DuPont de Nemours & Co.*, 53 N.C. App. 147, 280 S.E.2d 510, *disc. review denied*, 304 N.C. 393, 285 S.E.2d 838 (1981).

Plaintiff himself concedes in his brief to this Court that his own affidavit was merely cumulative and added nothing to the record. The affidavits of Trooper Williams and Linda Proctor only state that defendant was convicted of careless and reckless driving. We believe that the offense of which defendant was eventually convicted has no bearing on the issue of plaintiff's contributory negligence at the time of the accident. We conclude that the exclusion of the affidavits was not prejudicial.

[2] In his other assignment of error plaintiff contends that there are genuine issues of material fact regarding the allegations of his contributory negligence. In cases involving the issue of the contributory

negligence of a passenger for agreeing to ride in an automobile operated by an intoxicated person, the elements to be proved are: "(1) the driver was under the influence of an intoxicating beverage; (2) the passenger knew or should have known that the driver was under the influence . . .; and (3) the passenger voluntarily rode with the driver even though the passenger knew or should have known that the driver was under the influence." *Watkins v. Hellings*, 321 N.C. 78, 80, 361 S.E.2d 568, 569 (1987). Plaintiff argues that the question of his contributory negligence should have gone to the jury, because factual issues exist as to the condition of defendant Connor at the time of the accident and whether or not plaintiff knew or should have known of Connor's condition.

On a motion for summary judgment we must view the evidence in the light most favorable to the nonmovant. *Marlowe v. Clark*, 112 N.C. App. 181, 435 S.E.2d 354 (1993).

> [O]nce the defending party forecasts evidence which will be available to him at trial and which tends to establish his right to judgment as a matter of law, the claimant must present a forecast of the evidence which will be available for presentation at trial and which will tend to support his claim for relief.

Best v. Perry, 41 N.C. App. 107, 110, 254 S.E.2d 281, 284 (1979). The claimant's evidence must "do more than raise a suspicion, conjecture, guess, possibility or chance; it must reasonably tend to prove the fact in issue, or reasonably conduce to its conclusion as a fairly logical and legitimate deduction." *Dendy v. Watkins*, 288 N.C. 447, 455, 219 S.E.2d 214, 219 (1975) (citation omitted).

In support of his motion, defendant presented the affidavits of the State Trooper who arrived at the scene of the accident, Jimmy Ray Williams, and a certified toxicological chemist, Dr. Arthur J. McBay. Trooper Williams stated that he "believed immediately" that defendant was drinking and noticed an "obvious" odor of alcohol on defendant's person. He stated that defendant's eyes were red and glassy and his speech was slurred and mumbled. Trooper Williams concluded that "[b]ased on his observation of [defendant] at the accident scene, it was obvious to him that [defendant] was under the influence of alcohol at the time of the accident."

Four hours after the accident, Connor's breathalyzer test registered between .10 and .11. Dr. McBay stated that Connor's blood-alcohol concentration at the time of the accident would have been

between .16 and .17. Based on his experience and expertise, Dr. McBay concluded that "even if [defendant] had been an experienced drinker, with a blood alcohol concentration of 0.16 and 0.17, he would have obviously appeared to be under the influence of alcohol to anyone who observed him." *Cf. Kinney v. Baker*, 82 N.C. App. 126, 130-31, 345 S.E.2d 441, 444 (mere evidence of driver's blood-alcohol level does not establish passenger's knowledge of intoxication), *cert. denied*, 318 N.C. 416, 349 S.E.2d 597 (1986). In addition to evidence of defendant's blood-alcohol level, a toxicological chemist testified that defendant would have appeared drunk to anyone who observed him at the time of the accident and a trooper testified that he did appear intoxicated.

We find that plaintiff has failed to come forward with evidence to support his claim. Plaintiff's own version of the facts clearly shows his contributory negligence. According to plaintiff, he met defendant about 4:30 or 5:00 on the afternoon of 18 February. Neither had had anything to drink before they met that day. They went to the liquor store, purchased a fifth of bourbon, and drove to defendant's house. While at defendant's house they had two drinks each of bourbon and coke; each drink contained about one ounce of liquor. Both plaintiff and defendant had the same amount to drink. After these two drinks, plaintiff and defendant started their drive to South Carolina. In his deposition, plaintiff stated that he was mildly intoxicated when they left for South Carolina. Plaintiff testified that neither he nor defendant had eaten since lunch that day and that he weighed more than defendant.

Plaintiff has not disputed or contradicted either the testimony of Trooper Williams or of Dr. McBay regarding defendant's condition at the time of the accident. *Cf. Kinney*, 82 N.C. App. at 130, 345 S.E.2d at 443-44 (directed verdict inappropriate where contradictory evidence over whether odor of alcohol or appearance of intoxication at time of accident). Plaintiff has come forward with no evidence or testimony indicating that defendant was not intoxicated at the time of the accident. Plaintiff merely argues in his brief that they had consumed an insufficient amount of alcohol to be intoxicated. This contention does not refute the clear evidence of intoxication from Trooper Williams and Dr. McBay. We conclude, therefore, that there is no genuine issue of material fact as to defendant's condition.

We find that the evidence also shows that plaintiff knew or should have known of defendant's condition. Defendant's outward appear-

ance, as described by Trooper Williams, clearly indicated that he was appreciably under the influence of some intoxicant. We note, again, that plaintiff has not contradicted this evidence. Regardless of how much alcohol plaintiff and defendant actually drank, the evidence shows obvious intoxication of the defendant at the scene.

We find no genuine issues of material fact as to plaintiff's contributory negligence, and no prejudicial error in the exclusion of plaintiff's affidavits. We therefore affirm summary judgment in favor of defendant.

Affirmed.

Judges JOHNSON and GREENE concur.

IN THE MATTER OF THE ESTATE OF ROBERT OWENS, DECEASED

No. 9417SC171

(Filed 15 November 1994)

Limitations, Repose, and Laches § 119 (NCI4th)— dissent from will—six-month statute of limitation tolled by wife's disability

N.C.G.S. § 1-17 worked to toll the six-month statute of limitations period provided by N.C.G.S. § 30-2 for an incompetent wife to dissent from her husband's will.

Am Jur 2d, Limitation of Actions §§ 182 et seq.

Appeal by respondents from order entered 14 December 1993 by Judge James A. Beaty, Jr., in Stokes County Superior Court. Heard in the Court of Appeals 5 October 1994.

Robert Owens died testate on 4 May 1992, survived by his wife, Verlie J. Owens. Robert Owens' Last Will and Testament made no provision for his wife, except for the following:

ARTICLE IV

If my wife, VERLIE JESSUP OWENS, should survive me, I direct that my Executrices hereinafter named make provision from the assets of my estate for her funeral expenses, and I direct that they erect a suitable monument at her gravesite. I have made no pro-

vision for my wife by reason of the fact that she is now an Alzheimers disease patient at a nursing home facility, and I am confident that my half-sisters, MARGARET RUTH OWENS WRIGHT and FLORENCE OWENS ALLEY, will provide for her modest needs during the continuance of her life.

The will was probated in Stokes County on 19 May 1992 and letters testamentary were issued to Margaret Ruth Owens Wright and Florence Owens Alley as co-executrices of the estate.

A final account was filed on 14 June 1993, and the co-executrices were discharged. The final account shows the total assets of the estate amounted to $209,021.16 and that disbursements were $38,835.20, leaving a balance for distribution to the beneficiaries of the estate of $170,185.96.

Subsequent to the filing of the final account, a general guardian was appointed for Verlie Owens. On 6 October 1993, Mrs. Owens' guardian filed a dissent from the will of Robert Owens and petitioned that the estate be reopened. On 22 October 1993, the co-executrices of the estate filed a response admitting that Verlie Owens was incompetent throughout the administration of the estate, but asserting the provisions of G.S. § 30-2(b) as a bar to her right to dissent from her husband's will. After a hearing, the Clerk of Superior Court entered an order ruling that the dissent to the will of Robert Owens by the guardian of Verlie Owens was timely filed and that Verlie Owens was entitled to dissent.

The co-executrices appealed to the Superior Court. The Superior Court affirmed the order of the clerk and ordered that the estate be re-opened. Respondent co-executrices gave notice of appeal.

Gardner, Gardner and Johnson, by John C. W. Gardner, for respondent-appellants.

Stover, Cromer & Bennett, by Michael R. Bennett, for petitioner-appellee.

MARTIN, Judge.

Respondent co-executrices argue on appeal that Verlie Owens had, pursuant to G.S. § 30-2, six months from the date letters testamentary were issued to them to dissent from the will, regardless of her competency to do so, and that her attempt to dissent almost seventeen months after the will entered probate should have been denied

according to the express wording of the statute. We disagree and affirm the order of the trial court.

G.S. § 30-2 reads in pertinent part:

30-2. Time and manner of dissent.

(a) Any person entitled under the provisions of G.S. 30-1 to dissent from the will of his or her deceased spouse, may do so by filing such dissent with the clerk of the superior court of the county in which the will is probated, at any time within six months after the issuance of letters testamentary or of administration with the will annexed, or if litigation that affects the share of the surviving spouse is pending at the expiration of the time allowed for filing the dissent, then within such reasonable time as may be allowed by written order of the clerk of the superior court.

(b) The dissent shall be in writing signed and acknowledged by the surviving spouse or his or her duly authorized attorney; provided, however, if the surviving spouse is a minor or an incompetent, the dissent may be executed and filed by the general guardian, or by the guardian of the person or estate of the minor or incompetent spouse. If the minor or incompetent spouse has no guardian, the dissent may be executed and filed by a next friend appointed by the clerk of the superior court of the county in which the will is probated.

. . .

(d) If no dissent is filed in the manner and within the time provided for in subsections (a), (b) and (c) of this section the surviving spouse shall be deemed to have waived his or her right to dissent.

The statute is clear that a surviving spouse has six months from the issuance of letters testamentary or of administration to dissent, and upon failing to dissent within the statutory period, the spouse is deemed to have waived that right. "The six month period which is delineated by G.S. 30-2 is . . . a statute of limitations which serves to cut off the time in which a spouse may resort to the courts to enforce it." *Taylor v. Taylor*, 301 N.C. 357, 364, 271 S.E.2d 506, 511 (1980).

However, G.S. § 1-17 provides that "[a] person entitled to commence an action who is at the time the cause of action accrued either . . . (3) [i]ncompetent as defined in G.S. 35A-1101(7) or (8) may bring

his action within the time herein limited, after the disability is removed." N.C. Gen. Stat. § 1-17. Where a guardian is appointed, the limitations period begins to run from the time of the appointment. *Jefferys v. Tolin*, 90 N.C. App. 233, 368 S.E.2d 201 (1988). G.S. § 35A-1101(7) provides:

> "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family, or property whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

Respondents acknowledge, and the clerk found, that Verlie Owens was incompetent and without a guardian at all times during the administration of her husband's estate. Thus, it is clear that all statutes of limitations for civil actions under Chapter 1 of the General Statutes applicable to her were tolled by G.S. § 1-17 until the removal of her disability or the appointment of a guardian. The sole remaining question is whether the six-month period of limitation of G.S. § 30-2 for dissenting from a will in probate is a statute of limitations which can be tolled by G.S. § 1-17 for a disability.

Petitioner argues that G.S. § 1-17 is not applicable to G.S. § 30-2 because G.S. § 30-2 is a "special case" with a different limitation prescribed by a statute other than Chapter 1 of the General Statutes. *See* N.C. Gen. Stat. § 1-15(a). However, we have previously held that "[t]he applicability of G.S. 1-17 is not limited to the statutes of limitation found in Chapter 1 of the North Carolina General Statutes." *Jefferys*, 90 N.C. App. at 235, 368 S.E.2d at 202. In *Jefferys*, we held G.S. § 1-17 applicable to toll the operation of G.S. § 29-19(b), which imposes a six-month period of limitation for giving written notice to a putative father's personal representative when an illegitimate child is attempting to take from the father's estate through intestate succession.

Moreover, in *Whitted v. Wade*, 247 N.C. 81, 100 S.E.2d 263 (1957), our Supreme Court addressed this precise question under an earlier statute and held that G.S. § 1-17 worked to toll the six-month statute of limitations period provided by former G.S. § 30-1 for an incompetent wife to dissent from her husband's will. The earlier statute provided as follows:

> 30-1. **Time and manner of dissent.** Every widow may dissent from her husband's will before the clerk of the superior court of

> the county in which such will is proved, at any time within six months after the probate . . . If the widow be an infant, or insane, she may dissent by her guardian.

N.C. Gen. Stat. § 30-1 (1957) (amended 1959). The Supreme Court succinctly held, "[s]ince, therefore, G.S. 30-1 is a statute of limitation, G.S. 1-17 applies to this case." *Id.* at 84, 100 S.E.2d at 266. The six-month limitation period was deemed tolled for a mentally incompetent wife attempting to dissent upon the appointment of a guardian four years after the will entered probate. *Accord: Trust Co. v. Willis*, 257 N.C. 59, 125 S.E.2d 359 (1962).

In 1959, the North Carolina General Assembly revised the statutes governing dissents from wills. 1959 N.C. Sess. Laws Ch. 880. Former G.S. § 30-1 was divided into two separate statutes: G.S. § 30-1 providing for the right of a surviving spouse to dissent from the will of his or her deceased spouse, and G.S. § 30-2 providing for the time and manner of dissent. Nothing in the revision, however, indicates any intent by the legislature to invalidate the application of G.S. § 1-17 to toll the statute of limitations for dissent now found in G.S. § 30-2. We must presume that when it enacted G.S. § 30-2, the legislature acted with full knowledge of the law set forth in *Whitted. Wilder v. Amatex Corp.*, 314 N.C. 550, 336 S.E.2d 66 (1985); *Reavis v. Ecological Development, Inc.*, 53 N.C. App. 496, 281 S.E.2d 78 (1981).

Affirmed.

Judges JOHNSON and THOMPSON concur.

STATE OF NORTH CAROLINA v. STEVEN WAYNE SHEDD

No. 9327SC1204

(Filed 15 November 1994)

1. Constitutional Law § 169 (NCI4th)— alleged failure to comply with discovery—dismissal of charges—State's appeal—no double jeopardy

The State's appeal from the trial court's dismissal of first-degree murder charges against defendant due to the State's alleged failure to comply with discovery rules did not violate defendant's double jeopardy rights because the dismissal was

based on grounds unrelated to defendant's factual guilt or innocence.

Am Jur 2d, Criminal Law §§ 258 et seq.

Supreme Court's views as to application, in state criminal prosecutions, of double jeopardy clause of Federal Constitution's Fifth Amendment. 95 L. Ed. 2d 924.

2. Criminal Law § 106 (NCI4th)— no failure to comply with discovery—dismissal abuse of trial court's discretion

The trial court erred in dismissing first-degree murder charges against defendant due to the State's alleged failure to comply with discovery rules where (1) the State's failure to provide information concerning a police officer's log entry, which may have been relevant to an eyewitness's credibility, was disclosed at trial, and (2) there was no "statement" by an eyewitness within the meaning of N.C.G.S. § 15A-903 which the State failed to give to the defense, as the witness did not sign, adopt, or otherwise approve of any statement allegedly made by her on the night of the murder.

Dismissal of state court action for failure or refusal of plaintiff to obey request or order for production of documents or other objects. 27 ALR4th 61.

Appeal by the State from order entered 25 August 1993 by Judge Beverly T. Beal in Gaston County Superior Court. Heard in the Court of Appeals 27 September 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Mary Jill Ledford, for the State.

Steven B. Dolley, Jr. for defendant-appellee.

LEWIS, Judge.

[1] The trial court dismissed first-degree murder charges against defendant due to the State's alleged failure to comply with discovery rules. The State now appeals. This appeal does not violate defendant's double jeopardy rights, because the dismissal was based on grounds unrelated to defendant's factual guilt or innocence. *State v. Priddy*, 115 N.C. App. 547, 445 S.E.2d 610 (1994); *United States v. Scott*, 437 U.S. 82, 100, 57 L. Ed. 2d 65, 80 (1978). A recitation of the facts of this case is not necessary to our disposition of this appeal.

The trial court's order of dismissal was based on two findings: first, that the State failed to produce for the defendant evidence of an officer's log entry which indicated that a "key witness," Gayle Swanger, was too intoxicated to give a statement on the night in question, and second, that the State violated discovery rules by failing to provide to the defense a statement allegedly made by the same witness, Gayle Swanger.

[2] N.C.G.S. § 15A-910 (1988) provides a trial court with alternative sanctions to impose when a party fails to comply with discovery rules. The court may:

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

§ 15A-910. A trial court's imposition of discovery sanctions is within the court's sound discretion and will not be reversed absent a showing of abuse of discretion. *State v. Pigott*, 320 N.C. 96, 357 S.E.2d 631 (1987). The choice of sanctions contained in section 15A-910 is also within the discretion of the trial court. *State v. Lopez*, 101 N.C. App. 217, 398 S.E.2d 886 (1990). We find that the court abused its discretion in dismissing a first-degree murder charge with prejudice under the circumstances in the case at hand.

Officer Lowe wrote in his log at 2:09 a.m. on 8 August 1992, the night of the murder, that eyewitness Gayle Swanger was too intoxicated to interview. At trial, Swanger testified as to the events surrounding the death by shotgun blasts of Jimmy Helms that night. The trial court ruled that the log entry was directly relevant to Swanger's credibility, and that the State's failure to provide this information to the defense violated *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). Because the evidence was disclosed at trial, we find no *Brady* violation. *See State v. Abernathy*, 295 N.C. 147, 157, 244 S.E.2d 373, 380 (1978); *State v. Lineberger*, 100 N.C. App. 307, 311, 395 S.E.2d 716, 718, *disc. review denied and appeal dismissed*, 327 N.C. 639, 399 S.E.2d 331 (1990).

The trial court also found that Gayle Swanger had given a statement to Officer Lowe on the night of 8 August 1992 and that this statement was not voluntarily given to the defense, in violation of N.C.G.S. § 15A-903 (1988) and the court's own order. We note that, although the record contains defendant's motion for an order compelling discovery, it does not contain a discovery order from the court. For the purposes of this statute, a "statement" is defined in relevant part as "[a] written statement made by the witness and signed or otherwise adopted or approved by [her]." § 15A-903(f)(5)a.

The only evidence of a statement is the testimony of Gayle Swanger that she made a statement but did not sign it, go back over it, read it or have it read to her. She did not receive a copy of it; she never even saw it. Thus, even if the trial court believed that Swanger gave a statement, there is no evidence that Swanger signed, adopted or otherwise approved of the statement. We find that there was no statement as defined in section 15A-903.

Because there is no evidence that Swanger made a statement as defined in section 15A-903, the trial court was not authorized to impose sanctions for violating that section. *See* § 15A-910. Having found neither a *Brady* violation nor a section 15A discovery violation, we reverse the trial court's order of dismissal.

The final issue before us concerns a motion to dismiss the appeal, or, alternatively, to strike certain portions of the record on appeal. Defendant filed this motion one day prior to oral argument in this Court. In the motion defendant points out that several documents in the record are undated and were not signed by him, thereby violating the appellate procedure rules. N.C.R. App. P. 9(b)(3). He also alleges that the record was not properly settled and points out that several affidavits in the record were filed on 29 November 1993, which is the date on the Certificate of Settlement of the record. Defendant alleges that 29 November 1993 is the same day that the proposed record was served upon defendant. The record was filed in this Court on 30 November 1993.

The unsigned and undated documents, which have no effect on our disposition of the issues on appeal, should be stricken from this record. Although defense counsel contends that the proposed record was served upon defendant on 29 November 1993, the Certificate of Service in the record indicates that the record was served on defendant on 29 October 1993. In its Appellate Entries, the trial court ordered defendant to serve amendments or objections to the pro-

posed record within 15 days after its service upon him. Defendant failed to file any amendments or objections within that period, or within the 21-day period normally permitted by the appellate rules in non-capital cases. N.C.R. App. P. 11(b). Thus, the record was properly settled based on defendant's failure to respond, as indicated by the State in the Certificate of Settlement. We hereby strike the affidavits filed 29 November 1993, the same date as the date of settlement. These affidavits have no effect on our disposition of this appeal.

The order of the trial court is reversed and this case is remanded for further proceedings.

Judges JOHNSON and GREENE concur.

AMOS A. ESTES, EMPLOYEE, PLAINTIFF v. N.C. STATE UNIVERSITY, EMPLOYER; SELF-INSURED, DEFENDANTS

No. 9410IC40

(Filed 15 November 1994)

1. Workers' Compensation § 88 (NCI4th)— opinion awarding interest and costs—entry after commissioner's term expired—opinion void

An opinion and award of interest and costs, including attorney's fees, by the Industrial Commission was void where it was rendered after the term of one commissioner, who was in the majority on a two-to-one vote, had expired.

Am Jur 2d, Workers' Compensation § 55.

2. Workers' Compensation § 477 (NCI4th)— costs including attorney's fees—award on appeals by defendant proper

The Industrial Commission could properly award plaintiff attorney's fees as part of costs under N.C.G.S. § 97-88 on two but not three appeals where two of the appeals were made by defendant, and both the full Commission and the court on appeal affirmed the award of benefits.

Am Jur 2d, Workers' Compensation §§ 722, 725.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission filed 23 August 1993. Heard in the Court of Appeals 28 September 1994.

Gene Collinson Smith for plaintiff-appellee.

Michael F. Easley, Attorney General, by Elisha H. Bunting, Jr., Special Deputy Attorney General, for defendant-appellant.

LEWIS, Judge.

The issue before us is whether the Industrial Commission (hereinafter "the Commission") erred in awarding plaintiff attorney's fees pursuant to N.C.G.S. § 97-88 (1991). We note that this appeal is the third appeal of this case to this Court. A brief restatement of the procedural history of the case is necessary for resolution of the issue before us.

Plaintiff was employed by self-insured defendant and was injured in a work-related accident on 21 September 1984. Pursuant to plaintiff's request, the case was heard by a deputy commissioner, who concluded that defendant was required to pay plaintiff workers' compensation disability benefits. The deputy's opinion and award was affirmed by the full Commission. Thereafter, this Court, in *Estes v. North Carolina State University*, 89 N.C. App. 55, 365 S.E.2d 160 (1988), affirmed the award. The Court, in its discretion, went on to discuss a second issue, not properly raised by defendant. This second issue was defendant's contention that it was entitled to a set-off or credit for certain amounts already paid to plaintiff. The Court remanded the case for a determination of the set-off issue.

On remand, a deputy commissioner concluded that defendant was entitled to a set-off or credit for the amounts already paid to plaintiff, and the full Commission affirmed. Plaintiff appealed to this Court, which reversed the decision of the Commission and remanded for reinstatement of plaintiff's claim for disability benefits. *Estes v. North Carolina State Univ.*, 102 N.C. App. 52, 401 S.E.2d 384 (1991).

Thereafter, on 25 March 1991 plaintiff petitioned the Commission to award him interest and costs, including attorney's fees. The full Commission, by opinion and award filed 23 August 1993, awarded (1) interest, (2) an attorney's fee in the amount of twenty-five percent of the disability benefits, and (3) costs, including attorney's fees of $10,000, under N.C.G.S. § 97-88.

[1] On appeal, defendant argues that the 23 August 1993 opinion and award is void because it was rendered after the term of Commissioner J. Harold Davis had expired. Because the vote was two-to-one, and

Davis was in the majority, defendant contends, the opinion and award was not rendered by a majority of the Commission. We agree.

The Commission acts by a majority of the votes of its qualified members at the time the decision is made. *Gant v. Crouch*, 243 N.C. 604, 607, 91 S.E.2d 705, 707 (1956). Thus, a vote of two members constitutes a majority of the Commission empowered to act for the three-member Commission. *Id.* In the present case, the Commission consisted of Chairman James J. Booker, J. Harold Davis, and J. Randolph Ward. The opinion and award was signed by Chairman Booker on 4 August 1993 and was filed 23 August. Davis concurred and Ward dissented. However, Davis' term had expired 30 April 1993. Davis attached an affidavit to the opinion and award which stated that his decision had been made as of the date the Commission heard oral argument of the case, 30 September 1992, and that his decision had not changed in the interim. We cannot agree with plaintiff that Davis' vote on 30 September was a final, binding vote. The votes made after oral argument were merely preliminary votes. To say that these preliminary votes could bind the Commission would be to render meaningless the opinion and award signed and filed by the commissioners. In fact, the record in this case indicates that the Commission was still undecided about the issue of attorney's fees as late as 30 June 1993, as evidenced by a letter from Chairman Booker requesting further legal arguments from the parties on the issue. Accordingly, we hold that because Davis' term had expired at the time he signed the August 1993 opinion and award, the opinion and award is void and must be vacated.

[2] Defendant also contends that the Commission exceeded its authority and abused its discretion in awarding attorney's fees as part of costs under N.C.G.S. § 97-88. Under section 97-88, the Commission may award attorney's fees to an injured employee if (1) the insurer has appealed a decision to the full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee. § 97-88; *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 399, 298 S.E.2d 681, 685 (1983). Whether to make such an award is in the discretion of the Commission, as is the question of a reasonable attorney's fee. § 97-88; *Taylor*, 307 N.C. at 397, 298 S.E.2d at 685.

In the case at hand, defendant appealed the initial award of benefits from the deputy commissioner to the full Commission and then to this Court. Both the full Commission and this Court affirmed the award of benefits. Thus, the requirements of section 97-88 are satis-

fied, and the Commission may award plaintiff the costs, including attorney's fees, of defending those appeals to the full Commission and to this Court.

As to the second set of appeals, it was plaintiff, and not defendant, who appealed. Therefore, plaintiff is not entitled to costs, including attorney's fees, under section 97-88. However, the Commission may award plaintiff the costs, including attorney's fees, for the current appeal, as it was defendant who appealed to this Court, and we have held that the Commission could have properly awarded attorney's fees for the first set of appeals. *See Poplin v. PPG Indus.*, 108 N.C. App. 55, 57-58, 422 S.E.2d 353, 355 (1992).

For the reasons stated, the opinion and award of the Industrial Commission is vacated and the case is remanded to the Industrial Commission for consideration of the question of attorney's fees.

Vacated and remanded.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA, O/B/O JULIE GILBERT RAINES v. RUSSELL PAUL GILBERT

No. 9411DC241

(Filed 15 November 1994)

Adoption or Placement for Adoption § 2 (NCI4th)— child support arrearages forgiven in exchange for adopting child—agreement contrary to public policy—no estoppel to collect arrearages

A mother cannot be equitably estopped to collect child support arrearages due pursuant to a child support order on the basis that she agreed to forgive those arrearages in exchange for the obligor father's consent to allow the mother's husband to adopt the child who was the subject of the support order, since such arrangement involves the giving and receiving of consideration for the placement of the child for adoption, and the agreement is thus void as being contrary to the public policy of North Carolina. N.C.G.S. § 48-37.

Am Jur 2d, Adoption § 14.

Appeal by State from order entered 26 October 1993 in Harnett County District Court by Judge Frank Lanier. Heard in the Court of Appeals 21 October 1994.

Attorney General Michael F. Easley, by Assistant Attorney General T. Byron Smith, for the State.

Rosemary Godwin for respondent-appellee.

GREENE, Judge.

The State of North Carolina (Petitioner), on behalf of Julie Gilbert Raines (the Mother), appeals the trial court's order concluding that the Mother is equitably estopped from collecting the full amount of child support arrearages due from Russell Paul Gilbert (the Father).

The evidence shows that the Mother and the Father were married in Alabama on 28 May 1987, after which the Father signed papers claiming paternity and legitimating the Mother's daughter, Devin Nichole Gilbert (the child), who was born on 23 February 1987. The Mother and the Father divorced in Alabama on 27 March 1990, whereby the Mother was granted custody of the child and the Father was ordered, by the Alabama courts, to pay child support in the amount of $228 per month. The Father made some child support payments in the beginning, but has made no child support payments since June of 1991.

The Father has been living in North Carolina since 1992, while the Mother and the child continue to live in Alabama. On 21 April 1993 a Uniform Reciprocal Enforcement of Support Act (URESA) petition was filed in Harnett County seeking past due child support payments, in the amount of $5,143.73 plus interest of $638.77 (amended at trial to $7,423.74), pursuant to the Alabama order. Sometime after that petition was filed, but before the hearing on the matter, the Father went to Alabama to discuss the possibility of settlement with the Mother. The parties agreed that the Mother would drop the child support arrearage action and accept $2,000, in lieu of the total amount, in exchange for the Father's consent to the child's adoption by the Mother's new husband. The Father signed the necessary consent forms, and the child was adopted by the Mother's new husband on 16 August 1993. The hearing on the child support arrearages was held in the Harnett County District Court on 26 October 1993, and the trial court concluded that the Mother was equitably estopped from collecting

any more than $2,000 from Respondent based on their previous agreement and that the agreement was not void as against public policy.

The issue on appeal is whether a mother can be equitably estopped to collect child support arrearages due pursuant to a child support order on the basis that she agreed to forgive those arrearages in exchange for the obligor father's consent to allow the mother's husband to adopt the child who is the subject of the child support order.

The Petitioner first argues that the order of the trial court must be reversed because it reduced a vested past due child support payment inconsistent with the provisions of N.C. Gen. Stat. § 50-13.10. Without addressing this argument and assuming that the order of the trial court does not violate Section 50-13.10, we do agree with the second argument of the Petitioner, that the public policy of this State would be violated if the Father is allowed to release his parental interest in his child in exchange for a waiver of past due child support payments.

A person who gives or receives *any consideration* for "receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption" is guilty of a misdemeanor, N.C.G.S. § 48-37 (1991), and acts contrary to the public policy of North Carolina. *In re Adoption of P.E.P.*, 329 N.C. 692, 703, 407 S.E.2d 505, 511 (1991). Agreements that are "contrary to public policy" are void, *Hazard v. Hazard*, 46 N.C. App. 280, 283, 264 S.E.2d 908, 910, *cert. denied*, 301 N.C. 89, — S.E.2d — (1980), *cert. denied*, 449 U.S. 1083, 66 L. Ed. 2d 807 (1981), and therefore cannot be used to support the doctrine of equitable estoppel. 28 Am. Jur. 2d, *Estoppel and Waiver* § 28, at 631 (1966); *see also Porth v. Porth*, 3 N.C. App. 485, 492, 165 S.E.2d 508, 514 (1969) (North Carolina recognizes the principle of law and equity that no man can profit from his own wrong or crime).

In this case, the trial court concluded that the Mother was equitably estopped from collecting the child support arrearages. The sole basis for the estoppel was that the Mother had promised she would "not pursue the action for child support arrears" in exchange for the Father's consent to the adoption. This agreement violates N.C. Gen. Stat. § 48-37 in that both the Mother and the Father gave and received consideration for the placement of the child for adoption. Thus the agreement is void as being contrary to the public policy of North Carolina and cannot therefore be used in equity to estop the Mother from

enforcing her judgment for the full amount of the child support arrearages. *See Porth*, 3 N.C. App. at 492, 165 S.E.2d at 514.

We do not address, as it is not germane to this case, the question of what effect, if any, this opinion has on the validity of the Alabama adoption.

Reversed.

Judges WYNN and JOHN concur.

CONSOLIDATED TEXTILES, INC. Plaintiff-Appellant/Appellee v. RICHARD C. SPRAGUE, Defendant-Appellant/Appellee

No. 9426SC180

(Filed 15 November 1994)

Appeal and Error § 108 (NCI4th)— breach of covenant not to compete—preliminary injunction—no substantial right affected—appeal dismissed

In an action for breach of covenant not to compete, defendant's appeal from the trial court's preliminary injunction preventing defendant from calling on plaintiff's customers and from divulging plaintiff's trade secrets was interlocutory and did not affect a substantial right where defendant was not prevented from earning a living or practicing his livelihood.

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

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

Appeal by defendant from order entered 12 November 1993 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 October 1994.

Consolidated Textiles, Incorporated (Contex) buys synthetic fiber products, including off quality, excess, and regular quality, from fiber manufacturers and sells them to users in North America. The fiber products business is very competitive and developing a customer's needs is very time consuming and involves presenting numerous samples. This process of matching customer needs and products,

which Contex contends is a trade secret, is the crux of Contex's competitive edge over other potential sellers.

Contex uses a small number of trained and experienced sales employees to sell its product. Those employees are Contex's representatives and are the key to customer relations. Each sales employee has access to confidential information about all of Contex's business and trade secrets. Richard Sprague began working as a sales employee for Contex in August of 1990 and continued until he resigned in September of 1993. In his employment agreement, he agreed not to divulge trade secrets during or after his employment. He also agreed that he would not compete against Contex for three years following termination.

Contex filed suit against Sprague in November of 1993, alleging that Sprague expressed displeasure with the terms of his employment agreement and sought work with competitors. Sprague resigned and took a job with Stein, a major competitor of Contex. Contex alleged that while there he called on several of his former Contex customers and made efforts to transfer them to Stein. Contex also alleged that Sprague disclosed its trade secrets to Stein. More specifically, Contex alleged that Sprague violated the Whole Time and Best Efforts, Trade Secret, and Restrictive Covenant provisions of his employment agreement, causing it irreparable business harm.

Contex moved under the Trade Secrets Protection Act for a temporary restraining order and both a preliminary and permanent injunction to prevent Sprague from further violating the non-competition portion of the agreement, and to prevent further disclosure of its trade secrets. The trial court allowed the temporary restraining order and, several weeks later, granted Contex's preliminary injunction. In doing so, the court concluded that "[t]here is a substantially [sic] likelihood that defendant has or will breach the terms of the restrictive covenant in the parties' employment contract by calling on Contex's customers on behalf of Contex's competitor."

From this order, both parties appeal.

Smith Helms Mulliss & Moore, L.L.P., by Peter J. Covington and Irving M. Brenner, for plaintiff appellee.

Casstevens, Hanner, Gunter & Gordon, P.A., by Nelson M. Casstevens, Jr., and Teresa L. Conrad, for defendant appellant.

ARNOLD, Chief Judge.

Contex has filed a motion to dismiss defendant's appeal as interlocutory, and argues that a substantial right is not affected by the injunction because Sprague continues to work as a salesman for Stein. For the reasons stated below, the motion is allowed.

"No appeal lies from a trial court's grant of an interlocutory preliminary injunction unless the defendant would be deprived of a substantial right which he would lose absent a review prior to final determination." *Triangle Leasing Co. v. McMahon*, 96 N.C. App. 140, 146, 385 S.E.2d 360, 363 (1989), *aff'd in part, rev'd in part*, 327 N.C. 224, 393 S.E.2d 854 (1990). A substantial right is affected by the entry of a preliminary injunction if it prevents one from practicing his livelihood, or the right to work and earn a living. *Id; see also Masterclean of North Carolina v. Guy*, 82 N.C. App. 45, 345 S.E.2d 692 (1986).

Here, defendant is not prevented from earning a living or practicing his livelihood. The only restrictions imposed by the injunction are that he cannot contact Contex customers actively solicited within the year prior to his resignation, nor can he disclose to third persons information identified as Contex trade secrets. This appears to restrict him from contacting approximately three hundred customers—a fraction of the thousands that remain available, and this case is clearly different from others in which the Court found a substantial right was affected. *See Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 433 S.E.2d 811 (1993) (finding substantial right where injunction prevented defendants from working during season installing air-conditioning units); *Masterclean of North Carolina v. Guy*, 82 N.C. App. 45, 345 S.E.2d 692 (1986) (finding substantial right where injunction would prevent defendant from practicing his livelihood in five states). A substantial right is not affected in this case and this appeal is

Dismissed.

Judges COZORT and LEWIS concur.

GREGORY SCOTT LAVENDER v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 9427SC11

(Filed 15 November 1994)

Insurance § 487 (NCI4th)— punitive damages—coverage included in automobile liability policy—claim barred by statute of limitations

Because there was no express exclusion of punitive damages in its automobile liability insurance policy, defendant insurer was required to pay punitive damages awarded plaintiff by the jury in plaintiff's personal injury action against defendant's insured; however, plaintiff's claim for punitive damages was barred by the statute of limitations where the complaint was filed more than three years after the date of entry of the judgment against the insured.

Am Jur 2d, Automobile Insurance § 427.

Appeal by plaintiff from order and judgment entered 26 October 1993 in Gaston County Superior Court by Judge Jesse B. Caldwell. Heard in the Court of Appeals 28 September 1994.

Tim L. Harris & Associates, by T. Scott White and Jerry N. Ragan, for plaintiff-appellant.

Golding, Meekins, Holden, Cosper & Stiles, by Harvey L. Cosper, Jr. and Paul R. Dickinson, for defendant-appellee.

GREENE, Judge.

Gregory Scott Lavender (plaintiff) appeals from an order entering summary judgment for State Farm Mutual Automobile Insurance Company (defendant).

In this action, filed 22 March 1993, the plaintiff seeks a declaration of his rights under an insurance policy issued by the defendant to James Edward Parks, Jr. (Parks), specifically whether he is entitled to recovery from the defendant of the punitive damages awarded the plaintiff against defendant's insured. In that policy the defendant agreed to pay "damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident." On 6 February 1988, Parks was involved in an automobile

collision with the plaintiff in which the plaintiff sustained personal injuries. A jury trial was conducted and the jury rendered a verdict for the plaintiff in the amount of $30,000 in compensatory damages and $10,000 in punitive damages. A judgment for the plaintiff against Parks was docketed on 5 July 1989. On 13 July 1989, the defendant satisfied the compensatory award portion of the judgment, but not the punitive damage award.

The issues presented are (I) whether the policy language includes coverage for punitive damages and (II) if so, whether the three year statute of limitations bars the plaintiff's claim.

I

The defendant first argues that summary judgment was appropriate because it has no liability under its policy to pay for punitive damage awards entered against its insured. We disagree. This Court has recently held that the precise language contained in this policy provided coverage for punitive damages. *New South Ins. Co. v. Kidd*, 114 N.C. App. 749, 754, 443 S.E.2d 85, 88, *disc. rev. denied*, 336 N.C. 782, 447 S.E.2d 427 (1994). If the insurance company wishes to exclude punitive damages from its coverage, it must do so specifically. *Id.* In the policy at issue, there is no express exclusion of punitive damages, thus the punitive damage award is within the coverage of the defendant's policy. Accordingly, summary judgment for the defendant on this issue cannot be sustained.

II

In the alternative, the defendant argues that the plaintiff's claim is barred by the statute of limitations. We agree.

It is settled law that where "the liability of the insured has been established by judgment, the injured person may maintain an action [as a third-party beneficiary] on the [insured's] policy of [liability] insurance." *Hall v. Harleysville Mut. Casualty Co.*, 233 N.C. 339, 340, 64 S.E.2d 160, 161 (1951); *see Smith v. King*, 52 N.C. App. 158, 159, 277 S.E.2d 875, 876 (1981). The injured person's claim is therefore in contract and is governed by the three year statute of limitations, N.C.G.S. § 1-52(1) (Supp. 1993), which begins to run "at the time of entry of judgment against the insured." 20A John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 11614 (rev. vol. 1980); *see Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985).

In this case, the complaint was filed on 22 March 1993, more than three years after 5 July 1989, the date of the entry of the judgment against Parks, the insured. Accordingly, the summary judgment of the trial court is affirmed on this basis.

Affirmed.

Judges JOHNSON and LEWIS concur.

BENJAMIN WHITE	)	
	)	
v.	)	ORDER
	)	
N.C. DEPT. OF CORRECTION	)	

No. 9312SC862

(Filed 9 January 1995)

The following Order was entered:

The motion filed in this cause on the 6th day of January 1995 and designated "Motion" is allowed.

By order of the Court this 9th day of January 1995.

Witness my hand and official seal this the 10th day of January 1995.

s/John H. Connell
Clerk of the Court of Appeals

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 NOVEMBER 1994

CITIZENS SAVINGS & LOAN ASSN. v. DRYE No. 9322SC669	Iredell (91CVS00649)	No Error
CURTIS B. PEARSON MUSIC CO. v. FULK No. 9421SC325	Forsyth (93CVS5095)	Appeal Dismissed
DANIEL v. UNITED STATES FIDELITY & GUARANTY CO. No. 9425SC167	Burke (92CVS137)	Affirmed
EPPS v. NATIONWIDE MUTUAL INS. CO. No. 9411SC37	Harnett (92CVS1093)	Reversed and Remanded
GRUBB v. JOYNER No. 9422SC150	Davie (91CVS517)	Affirmed
HATCHER v. HATCHER No. 945DC287	New Hanover (92CVD735)	Affirmed
HODGIN v. CARDINAL LANES No. 945DC308	New Hanover (92CVD3301)	Appeal Dismissed
IN RE GRIFFIN No. 9411DC288	Johnston (93J113) (93J114)	Appeal Dismissed
IN RE THOMPSON No. 9310DC1090	Wake (93J161)	Vacated and Remanded
JOHNSTON v. WHITAKER No. 9427SC87	Gaston (92CVS4249)	Affirmed
KNIGHT v. N. C. MUT. LIFE INS. CO. No. 9419SC50	Montgomery (92CVS415)	Affirmed
RICHARDSON v. GRUBER & BENNETT No. 932SC1246	Beaufort (92CVS922)	Affirmed
SIGMON v. LITTLE No. 9425SC82	Catawba (92CVS1754)	Reversed and Remanded
STATE v. ALEXANDER No. 9426SC293	Mecklenburg (93CRS27823)	No Error
STATE v. BARBOUR No. 9415SC228	Alamance (89CRS29029) (90CRS1079)	Dismissed

STATE v. BELLAMY No. 943SC222	Pitt (93CRS8215) (93CRS8219) (93CRS8220) (93CRS8221) (93CRS8222) (93CRS8223)	No Error in part, Vacated in part, and remanded
STATE v. CLARK No. 9416SC407	Robeson (93CRS2455) (93CRS2457)	Affirmed
STATE v. JACOBS No. 9414SC372	Durham (92CRS19261)	No Error
STATE v. LEE No. 944SC231	Sampson (93CRS2271) (93CRS2272) (93CRS2273) (93CRS2274) (93CRS2275) (93CRS2276) (93CRS4224) (93CRS4225)	No Error
STATE v. STRICKLAND No. 949SC389	Franklin (93CRS1220)	No Error
STATE v. WILLIAMS No. 9326SC1223	Mecklenburg (93CRS21392) (93CRS21393) (93CRS21394) (93CRS21395)	No Error
STATE v. WRIGHT No. 9420SC311	Moore (93CRS006039)	No Error
THOMPSON v. NATIONWIDE MUTUAL INS. CO. No. 9320SC1239	Anson (93CVS162)	Affirmed
UNITED CAROLINA BANK v. TRASK No. 935SC710	New Hanover (91CVS3064)	Affirmed in part; Reversed in part
WHITMAN v. WHITMAN No. 9422DC60	Davidson (91CVD258)	Reversed and Remanded
YOEMAN v. BOONE CONST. CO. No. 9324SC1140	Watauga (93CVS100)	Affirmed

STATE OF NORTH CAROLINA v. GARY EDWARD NIXON

No. 945SC144

(Filed 6 December 1994)

1. Homicide § 635 (NCI4th)— no duty to retreat—failure to instruct error

In a first-degree murder case where the evidence tended to show that defendant and the victim were shooting at each other from separate cars after the victim was the aggressor in the events preceding the first shooting, the trial court erred in failing to instruct that defendant had no duty to retreat, since the evidence showed that, because the victim was using deadly force, defendant was permitted to stand his ground and kill the victim if defendant believed it necessary and had a reasonable ground for such belief.

Am Jur 2d, Homicide § 520.

Homicide: Extent of premises which may be defended without retreat under right of self-defense. 52 ALR2d 1458.

Homicide: Modern status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary—modern cases. 73 ALR4th 993.

2. Evidence and Witnesses § 876 (NCI4th)— statement of murder victim—admissibility to show state of mind

The trial court in a murder prosecution did not err in admitting testimony of the victim's brother concerning a question asked of defendant by the victim at the beginning of their altercation as to why defendant had recently pulled a gun on him, since this hearsay statement was properly admitted pursuant to N.C.G.S. § 8C-1, Rule 803(3), which deals with a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition.

Am Jur 2d, Evidence § 866.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declar-

ant's mental, emotional, or physical condition. 75 ALR Fed. 170.

3. Evidence and Witnesses § 1070 (NCI4th)— instruction on flight—sufficiency of evidence

The trial court in a murder prosecution properly instructed on flight of defendant where the evidence showed that after the shootings, defendant, who testified that he saw one victim's body fall out of the other victim's car and that he believed he had shot the second victim, jumped into his car and left, thereafter picked up his friend, and disposed of his gun before he called an acquaintance who was a police officer.

Am Jur 2d, Trial § 1184.

Appeal by defendant from judgment entered 19 February 1993 by Judge Henry L. Stevens, III in New Hanover County Superior Court. Heard in the Court of Appeals 25 October 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Valerie B. Spalding, for the State.

Nora Henry Hargrove for defendant-appellant.

JOHNSON, Judge.

Defendant Gary Edward Nixon was indicted for the first degree murders of Debra Henry and O'Hara Sneed. Upon defendant's pleas of not guilty, defendant was tried during the 1 February 1993 session of New Hanover County Superior Court.

Evidence presented at trial by the State showed the following: Joe Sneed, brother of one of the victims, O'Hara Sneed, testified that on 21 June 1992 he and O'Hara Sneed went to visit their father in O'Hara Sneed's brown Malibu vehicle and that three friends were with them; that while at their father's house, O'Hara Sneed checked out his shotgun by firing it into the air; that about 1:00 p.m. they drove back to Wilmington to a store on 10th and Dawson Streets to get something to drink; and that in the vehicle, O'Hara Sneed was driving, Debra Henry was in the front passenger seat, Michael Brown was behind her, Joe Sneed was in the middle, and Deidra Davis was behind O'Hara Sneed.

Joe Sneed further testified that when they arrived at the store, he saw defendant standing with a companion named Millhouse, near a

gray Cadillac facing Dawson Street; that O'Hara Sneed jumped out of his vehicle, got his shotgun out of the trunk and ran over to defendant; that (over the State's objection) O'Hara Sneed asked defendant why he had recently pulled a gun on him and threatened him; that O'Hara Sneed then fired his shotgun up into the air and returned to his car; that he did not know what O'Hara Sneed did with his shotgun; and that defendant jumped into his Cadillac and drove off up Dawson Street. Sneed's testimony continued, that defendant's companion went into the store; that O'Hara Sneed, Joe Sneed and the others drove to another store on 9th Street and Castle Street where O'Hara Sneed went inside and bought a fifth of wine; that after O'Hara Sneed had returned to the car and started it, O'Hara Sneed remarked to the others that defendant was coming; that he saw defendant driving towards them at a high rate of speed on Castle Street; that O'Hara Sneed began to drive similarly fast toward defendant's car; that as the cars approached each other, defendant reached out of his Cadillac and began to shoot into O'Hara Sneed's car; that he saw Debra Henry reach over for the front seat door knob with her left hand; that Debra Sneed was hit by gunfire and fell out of O'Hara Sneed's car; that O'Hara Sneed stopped the car and told the others to get out and see to her and then O'Hara Sneed drove on; that he saw that Debra Henry was dead and he told his companions to take cover behind a nearby church since bullets were still flying; that after the gunfire stopped, he emerged from cover and ran to Debra Henry's body; that he saw that O'Hara Sneed's car had backed into the church wall; and that he ran to it and found O'Hara Sneed slumped over with his head in the passenger seat, unconscious. He testified that an ambulance arrived a short time later, and that when he looked at O'Hara Sneed's Malibu, he saw that the hood and the driver's door had holes in them which had not been there earlier. On cross-examination, Mr. Sneed testified that he did not know if O'Hara Sneed had anything to drink that day; that he "guess[ed]" when O'Hara Sneed returned to the Malibu after the confrontation with defendant that the shotgun was in the front seat; and that when defendant was coming at them in the Cadillac, that O'Hara Sneed did not try to turn off or duck or pull over to the curb.

Deidra Davis, Debra Henry's sister, testified and corroborated Joe Sneed's testimony. She testified additionally that when defendant approached O'Hara Sneed's car on Castle Street, O'Hara Sneed told them all to "duck"; that when O'Hara Sneed told the three of them in the back to get out and see to Debra Henry, she ran towards her sis-

ter's body, but the shooting was still going on and so she ran with the others behind the church; and that she did not see O'Hara Sneed with a shotgun while the car was on Castle Street and that she did not see him fire a shotgun. On cross-examination, Deidra Davis testified that nobody had been drinking on 21 June 1992, and that she did not smell the odor of alcohol on anyone in O'Hara Sneed's car; that when O'Hara Sneed returned to the Malibu after the confrontation with defendant, he did not hand the shotgun to anyone, he kept it himself; and that two days after the shootings, she recalled telling an officer that O'Hara Sneed and defendant were shooting at each other and that during the shooting, she assumed her sister had run from the car.

Michael Brown also corroborated the testimony of Joe Sneed and Deidra Davis. Mr. Brown added that when O'Hara Sneed saw defendant driving toward them at a high rate of speed, O'Hara Sneed told the others that defendant had a gun; that after O'Hara Sneed stopped to let the others out, O'Hara Sneed turned the car around and started back toward the other end of Castle Street; and that he did not hear a shotgun fired from the car in which he was riding. On cross-examination, he stated that although, shortly after the shooting, he had told an officer that after Debra Henry fell out of the car, O'Hara Sneed went back to the trunk and fired two rounds back at defendant, he was excited at the time he made the statement to the officer, and in fact did not hear a shotgun blast. Michael Brown has been convicted of forgeries, breaking and enterings, and larcenies.

Angela Moore testified that on 21 June 1992, she, her husband and two children were driving on Castle Street; that they stopped at a stop sign at the corner of 11th Street and she saw a brown Malibu coming from the left and a Cadillac approaching from the other direction; that as the Cadillac approached the Malibu, the Cadillac crossed the center line and the Malibu began to swerve; that she saw a person fall out of the Malibu; that they then went to call the police; and that when they returned, the body was in the road and the Malibu had reversed into the church wall.

Susan Torres testified that she, her husband and daughter were driving on Castle Street on 21 June 1992; that after they had gone through the intersection of 9th Street and Castle Street, they heard what sounded like a "pop"; that the brown car in front of them began to swerve and the people's heads inside were bobbing around; that the car slowed and a woman's body fell out of the passenger side; that the car continued down Castle Street, slowed down, and three people

got out and fled; that the vehicle continued for a short distance, then made a U-turn and came back very fast; that she and her husband looked for a phone and stopped at a house; that as they approached the house, she heard several more "popping" noises; and that she and her husband returned to their car and left the area. Her husband, Jose Torres, corroborated her testimony, and stated that he did not hear any shotgun blasts at any time. Robert Milner testified that while in his home at 1105 Castle Street around 1:30 p.m. the day of the shooting, he heard "popping" sounds that sounded like shots; that he then walked to the front door and Susan Torres was approaching his house when he heard more shots fired; and that the sounds were rifle shots, not shotgun blasts.

Officer Edward Gibson testified that he answered a call to the crime scene on Castle Street; that he observed the brown Malibu backed into the church wall and Debra Henry's body lying in the street; that the car was still in reverse, the motor was running and the tires were spinning; that O'Hara Sneed was lying on the front seat; that a shotgun and three dollar bills were lying in the road; that there was no weapon in the Malibu, nor shells; and that the car interior did not smell as if a shotgun had been fired from within the vehicle. On cross-examination, Officer Gibson stated he was not familiar with how long the odor of a shotgun would last in a car.

Officer David Smith testified he was nearby when he received the call to Castle Street; that he heard a series of shots but not a shotgun blast; that when he arrived on the scene, he saw the brown Malibu "wrecked" over a sidewalk into the brick wall and an unloaded shotgun of which he took custody lying in the road across the double yellow line; that there were no shotgun shells lying in the road; and that the shotgun was a sawed-off shotgun and was illegal. Officer Ralph Shingleton also answered the call to the crime scene, and in the roadway he discovered some spent casings and live rounds which he pointed out to the I.D. technician.

Officer R. P. Lockamy, crime scene investigator, testified that she found seven fired .30 carbine casings and two unfired bullets in the area near the corner of 9th Street and Castle Street (the 900 block); that she took a number of photographs looking at the crime scene from the 1000 block of Castle Street; that when she inspected the Malibu, she noticed that the driver's door and the passenger door were open; that there were bullet holes in the windshield, the hood, and behind the left front tire; that there was blood in the passenger

seat and a bloody baseball cap was outside the passenger door; that an unopened wine bottle was on the passenger floorboard; that the car was in reverse and had caused there to be black rubber on the sidewalk; and that both the wall and the car were damaged from the crash.

Fred Parrish testified that he was driving down Castle Street the afternoon of 21 June 1992 when he saw a body lying in the road and a rifle nearby; that he then saw and heard someone firing a rifle with something that appeared to be a scope from an old Cadillac; that as he looked around, he saw the brown Malibu rolling backwards into the church wall; and that he knew what a shotgun blast sounded like but he heard only rifle shots. James Oliver testified that he lived on 9th Street and that he also heard rifle shots; he saw defendant preparing to put the rifle into the Cadillac's trunk and he saw that the rifle had a scope.

Richard Lundy, a cashier at a convenience store on 10th and Castle Streets, testified that he was in the store on 21 June 1992; that someone came in and said a girl had been shot; that he called 911 and then went outside and saw the body lying in the street; that he then saw the brown Malibu "screech" to a halt at the light on Castle Street heading towards 9th Street; that he saw the driver shift the gear up and open the door to step out; that the car began rolling back; and that the driver reached in and brought out a shotgun, placing it between the windshield and the door, and aiming it at the corner across the street. He further testified that he could not see anyone at that spot but that since he was in the line of fire, he returned to the store; that he then looked out the window and saw the brown car backing into the church wall; and that he returned outside once the police arrived and saw the shotgun lying in the road, about where the car had been, on the driver's side, but did not see any shotgun shells. Additional witnesses testified that their Castle Street homes had sustained damage from the rifle shots.

Salam Fattah testified that he was inside his business on Castle Street with his brother when someone came in and said shots were being fired; that he went outside and saw defendant shooting with a rifle towards the 9th Street block; that he also saw defendant pull the rifle back a couple of times so that live bullets fell onto the street; and that after defendant finished firing, he reversed his car back up Castle Street and disappeared. Salam Fattah's brother, Ahmad Fattah, corroborated his brother's testimony.

Charles Garrett, M.D., was accepted as an expert in the field of pathology. He testified that he performed an autopsy on O'Hara Sneed's body on 22 June 1992; that he found a gunshot wound above O'Hara Sneed's left eye which went straight through the brain, producing a large track of damage; and that although O'Hara Sneed had died from pneumonia of the lungs resulting from unconsciousness by gunshot wound, he was brain dead at the time he was actually shot.

Special Agent Thomas Trochum of the State Bureau of Investigation was accepted as an expert in the field of firearms identification. He testified that he had conducted an analysis upon the spent shell casings and unfired bullets recovered from the crime scene on Castle Street; that in his opinion, all seven of the fired cartridge cases were extracted from the same firearm; that the two unfired bullets did not have sufficient microscopic individuality for Agent Trochum to determine that they had also been worked through the same firearm, but that the bullets were all the same design and from the same manufacturer; and that the fired bullets were all worked through the action of a firearm known as an M-I carbine.

After the State rested, defendant testified on his own behalf. Defendant testified that on the morning of 21 June 1992, he took his guardian's car, a Cadillac, to the car wash; that he had a rifle in the trunk, which he put in the back seat so that nobody at the car wash could see it; that a friend, Jerone Millhouse, called him on the car phone, so defendant went to pick him up; that the two then drove to 10th and Dawson Streets to buy something to drink; that when they came out of the store, O'Hara Sneed "came out of nowhere[,]" pointed a shotgun at defendant, and held him up for his money; that he believed O'Hara Sneed was high on drugs; that O'Hara Sneed then fired the shotgun into the air and bent down to collect defendant's money from the street where defendant had dropped it; and that someone yelled that the police were coming and defendant jumped into the Cadillac and left, pulling out in front of other cars. Defendant further testified that he stopped a couple of blocks away to smoke and to pick up items that had fallen to the floorboard; that he tried to call his guardian and also tried to call a local police officer, Buster Yost, because he was scared; that he then drove up 12th Street until it deadended at Castle Street and turned onto Castle Street going toward the river; that as he got to between 11th and 10th Streets, a car "came out of nowhere" and "seemed like it was coming directly at me"; that "[w]hen it came directly at me I pulled over a little bit" and saw it was O'Hara Sneed; that "[w]hen [O'Hara Sneed] pulled beside

me he had the shotgun in his hand and we was side by side"; that "[a]t that time I grabbed my gun" from the back seat; and that "I tried to shoot him because he was trying to shoot me." Defendant further testified that after he shot,

> Mr. [O'Hara] Sneed pulled to the opposite side of the road. I speeded off. I tried to get away. I was going forward. As I was going forward I got there to 10th and Castle. In the middle of the intersection a yellow cab pulled in front of me and I stopped. I slammed on brakes right in the intersection. The cab went. After the cab went another car went. I looked back in my mirror. At that time the girl had already fell out of the car. Mr. [O'Hara] Sneed had made a U-turn. He was coming behind me. . . . I was trying to get away from him. I speeded up and I seen him coming behind me. I get up—I went—I got up there between 8th Street. It was two cars parked, stopped at the red light. The light was red. Two car[s] at the light waiting for the light to [change]. Traffic was coming down both ways like that. Going across like that. And I seen [O'Hara] Sneed coming up, so I turned around. As I turned around, as I made a complete turn around [O'Hara] Sneed was outside of the car pointing the gun at me. . . . At that time I stuck my gun out of the window and shot and I leaned down and I shot. . . . At that time, Mr. [O'Hara] Sneed jumped in the car and came forward. I backed up. He got back out of the car. As he got out the car, he was getting out of the car and the car started rolling back. When the car started rolling back he put one foot in the car. At that time, you know, I started shooting, because you understand he was pointing the gun again. I started shooting and I shot maybe three times, two more times, maybe three times and I think I hit the car. I am not sure. I think I did hit the car and Mr. [O'Hara] Sneed started getting back in the car and after he was coming at me again, so I shot. At that time I shot. The bullet, I think it hit Mr. [O'Hara] Sneed because the car started rolling back. The car rolled back and hit the wall.

After O'Hara Sneed's car hit the church, defendant jumped back into the Cadillac and left.

Defendant further testified that he picked up his friend and tried again to call Officer Yost; that they were finally in touch and Officer Yost told defendant to turn himself in; that defendant met Officer Yost and told him what had happened; that defendant knew because of a previous felony conviction, he was not supposed to have a gun; and

that before talking to Officer Yost he had disposed of the gun in a nearby river. He testified that O'Hara Sneed had previously robbed him and had "cut" him but that defendant had not reported this incident.

On cross-examination, defendant stated that his rifle did not have a scope on it, that he did not know how many bullets were in it, that he was not very familiar with it, and that he did not know whether it had a safety. When questioned as to how much money he had thrown on the ground in front of O'Hara Sneed when O'Hara Sneed had held him up on 10th and Dawson Streets, defendant stated that he had told Officer Yost that he had started out with $150.00 the morning of the shooting so that the amount was probably anywhere from $90.00 to $130.00. He also told Officer Yost that O'Hara Sneed had fired at him when they were on Dawson Street and that one of the shotgun pellets had struck him in the leg. Defendant stated he never got out of the Cadillac and that he shot O'Hara Sneed by leaning out and firing while the engine was running, the car was in drive, and defendant's foot was on the brake, because "it happened so quickly[.]" While interrogated about the second shooting, defendant testified that "[a]ll I know is when I turned around and I seen Mr. [O'Hara] Sneed with that gun pointed at me . . . I stopped and I shot back at Mr. [O'Hara] Sneed[.]"

The parties stipulated that O'Hara Sneed's blood alcohol level was .23 at the time of the shooting.

On rebuttal, the State called Officer Yost, who testified that he had made contact with defendant on 21 June 1992 and had interviewed him while driving to the police department; that defendant told him that O'Hara Sneed had pulled a sawed-off shotgun on him and robbed him of approximately $150.00; that defendant told him he had thrown the money on the ground and that as he ran away he heard the shotgun fire and a pellet hit him in the leg; that he asked defendant if he was hurt or injured and defendant said that he did not think so as they both looked at defendant's legs; and that defendant said he had been given the rifle he used to kill O'Hara Sneed. The State then rested its case.

Defendant was found not guilty of the murder of Debra Henry and not guilty of firing into an occupied vehicle. Defendant was found guilty of one count of voluntary manslaughter for the killing of O'Hara Sneed. Defendant has appealed to our Court.

[1] Defendant argues on appeal that the trial court erred in failing to instruct that defendant had no duty to retreat before repelling a felonious and deadly assault. During the charge conference, defendant's counsel requested, as to the charge of first degree murder of O'Hara Sneed, that in addition to the self-defense instructions the trial court proposed to give, the trial court also give a jury instruction on "no duty to retreat." The trial court denied this proposal, finding that such an instruction applied only to instances where defendant was in his home or business.

The law on the duty to retreat, as acknowledged by both parties, is set out in *State v. Pearson*, 288 N.C. 34, 215 S.E.2d 598 (1975), where our Supreme Court stated:

> [I]f a person is attacked in his own dwelling, home, place of business, or on his own premises, and is also free from fault in bringing on the difficulty, he is under no duty to retreat, whether the assailant is employing deadly force or nondeadly force. Of course, in order to justify the use of deadly force under these circumstances the person attacked must believe it to be necessary and must have a reasonable ground for such belief. On the other hand, where the person attacked is not in his own dwelling, home, place of business, or on his own premises, then the degree of force he may employ in self-defense is conditioned by the type of force used by his assailant. If the assailant uses nondeadly force, then generally deadly force cannot be used by the person attacked; provided there is no great disparity in strength, size, numbers, etc., between the person attacked and his assailant. However, if the assailant uses deadly force, then the person attacked may stand his ground and kill his attacker if he believes it to be necessary and he has a reasonable ground for such belief.

Id. at 43, 215 S.E.2d at 605. A judge must declare and explain the law arising upon the evidence. North Carolina General Statutes § 15A-1232 (1988). In the case *sub judice*, the trial court instructed the jury on first degree murder, second degree murder and voluntary manslaughter; the court also instructed the jury on self-defense. In the instant case, if the evidence shows that O'Hara Sneed used deadly force, defendant was permitted to stand his ground and kill O'Hara Sneed if defendant believed it necessary and had a reasonable ground for such belief.

A review of the evidence shows that O'Hara Sneed was the aggressor in the events preceding the first shooting. The evidence

shows that after the first shooting, O'Hara Sneed made a U-turn in his car and pursued defendant. Defendant testified that he was speeding and could see O'Hara Sneed coming up behind him. Defendant testified that he came to a red light where two cars were stopped and traffic was going both ways on the intersecting street, and defendant testified that he could still see O'Hara Sneed coming up in his rear view mirror, and so he turned around. Defendant testified that as he turned around, O'Hara Sneed was outside of his car pointing a gun at defendant, and defendant stuck his gun out of his car window and shot. Defendant stated that O'Hara Sneed then jumped in his car and came forward while defendant backed up, and that O'Hara Sneed then got out of his car and his car started rolling back. Defendant testified that when the car started rolling back O'Hara Sneed put one foot in the car and pointed the gun at defendant again and that defendant started shooting again. Based on this evidence, we find that the evidence shows that because O'Hara Sneed was using deadly force, defendant was permitted to stand his ground and kill O'Hara Sneed if defendant believed it necessary and had a reasonable ground for such belief. We find that the trial court erred in failing to instruct that defendant had no duty to retreat and we therefore award defendant a new trial.

Defendant also argues on appeal that the evidence was insufficient to persuade a rational trier of fact of each essential element beyond a reasonable doubt of the crime of voluntary manslaughter. Defendant argues that "there was insufficient evidence to sustain a finding that either the defendant used excessive force or was the aggressor, the only bases for a finding of voluntary manslaughter." After a review of all the evidence, we reject this argument.

[2] Defendant next argues that the trial court erred in admitting a statement made by O'Hara Sneed because the statement was hearsay, irrelevant, incompetent and unfairly prejudicial to defendant. Joe Sneed, while testifying as to the events leading up to the shootings, stated that O'Hara Sneed asked defendant why he had recently pulled a gun on him and threatened him. After a *voir dire*, the trial court permitted this statement as a hearsay exception, pursuant to North Carolina General Statutes § 8C-1, Rule 803 (1),(2) or (3) (1992).

We find that the statement was properly admitted pursuant to Rule 803(3), which deals with a statement of the declarant's then existing state of mind, emotion, sensation or physical condition. "Evidence of the [alleged] threats made by defendant was admissible to

explain [O'Hara Sneed's] then-existing mental and emotional state[.]" *State v. Lynch*, 327 N.C. 210, 224, 393 S.E.2d 811, 819 (1990).

We next address defendant's argument that the trial court plainly erred in instructing on reasonable doubt because the instructions lessened the State's burden of proof, deprived defendant of due process, and otherwise were contrary to state and federal constitutional law. We reject this argument. *See State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994).

[3] Defendant next argues the trial court committed plain error in instructing on flight because the instruction was not supported by the evidence, was an impermissible expression by the court, and lessened the State's burden of proving each essential element beyond a reasonable doubt. We disagree. The evidence shows that after the shootings, defendant, who testified that he saw Debra Henry's body fall out of O'Hara Sneed's car and that he believed he had shot O'Hara Sneed, jumped into his car and left and thereafter picked up his friend and disposed of his gun before he called Officer Yost. We find the trial court properly instructed the jury on flight.

Defendant's remaining argument is based on an assignment of error not in the record on appeal and is therefore dismissed.

New trial.

Judges MARTIN and THOMPSON concur.

DALE G. VANDERVOORT, PLAINTIFF v. CAMERON McKENZIE, DEFENDANT

No. 9329SC1154

(Filed 6 December 1994)

1. Adverse Possession § 2 (NCI4th)— use of roadway adverse, hostile, and under claim of right—sufficiency of evidence

Evidence was sufficient to create a jury question of whether plaintiff's use of a roadway was adverse, hostile, or under claim of right where it tended to show that plaintiff went onto the property at least once each year to clear out the roadway and that, as far as he knew, he was the only person who did so on a regular basis.

Am Jur 2d, Adverse Possession §§ 48 et seq.

2. Adverse Possession § 2 (NCI4th)— use of roadway not permissive—sufficiency of evidence

Evidence was sufficient to create a jury question as to whether plaintiff overcame the presumption that his use of the roadway was permissive where plaintiff testified that he had the right to use the roadway and that other people thought of him as being in control of the roadway.

Am Jur 2d, Adverse Possession §§ 48 et seq.

3. Adverse Possession § 3 (NCI4th)— use of roadway continuous and uninterrupted—sufficiency of evidence

Evidence was sufficient for a jury to find that plaintiff had satisfied his burden of showing that his use of a roadway was continuous and uninterrupted for the statutorily required twenty-year period where it tended to show that plaintiff bought his property and used the roadway from 1961 until the mid-1980's when defendant's construction activities completely destroyed the old roadway; plaintiff used the roadway quite often for recreational purposes when he lived nearby, and he used the roadway several times per year even after he moved away; other people used the roadway with plaintiff's permission; and plaintiff was the person who maintained the roadway for his use and other people's enjoyment.

Am Jur 2d, Adverse Possession §§ 80-83.

4. Appeal and Error § 147 (NCI4th)— failure to object to line of questioning—waiver of right to object on appeal

In an action to establish a prescriptive easement in a roadway across defendant's land, defendant waived his right to object on appeal to a line of questioning concerning a dispute between himself and two others regarding a separate road, since there was no indication from the record that defendant made a line objection at trial to plaintiff's line of questioning.

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

5. Evidence and Witnesses § 1987 (NCI4th)— illness of witness not shown—failure to show witness 100 miles away—deposition properly excluded

The trial court did not err by excluding the deposition of a subpoenaed witness where defendant's attorney was unable to adequately satisfy the court that the witness was ill, and defend-

ant's attorney could not produce a map to show the court that the witness was more than 100 miles from the place of trial. N.C.G.S. § 1A-1, Rule 32(a)(4).

Am Jur 2d, Witnesses §§ 5, 28, 28.5.

Appeal by defendant from judgment entered 26 April 1993 by Judge Zoro J. Guice, Jr. in McDowell County Superior Court. Heard in the Court of Appeals 30 August 1994.

Defendant-appellant (hereinafter appellant) appeals from a jury verdict declaring that plaintiff-appellee (hereinafter appellee) acquired a prescriptive easement over the land of appellant and awarding appellee $100,000 in damages. Appellee bought land in McDowell County from Charles Owens and his wife in June 1961. For many years appellee reached his land by using a roadway that extended from Bat Cave Road through the lands of several people to appellee's land. In March 1981, appellant bought from the White family approximately 980 acres of land which was adjacent to appellee's property. The land that appellant purchased had previously belonged to Kimball Miller. Appellant alleged that he had a title search of this land performed before he purchased the property and that the only easement revealed was a Duke Power easement. After appellant bought the property, he subdivided part of it as "Gateway Mountain" and sold off lots to various people. A homeowners' association, the Gateway Mountain Property Owners Association, (hereinafter Association) was formed in September 1986.

During the development of the Gateway property, the old logging roads and trails, including the old roadway that appellee had used to reach his property, were destroyed as new roads were constructed. For awhile, appellee used portions of appellant's new roads to reach his property, but in September 1984, appellant informed appellee that he would no longer be permitted to use appellant's new roads.

Appellee filed suit against appellant and the Association in June 1987, alleging that appellee had acquired a prescriptive easement over appellant's land. Appellee and the Association moved for summary judgment in March 1988 which was denied on 25 April 1988. In July 1988 appellant and the Association moved to dismiss and for sanctions for appellee's failure to comply with the Rules of Civil Procedure and for failure to join necessary parties. In September, appellee was allowed to amend his complaint to conform with the Rules of Civil Procedure and to join additional parties necessary for a final and

full determination of the matters in controversy. Appellee subsequently amended his complaint to add as defendants Carmen Anna McKenzie (appellant's wife), Betty Gilliam, Emory Vess, Cheryl Kirkland, Doris Harrison, and Johnson, Price and Sprinkle, P.A. These additional defendants owned land through which the old roadway traveled. Appellant, joined by all of the other defendants, answered the amended complaint.

On 19 May 1989, appellee filed a notice of lis pendens claiming a right of way extending from Bat Cave Road through portions of all of the defendants' property and ending at appellee's property. On 12 June 1990, appellant again moved for summary judgment, joined by all of the new defendants. Judge James J. Booker granted defendants' motion for summary judgment on 2 October 1990. Appellee appealed the granting of summary judgment on 8 October 1990. This Court reversed Judge Booker's entry of summary judgment as to appellant because Judge Bruce Briggs had previously denied appellant's first motion for summary judgment in April 1988. This Court affirmed Judge Booker's entry of summary judgment as to defendants Estate of Emory Vess, Doris Harrison, Johnson, Price & Sprinkle, P.A., Cheryl Kirkland, and appellant's wife. The forecast of evidence indicated that appellee's use of the roadway had been permissive. This Court did not rule with respect to defendant Association or defendant Betty Gilliam because the Clerk of Superior Court of McDowell County had entered default judgment against them in March 1989.

Appellee's claim went to trial and on 22 April 1993 the jury returned a verdict for appellee. Despite appellant's post-verdict motions for judgment notwithstanding the verdict, a new trial, and remittitur, the trial court entered judgment on 26 April 1993. On 12 May 1993, appellant filed notice of appeal.

Dungan & Mraz, by James M. Lloyd, Michael E. Smith, and Robert E. Dungan, for defendant-appellant Cameron McKenzie.

Carnes and Franklin, by Hugh J. Franklin, for plaintiff-appellee Dale G. Vandervoort.

EAGLES, Judge.

Appellant brings forward several assignments of error. After careful review, we affirm.

We begin by stating the elements necessary for a party to establish its right to a prescriptive easement. In establishing a prescriptive

easement, the party must overcome the presumption that the party is on the owner's land with the owner's permission. *Johnson v. Stanley*, 96 N.C. App. 72, 73, 384 S.E.2d 577, 579 (1989), *citing Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900 (1974). Accordingly, the party must prove by a preponderance of the evidence:

> (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is 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).

I.

Appellant contends that the trial court erred by denying appellant's motions for directed verdict and for judgment notwithstanding the verdict. In deciding whether to grant a motion for directed verdict and a motion for judgment notwithstanding the verdict the trial court must determine whether the evidence, viewed in the light most favorable to the non-moving party, is sufficient to take the case to a jury. *Freese v. Smith*, 110 N.C. App. 28, 33, 428 S.E.2d 841, 845 (1993). "In making this determination[,] a directed verdict should be denied if there is more than a scintilla of evidence supporting each element of the nonmovant's case." *Id.* at 33-34, 428 S.E.2d at 845, *citing Snead v. Holloman*, 101 N.C. App. 462, 400 S.E.2d 91 (1991). On appeal, "[our] scope of review is limited to those grounds asserted by the moving party at the trial level." *Freese v. Smith*, 110 N.C. App. at 34, 428 S.E.2d at 845-46 (citations omitted).

[1] Appellant first contends that the trial court erred in denying appellant's motion for directed verdict because appellee presented no evidence that appellee's use of the roadway was adverse, hostile, or under claim of right. We consider the following portions of appellee's testimony at trial pertinent to our decision:

> Q. During the time that you owned [the land] until the road construction work was done by Mr. McKenzie, did you keep it maintained so that you could drive a car up there?
>
> A. Yes, at least once a year and sometimes more. Anytime I knew we had to go up or wanted to go up, we had somebody go check the road and take a tractor and blade and smooth it out, if there

was any erosion, and we kept putting water breaks on it as the years went by, so that you could drive up over it. So we maintained the road regularly.

. . .

Q. To your knowledge, did the White family use that same road for getting into the property?

A. They had no other way of getting into the property. I didn't know if they used it or what but if they used it, they had to use that road.

Q. Now, describe to the Jury the use that you made of the property from the time you bought it over the years until your access was destroyed by Mr. McKenzie?

A. Well the first thing we did after building the trout pond, about a year later, we decided that we would plant some Christmas trees. So we cleared out part of the are [sic] of the old apple orchard and put about 1,000 Christmas trees in. That didn't work too well because of the locust they brought up there and they grew faster than the Christmas trees. We tried to keep up with it for awhile but we couldn't. Some of the Christmas trees are still up there. There was also an apple orchard there and we cleaned out part of the apple orchard to put the Christmas trees in. There was peach trees. For years, we picked peaches on every year. We would go up on Labor Day and have a picnic and that sort of thing. My family and I and some of our friends would go up there nearly every weekend. We built a shed and fireplace. We would camp. We would take our tents and go up and camp out and the shed was to keep us out of the rain. We did some fishing. We had an awful lot of frogs in that pond. We use [sic] to shoot frogs and had frog legs. My children really enjoyed the place and they called it "Daddy's Mountain." We had a lot of friends that use [sic] to use it and would join us up there. Woody, a friend of mine, would go and camp on weekends with us. So we used it quite frequently.

. . .

Q. Did you give any of your friends any general permission to go up there anytime?

A. Yes sir, anybody that I knew that knew I had the place, they were welcome to go. . . .

Q. Did you ever at anytime ask anyone for permission to use that road to get to your property?

A. No sir, that road was there. It was the only way to get to that property and that property when I bought the property, I assumed that road was there, that's why I maintained it and kept it going, I knew that Kim Miller had used it and knowing he used it and I also knew the Vess' [sic] had a right to that road. They had no other way to get there.

. . .

Q. While you were living away from here, how frequently did you go to the property?

A. Well, that depends an awful lot where I was living at the time. When I was in Montreal, I only got up there maybe three times, maybe four times a year. When I was living in New York, I got up there quite a lot more but I would be coming to Old Fort on business frequently and we would go up there nearly everytime I come down here. I'd say 10, 15 times a year when I was living in New York, and then when I was in Williamstown, I always came down in the fall to go up dove shooting. We had dove shoots for 35 years down here and I always came back and we always went upon the mountain and picked peaches. I would say in Williamstown and Coopersburg, I would probably come down about three times a year. Once I got to Coopersburg, I found out Cameron had bought the property and cutting timber on it so I came down to see what was happening. I came down more then and at that time, they had destroyed part of my road. I was trying to negotiate trying to get my road back.

Q. During the time that you lived away from here, did you continue to have contact with others who used your property with your permission?

A. Yes, I was constantly frequently called and talked to either Gudger Welch or Sonny Ashe, who was, I believe Sonny Ashe was here after Gudger moved to Greenville so I would call him and ask him how the road was and if anybody was going up it and he would report it and I would have to get back up here and fix it. They kept the road going all the time and whoever wanted to use it did use it. A lot of people used it.

. . .

Q. Did anyone else make any repairs or do any maintenance on the road during the time that you owned it?

A. Not to my knowledge, except I do believe that when they were cutting the timber off the Roy Vess property, they more than likely had to do some work on it to keep it up, some scraping work on it because it was pretty much of a clay road where the Vess property joined in and if they would run trucks out of there with timber on it, I feel like they would have done some work on it but they wouldn't have done any work past where they went in the road up to where it joins my property. That, we had to maintain.

. . .

Q. (omitted from the record)

A. I kept it maintained. It would wash out in spots and we would keep it repaired.

Q. At sometime, did you put a gate on that property?

A. Yes, I did. We got that road in such a good shape, we thought that people were going out and using it, people we hadn't given permission to and we thought it was wise to put a gate on it and we installed the gate on it just above the place where the Vess Road came into the old road. We couldn't put it below that because we would have stopped Vess from using it.

Q. Which piece of property was this gate located on?

A. It was on the White property.

Q. Was Mr. White aware of this?

A. Yes, we sent him a key. We had a lock on it and we sent him a key and the lock kept getting shot off and we would have to put a new lock on and everytime we did, we sent a key to him, to Mr. White.

Q. Was there ever a time when you excluded Mr. White or his family from the property?

A. No sir, I never excluded anybody. He had a key and all they had to do is go by the guard house at the Plant. We had a key if anybody wanted to use it.

Q. Whose idea was it to put the gate on the property?

A. I suppose it may have been mine. I'll have to take responsibility for it. I don't know who suggested it to me but I put it on there or they put it on there.

Q. Before you put the gate on it, did you speak with Mr. White?

A. Yes, I did.

Q. And what did you tell him at that time?

A. I told him we had got the road in such good shape that I thought it would be wise to limit the access to it somewhat and that I wanted to put a gate down where the Vess Road came in and he said no problem. So we put the gate in. I told him he could have keys to it and he had keys to it. Everytime we changed that lock, somebody shot it off, we sent him the keys to it again.

Q. He had no objection to that gate being placed there?

A. He didn't say so, I, you know, really, we could have put the gate on there anyway but knowing we were putting it on his property, we thought it was best to tell him about it.

Q. Do you recall, approximately when you first put that gate up?

A. Well, I guess it was a couple of years after Kim sold it. So I don't know, probably about 4 or 5 years after I bought mine, '65 or '66.

Q. Mr. Vandervoort, at anytime when you were dealing with Mr. White, did you ever tell him that you felt that you had the right to use that road?

A. I didn't have to tell him. I had the right. I was using it.

The meanings of the terms "adverse," "hostile," and "under claim of right" are intertwined. " 'Adverse' means 'having opposing interests,' *Blacks Law Dictionary* 49 (5th ed. 1979) and '[t]he term adverse use . . . implies a use . . . that is not only under a claim of right, but that is open and of such character that the true owner may have notice of the claim.' " *Johnson v. Stanley*, 96 N.C. App. 72, 74, 384 S.E.2d 577, 579, *quoting Warmack v. Cooke*, 71 N.C. App. 548, 552, 322 S.E.2d 804, 807-08 (1984), *disc. rev. denied*, 313 N.C. 515, 329 S.E.2d 401 (1985) (citation omitted). "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." *Dickinson v. Pake*, 284 N.C. at 581, 201 S.E.2d at 900 (citation omit-

ted). "The term 'claim of right' is widely considered to be merely a restatement of the hostility requirement." *Johnson v. Stanley*, 96 N.C. App. 72, 75, 384 S.E.2d 577, 579 (1989) (citations omitted). A claim of right is an intention to claim and use land as one's own. *Black's Law Dictionary* 248 (6th ed. 1990). The true owner must have notice of the existence of the easement for the claim of right to validly exist. *Johnson*, 96 N.C. App. at 75, 384 S.E.2d at 579, *citing Taylor v. Brigman*, 52 N.C. App. 536, 541, 279 S.E.2d 82, 85-86 (1981). "[R]epairing or maintaining the way over another's land" is one way of giving notice. *Johnson*, 96 N.C. App. at 75, 384 S.E.2d at 579 (citations omitted).

From the record, it appears that, at trial, appellee presented sufficient evidence at trial that he maintained and repaired the roadway. Appellee testified that he went onto the property at least once each year to clear out the roadway and that as far as he knew, he was the only person who did so on a regular basis. We hold that the testimony set out *supra*, when viewed in the light most favorable to appellee, was sufficient to create a jury question of whether appellee's use of the roadway was adverse, hostile or under claim of right.

[2] Appellant also contends that the trial court erred in denying appellant's motion for directed verdict because this Court had previously ruled that appellee's use of the roadway was permissive. In *Vandervoort v. McKenzie*, 105 N.C. App. 297, 302, 412 S.E.2d 696, 699 (1992), we held that appellee did not "present[] sufficient evidence to overcome the presumption that his use was permissive." However, we also held that the trial court erred in granting summary judgment in favor of this appellant (McKenzie) because a previous trial court had denied his first motion for summary judgment. *Id.* Because appellee's case thereafter went to trial against appellant, we may not, in our evaluation of the trial court's denial of the directed verdict motion, simply look at the evidence that appellee presented when defending against the defendants' June 1990 summary judgment motion. We must consider the evidence presented at the 1993 trial in the light most favorable to appellee.

Because we have held that the evidence presented at trial was sufficient to permit the case to go to the jury on the issue of whether appellee's use of the roadway was adverse, hostile or under claim of right, we also hold that the trial court correctly denied the directed verdict on the issue of whether appellee overcame the presumption that his use of the roadway was permissive. Appellee testified that he

had the right to use the roadway and that other people thought of him as being in control of the roadway. Appellant contends that appellee's testimony of a conversation between appellee and members of the White family outweighs appellee's other testimony about being in control of the roadway. In our previous opinion dealing with the summary judgment issue, this Court focused on the conversation between appellee and the Whites and on additional evidence of a conversation between appellee and Miller, the previous owner of the property. There we held that the forecast of evidence indicated no genuine issue of material fact on the issue of permissive use. However, at the trial which gives rise to this appeal, the additional evidence of the conversation between appellee and Miller was not before the trial court. Accordingly, we hold that the evidence contained in this record, viewed in the light most favorable to appellee, was sufficient to create a jury question as to whether appellee overcame the presumption that his use of the roadway was permissive.

[3] Finally, appellant contends that the trial court erred in denying appellant's motions for directed verdict and judgment notwithstanding the verdict because appellee's use of the claimed right of way was not continuous and uninterrupted. We disagree. The "continuity" necessary for a party to establish a prescriptive easement depends on the nature of the easement asserted. *Concerned Citizens v. State Ex Rel. Rhodes*, 329 N.C. 37, 52, 404 S.E.2d 677, 686 (1991) (citations omitted). The use simply has to be often enough for the true owner to have notice that a party is asserting an easement. *Id.* at 52, 404 S.E.2d at 686-87.

Here, the record shows that appellee bought the property and used the roadway from 1961 until the mid-1980's when appellant's construction activities completely destroyed the old roadway. Appellee testified that he used the roadway quite often for recreational purposes when he lived nearby and he used the roadway several times per year even after he moved away. The record also shows that other people used the roadway with appellee's permission and that appellee was the person who maintained the roadway for his use and other people's enjoyment. We hold that this evidence was sufficient for a jury to find that appellee had satisfied his burden of showing that his use of the roadway was continuous and uninterrupted for the statutorily required twenty year period.

II.

[4] Appellant also contends that the trial court erred by admitting testimony of Roland Elliot (hereinafter Elliot) and Burton Murphy (hereinafter Murphy) concerning a dispute between appellant and these two men regarding a separate road. To obtain a new trial based upon an error of the trial court in admitting evidence, the appellant must establish that: (1) he objected to the admission of the evidence at trial; (2) the evidence was inadmissible in law because it was incompetent, immaterial, or irrelevant; and (3) the evidence was prejudicial to appellant's cause of action or defense. *Hunt v. Wooten*, 238 N.C. 42, 45, 76 S.E.2d 326, 328 (1953) (citations omitted).

While appellant occasionally made general objections during appellee's examination of Elliot and Murphy, appellant at times allowed Elliot and Murphy to testify about the same facts without objection. A party waives its objection to a witness' testimony when the party allows the witness to later testify about virtually the same facts without objection. *Hunt v. Wooten*, 238 N.C. App. 42, 49, 76 S.E.2d 326, 331 (1953); *see also* Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 22 (4th ed. 1993). Here, there is no indication from the record that appellant made a line objection to appellee's line of questioning. *See Kenneth S. Broun, Brandis & Broun on North Carolina Evidence* § 22 (4th ed. 1993) (stating that "a general objection ordinarily cannot operate as a line objection"). Having failed to make a line objection which would have applied to any subsequent admission of evidence falling within the same line of questioning, appellant waived his right to preserve his objections for appeal. Accordingly, this assignment of error fails.

III.

[5] Finally, appellant contends that the trial court erred by excluding the deposition of Samuel L. White (hereinafter White). Appellant claimed that he served White with a subpoena to testify at appellant's trial, but when the trial court was prepared to hear White's testimony, appellant's attorney told the trial court that White's wife had called and said that he was ill and unable to attend. Rule 32(a)(4) of the North Carolina Rules of Civil Procedure provides that a party may use the deposition of an unavailable witness if, among other reasons, the witness is ill, at a greater distance than 100 miles from the place of trial, or the party offering the deposition has been unable to procure the attendance of the witness by subpoena. G.S. 1A-1, Rule 32(a)(4). "A written note or report from a physician should be sufficient to sup-

port a finding of illness or infirmity." G. Gray Wilson, *North Carolina Civil Procedure*, Vol. 1, § 32-5, n.44 (1989). Here, appellant's attorney orally stated that he had received the information that White was ill from White's wife over the telephone. Appellant's attorney offered no other form of proof concerning White's alleged illness although the record indicates that appellant's attorney had known that White was ill since the previous Monday morning. We hold that appellant's attorney failed to offer sufficient proof of White's alleged illness and that the trial court did not abuse its discretion in refusing to admit White's testimony under this provision of Rule 32(a)(4).

Because appellant's attorney could not adequately satisfy the trial court that White was ill, appellant's attorney also sought to have White's deposition admitted pursuant to Rule 32(a)(4) by asserting that White was more than 100 miles from the place of trial. Appellant's attorney asked the court to take judicial notice of this fact, but the trial court refused. Appellant now asserts that the trial court erred by refusing to take judicial notice that it is over one hundred miles between Marion and Mebane, North Carolina. Rule 201(d) of the North Carolina Rules of Evidence provides that "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." G.S. 8C-1, Rule 201(d). Here, the trial court stated that it did not know the distance between the two cities. Appellant's counsel offered to supply the trial court with a map at the lunch break, but the trial court declined to wait. Although the better practice would have been for the trial court to provide appellant's attorney with time to retain a map, we hold on this record that the trial court did not abuse its discretion by declining to take judicial notice of the distance between Marion and Mebane. Accordingly, we hold that the trial court did not err in refusing to admit White's deposition.

We note that our review has been complicated by the manner in which the record on appeal was compiled and submitted. The parties failed to cooperate in preparation of the record on appeal. Portions of the transcript are omitted leaving the remaining portions disjointed and not logically connected. The absence from the record of exhibits referred to in the record as relevant to the issue of permissive use is particularly disturbing and has contributed to the difficulty of review of the trial court's decisions.

Affirmed.

Judges ORR and JOHN concur.

WACHOVIA BANK OF NORTH CAROLINA, N.A., PLAINTIFF-APPELLANT v. BOB DUNN JAGUAR, INC., DEFENDANT-APPELLEE

No. 9421SC200

(Filed 6 December 1994)

1. Guaranty § 11 (NCI4th)— guaranty signed by person without actual authority—sufficiency of evidence

In an action to recover on a guaranty on an automobile lease, the person who signed the guaranty on behalf of defendant corporation had no actual authority to do so where he was not an employee, officer, or director of defendant; he was not authorized to execute documents on behalf of defendant; plaintiff had failed to obtain the Signature Authorization or Directors' Resolution according to its own policy; and the person could not be given authority to execute a guaranty by the general manager of defendant who himself was not authorized to execute guaranties.

Am Jur 2d, Guaranty §§ 26 et seq.

2. Guaranty § 11 (NCI4th)— guaranty signed by unauthorized person—no apparent authority to sign

In an action to recover on a guaranty on an automobile lease, the person who signed the guaranty on behalf of defendant had no apparent authority to execute the guaranty where that person was not the general manager or an officer of defendant; defendant's president specifically told the person that he was not authorized to sign guaranties; defendant's president met with two of plaintiff's vice-presidents and advised them that he did not want any more recourse paper with plaintiff, that no one could execute guaranties on his behalf, and that any guaranties had to have his personal approval and signature; and plaintiff failed to follow its own policy by not requiring defendant to execute a Signature Authorization and Directors' Resolution.

Am Jur 2d, Guaranty §§ 26 et seq.

3. Guaranty § 11 (NCI4th); Principal and Agent § 7 (NCI4th)— guaranty signed by unauthorized person—no agency by ratification

In an action to recover on a guaranty, the trial court did not err in failing to find agency by ratification or estoppel where the evidence showed that defendant's president was the only person

authorized to make and sign guaranties; the president did not know that another person had signed a guaranty until he was notified three and one-half years later; and he then promptly repudiated the guaranty on behalf of defendant.

Am Jur 2d, Agency §§ 180-208; Guaranty §§ 26 et seq.

Appeal by plaintiff from judgment filed 1 September 1993 by Judge Julius A. Rousseau, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 20 October 1994.

Davis & Harwell, P.A., by Fred R. Harwell, Jr., for plaintiff-appellant.

Adams Kleemeier Hagan Hannah & Fouts, L.L.P., by Amiel J. Rossabi and Edward L. Bleynat, Jr., for defendant-appellee.

JOHNSON, Judge.

Plaintiff Wachovia Bank is a national bank headquartered in Winston-Salem, North Carolina. Plaintiff has a Dealer Lease Division to service the needs of consumers who wish to lease rather than purchase new automobiles. Defendant Bob Dunn Jaguar, Inc. is a corporation with its office and principal place of business in Greensboro, Guilford County, North Carolina.

In 1983, Robert C. Dunn was the president of Bob Dunn Ford, Inc. (Dunn Ford), a corporation engaged in selling and leasing Ford and Jaguar automobiles out of a dealership located at 801 E. Bessemer Avenue in Greensboro, North Carolina. Robert C. Dunn and plaintiff have been doing business since the late 1960's.

Beginning in 1983, the Dealer Lease Division of Wachovia established a business relationship with Dunn Ford at the Ford Store. Leases were offered for assignment for value to the Dealer Lease Division at Wachovia. Leases from the Ford Store were assigned to the Wachovia Dealer Lease Division in the name Dunn Leasing Corp., as lessor. Around 1984, Dunn Leasing Corp. was dissolved and Dunn Ford began leasing in the name Dunn Leasing.

Plaintiff had certain policies and general practices where prior to doing business with a new entity or shortly thereafter, plaintiff required execution of a Signature Authorization and a Directors' Resolution authorizing the borrowing of money, and indicating what persons were authorized to execute documents on behalf of the enti-

ty. The purpose of requiring execution of the Signature Authorization and Directors' Resolution was two-fold: (a) to protect the dealer—so that plaintiff would not accept contracts submitted by persons unauthorized to act for the dealer; and (b) to protect plaintiff—so that it only needed to deal with authorized representatives of the dealer.

In May 1983, Dunn Leasing Corp. executed a Signature Authorization and Directors' Resolution which contained the names of officers authorized to execute documents on behalf of Dunn Leasing Corp.

On occasion, both direct and indirect leases were assigned from a Dunn automobile dealership to plaintiff prior to the execution of Signature Authorization forms and Directors' Resolution forms. However, in such transactions, bank officials would immediately thereafter obtain Signature Authorization forms and Directors' Resolution forms pertaining to the dealership assignor.

In June 1984, after the dissolution of Dunn Leasing Co., Dunn Ford continued to assign leases to plaintiff using the name Dunn Leasing, and plaintiff continued to accept assignment of leases from Dunn Ford using the name Dunn Leasing. On 20 June 1984, Dunn Ford executed a Signature Authorization and Directors' Resolution form which contained the names of officers authorized to execute documents on behalf of Dunn Ford d/b/a Dunn Leasing. At some later time, the signature of Joe Parker also appeared in ink on the Signature Authorization form for Dunn Ford d/b/a Dunn Leasing.

All indirect leases assigned to Wachovia's Dealer Lease Division were without recourse unless guaranteed by the dealership lessor. On a few occasions, Robert C. Dunn personally guaranteed payment on indirect leases that were assigned to the Wachovia Dealer Lease Division. At some point in late 1986 or early 1987, however, Robert C. Dunn met with James Valentine and Bob Earnhardt, plaintiff's vice-presidents, and advised them that he did not want any more recourse paper with Wachovia, and that no one, other than Mr. Dunn, was authorized to execute guarantees.

Effective on or about 1 August 1987, a new corporation was formed by Robert C. Dunn to engage in the sales and leases of Jaguar automobiles at a newly constructed dealership located at 3915 W. Wendover Avenue, Greensboro, North Carolina under the name of Bob Dunn Jaguar, Inc. (Dunn Jaguar). Dunn Jaguar, defendant in this action, is a subsidiary of Dunn Ford. Sometime during the fall of 1987,

a grand opening was held at the Jaguar Store, at which Wachovia officials were present.

At its inception and through 1987, Mel Blackwell was the General Manager of defendant Dunn Jaguar, and the officers of Dunn Jaguar were Robert C. Dunn, T. Jeff Lynn, Kathy Curry and Robert C. Dunn, Jr. Wachovia and its Dealer Lease Division did not obtain from Dunn Jaguar a Signature Authorization or Directors' Resolution authorizing Dunn Jaguar to do business with Wachovia.

In 1983, a couple named George and Lilly McKeathen leased a Jaguar automobile from the Ford Store, with Dunn Leasing Corp. as lessor (1983 Lease). The 1983 Lease was assigned to the Dealer Lease Division of Wachovia. The 1983 Lease had been guaranteed by Dunn Leasing Corp., and signed by Robert C. Dunn on behalf of Dunn Leasing Corp.

In November 1987, the McKeathens sought to lease a new Jaguar automobile from the Jaguar Store. The McKeathens filled out a lease application on 17 November 1987, which was transmitted by fax to the Dealer Lease Division of Wachovia. Charles Patterson, an employee of the Dealer Lease Division, reviewed the Lease Application and immediately conditioned acceptance of assignment of the McKeathen Lease on the lessor dealership executing a guaranty of the lessees' obligations. On the same day, Mr. Patterson telephoned Mel Blackwell, then General Manager of the Jaguar Store, and advised him that acceptance of assignment of the McKeathen Lease by Wachovia would be conditioned upon the dealership assignor executing a guaranty of the lessees' obligations. Mel Blackwell told Mr. Patterson that obtaining such a guaranty would be "no problem."

Thereafter, the original lease prepared by Dunn Jaguar, naming that dealership as the lessor and the McKeathens as lessees, was mailed to Wachovia, together with a Security Agreement purportedly granting Wachovia a security interest in the leased vehicle. The Lease was signed by Joe Parker, who indicated in his own handwriting that he was vice president of Dunn Jaguar. The Security Agreement was also signed by Joe Parker. The guarantor portion of the original lease form was executed by George and Lilly McKeathen as guarantors, rather than by any representative of the dealership assignor.

The McKeathen Lease and Security Agreement were then reviewed at Wachovia's Dealer Lease Division, and a representative of the Dealer Lease Division telephoned Mel Blackwell to advise him

that Wachovia required a guaranty of the obligations of the lessees by Dunn Jaguar before accepting assignment of the lease. Mel Blackwell advised representatives of the Wachovia Dealer Lease Division that he would try to obtain such a written guaranty, and a written Guaranty Agreement was then prepared, naming as the Guarantor Dunn Jaguar. The signature line of the Guaranty prepared by Wachovia naming Dunn Jaguar as the Guarantor was left blank.

The Guaranty prepared by Wachovia naming Dunn Jaguar as the guarantor was sent to Mel Blackwell. Mel Blackwell was not authorized to execute any guarantees on behalf of Dunn Jaguar, and Wachovia was aware of this fact. Wachovia did not request execution of the Guaranty Agreement by any specific individual nor did they indicate that the Guaranty Agreement should be signed by Joe Parker. The Guaranty Agreement was signed by Joe Parker, who was vice-president and general manager of Dunn Ford. Mr. Parker was not an employee, officer, or director of Dunn Jaguar. Nonetheless, the guaranty naming Dunn Jaguar as the guarantor was signed by Joe Parker, who indicated in his own handwriting that he was vice-president of Dunn Jaguar. Plaintiff issued a check payable to the order of Dunn Leasing in the amount of $38,978.35 and accepted assignment of the McKeathen Lease. These funds were deposited into the separate bank account of Dunn Jaguar without notice of any discrepancy regarding the payee, and without notice to plaintiff that Joe Parker was not an officer, director, or employee of Dunn Jaguar. Plaintiff had no document in its possession, custody or control which showed that Joe Parker was authorized to sign any document on behalf of Dunn Jaguar.

Around February 1991, the McKeathens defaulted on the 1987 Lease. In May 1991, the president of Dunn Jaguar, Robert C. Dunn, was notified for the first time that Joe Parker had executed the guaranty. Mr. Dunn immediately repudiated the guaranty.

Following a bench trial, the trial court made certain findings of fact. The court concluded as a matter of law that Joe Parker had no actual authority to sign the guaranty on behalf of Dunn Jaguar because he was not an officer, director or employee of Dunn Jaguar; that Joe Parker had no apparent authority to execute the guaranty on behalf of Dunn Jaguar because Robert C. Dunn had notified Wachovia prior to Joe Parker executing the guaranty that there would be no further guaranties executed for the benefit of Wachovia, and that only Robert C. Dunn was authorized to execute any guaranties; and that

plaintiff therefore had actual and constructive notice that Joe Parker had no authority to execute the guaranty. The court further concluded that the unauthorized act of Joe Parker in executing the guaranty was not ratified by Dunn Jaguar, because Dunn Jaguar did not know of the execution of the guaranty until 1991, at which time it immediately repudiated the guaranty.

The trial court entered judgment for defendant. After entry of judgment, the parties made certain post-trial motions, which the trial court denied.

Plaintiff appealed from the judgment and from certain aspects of the 23 September 1993 Order denying its post-trial motions. Defendant appealed from that aspect of the 23 September 1993 Order denying its motion for costs under Rule 37(c), and from the trial court's denial of its motion to tax certain deposition costs to plaintiff.

Plaintiff contends that the trial court erred and abused its discretion by concluding as a matter of law that Joe Parker did not have authority to bind Dunn Jaguar, and by concluding that Dunn Jaguar repudiated the transaction, thus, not ratifying the transaction. Plaintiff argues Joe Parker, vice-president of Dunn Ford, had actual and apparent authority to bind Dunn Jaguar to the terms of the documents. We disagree.

It is well established that "[w]here the trial judge sits as the trier of facts, his findings of fact are conclusive on appeal when supported by competent evidence. This is true even though there may be evidence in the record to the contrary which could sustain findings to the contrary." *Institution Food House v. Circus Hall of Cream*, 107 N.C. App. 552, 556, 421 S.E.2d 370, 372 (1992) (*quoting General Specialties Co. v. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979)). The trial court's judgment will not be disturbed on appeal if *any* evidence exists which supports the judgment. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E.2d 316 (1976) (emphasis added).

There are three situations in which a principal is liable upon a contract duly made by its agents: when the agent acts within the scope of his or her actual authority; when the agent acts within the scope of his or her apparent authority, and the third person is without notice that the agent is exceeding actual authority; and when a contract, although unauthorized, has been ratified. *Investment Properties v. Allen*, 283 N.C. 277, 196 S.E.2d 262 (1973); *Foote & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 324 S.E.2d 889 (1985).

[1] Plaintiff first contends that Joe Parker had actual authority to execute the guaranty because plaintiff believed that he was general manager of Robert C. Dunn's automobile dealerships and that he signed the guaranty as vice-president. Plaintiff's argument, however, ignores significant facts.

In the instant case, the trial court found that Joe Parker signed the guaranty; that Joe Parker was not an employee, officer or director of Dunn Jaguar; that Joe Parker was not authorized to execute documents on behalf of Dunn Jaguar; and that plaintiff had failed to obtain the Signature Authorization or Directors' Resolution according to their own policy. Barbara Tilley, vice president and manager of the leasing section of Wachovia, testified that it was standard practice to require Signature Authorizations or Directors' Resolutions soon after plaintiff's representatives' initial visit to a new dealership to acquire a list of people authorized to execute documents. Ms. Tilley also testified that no documentation existed showing that Joe Parker had actual authority to bind defendant Dunn Jaguar.

Plaintiff seeks to show that Joe Parker had authority through Mel Blackwell whom they acknowledge did not have authority. Plaintiff contends that "through Blackwell DUNN JAGUAR permitted Parker to perform the functions of a vice president and that through Blackwell's conduct DUNN JAGUAR both consented to and acquiesced in Parker's execution of the McKeathen documents, including the McKeathen guaranty." Plaintiff acknowledges that Blackwell did not have authority to execute the guaranty and plaintiff's representatives testified that they would not have accepted the guaranty if Blackwell had, in fact, executed the guaranty. Thus, plaintiff's attempts to argue that Mel Blackwell could authorize Joe Parker to execute the guaranty despite the fact that Mr. Blackwell himself was not authorized to execute the guaranties is without merit. Mel Blackwell could not delegate authority to Joe Parker when he himself had no authority to execute guaranties.

[2] Plaintiff next contends that Joe Parker had apparent authority to execute the guaranty. Apparent authority "is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possess." *Zimmerman v. Hogg & Allen,* 286 N.C. 24, 31, 209 S.E.2d 795, 799 (1974). Our Supreme Court has said that whether apparent authority exists depends on the "unique facts" of each case. *Id.* at 32, 209 S.E.2d at 800. "Thus, in a case where the evidence is conflicting, or susceptible to different rea-

sonable inferences, the nature and extent of an agent's authority is a question of fact to be determined by the trier of fact." *Foote & Davies, Inc.*, 72 N.C. App. at 595, 324 S.E.2d at 893. The trial judge having heard all the evidence determined that Joe Parker did not have apparent authority.

Whether the agent acts within the apparent scope of his authority is determined by what the principal does, not by the unauthorized acts and contentions of the agent. *Zimmerman*, 286 N.C. 24, 209 S.E.2d 795. The evidence presented shows that Joe Parker was not the general manager of Dunn Jaguar in 1987 nor at any other time. Additionally, President Robert C. Dunn testified that Mel Blackwell was general manager and that he and three others, not including Joe Parker and Mel Blackwell, were defendant's only officers during that period. Robert C. Dunn also specifically told Joe Parker that he was not authorized to sign guaranties.

Furthermore, there is no evidence showing that defendant held Joe Parker out as having authority to execute guaranties on his behalf. In fact, evidence showed that defendant's president, Robert C. Dunn, met with James Valentine and Bob Earnhardt, Wachovia vice-presidents, and advised them that he did not want any more recourse paper with plaintiff, that no one could execute guaranties on his behalf, and that any guaranties had to have his personal approval and signature. Thus, this communication divested Joe Parker of any authority which may have been imputed to him. In addition, Wachovia failed to follow its own policy by not requiring defendant to execute a Signature Authorization and Directors' Resolution.

Plaintiff's reliance on *Bell Atlantic Tricon Leasing Corp. v. DRR, Inc.*, 114 N.C. App. 771, 443 S.E.2d 374 (1994) in support of its position is misplaced. In *Bell Atlantic*, this Court found that a third party would not be on notice that the president executing a guaranty was exceeding the scope of his authority. *Id.* Plaintiff argues that because it believed Joe Parker was vice president, it was without notice that he was not authorized. In the instant case, unlike the situation in *Bell Atlantic*, there is ample evidence from which plaintiff should have been on notice that Joe Parker was exceeding his authority. Thus, *Bell Atlantic* is inapplicable here.

[3] Plaintiff's third contention is that the court erred in failing to find agency by ratification or estoppel. We disagree. Our Supreme Court has stated:

> In order to establish the act of a principal as a ratification of the unauthorized transactions of an agent, the party claiming ratification must prove (1) that at the time of the act relied upon, the principal had full knowledge of all material facts relative to the unauthorized transaction . . . and (2) that the principal had signified his assent or his intent to ratify by word or by conduct which was inconsistent with an intent not to ratify.

Equipment Co. v. Anders, 265 N.C. 393, 400-01, 144 S.E.2d 252, 258 (1965).

The evidence shows that Robert C. Dunn was the only person authorized to make and sign guaranties. The evidence also shows that Mr. Dunn did not know of Joe Parker's acts until he was notified in May 1991; he then promptly repudiated the guaranty on behalf of defendant. Thus, there was no ratification of the guaranty.

"Ratification requires intent to ratify plus full knowledge of all material facts. . . . [Ratification] may be express or implied, and intent may be inferred from failure to repudiate an unauthorized act . . . or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act." *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982) (citation omitted). In the instant case, no evidence exists. Accordingly, defendant Dunn Jaguar is not liable to defendant on the basis that it ratified Joe Parker's actions.

Plaintiff next contends that the trial court erred and abused its discretion by failing to order an award of attorney's fees. We disagree. North Carolina General Statutes § 6-21.2 (1986) limits recovery of attorney's fees to situations where the indebtedness is actually collected. In the case *sub judice*, plaintiff was not entitled to recovery, thus no sums were collected. The court's decision was without error. Plaintiff also contends that the trial court erred and abused its discretion by denying its motions pursuant to Rules 11, 37, and 59 of the North Carolina Rules of Civil Procedure. We disagree.

The trial court correctly denied Rule 11 sanctions against defendant. Plaintiff offers no evidence suggesting that the trial court abused its discretion in denying plaintiff's request for sanctions. *See Central Carolina Nissan, Inc. v. Sturgis*, 98 N.C. App. 253, 390 S.E.2d 730, *disc. review denied*, 327 N.C. 137, 394 S.E.2d 169 (1990). Plaintiff's reliance on Rule 37 is also inapplicable in the instant case because

plaintiff did not compel discovery, but instead sought to prevent discovery by asking for a protective order. In addition, review of a trial court's denial of a motion for new trial is within the discretion of the trial judge and review of his decision "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). As stated previously, the trial judge's findings of fact were supported by competent evidence, and its conclusions were properly based on these findings of fact. Thus the trial court did not abuse its discretion in denying plaintiff's Rule 59 motion.

Defendant cross appeals from the 20 September 1993 order denying its Rule 37(c) motion. Rule 37(c) of the North Carolina Rules of Civil Procedure requires:

> *Expenses on failure to admit.*—If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (i) the request was held objectionable pursuant to Rule 36(a), or (ii) the admission sought was of no substantial importance, or (iii) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (iv) there was other good reason for the failure to admit.

North Carolina General Statutes § 1A-1, Rule 37(c) (1990). In the instant case defendant served requests for admission on plaintiff and plaintiff denied every admission. The trial court found that defendant proved the truth of the matter asserted.

"The choice of sanctions under Rule 37 is within the trial court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion." *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239 (1992), *aff'd*, 334 N.C. 303, 432 S.E.2d 339 (1993). There is no evidence that the trial court abused its discretion in denying defendant's motion, thus the trial court's decision is affirmed.

Defendant also cross appeals from the trial court's denial of its motion to tax the deposition costs against plaintiff as set forth in defendant's affidavit of costs. It is within the trial court's discretion

whether costs are to be taxed. North Carolina General Statutes § 6-20 (1986). Whether deposition expenses may be taxed as part of the costs is also within the trial court's discretion. *Alsup v. Pitman*, 98 N.C. App. 389, 390 S.E.2d 750 (1990). The trial court's discretion will not be disturbed on appeal absent an abuse of discretion. *Id.* Because there is no evidence that the trial court abused its discretion, we affirm the trial court's decision.

For all of the foregoing reasons, the decision of the trial court is affirmed.

Affirmed.

Judges MARTIN and THOMPSON concur.

GARY SHAMLEY v. SUZY SHAMLEY

No. 9328DC1274

(Filed 6 December 1994)

1. Courts § 15 (NCI4th)— equitable distribution—no personal jurisdiction over defendant—failure to show minimum contacts with North Carolina

The trial court did not err in dismissing plaintiff's equitable distribution action for lack of personal jurisdiction over defendant where the evidence tended to show that defendant had been a resident of New Jersey for over twenty years; she had been in North Carolina on only two occasions for a total of ten days; plaintiff left the marital home in New Jersey, bought property, built a house in North Carolina and had it titled in both parties' names, all without defendant's agreement or acquiescence; and plaintiff thus failed to show the necessary minimum contacts to give North Carolina personal jurisdiction over defendant.

Am Jur 2d, Courts §§ 118 et seq.

Long-arm statutes: in personam jurisdiction over nonresident based on ownership, use, possession, or sale of real property. 4 ALR4th 955.

Comment note.—"Minimum contacts" requirement of Fourteenth Amendment's due process clause (Rule of *International Shoe Co. v. Washington*) for state court's

assertion of jurisdiction over nonresident defendant. 62 L. Ed 2d 853.

2. Divorce and Separation § 112 (NCI4th)— resulting trust in house—claim ancillary to equitable distribution claim—denial of motion proper

The trial court did not err in denying plaintiff's motion to be declared sole owner of a house which he built in North Carolina and had titled in both parties' names, since plaintiff's motion was ancillary to his equitable distribution action; the equitable distribution action was dismissed for lack of personal jurisdiction over defendant; and plaintiff would not be entitled to a resulting trust anyway, as he would be required to show that he purchased the home with separate funds, and whether the funds were separate was an issue to be resolved in the equitable distribution action.

Am Jur 2d, Divorce and Separation §§ 878 et seq.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

3. Courts § 74 (NCI4th)— earlier order vacated and set aside by another judge—different stage of proceedings—different issues—no error

There was no merit to defendant's contention that the trial court's order dismissing plaintiff's equitable distribution claim for lack of jurisdiction over defendant should be reversed because he had no authority to vacate and set aside an earlier court order continuing the case and enjoining both parties from using or disposing of any funds which were the subject of plaintiff's motion for injunctive relief, since the prior judge's order was rendered at a different stage of the proceedings, and the issues and materials considered by the second judge were not the same.

Am Jur 2d, Courts §§ 87 et seq.

Appeal by plaintiff from orders entered 14 July 1993, 30 July 1993, and 27 September 1993 by Judge Earl J. Fowler, Jr. in Buncombe County District Court. Heard in the Court of Appeals 26 September 1994.

Plaintiff Gary Shamley and defendant Suzy Shamley were married in New York in December 1965. The couple resided for 20 years in New Jersey until 1991. In January 1991, plaintiff bought a house in

Barnardsville, North Carolina and moved there. Defendant remained in New Jersey. In February 1992 plaintiff started the construction of a new house on his property in Barnardsville, which he finished in November 1992.

On 7 January 1993, plaintiff sued for absolute divorce and equitable distribution in North Carolina. On 25 February 1993, defendant brought a similar suit in a New Jersey Superior Court. On 25 May 1993, Judge Peter L. Roda granted plaintiff an absolute divorce from defendant in North Carolina. Plaintiff then moved to dismiss the New Jersey suit. On 1 June 1993, Judge Eugene H. Austin dismissed the New Jersey suit without prejudice because he concluded that the North Carolina judgment was entitled to full faith and credit and that the matter of distributing the marital property was before the North Carolina court.

Plaintiff moved for injunctive relief, seeking restitution of his certain separate funds and of gold coins allegedly converted by defendant because monies constituting his separate funds were withdrawn by defendant in January 1992 from a joint account. Plaintiff's motion was heard on 26 May 1993 by the Honorable Shirley H. Brown in Buncombe County District Court. Defendant did not appear. Instead, her attorney in New Jersey sent a letter to the court requesting a continuance to allow defendant an opportunity to retain local counsel. By order entered 28 May 1993, Judge Brown continued the hearing on plaintiff's motion until 2 July 1993 and enjoined both parties from using or disposing of any funds which were the subject of plaintiff's motion for injunctive relief pending the hearing.

At the 2 July 1993 hearing, defendant's attorney made a special appearance to challenge jurisdiction and produced a motion to vacate the divorce order and the order of 28 May 1993. Defendant moved that the judgment and order be set aside pursuant to Rule 60(b)(4) for lack of personal jurisdiction over the defendant, insufficient service of process, and lack of subject matter jurisdiction. Judge Gary S. Cash continued the matter to 9 July 1993.

On 7 July 1993, the order dismissing the New Jersey suit was modified by the New Jersey court to grant the right to move the equitable distribution action to New Jersey.

On 9 July 1993, Judge Fowler conducted an evidentiary hearing on defendant's motion. On 14 July 1993, the court determined that it did not have personal jurisdiction over defendant and thus granted

defendant's motion to vacate and set aside the order of 28 May 1993, dismissed plaintiff's cause of action for equitable distribution, and denied plaintiff's motion for injunctive relief. The court concluded that it had jurisdiction over the parties sufficient to alter their marital status and thus denied defendant's motion to vacate the divorce order. On the other hand, the court concluded that it could not assume jurisdiction over plaintiff's cause of action for equitable distribution because it did not have "jurisdiction over defendant sufficient to meet the minimum contact requirements" and that it could not entertain plaintiff's motion for injunctive relief because it was part of the equitable distribution action. Judge Fowler also decreed that New Jersey was the proper jurisdiction for the equitable distribution action.

On 21 July 1993 plaintiff filed a motion to declare plaintiff sole owner of the Barnardsville home, which he had jointly titled in the couple's names. Plaintiff's motion was denied by Judge Fowler by order entered 30 July 1993. On 23 July 1993 plaintiff filed a motion under Rules 52(b) and 59(a) to vacate, set aside or amend the 14 July order, which motion was denied by order entered 27 September 1993.

From the orders entered 14 July 1993, 30 July 1993 and 27 September 1993, plaintiff appeals.

Gary Shamley, plaintiff-appellant, pro se.

Robert E. Riddle, P.A., by Robert E. Riddle, for defendant-appellee.

THOMPSON, Judge.

[1] The main issue on appeal is whether the trial court erred in dismissing plaintiff's equitable distribution action and his ancillary claim for restitution for lack of personal jurisdiction over defendant.

Exercise of jurisdiction in an equitable distribution action must meet the minimum contacts standard of *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945). *Carroll v. Carroll*, 88 N.C. App. 453, 455, 363 S.E.2d 872, 874 (1988). In determining whether a nonresident defendant is subject to the *in personam* jurisdiction of the courts of this State, we must consider (1) whether there is a statutory basis for the exercise of *in personam* jurisdiction by the court and (2) whether the exercise of jurisdiction comports with the requirements of the due process clause of the Fourteenth Amendment. *Buck v. Heavner*, 93 N.C. App. 142, 144, 377

S.E.2d 75, 77 (1989) (*citing Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977)). "Due process demands that the maintenance of a lawsuit against a nonresident not offend 'traditional notions of fair play and substantial justice.' The 'constitutional touchstone' of this due process requirement is whether the defendant has purposefully established minimum contacts with the forum state so that he should reasonably anticipate being haled into court in that forum." *Id.* at 145, 377 S.E.2d at 77 (citations omitted).

The question on appeal is whether the second prong of the test was met. Plaintiff argues the trial court's findings of fact regarding defendant's contacts with North Carolina were unsupported by the evidence and that the trial court overlooked evidence which was sufficient to prove that defendant purposefully established numerous contacts with North Carolina. We disagree. We conclude that the trial court's findings were adequately supported and in light of these findings and other evidence presented, plaintiff did not establish the necessary minimum contacts.

The trial court made the following findings of fact regarding defendant's contacts:

> 9. On December 14, 1990, without the Defendant's participation, the Plaintiff purchased a tract of land in Buncombe County North Carolina and when he left the marital home in New Jersey moved into an old house located on this property; that he has since that time without the participation of the Defendant constructed a home on this property and has resided there since.
>
> 10. That although the Plaintiff had the North Carolina property titled in joint names, this was done without Mrs. Shamley's presence or knowledge and he paid for the property with cash which he contends was his separate money.
>
> 11. When the Plaintiff left the marital home in New Jersey he removed certain personal property with him to North Carolina including several vehicles, which he contends were his property; the Defendant did not assist in moving any of her personal property to North Carolina; that the presence of personal property in North Carolina was brought about exclusively by the Plaintiff and its presence here does not represent an active choice on the part of the Defendant.
>
> 12. The Defendant has never been a resident of North Carolina and although she visited on two occasions for a total of ten days

the marriage relationship was never resumed; the defendant looked at houses in North Carolina in October, 1991 but did not purchase any real estate; that she did purchase an automobile in North Carolina in July, 1992, but paid New Jersey sales tax and had the automobile titled in New Jersey and the vehicle has been in New Jersey since its purchase.

The only evidence presented at the 9 July 1993 hearing were the affidavits and exhibits filed by the parties. Plaintiff argues that defendant's affidavit does not support the trial court's findings that: (1) plaintiff purchased land in North Carolina and constructed a home without defendant's participation, (2) the property was titled in joint names without defendant's presence or knowledge, (3) plaintiff did not purchase any real estate in North Carolina when she went to look at houses there in October 1991, and (4) defendant purchased an automobile in North Carolina in July 1992, but paid New Jersey sales tax and had the auto titled in New Jersey.

The trial court's findings of fact are conclusive if supported by any competent evidence and judgment supported by such findings will be affirmed, even though there may be evidence to the contrary. *Little v. Little*, 9 N.C. App. 361, 365, 176 S.E.2d 521, 523-524 (1970). We conclude that the trial court's findings of fact were supported by statements in the affidavits and were thus supported by competent evidence.

In her affidavit, defendant stated the following:

2. That she is presently a citizen and resident of Upper Saddle River, New Jersey; that she has been a citizen and resident of said place for more than twenty years.

3. That she visited North Carolina only twice in her life, for a total of ten days.

4. That she had no other contact with the state of North Carolina other than the aforementioned ten day stay.

5. That the Plaintiff, acting completely on his own and without Defendant's consent, travelled to North Carolina in 1991 to buy land and a house; that Plaintiff moved to North Carolina to build a new house on the land in 1992, against Defendant's wishes.

6. That Defendant was not present at the closing of the land purchase on January 4th, 1991.

7. That Defendant refused to join him, and remained in New Jersey . . . .

. . .

10. That Defendant has no personal property located in North Carolina.

This affidavit clearly supports the findings that plaintiff purchased land and constructed a home in North Carolina without defendant's participation and that the property was titled in joint names without defendant's presence and knowledge.

The court's finding that defendant did not purchase any real estate in North Carolina when she went to look at houses there in October 1991 is supported by plaintiff's statement in his affidavit that a real estate agent showed him and defendant houses while defendant was in North Carolina and that defendant did not like any of them. The court's finding that defendant purchased an automobile in North Carolina in July 1992, but paid New Jersey sales tax and had the auto titled in New Jersey is supported by plaintiff's statement in his affidavit that between 2 July and 7 July 1992 plaintiff visited Buncombe County to buy a new car which she took to New Jersey.

Plaintiff also argues that the trial court's finding that plaintiff removed several vehicles from New Jersey to North Carolina which he contends were his property is unsupported by the evidence. The only evidence relating to this property is plaintiff's statement in his affidavit that he moved various automobiles and other personal property to North Carolina that are "part of the marital estate [to] which [defendant] has not relinquished her rights." We agree that the trial court's finding in this regard was not supported by the evidence; the evidence did not show that plaintiff contended that the vehicles were his personal property. However, this error does not warrant reversal. Even if the vehicles were part of the marital estate, plaintiff was solely responsible for their removal to North Carolina.

Plaintiff next argues that the trial court overlooked evidence which was sufficient to prove that defendant had numerous purposeful contacts with North Carolina. Plaintiff points to evidence that defendant purchased real estate here, brought personal property to North Carolina, and had funds "domiciled" in North Carolina. Some of the evidence to which plaintiff refers was not presented at the hearing but was instead submitted with plaintiff's motion to vacate, set aside or amend the judgment, which was denied by order of 27 September 1993. Plaintiff makes no argument regarding the denial of this motion in his brief and thus has abandoned his assignment of error

relating to the trial court's order of 27 September 1993. N.C. R. App. P. 28(b)(5) (1994). We find that the evidence presented at any or all of the hearings is insufficient to establish that defendant made numerous purposeful contacts with North Carolina. "Minimum contacts must have a basis in 'some act by which the defendant purposely avails [himself] of the privilege of conducting activity within the forum State, thus invoking the benefits and protections of its laws.' " *Carroll v. Carroll*, 88 N.C. App. 453, 455, 363 S.E.2d 872, 874 (1988) (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75, 85 L.Ed.2d 528, 542 (1985)). The latter requirement ensures that defendant will not be haled into a jurisdiction solely as a result of the "unilateral activity of another party or third person." *Id.* at 456, 363 S.E.2d at 874 (*quoting Burger King v. Rudzewicz*, 471 U.S. 462, 475, 85 L.Ed.2d 528, 542 (1985)). Plaintiff's purchase of land in North Carolina and construction of a house thereon was done without defendant's participation. Defendant's only voluntary contacts with North Carolina were during a brief visit in which she looked at houses with defendant and another visit in which she purchased an automobile. We find that defendant could not, on the basis of these contacts, reasonably anticipate being haled into court here.

[2] Plaintiff also assigns as error the denial of his motion to be declared sole owner of the North Carolina house. Defendant contends that the order entered 30 July 1993 is erroneous because the court did not make findings of fact and conclusions of law and plaintiff was entitled as a matter of law to a judgment of resulting trust in his favor. We disagree.

After his motion was denied, plaintiff requested Judge Fowler to make findings of fact and conclusions of law so that he could appeal the denial of his motion. By order of 27 September 1993, Judge Fowler denied plaintiff's motion because it sought relief that would be ancillary to the equitable distribution action which had been dismissed for lack of personal jurisdiction. Rule 52(a)(2) of the North Carolina Rules of Civil Procedure requires findings of fact and conclusions of law on decisions with respect to any motion or order *ex mero motu* only when requested by a party and as provided in Rule 41(b). N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (1990). The trial court must comply with a party's request under Rule 52(a)(2). *Andrews v. Peters*, 75 N.C. App. 252, 258, 330 S.E.2d 638, 642, *disc. review denied*, 315 N.C. 182, 337 S.E.2d 65 (1985), *affirmed*, 318 N.C. 133, 347 S.E.2d 409 (1986).

Although the trial court was required under Rule 52(a) to enter findings of fact and conclusions of law pursuant to plaintiff's request, we need not remand for findings and conclusions because plaintiff's motion was ancillary to the equitable distribution action, moreover, plaintiff would not have been entitled to a resulting trust. To be entitled to a resulting trust in his favor, plaintiff must have presented evidence that he purchased the home with separate funds and must have produced clear and convincing evidence to rebut the presumption that a gift was intended. *See Mims v. Mims*, 305 N.C. 41, 56-58, 286 S.E.2d 779, 789-790 (1982). Plaintiff contends that he spent $205,000 which he received in settlement of lawsuits he filed against his employer to purchase the home and that these funds were his separate funds. Whether or not these funds were plaintiff's separate property is an issue to be resolved in the equitable distribution action. Moreover, the only evidence plaintiff points to as proof of those facts is the written settlement agreement and the couple's summary account statement with Dreyfus Worldwide Dollar Money Market Fund, which shows that $205,000 was added to the couple's account. We find this evidence insufficient to show that the property was purchased with his separate funds and thus conclude that plaintiff would not have been entitled to a resulting trust.

[3] Plaintiff further argues that Judge Fowler's order should be reversed because he had no authority to vacate and set aside Judge Brown's order. Ordinarily, one superior court judge may not modify, overrule, or change the judgment of another superior court judge previously made in the same action. *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987). The rule also applies to district court judges. *See Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117, *appeal dismissed and disc. review denied*, 303 N.C. 319, 281 S.E.2d 659 (1981).

Judge Fowler was entitled to set aside the judgment if plaintiff's motion were proper and authorized under N.C. Gen. Stat. § 1A-1, Rule 60. *See Waters v. Qualified Personnel, Inc.*, 32 N.C. App. 548, 550, 233 S.E.2d 76, 78 (1977) (a new judge can hear a party's motion for rehearing to set aside a judgment if the motion is proper and authorized under Rule 60). However, defendant's motion was not authorized under Rule 60(b) because section (b) of the rule applies by its express terms only to final judgments. *Sink v. Easter*, 288 N.C. 183, 196, 217 S.E.2d 532, 540 (1975). Judge Brown's order, which continued the hearing and enjoined the parties from converting the funds pending the hearing, was not a final judgment.

Nevertheless, we hold that Judge Fowler was not bound by the prior order in ruling on defendant's motion to set aside that order because the prior order of Judge Brown was rendered at a different stage of the proceedings and the issues and materials Judge Fowler considered were not the same. The rule does not apply where the prior order is rendered at a different stage of the proceedings, where the materials considered are not the same, and where the issues are not the same. *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987). The hearing before Judge Brown dealt primarily with defendant's motion to continue the hearing in order to retain local counsel. Judge Brown's order was based on the letter submitted by defendant's attorney, plaintiff's affidavit and plaintiff's arguments. On the other hand, the hearing before Judge Fowler dealt with the issues raised by defendant's motion. The primary issue there was whether defendant's contacts with North Carolina, as evidenced by the parties affidavits, were sufficient to establish minimum contacts.

We have reviewed plaintiff's remaining assignments of error and find no error except in the trial court's decree that New Jersey was the proper forum for the parties' equitable distribution action. Whether or not New Jersey is the proper forum for the equitable distribution action is a matter to be determined by the New Jersey courts. However, this error does not warrant reversal of the order of 14 July 1994.

The orders entered 14 July 1993 and 30 July 1993 are

Affirmed.

Chief Judge ARNOLD and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. THOMAS DONNELL

No. 9318SC1164

(Filed 6 December 1994)

1. Robbery § 66 (NCI4th)— armed robbery—sufficiency of evidence

Evidence of armed robbery was sufficient to be submitted to the jury even though the State failed to introduce the $120.00 found on defendant's person and claimed by the victim to be his

property where the State's evidence showed that defendant and two other men knocked the victim to the ground and began kicking and hitting him in the face and head; before knocking the victim to the ground, one of the men brandished a firearm and hit the victim in the head with it; while the victim was on the ground, one of the men reached into his pocket and took his money; and the investigating officer testified that $162.50, $126.00, and $9.55 were found on defendant and his accomplices.

Am Jur 2d, Robbery §§ 62 et seq.

2. Robbery § 135 (NCI4th)— armed robbery—no submission of lesser offense

The trial court in an armed robbery prosecution did not err in refusing to submit the lesser offense of common law robbery to the jury where the victims testified that a firearm was used, and testimony of a security officer and police officer that they did not see a gun but that they performed no search of the crime scene and no search of defendants until some time after they had fled the scene did not refute the victims' testimony.

Am Jur 2d, Robbery §§ 75, 76.

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

3. Robbery § 118 (NCI4th)— armed robbery—instruction on weapon used—no error

The trial court in an armed robbery prosecution did not commit plain error by giving the jury an instruction that tended to imply that any deadly weapon was sufficient when the indictment required that the jury find the weapon in question was a pistol, since the only evidence before the jury was that the weapon was a pistol, and there was no likelihood that the jury would have reached a different result had the offending instruction not been given.

Am Jur 2d, Robbery §§ 71 et seq.

4. Robbery § 164 (NCI4th)— aggravating factor not found—no error

The trial court did not abuse its discretion by finding that defendant had lied about his record where the trial court did not find this as a separate aggravating factor but included it in the findings of prior convictions, and the trial court gave defendant

an opportunity to explain his testimony that he had no prior convictions.

Am Jur 2d, Robbery §§ 82 et seq.

Appeal by defendant from judgment and commitment entered 21 May 1993 by Judge Edward K. Washington in Guilford County Superior Court. Heard in the Court of Appeals 26 September 1994.

Defendant was charged in an indictment with robbery with a firearm in violation of G.S. 14-87. The State's evidence tended to show that on 21 September 1991, James Edwards and Jerry Harrelson walked up to a phone booth in a parking lot on 1510 East Market Street, across from A & T University. Defendant and two other men were standing around a car parked near the phone booth. While Jerry Harrelson was trying to use the phone, James Edwards began talking with the defendant. One of the men who was with defendant grabbed James Edwards and Edwards fought back. The other man with the defendant went to the car and pulled out a pistol. Upon seeing the pistol, Edwards yelled to Harrelson that the man had a gun and to run for safety. The man with the gun then approached Harrelson and hit him in the head with the gun. Defendant and the two men then knocked Harrelson to the ground and started kicking him. While Harrelson was on the ground he felt one of the men take his money out of his pocket. Harrelson testified that he was carrying $120.00 on his person.

Duran Dulin, a security officer for A & T University, testified that he was traveling west on Market Street on the night of 24 September 1991. When Officer Dulin stopped at the light at the intersection of Market and Laurel, he looked to the left and saw three individuals on top of Harrelson, striking him about the head and face with their fists. When Officer Dulin pulled into the parking lot to investigate, the three men stood up and backed away. After checking Harrelson for injuries, Officer Dulin began questioning the three men to determine what had happened. Officer Dulin then returned to Mr. Harrelson, who told him that the men had tried to take his money. When Officer Dulin again tried to talk to the three men, they ran away.

Edwards returned to the scene and informed the officer that one of the subjects had a gun. Edwards noticed the men who had assaulted Harrelson were going west in a cab down Market Street. Another officer followed the cab and pulled it over. After Harrelson and Edwards identified the men as their assailants, the suspects and

the cab were searched for weapons and money. The sum of $162.25 was found on defendant's person. No weapons were found. On cross examination, Officer Dulin testified that he did not draw his weapon when he got out of his car and that he did not see any sign of a weapon. He further admitted that he did not know whether the men had a weapon because he never saw one.

Officer Karen G. Laboard of the Greensboro Police Department testified that she was called to the scene. Officer Laboard testified as to statements she took from James Edwards, Jerry Harrelson, and Officer Dulin. Officer Laboard testified that after the men were arrested, she collected their clothing and other personal items. Defendant had $162.25 and the other two men each had $126.00 and $9.55 respectively on their persons. Officer Laboard identified State's Exhibits 6 and 7 as defendant's clothing and Exhibit 8 as the money she took from defendant, less $120.00, which had been released to Harrelson without her knowledge.

At the close of the evidence, defendant moved to dismiss the charges on the ground that the State had failed to produce evidence of the stolen property. Defendant's motion was denied. Defendant also requested an instruction on the lesser offense of common law robbery, which was also denied.

The jury found defendant guilty of robbery of Jerry Harrelson with a firearm. By order entered 21 May 1993, defendant was sentenced to a term of twenty years. Defendant apppeals.

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

Harris & Iorio, by Douglas S. Harris, for defendant-appellant.

THOMPSON, Judge.

Defendant raises the following assignments of error: (1) the denial of his motion to dismiss, (2) the denial of his request for an additional instruction on common law robbery, (3) instructions given to the jury in response to a question submitted by the jury, and (4) the trial court's finding of an aggravating factor. We find no error and thus affirm.

In reviewing the denial of a motion to dismiss for insufficient evidence, the evidence at trial must be examined in the light most favorable to the State to determine whether there is substantial evidence

of every essential element of the crime. "Evidence is 'substantial' if a reasonable person would consider it sufficient to support the conclusion that the essential element exists." *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). The essential elements of the offense of armed robbery under N.C. Gen. Stat. § 14-87 are: (1) the unlawful taking or attempted taking of personal property from another, (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means, and (3) danger or threat to the life of the victim. *State v. Giles*, 83 N.C. App. 487, 490, 350 S.E.2d 868, 870 (1986), *cert. denied*, 319 N.C. 460, 356 S.E.2d 8 (1987). A person who aids or abets another person or persons in the commission of the offense of armed robbery is equally guilty as a principal. *See* N.C. Gen. Stat. § 14-87(a) (1993) (persons who commit the offense of robbery with firearms or other dangerous weapons and persons who aid or abet such persons shall be guilty of a Class D felony).

[1] Defendant argues that the trial court should have granted his motion to dismiss because the State failed to introduce the $120.00 found on defendant's person. We disagree. Viewing the evidence in the light most favorable to the State, we find that there was substantial evidence of each essential element of the offense. Thus, the trial court's denial of defendant's motion to dismiss was proper. The State's evidence showed that defendant and two other men knocked Harrelson to the ground and began kicking and hitting him in the face and head. Before knocking Harrelson to the ground, one of the men brandished a firearm and hit Harrelson in the head with it. While Harrelson was on the ground, one of the men reached in his pocket and took his money. Although the State did not introduce the $120.00 found on defendant's person, there was substantial evidence that defendant and his accomplices unlawfully took Harrelson's personal property. A reasonable person would consider Harrelson's testimony that defendant and his two accomplices assaulted him and that one of the three men took $120.00 from his person, along with Officer Laboard's testimony that $162.25, $126.00, and $9.55 were found on defendant's and his accomplices' persons respectively, sufficient to support the conclusion that defendant and his accomplices unlawfully took Harrelson's personal property.

[2] Defendant next argues that the trial court erred in refusing to submit a charge of common law robbery to the jury as an alternative to the armed robbery charge. The trial court is required to submit a lesser included offense to the jury only when there is evidence from which the jury could find that defendant committed the lesser includ-

ed offense. Submission of a lesser included offense is not required when the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element. *State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988). " 'Robbery at common law is the felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or putting him in fear.' " *State v. Melvin*, 57 N.C. App. 503, 506, 291 S.E.2d 885, 887, *cert. denied*, 306 N.C. 748, 295 S.E.2d 484 (1982) (citation omitted).

Defendant contends that the trial court should have instructed the jury on common law robbery because the testimonies of Officer Dulin and Officer Laboard constituted conflicting evidence relating to the use of a firearm and provided evidence from which the jury could find that he committed common law robbery. We disagree. James Edwards and Jerry Harrelson testified that a firearm was used. Their testimony was not refuted by Officer Dulin and Officer Laboard. Officer Dulin testified that the three men stood up and backed away as soon as he pulled into the parking lot. Officer Dulin did not immediately arrest and search the three men and did not search the area. Instead, the officer checked the victim for injuries and questioned the three men about what happened. No search was ever performed at the scene of the crime and defendants were not searched until some time after they had fled the scene.

[3] Defendant's third assignment of error is to instructions given in response to a question submitted by the jury. The jury submitted the following question during its deliberations: "Do we need to decide that there was a firearm involved or simply any object that could be used as a deadly weapon?" Judge Washington discussed the question with counsel for the State and counsel for the defendant outside of the presence of the jury. He then stated that he intended to read the indictment to the jury and to tell them that "so far as this case is concerned the words 'to wit, the use of a .25 caliber automatic pistol,' may be taken by them and they may consider that, but it's up to them to decide whether this defendant is guilty of robbery with a firearm or not." Defendant did not object to the proposed instruction. Thereafter, the trial court instructed the jury as follows:

> The indictment reads, "Indictment, robbery with dangerous weapon." The first part of it is the charge that, "He did steal, take, and carry away, or—and attempt to steal, take, and carry away another's personal property, the value of $120.00, from the pres-

> ence or person of Jerry Wayne Harrelson. The defendant committed this act having in possession and with the use and threatened use of firearms and other dangerous weapons, implements, and means," and then, it has a comma, "to wit, the use of a .25 caliber automatic pistol, whereby the life of Jerry Wayne Harrelson was endangered and threatened."
>
> Now, the indictment itself is the charge that is being tried by this jury. In one respect, you may consider that it says, "any dangerous weapons, implements and means." On the other hand of that coin, you can say it also says, "to wit, the use of a .25 caliber automatic pistol." But it's for you, the jury, to say and determine whether or not this defendant is guilty beyond a reasonable doubt of the charge against him listed as robbery with a dangerous weapon.

Defendant did not object to this instruction. Defendant now argues that the instruction was in error because it tended to imply that any weapon was sufficient when the indictment required that the jury find the weapon in question was a gun.

The State argues that defendant is prohibited from assigning as error any portion of the jury charge because he failed to object to any portion of the instruction before the jury retired, as required by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure. Rule 10(b)(2), which provides that "a party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict," has no application once the jury has begun its deliberations. N.C. R. App. P. 10(b)(2) (1994); *City of Winston-Salem v. Hege*, 61 N.C. App. 339, 341, 300 S.E.2d 589, 590 (1983). However, we find that defendant has failed to preserve this question for review as required under Rule 10(b)(1), which provides that in order to preserve a question for appellate review a party must make a timely objection and obtain a ruling on such objection. N.C.R. App. P. 10(b)(1) (1994). Where a defendant fails to preserve a question by objection noted at trial, the question may nevertheless be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error. N.C. R. App. P. 10(c)(4) (1994). Although defendant does not contend the instruction amounted to plain error, we exercise our discretion under Rule 2 to suspend the rules and review for plain error. N.C. R. App. P. 2 (1994).

In deciding whether a defect in the jury instruction constitutes plain error, the appellate court must review the entire record to determine if the instructional error had a probable impact on the jury's finding of guilt. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-379 (1983). " '[T]he appellate court must be convinced that absent the error the jury probably would have reached a different verdict.' " *State v. Hartman*, 90 N.C. App. 379, 383, 368 S.E.2d 396, 399 (1988) (citation omitted). An improper instruction rarely justifies reversal of a criminal conviction where no objection was made in the trial court. *Odom*, 307 N.C. at 661, 300 S.E.2d at 378 (citing *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed.2d 203, 212, 97 S.Ct. 1730, 1736 (1977)).

Having reviewed the entire record, we cannot say that, absent the error, the jury probably would have reached a different verdict. Although the jury's question suggests uncertainty of whether the object was a firearm or some other weapon, the only evidence before the jury was that the weapon was a gun. Both prosecuting witnesses testified that one of the three men had a gun. James Edwards testified that after he saw one of the men go to the car and "pull something silver out" he told Jerry Harrelson that "he had a pistol." Jerry Harrelson testified that one of the men approached him and hit him in the head with a .25 automatic pistol. When asked if he could definitely see that the object with which he was struck with was a gun, Mr. Harrelson replied "it was a gun."

On cross examination defendant's counsel attempted, to no avail, to undermine this testimony. On cross examination of James Edwards, defendant's counsel said, "I take it you didn't get a real good look at the silver object because you took off running as soon as you saw it." Mr. Edwards responded, "I know what a pistol looks like." Defendant's counsel then stated, "You saw enough to see it was a pistol," to which Mr. Edwards said, "Yes, I know what a pistol looks like." On cross examination of Jerry Harrelson, defendant's counsel asked Mr. Harrelson when he had an opportunity to observe the gun. Mr. Harrelson answered that he saw the gun when the man who hit him in the head with it was walking towards him.

[4] Lastly, defendant contends that the trial court abused its discretion by finding as an aggravating factor that defendant had lied about his record. Defendant argues that this was an abuse of discretion because he was not given the opportunity to explain his statement. We find no error. The record of the sentencing proceeding reflects that the trial court did not find as a separate aggravating factor that

defendant lied about his record. The record also reflects that defendant was given an opportunity to explain his testimony. The State offered evidence of prior convictions for offenses that carry sentences of greater than 60 days. Defendant's counsel stipulated to these convictions although at trial defendant had denied on the stand that he was ever convicted. Judge Washington asked defendant to explain why after being sworn to tell the truth he denied ever being convicted. After listening to defendant's response, Judge Washington held that "the Court would find that the aggravating factors are that the defendant has prior convictions for criminal offenses punishable by more than 60 days confinement, and I want you to add to that, parentheses, 'these convictions were denied under oath in this trial.' "

No error.

Chief Judge ARNOLD and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. CARLTON NICHLOS LILLY

No. 9329SC1192

(Filed 6 December 1994)

Rape and Allied Offenses § 112 (NCI4th)— sexual assault— bruises and tears constituting serious personal injury

Though a rape and sexual assault victim testified that she moved out of her home to live with her niece because she was scared to go back home, this evidence, standing alone, was insufficient to support a conclusion that the victim sustained a "serious" personal injury; however, bruises to the victim's rectal area and vaginal tears requiring surgery and three days of hospitalization were serious personal injuries which could be used to elevate the sexual offense to first degree.

Am Jur 2d, Rape §§ 88 et seq.

Judge LEWIS concurring in the result.

Judge GREENE dissenting.

Appeal by defendant from judgments entered 20 May 1993 by Judge Zoro J. Guice, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 27 September 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Christopher E. Allen, for the State.

David William Rogers for defendant-appellant.

JOHNSON, Judge.

Defendant Carlton Lilly was convicted of one violation of North Carolina General Statutes § 14-27.2 (1993), first degree rape, one violation of North Carolina General Statutes § 14-27.4 (1993), first degree sexual offense, and one violation of North Carolina General Statutes § 14-54 (1993), breaking or entering. Defendant was sentenced to two consecutive life sentences, and an additional consecutive ten year sentence.

The State's evidence at trial showed that the victim was sexually assaulted and raped, in one attack, on 22 August 1992; the victim identified defendant as her attacker. Dr. Douglas Sheets, who examined the victim in the emergency room at Rutherford Hospital the night of the attack, testified that his examination revealed (1) vaginal bleeding; (2) one laceration in the internal vagina, measuring one and one-half inch in width and one-quarter of an inch in depth; (3) one laceration in the external vagina, measuring less than an inch in length; and (4) some bruising in the rectal area. While the bruising of the rectal area did not require surgery, both lacerations required stitches. The internal laceration was near the top of the vagina, and it did not extend into the deeper tissues or abdominal cavity. The victim required anesthesia during the examination and suturing process, and also required three days of hospitalization to recuperate. After the victim was released from the hospital she moved out of her house and began living with her niece, where she was living at the time of trial.

The single assignment of error argued in defendant's brief relates to the sexual offense conviction and we therefore address only that issue. N.C.R. App. P. 28(a). Although defendant makes other arguments in his brief, these are not addressed as there are no assignments of error to support them. N.C.R. App. P. 10(a); *State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992) (arguments presented in appellate briefs must correspond to assignments of error set forth in the record). Defendant argues that the injuries suffered by the victim in the instant case do not constitute serious bodily injury and that therefore, the conviction for first degree sexual offense should be reversed and defendant should be resentenced for second degree sexual offense. Further, defendant argues that if a particular injury is a seri-

ous personal injury, it cannot be used as that element in both the rape and the sexual offense charges, elevating both charges to first degree. The State argues that there is substantial evidence of serious personal injury in that the victim suffered bruises in the rectal area, vaginal tears and mental distress.

A person engaging in a "sexual act," as defined in North Carolina General Statutes § 14-27.1(4) (1993), with another person "by force and against the will of the other person," is guilty of first degree sexual offense if that person:

> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. Inflicts serious personal injury upon the victim or another person; or
>
> c. The person commits the offense aided and abetted by one or more other persons.

North Carolina General Statutes § 14-27.4(a)(2)(a), (b), and (c). In this case, there is no dispute that defendant committed a sexual act upon the victim, by force and against her will. There is no evidence that defendant used a dangerous weapon or that defendant was aided or abetted by another in the commission of the offense. Therefore, the only question is whether there is substantial evidence that defendant "inflict[ed] serious personal injury upon the victim[.]"

Our courts have "declined to attempt to define the substance of the phrase 'serious [personal] injury' and [have instead] adopted the rule . . . '[w]hether such serious injury has been inflicted must be determined according to the particular facts of each case.' " *State v. Boone*, 307 N.C. 198, 204, 297 S.E.2d 585, 589 (1982) (*quoting State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962)). In *Boone*, our Supreme Court cited several cases "holding that there was sufficient evidence to go to the jury on the question of 'serious bodily injury[.]' " *Boone* at 203, 297 S.E.2d at 589. Injuries which have been determined to be serious include wounds requiring sixty-four stitches, five teeth knocked out of alignment, and a whiplash injury causing cramps and pain in the victim's legs. *Id.* The Court in *Boone* stated that "serious personal injury" may be met by a showing of physical injury as well as mental injury, and noted that all of the cited cases "referred to involved tangible bodily injury and continuing suffering and pain." *Id.* at 204, 297 S.E.2d at 589. Mental injuries received as part of the *res*

gestae are not considered serious personal injuries. *Id.* Injuries to the mind and nervous system are within the meaning of "serious personal injury" if "the injury extended for some appreciable time beyond the incidents surrounding the crime itself." *Id.* at 205, 297 S.E.2d at 590.

We first address the issue of mental or emotional serious personal injury. Although the victim testified that she moved out of her home to live with her niece because she was "scared to go back" home, we do not believe this evidence, standing alone, is sufficient to support a conclusion that the victim sustained a "serious" personal injury. We observe that the State attempted to develop this testimony at trial, asking the victim, "[W]hat made you scared to live in your house?" However, after the State asked this question, defendant's counsel objected, and for unexplained reasons the trial court sustained the objection. Therefore, because this testimony was never developed, we are unable to say whether the victim's emotional injuries rose to a "serious" level. *See State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990), *dismissal allowed, disc. review denied*, 328 N.C. 574, 403 S.E.2d 516 (1991) (substantial evidence of serious personal injury present where victim suffered appetite loss, severe headaches and sleep difficulty); *State v. Mayse*, 97 N.C. App. 559, 389 S.E.2d 585, *disc. review denied*, 326 N.C. 803, 393 S.E.2d 903 (1990) (substantial evidence of serious personal injury present where victim received mental health care).

However, we believe the bruises to the rectal area of the victim are not injuries received as part of the *res gestae* of anal intercourse and do rise to the level of "serious personal injuries." Further, we believe that the injuries to the victim's vagina can be used to elevate the sexual offense charge to first degree. There is substantial evidence that the injuries to the victim's vagina are serious personal injuries. The victim sustained several tears in her vaginal wall, one measuring one and one-half inch in width and one-quarter inch in depth; furthermore, she required three days hospitalization to recover from the surgery. Clearly, these serious personal injuries can be used to elevate the sexual offense to first degree, because the rape, the ensuing serious personal injuries as a result of the rape, and the anal intercourse are "a series of incidents forming one continuous transaction between the . . . sexual offense and the infliction of the serious personal injury." *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 367 (1988) (*quoting State v. Blackstock*, 314 N.C. 232, 242, 333 S.E.2d 245, 252 (1985)). "Such incidents include injury inflicted on

the victim to overcome resistance or to obtain submission [and] injury inflicted upon the victim . . . in an attempt to commit the crimes[.]" *Id.* We find that the evidence shows that the injuries to the vagina were inflicted on the victim by defendant in an attempt to commit anal intercourse or in furtherance of the anal intercourse. The victim testified that "[h]e held me down, he told me to pull my clothes off and I didn't, he pulled my clothes off and pulled his clothes off, threw me down on the bed and raped me. . . . He raped me in my private part. . . . In the front and in the back." Therefore, as part of "one continuous transaction[,]" we find that the rape and the ensuing serious personal injuries the victim suffered as a result of the rape wore down the victim's resistance and contributed to her submission so that defendant was able to inflict further personal injury on the victim with the sexual offense of anal intercourse.

As such, we find that the injuries suffered by the victim in the instant appeal constitute serious bodily injury. We find defendant received a fair trial, free from prejudicial error.

Affirmed.

Judge LEWIS concurs in the result with separate opinion.

Judge GREENE dissents.

Judge LEWIS concurring in the result.

While I agree with the result reached, I respectfully disagree with that part of the majority opinion which holds that there was not sufficient evidence of mental and emotional injury to support a finding of serious personal injury. Serious personal injury can be established solely upon mental and emotional injuries, provided such injuries extend for some appreciable time beyond the incidents surrounding the crime itself. They must be more than the *res gestae* results present in every forcible rape or sexual offense. *State v. Baker*, 336 N.C. 58, 62-63, 441 S.E.2d 551, 554 (1994).

I believe that there was sufficient evidence of such mental and emotional injury in this case to support the jury's verdict. The victim was a 71-year-old widow at the time she was raped and sodomized in her own home. She testified that after the attack, she was too frightened to go back to her home and that, as a result, she went to live with a niece. Even at the time of trial, nine months after the crime, the victim was still living with her niece. Clearly, the victim suffered men-

tally and emotionally as a result of the attack. These injuries did extend for an appreciable time beyond the incidents surrounding the crime itself and they are not the *res gestae* results present in every forcible rape or sexual offense. At age 71, when some professionals are forced to retire, the safety, comfort, and security of a person's home is of incalculable worth to her piece of mind. To be terrorized, raped, then sodomized and forced thereby to flee the sanctity of one's own dwelling is more than serious; it is near fatal. Accordingly, I would conclude that the victim's mental and emotional injuries amounted to serious personal injury.

Judge GREENE dissenting.

Although I agree with the majority's opinion that "we are unable to say whether the victim's emotional injuries rose to a 'serious' level," I do not believe that the bruising to the victim's rectal area constituted "serious personal injury," as contemplated by N.C. Gen. Stat. § 14-27.4 or that the rape and sexual offense in this case were a continuous transaction as contemplated by *Herring*, therefore I dissent.

Dr. Sheets testified that the victim received "some bruising in the rectal area," which he testified was consistent with a sexual assault. While the lacerations in the vagina required surgery and the victim required a hospital stay, the bruising in the rectal area did not require surgery and there is no other evidence regarding the bruising. These bruises, alone, are of the type present in every instance of anal intercourse and thus cannot support a conclusion that the victim sustained serious personal injuries. *See State v. Boone*, 307 N.C. 198, 205, 297 S.E.2d 585, 590 (1982).

While I agree that there is substantial evidence, *see State v. Herring*, 322 N.C. 733, 738, 370 S.E.2d 363, 367 (1988) (substantial evidence required to survive motion to dismiss), that the injuries to the victim's vagina are serious personal injuries, I do not believe that those injuries can be used to elevate the sexual offense charge to first degree in this case.

The evidence in this case does not support a conclusion that the injuries to the vagina of the victim are related in any manner to the anal intercourse, as set forth in the majority's examples of "a series of incidents forming one continuous transaction." Although the rape and the sexual offense occurred in one continuous transaction, there is no evidence that the injuries to the vagina were inflicted on the victim by the defendant in an attempt to commit anal intercourse or in further-

ance of the anal intercourse. This case must be distinguished for the situation where the serious personal injury inflicted upon the victim is used to subdue the victim in order to commit rape *and* sexual offense. In that event, the same injury can be used to elevate both rape and the sexual offense to first degree. *See Herring*, 322 N.C. at 739, 370 S.E.2d at 367-68 (permitting elevation of both rape and sexual offense where defendant choked victim into unconsciousness after committing offenses).

For these reasons, I would reverse the first degree conviction for sexual offense and remand this case to the Superior Court, Rutherford County, for pronouncement of a judgment as upon a verdict of guilty of second degree sexual offense and resentencing. *State v. Barnette*, 304 N.C. 447, 469, 284 S.E.2d 298, 311 (1981) (conviction of first degree sexual offense necessarily finds elements of second degree sexual offense).

WESTPORT 85 LIMITED PARTNERSHIP, PLAINTIFF v. GERALD E. CASTO AND WIFE, LINDA L. CASTO AND COTTMAN TRANSMISSION SYSTEMS, INC., DEFENDANTS

No. 9414SC178

(Filed 6 December 1994)

1. Landlord and Tenant § 31 (NCI4th)— alleged breach—failure to deliver premises in timely manner—counterclaims properly denied

In an action to recover for breach of a lease agreement where defendant counterclaimed alleging that plaintiff failed and refused to deliver possession of the premises to defendant franchisor upon failure of defendant franchisees to pay the rent, the trial court properly denied the counterclaim and held defendant franchisor liable for damages where plaintiff acted reasonably and promptly to remove the franchisee's manager from the property after it learned that defendant franchisor had exercised its right to become lessee; and plaintiff did not breach the implied warranty of possession because that warranty required plaintiff to deliver actual possession of the property at the beginning date of the lease, not the subsequent date when the franchise agreement was terminated.

Am Jur 2d, Landlord and Tenant §§ 642 et seq.

2. Contracts § 107 (NCI4th)— licensing agreement terminated—novation—dismissal of crossclaim proper

The trial court did not err in concluding that a license agreement between defendant franchisor and franchisees was terminated and in dismissing the franchisor's crossclaim against the franchisees for breach of the license agreement where a management agreement was executed with third persons for the purpose of relieving franchisees of further liability and responsibility on the franchise; the management agreement constituted a novation with respect to the license agreement; and defendant franchisor, though not a party to the management agreement, evidenced acquiescence to it by acknowledging receipt of the agreement, negotiating a check from the third persons for purchase of the franchise, and accepting a third party's performance under the management agreement.

Am Jur 2d, Novation §§ 25 et seq., 44 et seq.

Creditor's acceptance of obligation of third person as constituting novation. 61 ALR2d 755.

Appeal by defendant Cottman Transmission Systems, Inc. from judgment entered 7 September 1993 by Judge J. B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 5 October 1994.

On or about 15 June 1989, Defendants Gerald E. Casto and Linda L. Casto (the Castos) entered into a License Agreement for the purchase of a Cottman franchise from defendant Cottman Transmission Systems, Inc. (Cottman). The Castos leased space in a building located at 1408 Christian Avenue, Durham, North Carolina (the property) from plaintiff Westport 85 Limited Partnership for the purpose of operating the Cottman franchise. The lease, which was executed on 30 July 1989, was for a term of five years commencing on the lst day of November 1989 and expiring 30 October 1994. The rent was to be $2,200 per month for the first year and was to increase in subsequent years. The lease contained a Lease Rider signed by plaintiff, the Castos and Cottman, which provided that the Castos conditionally assigned all of their right, title and interest in the Lease Ageement to Cottman, effective upon the occurrence of two conditions: (1) termination or expiration of the License Agreement between Cottman and the Castos and (2) exercise by Cottman of its option to assume the

obligations of and replace lessee as the lessee under the lease within thirty days after termination or expiration of the License Agreement.

From 25 February 1991 to 15 April 1991, pursuant to a Management Agreement (the Management Agreement) entered into by the Castos, Leo J. Trapp (Trapp) and Veelam Anand (Anand) on a Cottman form provided by Cottman, Trapp managed the Cottman Transmission Center located on the property. The Management Agreement provided for the eventual sale of the Castos' Cottman franchise to Trapp and Anand. Pursuant to that purchase agreement, Trapp and Anand paid $7,500 of a $15,000 purchase price to Cottman at the time of the signing of the Management Agreement and $7,500 thereafter. On 12 March 1991, Cottman acknowledged receipt of the fully executed Management Agreement and the first payment of $7,500. Cottman later decided not to sell the franchise to Anand and Anand was removed as a party to the Management Agreement.

On 15 April 1991, after the Castos were in arrears on amounts due under the License Agreement, Cottman sent two representatives to Durham to execute a Termination of License Agreement between Cottman and the Castos (the Termination Agreement). Prior to executing the Termination Agreement, the Cottman representatives unsuccessfully attempted to take control of the property by entering the premises unannounced to Trapp. Trapp "flashed" a gun at one of the representatives, who then called the police. When the police officers arrived, Gerald Casto informed them that he was the lawful tenant and that Trapp was present on the property pursuant to the Management Agreement. Moreover, the police called the plaintiff and were told by plaintiff's representative that Trapp was the lawful tenant. The police then ordered the Cottman representatives to leave the property. After the Cottman representatives left the premises, defendant Cottman and defendants Castos executed the Termination Agreement.

Defendant Cottman elected to assume the lease and notified plaintiff to that effect via telefax on 16 April 1991. Plaintiff acknowledged Cottman as the lessee of the property and informed Cottman that the lease was in default for nonpayment of rent. Plaintiff requested Cottman to cure the default by 17 May 1991. On or about 17 April 1991, at Cottman's request, plaintiff hand delivered a letter to Trapp, informing Trapp that Cottman had elected to assume the lease and that Cottman was entitled to possession of the premises. Cottman subsequently negotiated a settlement agreement with Trapp

which provided that Trapp would leave the property and be allowed to remove the equipment and inventory. In the meantime, Cottman had been discussing with Richard Draina the possibility of his operating the franchise pursuant to a management agreement, but Draina eventually decided not to enter into a management agreement. On 10 May 1991, Cottman informed plaintiff that it was unable to find an operator to replace the Castos and advised plaintiff that it should find a new lessee for the property. Cottman did not cure the default and did not pay any more rent. Thereafter, plaintiff rented the property to a new lessee for $1,600 per month for a term commencing on 1 September 1991 and expiring 31 August 1994.

On 11 October 1991 plaintiff instituted this action against the Castos for $8,800 in back rent and against defendant Cottman for $38,628 damages for breach of the lease. Defendant Cottman filed an answer, crossclaim and counterclaim. In its counterclaim, Cottman alleged, among other things, that plaintiff breached the Lease Rider and Lease Agreement by failing and refusing to deliver possession of the premises to defendant Cottman on 15 April 1991 as a result of which Cottman was unable to resell the Cottman Transmission Center franchise to a prospective purchaser and the Center was closed. Cottman sought damages in excess of $10,000 for losses associated with the closing of the Center. Defendant's crossclaim against the Castos alleged and sought damages for breaches of the License Agreement.

The case was tried without a jury before the Honorable J. B. Allen, Jr. in the 16 August 1993 Civil Session of Durham County Superior Court. By judgment entered 7 September 1993, the trial court concluded that defendant Cottman became lessee under the 30 July 1989 Lease Agreement when Cottman gave written notice to plaintiff that it had exercised its option to become lessee under the Lease Rider on 16 April 1991. The trial court further concluded that Cottman breached the Lease Agreement by failing to pay any rent due under the lease and by abandoning the lease pursuant to the notice given to plaintiff on 10 May 1991. The court ordered defendant Cottman to pay plaintiff damages of $32,553 with interest from 10 May 1991. The court denied Cottman's counterclaim and dismissed the crossclaim with prejudice. From this judgment, defendant Cottman appeals.

Hutson Hughes & Powell, P.A., by James H. Hughes and Lauren M. Mikulka, for plaintiff-appellee.

Carruthers & Roth, P.A., by Kenneth L. Jones, for defendant-appellant Cottman Transmission Systems, Inc.

Randall, Jervis & Hill, by James T. Hill, for defendants-appellants Gerald E. Casto and wife, Linda L. Casto.

THOMPSON, Judge.

[1] Defendant Cottman argues that the trial court erred in denying its counterclaim, in dismissing its crossclaim and in holding it liable for damages. For the reasons discussed below, we affirm.

In denying defendant's counterclaim and awarding damages to plaintiff, the trial court concluded that plaintiff acted reasonably and promptly to remove Trapp from the property after it learned that Cottman had exercised its right to become lessee and that plaintiff did not breach the implied warranty of possession. Defendant argues that the trial court erred in concluding that plaintiff did not breach the implied warranty of possession because that warranty required plaintiff to deliver actual possession of the property to Cottman on 15 April 1991.

Cottman also argues that the trial court erred in holding it liable for rent because plaintiff's breach entitled it to treat the lease as repudiated on 16 April 1991. We hold that plaintiff was not required to deliver actual possession of the property to Cottman on 15 April 1991 and thus affirm the trial court's denial of the counterclaim and its award of damages to plaintiff.

In *Sloan v. Hart*, 150 N.C. 269, 272, 63 S.E. 1037, 1038 (1909), our Supreme Court adopted the English Rule "that in the absence of express provision in the lease, the lessor impliedly covenants with the lessee that the premises shall be open to entry by the lessee at the time fixed for the beginning of the term." The rationale for the rule is that

> [w]hen a lease is made, the beginning of which is fixed at some future date, it is within the contemplation of the parties and a part of their understanding, without which the lease would not have been made, that when the time comes for the lessee to take possession, according to the lease, the lessor shall have the premises open to the entry of the lessee, and that the latter is not liable for rent until he is afforded an opportunity to enter, and is under no

obligation to maintain an action against a tenant holding over to recover possession.

Id. at 273, 63 S.E. at 1039. However, the implied covenant does not extend beyond the time when the lease is to commence. *Id.* at 274, 63 S.E. at 1039. Thus, where a stranger trespasses on or takes possession of and holds the leased premises after the time when the lessee is entitled to have the possession, that is a wrong done to the lessee for which the lessor cannot be held responsible. *Id.*

Defendant Cottman satisfied the conditions of the Lease Rider on 16 April 1991 and thus was assigned all of the Castos' right, title and interest in the 30 July 1989 Lease Agreement on that date. " 'An "assignment" is a conveyance of the lessee's entire interest in the demised premises, without retaining any reversionary interest in the term in itself.' " *Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 162, 356 S.E.2d 912, 915 (1987) (citation omitted). The 30 July 1989 Lease Agreement was for a five-year term to commence on 1 November 1989. Thus, under the rule set out in *Sloan*, plaintiff lessor impliedly covenanted to deliver actual possession of the premises on 1 November 1989 and not on some subsequent date when the Castos' franchise agreement was terminated.

Defendant Cottman also argues that the trial court's finding that the plaintiff acted reasonably and promptly to remove Trapp was not supported by competent evidence. Assuming *arguendo* that plaintiff was obligated to make reasonable efforts to assist Cottman in removing Trapp, we find the trial court's findings were supported by competent evidence. On April 15, at the time the Cottman representatives sought possession of the property, plaintiff had not received notice of the termination of the Castos' franchise agreement or of Cottman's exercise of its option to assume the lease. After it did receive such notice, plaintiff acted reasonably and promptly to remove Trapp.

Defendant Cottman also contends that the trial court should have awarded it damages for its financial losses suffered as a result of the loss of the Draina management agreement because the court found as fact that one reason Draina decided not to go forward with the management agreement was that "the transfer of the Property from Trapp to Cottman had not been handled cleanly." We disagree. Defendant wrongly equates this finding with a conclusion that plaintiff's conduct was a contributing cause and a proximate cause of the loss of the Draina management agreement. The court did not find either that defendant's losses were caused by the loss of the Draina management

agreement or that plaintiff was responsible for the manner in which the property was transferred from Trapp to Cottman.

[2] We next address the trial court's dismissal of Cottman's crossclaim. The trial court dismissed the crossclaim because it concluded that the Management Agreement constituted a novation with respect to the license agreement and that the termination agreement constituted a release of any and all liability between Cottman and the Castos. Cottman argues that the court's conclusion that the Management Agreement constituted a novation is erroneous and that the court's conclusion that the Termination Agreement constituted a release was based on improperly admitted parol evidence. We do not address the latter argument because we find that the trial court correctly concluded that the Management Agreement constituted a novation with respect to the license agreement and that this conclusion was a sufficient ground for dismissing the crossclaim.

In reviewing the decision of a trial court sitting without a jury, we must determine " 'whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts.' " *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 37, 351 S.E.2d 786, 792 (1987) (citation omitted).

The trial court made the following pertinent findings of fact which were supported by competent evidence: (1) Cottman was aware of the negotiations between the Castos and Trapp and Anand for the sale of Castos' Cottman franchise and Cottman furnished Trapp and Anand with a North Carolina Offering Circular to familiarize and inform them concerning the franchise of an automobile transmission repair center, (2) the purpose of the Management Agreement was for Trapp and Anand to acquire the franchise and relieve Castos of further liability and responsiblity on the franchise, (3) by letter dated 12 March 1991 Cottman acknowledged receipt of the fully executed Management Agreement with a check payable to Cottman in the amount of $7,500, (4) Cottman negotiated the $7,500 check by depositing it in Cottman's account and applying it towards the Castos' accounts receivable balance, which was in arrears, and (5) Trapp operated the Cottman center from 26 February 1991 through 15 April 1991 pursuant to the Management Agreement.

The court concluded that the signing of the 25 February 1991 Management Agreement between the Castos, Trapp and Anand, and the participation of Cottman in that transaction, including its subse-

quent acceptance of the $7,500 check, constituted a substitution of contract between Cottman, Trapp and Anand, and therefore terminated the License Agreement between Cottman and Castos. We hold that this conclusion was proper in light of the findings of fact referred to above. "A novation occurs when the parties to a contract substitute a new agreement for the old one." *Whittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 526, 379 S.E.2d 824, 827 (1989). " 'The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract.' . . . 'Ordinarily in order to constitute a novation the transaction must have been so intended by the parties.' " *Tomberlin v. Long*, 250 N.C. 640, 644, 109 S.E.2d 365, 368 (1959) (citations omitted). Defendant Cottman contends that the Management Agreement could not have constituted a novation because it was not a party to the agreement. We disagree. Although Cottman did not sign the Management Agreement, it evinced agreement to the substitution of Trapp for the Castos by acknowledging receipt of the Management Agreement, negotiating the $7,500 check, and accepting Trapp's performance under the Management Agreement from 26 February 1991 through 15 April 1991. Moreover, Cottman's knowledge and acquiescence constituted a ratification of the agreement between Trapp and the Castos which is sufficient to effect a novation. *See Port City Electric Co. v. Housing, Inc.*, 23 N.C. App. 510, 512, 209 S.E.2d 297, 299, *cert. denied*, 286 N.C. 413, 209 S.E.2d 297 (1975) (an agreement to substitute a new contract for an existing valid contract can be consummated by ratification).

For the reasons stated herein, the judgment below is

Affirmed.

Judges JOHNSON and McCRODDEN concur.

EDWARD L. GARRISON, DIRECTOR, PITT COUNTY DEPARTMENT OF SOCIAL SERVICES, EX REL. BELINDA ANN CHAVIS, PLAINTIFF v. LINZER RAY BARNES

No. 943DC276

(Filed 6 December 1994)

1. Trial § 559 (NCI4th)— defendant's inappropriate use of Rule 59 and 60 motions—no error in denying relief

Because defendant attempted to use a Rule 60(b)(6) motion as a substitute for appellate review, the trial court's order denying defendant's Rule 60(b)(6) motion must be affirmed; because defendant's motion for new trial was filed more than ten days after entry of the default judgment, the trial court properly denied that motion; and because Rule 59 is an inappropriate vehicle to challenge the denial of a Rule 60 motion, the trial court did not abuse its discretion in denying defendant's motion to amend the denial of his Rule 60(b)(6) motion.

Am Jur 2d, New Trial §§ 333 et seq.

2. Illegitimate Children § 11 (NCI4th); Evidence and Witnesses § 1920 (NCI4th)— motion for blood testing barred by res judicata

Res judicata barred the granting of defendant's motion for blood testing because an earlier default judgment conclusively established defendant's paternity, and defendant failed to appeal the default judgment or make a timely motion under Rule 59(a)(8).

Am Jur 2d, Bastards § 118; Evidence § 573; Judgments §§ 606 et seq.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

Judge WYNN dissenting.

Appeal by defendant from orders entered 30 April 1993 and 26 January 1994 in Pitt County District Court by Judge E. Burt Aycock, Jr. Heard in the Court of Appeals 26 October 1994.

Pitt County Legal Department, by Associate County Attorney Pamela Weaver Best and Staff Attorney Amy K. Cooney, for plaintiff-appellee.

Jeffrey L. Miller for defendant-appellant.

GREENE, Judge.

Linzer Ray Barnes (defendant) appeals from orders entered 30 April 1993 and 26 January 1994 by Judge E. Burt Aycock, Jr. (Judge Aycock) in Pitt County District Court, denying defendant relief from a default judgment entered 1 July 1991 which declared defendant the natural and legal father of Aaron Edward Chavis (Aaron) and ordered defendant to pay Belinda Ann Chavis (Ms. Chavis) child support.

On 9 August 1990, Ms. Chavis gave birth to Aaron out of wedlock. On 22 April 1991, Edward L. Garrison (plaintiff), the director of Pitt County Department of Social Services (DSS), filed a complaint on behalf of Ms. Chavis, requesting an adjudication that defendant is the biological and legal father of Aaron, an order obligating defendant to pay child support, and an order requiring defendant to indemnify the State of North Carolina for past public assistance paid to Aaron. Plaintiff also requested that defendant provide continuing medical support for Aaron, pay the costs of the action, and add Aaron as a beneficiary under any health insurance plan.

On 28 May 1991, plaintiff filed an application for default because defendant, having been personally served with process on 24 April 1991, failed to answer plaintiff's complaint within the time allowed by law for filing an answer. The Pitt County Clerk of Court entered default on 28 May 1991. On 1 July 1991, Judge George L. Wainwright (Judge Wainwright) entered a default judgment against defendant containing the following finding of fact:

> 12. The defendant came into Court this day and requested the opportunity to have blood testing completed. However, the defendant has requested blood testing on three (3) occasions but has failed to appear for such blood testing and has failed to pay any part of the blood testing. The defendant missed opportunities to have blood testing completed on February 22, 1991, March 29, 1991, and May 31, 1991. The defendant has, therefore, waived his right to have blood testing completed in this case.

Judge Wainwright then concluded that defendant is the biological father of Aaron and ordered defendant to pay plaintiff child support,

past public assistance paid, to add Aaron as a beneficiary to any health insurance plan, taxed all costs against defendant, and ordered that defendant's state and federal income tax refunds are subject to garnishment as long as any arrearage remains due.

On 23 February 1993, defendant filed a verified motion for relief from judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, requesting the court to grant defendant relief from the default judgment by suspending the judgment and setting it aside pending a blood test to determine paternity and to order defendant, Ms. Chavis, and Aaron to undergo a blood grouping test. The motion alleged he is not the father of Aaron and that:

> 2. . . . defendant had a constitutional right to counsel which he would have exercised if the right had been made known to him. . . .
>
> 3. At the time the default judgment was entered on 30 July 1991, the Defendant was incarcerated . . . . At no time while he was incarcerated up to the date judgment was entered was the defendant notified of the Court hearing.
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> . . . .
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> 6. It is manifestly unjust and inequitable to require defendant to support a child when he is not the actual biological father of the child.
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> . . . .
>
> 10. . . . Extraordinary circumstances exist and justice demands that defendant be granted relief from the judgment pending blood testing.

On 1 April 1993, defendant filed a motion for blood test pursuant to N.C. Gen. Stat. § 8-50.1(b) "for the purpose of excluding the defendant's paternity in support of defendant's motion for relief from judgment entered by default in this matter."

An order by Judge Aycock was filed on 11 October 1993, *nunc pro tunc* for 30 April 1993. In his order, Judge Aycock found as a fact that defendant asserted "he was entitled to relief from the [default] judgment on the grounds that he had made a request of the Court in the civil proceeding for blood testing and that, upon such request, the Court was mandated by statute to order the blood testing. The defendant indicated that the July 1991 order violated his statutory rights under N.C.G.S. 8-50.1(b) and his constitutional rights to due process and equal protection of law." Judge Aycock concluded

"defendant is not entitled to an order for a blood test or for relief from the judgment of paternity and child support" and therefore denied his motions and ordered defendant to "continue to pay child support in accordance with the previous orders of this Court."

On 6 May 1993, defendant filed a motion for new trial, to amend judgment, and for relief from judgment under Rules 59(a)(1), 59(a)(8), 59(e), 60(b)(4), and 60(b)(6) and requested the court for "a new hearing and trial on the issue of his paternity and compelling a blood test, to amend or alter the judgment entered on 30 April 1993 so as to vacate the 1 July 1991 judgment and allow him relief therefrom and a blood test, and to grant him relief from the judgment entered on 1 July 1991 and 30 April 1993 by suspending the judgment and setting it aside pending a blood test to determine paternity." In his motion, defendant alleged the following:

> 2. . . . Notwithstanding the mandatory provisions of NCGS 8-50.1, the Court erroneously denied the defendant's request and motion on the purported basis that he had waived his right to such a test by failing to have the test conducted on occasions prior to the filing of the action and prior to the making of his motion before the Court in this civil proceeding.
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> . . . .
>
> 5. The defendant was deprived of statutory and constitutional guarantees in violation of the provisions of the North Carolina Constitution (Article I, sections 18, 19) and United States Constitution (14th Amendment, 5th Amendment) which guarantee equal protection of the laws, due process of law, fundamental fairness, and open courts for the fair administration of justice.
>
> 6. The failure of the Court to grant defendant relief from the judgment of paternity and support based upon the denial of his statutory and constitutional rights constitutes prejudicial legal errors. The irregularities occurring on 1 July 1991 and 30 April 1993 prevented defendant from having a fair trial and hearing, render the judgments void or voidable, and justify relief from the operation of the judgment.

By order entered 26 January 1994, Judge Aycock, "[h]aving reviewed the record and the defendant's motion," denied defendant's motions for new trial, to amend the judgment entered 30 April 1993, and for relief from the judgments and orders entered on 1 July 1991 and 30 April 1993.

The issues presented are whether (I) there is any evidence in the record to support the granting of defendant's Rule 60(b)(6) motion for relief from judgment; and (II) Judge Aycock erred in denying defendant's motion for blood testing under Section 8-50.1(b).

I

Defendant argues in his Rule 60(b)(6) motion that "statutory and constitutional mandates were not properly considered or followed by the court, and the public and legal policies of this State in determining paternity were not applied" because Judge Wainwright failed to enter an order on 1 July 1991 for blood testing under N.C. Gen. Stat. § 8-50.1(b) and failed to provide defendant with counsel. Thus, defendant's argument concerns errors of law alleged to have been made by Judge Wainwright in entering default judgment.

[1] Rule 60(b)(6) provides that a party may make a motion to the trial court to seek relief from any judgment or order of the trial court for, in addition to specific reasons listed in Rule 60(b)(1) to (5), "[a]ny other reason justifying relief from the operation of the judgment." N.C.G.S. § 1A-1, Rule 60(b)(6) (1990). It is well settled, however, that Rule 60(b)(6) does not include relief from errors of law, *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988), or erroneous judgments. *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117, *disc. rev. denied*, 303 N.C. 319, 281 S.E.2d 659 (1981). "The appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under N.C.G.S. Sec. 1A-1, Rule 59(a)(8)." *Hagwood*, 88 N.C. App. at 519, 364 S.E.2d at 193. Therefore, because defendant attempted to use a Rule 60(b)(6) motion as a substitute for appellate review, Judge Aycock's order denying defendant's Rule 60(b)(6) motion must be affirmed. *Id.*; *see also Chicopee Inc. v. Sims Metal Works*, 98 N.C. App. 423, 431, 391 S.E.2d 211, 216 (because Rule 60 motion was inappropriate vehicle to review allegedly erroneous judgment, we did not consider disposition of plaintiff's Rule 60 motion), *disc. rev. denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). For the same reasons, Judge Aycock did not err in denying defendant's Rule 60 motion made on 6 May 1993.

Defendant also appeals from the denial of his motions under Rules 59(a)(1) and (8) and 59(e) seeking a new trial and an amendment of the judgment entered 30 April 1993. Because defendant's motion for new trial was filed on 6 May 1993, more than ten days after entry of the default judgment on 30 July 1991, Judge Aycock correctly denied that motion. N.C.G.S. § 1A-1, Rule 59(b) (1990); *see Coats v.*

Coats, 79 N.C. App. 481, 339 S.E.2d 676 (1986) (court had no authority to alter or amend divorce judgment under Rule 59 pursuant to motion made more than 10 days after entry of judgment sought to be altered or amended). Furthermore, because Rule 59 is an inappropriate vehicle to challenge the denial of a Rule 60 motion, Judge Aycock did not abuse his discretion in denying defendant's motion to amend the 30 April 1993 denial of his Rule 60(b)(6) motion. N.C.G.S. § 1A-1, Rule 59 (1990); W. Brian Howell, *Shuford North Carolina Civil Practice & Procedure* § 59, at 625 (4th ed. 1992) (Rule 59 provides relief from judgments in jury or nonjury trials resulting from errors occurring during trial).

II

[2] Judge Aycock did not abuse his discretion in denying defendant's motion for blood testing pursuant to N.C. Gen. Stat. § 8-50.1(b). Because the default judgment conclusively established defendant's paternity, defendant having failed to appeal the default judgment or make a timely motion under Rule 59(a)(8), res judicata barred the granting of defendant's motion for blood testing. *See Sampson County Child Support Enforcement Agency ex rel. McNeill v. Stevens*, 101 N.C. App. 719, 400 S.E.2d 776 (1991) (original paternity judgment ruled *res judicata* in later contempt proceedings where a blood test was requested); *State ex rel. Hill v. Manning*, 110 N.C. App. 770, 431 S.E.2d 207 (1993) (error to allow defendant's motion to compel DNA testing to further establish paternity after paternity had been adjudicated because *res judicata* prohibited defendant from raising issue in subsequent hearings).

For these reasons, the trial court's decisions are

Affirmed.

Judge JOHN concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

Defendant filed a Rule 60(b) motion for relief from default judgment. The majority correctly holds that the relief defendant is seeking can only be obtained through an appeal of the judgment to this Court. Since defendant did not follow the correct procedure, this case is subject to dismissal. Under Rule 2 of the Rules of Appellate proce-

dure, however, this Court has the power to suspend the rules in order to prevent manifest injustice to a party. I would exercise our Rule 2 authority and conclude that defendant should have been permitted to take a paternity test.

The trial court should have allowed for defendant's paternity test because "a defendant's right to a blood test is a substantial right and . . . upon defendant's motion, the court must order the test when it is possible to do so." *State v. Fowler*, 277 N.C. 305, 177 S.E.2d 385, 387 (1970). In the subject case, defendant requested a blood test on three separate occasions, but, on each occasion, he was unable to pay the $225.00 fee. Since defendant's request was made before the default judgment was entered, the trial court should have ordered the blood test and, following a failure by defendant to take the court ordered test, the court should have then acted. *See State ex rel. Hill v. Manning*, 110 N.C. App. 770, 431 S.E.2d 207 (1993) (the defendant was allowed to have a blood test performed upon a request made after entry of default but prior to entry of judgment). The court should not have acted, however, based on defendant's failure take a blood test which defendant personally requested; especially since defendant's failure was due to his indigency.

Under the circumstances of this case, it is not fair to burden defendant with the financial responsibility of a child that he contends is not his when there is a genetic test that can answer this simple question. The implications of finding him to be the father of the subject child based on an entry of default is not only unfair to him—*it is an indignity to the child.* Modern science has advanced the accuracy of a blood test for paternity to nearly a point of certainty. Defendant adamantly contends that he is not the father of the subject child, and, because of his indigency, he has been denied the opportunity to have this matter settled by a test that should have been ordered by the trial court. Moreover, should he wilfully fail to obey the trial court's order for the paternity test, the trial court should exercise its contempt powers, rather than summarily entering a judgment that he is the father of the subject child.

IN RE: PROTEST BY ROCKY MIDGETTE OF 2 NOVEMBER 1993 MANTEO TOWN ELECTION

No. 9410SC332

(Filed 6 December 1994)

Elections § 72 (NCI4th)— ballots for write-in candidate—variations of name acceptable—no name written in—ballots unacceptable

It was possible to determine the voter's choice from ballots containing variations of a candidate's name where the candidate conducted an active campaign and was the only write-in candidate, and those ballots should have been counted; however, it was impossible to determine the voter's choice from ballots with no name written on them but punched in the space for write-in candidates.

Am Jur 2d, Elections §§ 254 et seq.

Appeal by Dellerva Collins from order entered 4 February 1994 in Wake County Superior Court by Judge Henry V. Barnette, Jr. Heard in the Court of Appeals 27 October 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General Charles M. Hensey, for the State Board of Elections.

Tharrington, Smith & Hargrove, by Michael Crowell and Jaye P. Meyer, for Rocky D. Midgette.

Thigpen, Blue, Stephens & Fellers, by Cressie H. Thigpen, Jr., and Steven F. Bryant, for appellant Dellerva Collins.

GREENE, Judge.

Dellerva W. Collins (Ms. Collins) appeals from an order entered 4 February 1994 in Wake County Superior Court, affirming the State Board of Elections' (the State Board) 23 November 1993 decision directing that an additional forty-one votes for write-in candidate Rocky Dillon Midgette (Rocky Midgette) be certified by the Dare County Board of Elections (the County Board) for the 2 November 1993 town election for three seats on the Manteo town board.

On 2 November 1993, the town of Manteo, North Carolina, had a general election to elect three town commissioners by plurality vote. Ms. Collins, Edward C. Etheridge, and Lee Tugwell filed as candidates

and were listed on the ballot while Rocky Midgette was a write-in candidate. On 3 November 1993, Rocky Midgette wrote a letter to the chairman and supervisor of the County Board, stating that although 152 votes were attributed to him, "41 ballots were set aside because the precinct could not figure out whether they should be counted or not." He asked the County Board to count the forty-one votes for him.

The County Board met on 4 November 1993 to canvass the votes and determined that thirty-six ballots which were punched in the proper place but did not have a name written on the ballot should not be counted because the directions on the ballot stated that a name must be written in. The County Board also determined that several ballots on which voters wrote "R. Midgette," "Rocky," "Midgette," or some other abbreviation of Rocky Midgette's name should not be counted. The County Board therefore dismissed Rocky Midgette's complaint for lack of probable cause and determined that the official canvass results for town commissioner were 254 votes for Edward Etheridge, 254 votes for Lee Tugwell, 185 votes for Ms. Collins, and 162 votes for Rocky Midgette.

Rocky Midgette filed a complaint with the County Board and protested the following alleged violations and misconduct:

> (1) Precinct officials and the Board of Elections refused to count several ballots on which voters wrote "R. Midgette", "Rocky", "Midgette" or some other, similar abbreviations of Rocky Midgette's name. Those votes should have been counted because the voter expressed a clear intent to vote for Rocky Midgette. Although the name was not written out completely and there are other citizens in town named Midgette, no other Midgette was actively seeking the town commissioner's office.
>
> (2) Approximately 36 ballots were rejected and not counted at all because the voter had punched next to place 70 on the punchcard ballot but had not written in Rocky Midgette's name. . . . Because 70 was the place to vote for write-ins, campaign material for Rocky instructed voters to punch next to 70, and there was no other write-in candidate in the election, it is clear that the voters' intent in punching out 70 was to vote for Rocky Midgette.

Rocky Midgette requested that all ballots with a variation of his name and the thirty-six ballots on which place 70 was punched be counted for him and added to his total.

The County Board held a hearing on 13 November 1993 and by order dated 16 November 1993, made the following findings of fact based on testimony from Rocky Midgette and several voters and the affidavits of several voters:

5. Rocky Midgette ran an active campaign for town commissioner. He set up approximately 500 posters, distributed 1,000 flyers, mailed over 500 postcards to voters, visited homes, ran display ads in the newspaper, spoke at candidates' forum sponsored by League of Women Voters, and had workers telephone voters.

6. Rocky Midgette's campaign material directed voters to cast a write-in vote for him by punching 70 on the ballot and writing in his name.

7. No other person was actively campaigning as a write-in candidate for town commissioner, and no other person named Midgette or Midgett or Rocky was running as a candidate in the town election or otherwise actively seeking votes for town office.

. . . .

10. . . . Each [voting] booth included a plastic holder containing a booklet listing the names of candidates and the number of the space on the ballot to be punched for each candidate.

. . . .

12. Lines 70, 71 and 72 in the booklet were identified as spaces for write-in candidates for town commissioner.

13. The instructions printed on the top of each ballot indicated that to vote for a person whose name is not on the ballot, you were to write in on the ballot in the space provided, the number for the office and the person's name you wanted to vote for.

. . . .

18. One ballot had space 70 punched for a write-in and "Rocky" written on it. Two ballots had space 70 punched for a write-in and had "R. Midgette" written on them. Two ballots had space 70 punched for a write-in and had "Midgette" written on them. These ballots were not counted.

19. On 36 ballots, the voters punched place 70 on the ballot but wrote no name or number on the ballot. Those ballots were not counted.

. . . .

24. At the November 13th hearing, 5 voters testified and 13 voters had affidavits presented which indicated they punched space 70 on their ballots but did not write anything on the ballot itself. These voters indicated that they either mistakenly wrote Rocky Midgette's name in the booklet on line 70 or did not believe it was necessary to write his name anywhere because it was already written in the booklet on line 70.

Based on these findings of fact, the County Board concluded it properly excluded one ballot with space 70 punched and "Rocky" written on it, two ballots with space 70 punched and "R. Midgette" written on them, two ballots with space 70 punched and "Midgette" written on them, and thirty-six ballots with space 70 punched but no name written on them. The County Board therefore dismissed Rocky Midgette's complaint.

Rocky Midgette then appealed to the State Board which, after considering the Board's findings of fact and conclusions of law, all submissions previously distributed to all State Board members, and verbal presentations before the County Board and the State Board, rejected the County Board's order. By decision and order entered 23 November 1993, the State Board ordered that "the 41 questioned votes for write in candidate Rocky Midgette be certified by" the County Board.

On 3 December 1993, Ms. Collins filed a petition with the State Board to reconsider its 23 November 1993 decision; however, on 9 December 1993, the State Board, by letter, informed her that it would not reconsider its decision. On 15 December 1993, Ms. Collins, pursuant to N.C. Gen. Stat. § 150B-43, appealed the 23 November 1993 and 9 December 1993 decisions of the State Board to Wake County Superior Court. On 22 December 1993, she filed an amendment to her petition to except to the failure of the State Board to include findings of fact and conclusions of law "in contravention of N.C.G.S. Section 150A-36" and requested that "the matter be remanded to the State Board . . . for appropriate findings of fact and conclusions of law." On 22 December 1993, she also filed a motion to remand for findings of fact and conclusions of law. By order entered 4 February 1994, the trial court found that the State Board "adopted the findings of fact of the county board and concluded as a matter of law that the additional votes should be counted for Mr. Midgette." The trial court also concluded the State Board "acted within the scope of its authority in determining that the 41 additional votes should be counted for Rocky

Midgette," its decision was "supported by substantial admissible evidence in view of the entire record as submitted," and its decision was not "in violation of constitutional provisions, in excess of authority, made upon unlawful procedure, affected by other error of law or arbitrary and capricious." The trial court therefore denied Ms. Collins' appeal and affirmed the State Board's decision.

The issue presented is whether it is impossible to determine the voter's choice from ballots containing variations of Rocky Midgette's name and ballots with no name written on them, but punched in the space for write-in candidates, where Rocky Midgette conducted an active campaign and was the only write-in candidate.

Because Ms. Collins contends the State Board's decision to count the forty-one votes in question was in excess of its statutory authority and was an error of law, *de novo* review is required. *Brooks, Comm'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). N.C. Gen. Stat. § 163-151, which provides for marking ballots in primaries and elections, states that in an election, "if a voter desires to vote for a person whose name is not printed on the ballot, he shall write in the name of the person in the space immediately beneath the name of a candidate, if any, printed on the ballot for that particular office." N.C.G.S. § 163-151 (1991). N.C. Gen. Stat. § 163-170, which governs the rules for counting ballots, provides:

> Only official ballots shall be voted and counted. No official ballot shall be rejected because of technical errors in marking it unless it is impossible to determine the voter's choice. In applying the general rule, all election officials shall be governed by the following rules . . . .
>
> (5) Write-In Votes.—If a name has been written in on an official general election ballot as provided in G.S. 163-151, it shall be counted in accordance with the following rules:
>
> a. The name written in shall not be counted unless written in by the voter or a person authorized to assist the voter pursuant to G.S. 163-152.
>
> b. The name shall be written in immediately below the name of a candidate for a particular office, if any, and shall be counted as a vote for the person whose name has been written in for that office . . . .

N.C.G.S. § 163-170 (1994). Under these statutes, while a voter must write in the name of a person not on the ballot in order for the vote to be counted, any technical errors in following this procedure will not make the ballot invalid "unless it is impossible to determine the voter's choice." *See Duke Power Co. v. Clayton*, 274 N.C. 505, 164 S.E.2d 289 (1968) (all parts of same statute dealing with same subject are to be construed together as a whole, and every part must be given effect if this can be done by fair and reasonable intendment). We must therefore determine whether it is impossible to tell the voter's choice for the thirty-six ballots where no name was written in and the five ballots marked "Rocky," "R. Midgette," or "Midgette."

It is unclear under N.C. Gen. Stat. § 163-170 whether or not, in determining if it is impossible to ascertain a voter's choice, a court is to look to the circumstances surrounding an election or only to the specific ballot in question. We agree, however, with the approach taken by other courts, which have dealt with this issue by generally looking to the face of the ballot, and if the write-in candidate's name is on the ballot, but not in exact accordance with mandatory statutory requirements, looking to extrinsic evidence to see if the voter's choice can be determined. "[T]here must be an expression of intent on the ballot, but the ballot is to be read in the light of surrounding circumstances, evidence of which is admissible." *Fifteen Registered Voters on behalf of Flanagan*, 323 A.2d 521, 523 (N.J. Super. 1974) (write-in votes for "Wright" or "Mr. Wright" should be counted for "Harry C. Wright" where evidence showed no other "Wright" sought the office and where "Harry Wright" vigorously campaigned); *see also Meyer v. Lamm*, 846 P.2d 862 (Colo. 1993) (if ballot is substantially marked as law requires, and from such marking, intention of voter, when viewed in light of circumstances surrounding election, can be ascertained, ballot should be counted); *Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978) (candidate's surname sufficient to indicate vote for him where he vigorously campaigned, and it was unlikely to confuse him with others having same surname, none of whom were politically active); 26 Am. Jur. 2d *Elections* §§ 268-72 (1966). Based on this general rule, courts have considered extrinsic evidence to determine a voter's intention where he or she has written in only a surname, where only the middle name of the candidate is wrong, where the first name is abbreviated, or if the wrong initials are used. 26 Am. Jur. 2d *Elections* § 272.

In this election, the thirty-six ballots which have no name written on them do not express an intention of the voter's choice because

they do not contain Rocky Midgette's name, a variation of Rocky Midgette's name, or any name at all, and disregard completely the requirements of Sections 163-151 and 163-170, the instructions on the ballot, and even the instructions Rocky Midgette provided in his campaign. Accordingly, because no name at all was written on these thirty-six ballots, we do not consider any extrinsic evidence in attempting to ascertain voter intent based on the rules articulated above. These thirty-six ballots, therefore, are tantamount to technical errors which make it impossible to determine the voter's choice. The County Board's findings of fact, which the trial court found the State Board adopted, cannot support the conclusion that these thirty-six votes should be counted for Rocky Midgette.

We now consider the one ballot marked "Rocky," the two ballots marked "R. Midgette," and the two ballots marked "Midgette." Because there is some evidence of voter intent on these five ballots, it is appropriate to look at extrinsic evidence. The evidence adduced at the hearing before the County Board, contained in the County Board's findings of fact, indicates that Rocky Midgette ran an active campaign for town commissioner by setting up approximately 500 posters, distributing 1,000 flyers, mailing over 500 postcards to voters, visiting homes, running display ads in the newspaper, speaking at a candidates' forum sponsored by the League of Women Voters, and having workers telephone voters. There was also evidence that Rocky Midgette was the only person actively campaigning as a write-in candidate for town commissioner, and no other person named Midgette or Midgett or Rocky was running as a candidate in the town election or otherwise actively seeking votes for town office. Given these facts, it is not impossible to tell the voter's choice from these five ballots, and the State Board correctly ordered the County Board to count these five votes for Rocky Midgette. *See McIntosh v. Helton*, 828 S.W.2d 364 (Ky. 1992) (write-in votes for candidate could be counted for him even though they only designated him by initials rather than name as statute requires; election commission had given approval to use of initials and only one person with initials in question campaigned for position). For these reasons, the trial court's decision should be affirmed in part and reversed in part. We remand the case to the trial court with directions to reverse the State Board's decision in part and remand to the State Board so that it may order the County Board not to count the thirty-six ballots which did not have a name written in.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and JOHN concur.

RANDOLPH H. TRULL, PLAINTIFF v. CENTRAL CAROLINA BANK & TRUST COMPANY; RICHARD H. CRONK, JR.; AND PLAYER I, A NORTH CAROLINA GENERAL PARTNERSHIP AND KITTY PLAYER BECK, DEFENDANTS

No. 9310SC1280

(Filed 6 December 1994)

Fraud, Deceit, and Misrepresentation § 24 (NCI4th)— failure to plead with particularity—summary judgment for defendant proper

Plaintiff's claims that defendant fraudulently procured his signature on a $100,000 promissory note and fraudulently induced him to purchase property and execute a $650,000 note failed to meet the particularity requirements for pleading fraud where the complaint failed to allege the individual who concealed the original borrower's financial condition and requested plaintiff's signature on the $100,000 promissory note and failed to allege that the representations which defendant's agent made were false or that the agent either knew them to be false or made them with reckless indifference to the truth.

Am Jur 2d, Fraud and Deceit §§ 423 et seq.

Appeal by plaintiff from order entered 13 September 1993 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 26 September 1994.

Defendants Kitty Beck and Richard H. Cronk, Jr. were general partners in a North Carolina general partnership under the assumed name Player I. On 26 February 1987 Player I purchased property at 6729 Falls of the Neuse Road in Raleigh, North Carolina (the property). At that time Player I executed a deed of trust in favor of Planters National Bank, securing a loan of $110,000. On 3 August 1987 Player I also signed a $380,000 note for a construction loan to build on the property, which was also secured by a Deed of Trust in favor of Planters National Bank.

On 13 October 1988, Beck assigned her partnership interest to Cronk and the Beck/Cronk partnership was dissolved. Also on 13 October 1988, defendant Central Carolina Bank and Trust Company (CCB) made loan #88103 for $100,000 payable to Cronk d/b/a Player I.

On 9 December 1988, Cronk and plaintiff Randolph H. Trull formed a partnership under the name of Player I. Also on that day, CCB lent $140,000 (loan #88130) to Cronk d/b/a Player I, Trull individually and Cronk's wife Kathleen, which loan was secured by a deed of trust on the property. On 7 June 1989 Cronk and Trull signed a Certificate of Loan for Business Purposes as borrowers on the $100,000 note No. 88103 and renewed the loan for $140,000 as partners in Player I. On 1 November 1989, Trull and Cronk signed a renewal note for the $100,000 loan that CCB had made to Cronk "d/b/a Player I" on 13 October 1988.

After the building was completed, Player I defaulted on the $380,000 construction loan. On 1 June 1990 Planters National Bank began foreclosure proceedings against the property. To protect its interest in the property, CCB authorized foreclosure on loan No. 88130 on 30 June 1990.

In July 1990, W. Emmett Quarles, an officer of CCB, met with Cronk and Trull to discuss the foreclosure on the property. Trull was informed that because Cronk had no assets, CCB would collect its outstanding loans from Trull. Quarles and Cronk advised Trull that he should purchase the property. Quarles promised to lend Trull $650,000 to purchase the property. Shortly thereafter, Player I adopted a resolution to sell the building and the property on which it was located to Trull and CCB sent Trull a commitment letter authorizing the $650,000 loan. Trull signed a promissory note for $650,000 payable to CCB. Most of the $650,000 loan was used to pay the balances due on the $380,000 note and deed of trust to Planters National Bank and the two notes to CCB—one for $100,000 and the other for $140,000.

On or about 4 April 1992, CCB sent a notice of default to Trull on his $650,000 note. Shortly thereafter, on 15 April 1992, Trull filed this action against CCB, Cronk, Player I, and Beck. Plaintiff's complaint alleged claims for fraud, negligent misrepresentation, breach of duty of good faith, economic duress, unfair and deceptive trade practices and punitive damages against defendant CCB and Cronk. Defendant CCB filed an answer, counterclaim and affirmative defenses on 17 June 1993 and filed motion for summary judgment on plaintiff's claims against CCB on 10 August 1993. On 27 August 1993, over a year

after plaintiff filed his complaint, plaintiff filed an amended complaint, a motion to amend the complaint, and a notice of hearing on the motion to amend, which are contained in the record on appeal. The record contains no order allowing plaintiff's amended complaint and therefore it is not before this Court. Defendant CCB's motion and other motions filed by the parties were heard during the 30 August 1993 civil session of Wake County Superior Court. On 13 September 1993, Judge Donald W. Stephens entered an order which, among other things, granted defendant CCB's motion for summary judgment.

Burns, Day & Presnell, P.A., by Lacy M. Presnell III, for plaintiff-appellant.

Barrow and Davis, by Paul D. Davis, for defendant-appellee Central Carolina Bank and Trust Company.

THOMPSON, Judge.

Plaintiff appeals from an order entered 13 September 1993 granting defendant CCB's motion for summary judgment on all of plaintiff's claims against CCB. By order entered 4 October 1993, the 13 September 1993 order was amended to certify that the 13 September 1993 order is a final judgment in connection with plaintiff's claims against CCB and is therefore immediately appealable under N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990).

Although plaintiff assigns error to the granting of summary judgment on all of his claims, his brief only discusses the assignment of error with respect to fraud claims. Because plaintiff's brief in chief failed to state any reason, argument or authority in support of its contention that summary judgment was improperly granted on his claims other than fraud, plaintiff's assignments of error with respect to that portion of the order are deemed abandoned. *See* Rule 28(b)(5) N.C. R. App. P. (1994). We also note that plaintiff has filed a reply brief pursuant to Rule 28(h)(2), which sets forth arguments and cites authority in support of his contention that summary judgment on his other claims was improper. The reply brief cannot, however, revive assignments of error which plaintiff has previously abandoned. Thus, the only issue before us is whether the trial court properly granted defendant CCB's motion for summary judgment on plaintiff's fraud claims.

In his complaint, plaintiff alleges that CCB fraudulently induced him to sign the 1 November 1989 $100,000 promissory note and that

CCB and Cronk fraudulently induced him to purchase the property and to execute the $650,000 promissory note. Specifically, plaintiff alleges in his complaint that:

> 23. . . . [P]rior to November 1, 1989 CCB had learned that the Cronks were experiencing severe financial problems, difficulties in paying their loans and financial obligations, and were insolvent.
>
> 24. On November 1, 1989 CCB, while concealing its knowledge of the Cronks' insolvency, requested Trull to sign a Line of Credit Deed of Trust Promissory Note in the amount of $100,000, and Trull signed this renewal note on or about November 1, 1989. This note was a renewal of CCB loan number 88103 previously made to Richard and Kathleen Cronk. Prior to November 1, 1989, Trull had not signed and had no personal liability for this $100,000 loan. CCB had obtained a Deed of Trust on the property executed by the Cronks on October 13, 1988.
>
> . . .
>
> 28. Shortly after June 1, 1990 Cronk and W. Emmett Quarles, an officer of CCB, met with Trull at CCB's offices and advised Trull of the foreclosure of the property. At this meeting CCB, acting through its duly authorized officer and Cronk together, made the following representations to Trull:
>
> (a) if Trull did not purchase the property and pay all outstanding loans secured by deeds of trust on the property, CCB would collect its outstanding loans in an amount of over $240,000 from Trull;
>
> (b) Cronk had nothing, and payment of all loans (including the $100,000 note Trull had been fraudulently induced to sign) would have to be paid solely by Trull;
>
> (c) Trull had "no choice" but to buy the property
>
> (d) Trull should purchase the property, even though Trull told them repeatedly at the meeting that he did not want to buy the property;
>
> (e) CCB would loan Trull the money to fund his purchase of the property; and
>
> (f) that Quarles and Cronk would help Trull sell the property shortly after Trull purchased it.

The complaint further alleges that, because of these fraudulent acts, plaintiff is entitled to rescind his purchase of the property, the $650,000 promissory note to CCB and a 28 June 1991 promissory note for $43,775, which represents interest accrued on the $650,000 promissory note. The complaint also seeks the return of all collateral and security for these loans and damages from Cronk and CCB, jointly and severally, in excess of $10,000 for payments plaintiff made on these notes.

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 a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (1990). The movant has the burden of establishing the lack of any genuine issue of material fact. *Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 374 S.E.2d 135 (1988). The movant may meet this burden by proving that an essential element of the opposing party's claim does not exist. If the movant satisfies his burden, the opposing party must come forward with facts which controvert the facts set forth in the moving party's case. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992).

The essential elements of an action based on fraud are (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) which results in damage to the injured party. N.C. Gen. Stat. § 1A-1, Rule 9(b) (1992) requires that a complaint charging fraud allege these elements with particularity. *Hunter v. Spaulding*, 97 N.C. App. 372, 377, 388 S.E.2d 630, 634 (1990). If it does not, summary judgment is proper. *See Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 205, 377 S.E.2d 285, 289, *cert. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989) (summary judgment proper on fraudulent representation claim where plaintiffs failed to allege defendants' intent at the time the alleged fraudulent misrepresentations were made and thus failed to satisfy Rule 9(b)). Defendant argues that summary judgment was proper because plaintiff's complaint failed to allege the essential elements of fraud with particularity. We agree. A complaint charging fraud against a corporation must specifically allege the time and occasion of the misrepresentation or concealment of material fact and the individual who made the misrepresentation or concealment in order to satisfy the requirements of Rule 9(b). *Coley v. North Carolina National Bank*, 41 N.C. App. 121, 125, 254 S.E.2d 217, 220 (1979).

Plaintiff's claim that CCB fraudulently procured his signature on the $100,000 promissory note fails to satisfy the particularity requirements because his complaint failed to allege the individual who concealed Cronk's financial condition and requested his signature on the $100,000 promissory note.

Plaintiff's claim that CCB fraudulently induced him to purchase the property and execute the $650,000 note does not meet the particularity requirements because there is no allegation that the representations which CCB's agent, W. Emmett Quarles, made were false or that Quarles either knew them to be false or made them with reckless indifference to the truth. *See Watts v. Cumberland County Hosp. System*, 74 N.C. App. 769, 774, 330 S.E.2d 256, 260-267 (1985), *rev'd in part on other grounds*, 317 N.C. 110, 343 S.E.2d 879 (1986) (plaintiff must prove that the false representations were made with knowledge of the truth or with reckless indifference thereto). Moreover, except for the representation that "Cronk had nothing," these representations were not of past or existing facts. While the representation that "Cronk had nothing" is of a past or existing fact, plaintiff's complaint asserts that this representation was true. The representations that CCB would collect its outstanding loans from Trull if Trull did not purchase the property, that CCB would lend Trull the money to purchase the property, and that Quarles and Cronk would help Trull sell the property shortly after he purchased it are promissory representations. A promissory misrepresentation will not normally support an allegation of fraud. It is true that fraud may be found where a promissory misrepresentation is made with an intent to deceive the party and at the time the misrepresentation is made defendant has no intention of performing his promise. *Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 204-205, 377 S.E.2d 285, 288-289, *cert. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989). In this case, the representation that CCB would lend Trull the money to purchase the property was true. Even assuming that the promissory representations were false, there is no allegation that Quarles knew that CCB would not collect its outstanding loans from Trull or that Quarles and Cronk would not help Trull sell the property shortly after Trull purchased it. Thus, plaintiff has failed to allege defendant's fraudulent intent at the time those representations were made.

Even if plaintiff had properly pleaded fraud, defendant CCB would have been entitled to summary judgment as a matter of law. The record shows no genuine issue of material fact as to whether CCB fraudulently induced plaintiff to sign the $100,000 promissory

note, to purchase the property, or to execute the $650,000 promissory note.

The order granting defendant CCB's motion for summary judgment is

Affirmed.

Chief Judge ARNOLD and Judge MARTIN concur.

DENNIS P. SLATTON, EMPLOYEE, PLAINTIFF v. METRO AIR CONDITIONING, INC., EMPLOYER; COMMERCIAL UNION INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 9310IC1219

(Filed 6 December 1994)

Workers' Compensation § 415 (NCI4th)— depositions missing from file—full review not made by full Commission

The full Industrial Commission failed to satisfy its duty to review the evidence and findings of fact in full and failed to satisfy its duty to make specific findings of fact and conclusions of law with respect to each issue raised by the evidence and upon which plaintiff's right to compensation depended where the depositions of four physicians and one vocational rehabilitation counselor, which contained the only medical testimony submitted in evidence, were missing from the file under review by the full Commission.

Am Jur 2d, Workers' Compensation §§ 686 et seq.

Appeal by plaintiff from an Order filed 24 June 1993 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 September 1994.

Robin E. Hudson for plaintiff-appellant.

Young Moore Henderson & Alvis, P.A., by J.A. Webster III, for defendants-appellees.

THOMPSON, Judge.

In this case the Industrial Commission denied workers' compensation benefits to an employee, finding that the employee was unable

to prove that: (1) he had sustained a compensable occupational disease; and (2) his employment with the defendant was a contributing factor to the alleged occupational disease. We find that the review conducted by the Full Commission did not satisfy the mandate of N.C. Gen. Stat. § 97-85 to review the evidence and findings of fact in full. The facts and the procedural history follow.

The defendant employer (Metro) was a heating and air conditioning installation company. Prior to working at Metro the plaintiff had been working in the heating and air conditioning industry for a number of years. Plaintiff worked at Metro from February 1988 to May 1988. His hourly pay was $9.50. At Metro plaintiff was employed as a "rough in" mechanic, in the course of which he frequently cut metal duct work with spring action snips, which he used in his right hand. The snips were heavier than pliers, made of steel and required a strong squeezing action to operate. Plaintiff was also required to lift and install overhead piping duct work, range hoods and venting. On many days, plaintiff spent at least five hours doing overhead work.

After working at Metro and using the snips for about two weeks, the plaintiff developed soreness and numbness in his fingers, which woke him up at night with the feeling that there were "a bunch of little needles" in his hands. At the same time, the plaintiff also began to have shoulder pain. Plaintiff described his shoulders as feeling very painful, as if his bones were grinding since they made sounds like rice krispies. After some period of time, the pain became more frequent and began affecting how much he could lift. When he began working for Metro he could lift 100 to 150 pounds and as time went on the pain worsened so he could lift very little. Although plaintiff had had shoulder pain at times in the past, the pain was minimal.

Several weeks after his employment with the defendant began, the plaintiff contacted the health care service at Kaiser Permanente. On 7 March 1988 plaintiff reported to the nurse on the telephone that he had, "bad pain in his shoulders, radiating to both hands, right side pain . . . can't lift . . . can't sleep at night." The notes from Kaiser reveal that plaintiff called again on 18 March 1988 with complaints of increasing pain in both shoulders and numbness in the right hand.

Plaintiff began to have trouble with production demands. Subsequently, plaintiff was called into the office by his supervisor, Mr. Jake Williamson, Jr., who was aware that the plaintiff was having problems and had recommended that he see a doctor. Mr. Williamson was concerned because plaintiff's shoulder problem was affecting his ability

to perform his job. Plaintiff told Mr. Williamson that he had gone to the doctor as he had suggested and that his shoulders were hurting and that the doctor had recommended surgery which would result in plaintiff's missing two months of work. On the next work day, when plaintiff came to work, he was told that his pay would be cut $2.00 an hour because he was unable to work as quickly as before, or he could quit. Plaintiff refused the reduction in pay and was terminated.

Subsequent to his work at Metro, plaintiff worked for three to four months at Weather Master, another heating and air conditioning installation company. However, plaintiff's job duties at Weather Master were of a somewhat different nature. At Weather Master plaintiff was a "trim-out" mechanic and rarely performed overhead work or used snips. Plaintiff received $9.00 per hour for his work at Weather Master. Plaintiff was discharged from Weather Master for reasons other than his physical condition.

When plaintiff left his employment at Weather Master, he unsuccessfully attempted to get work with various heating and air conditioning companies in the area. In August of 1988 he went to the vocational rehabilitation office where he met with Susan Adams. For approximately 9 months plaintiff went every other week and took tests in order to find employment consistent with his limitations. In April 1989, through his efforts in vocational rehabilitation, the plaintiff found a job with Accu-Fab and worked there for a short time, earning $5.75 per hour. Plaintiff left his job with Accu-Fab because he was required to do work which exceeded his physical limitations. When he informed his supervisor that he could not perform the job, he got into an altercation which caused him to lose the job.

The plaintiff then chose to work for himself so that he could work as much or as little as his limitations would allow. His actual earnings were entered into the record in the form of the books and records of his business.

On or about 11 October 1989 plaintiff filed a claim for workers' compensation benefits, alleging disability of an unknown extent due to the occupational diseases of bursitis and tendinitis in his shoulders and carpal tunnel syndrome in his wrists. The claim alleged that these conditions were all related to trauma, intermittent pressure and repetitive motion in his employment in the heating and air conditioning business.

The case was heard before Deputy Commissioner Charles Markham on 23 May 1990; the parties subsequently took depositions of three physicians who testified on behalf of the plaintiff: Kapil Rawal, M.D., Robert J. Starkenburg, M.D., and George Brothers, M.D. In addition, the parties took the deposition testimony of Susan Catherine Adams, a vocational counselor who testified on behalf of the plaintiff, and Lillian R. Horne, M.D., who testified on behalf of defendant. The Deputy Commissioner denied plaintiff's claim and plaintiff appealed to the Full Industrial Commission.

The Full Commission affirmed the decision of the Deputy Commissioner in a decision which contains three separate opinions, one by each sitting member of the Full Commission. Commissioner James J. Booker rewrote some of the findings and conclusions set forth in the Opinion and Award of the Deputy Commissioner; Chief Deputy Commissioner Dianne Sellers (sitting for absent Commissioner Harold Davis) concurred and adopted the findings of fact and conclusions of law set forth in the Opinion and Award of the Deputy Commissioner; Commissioner J. Randolph Ward dissented on the ground that five depositions, which contained all of the medical evidence relevant to the case and which were in evidence before the Deputy Commissioner, were missing from the file under review by the Full Commission. In his opinion the Full Commission could not carry out its duty to review the award without that evidence. Plaintiff appealed to this Court in forma pauperis.

On appeal, plaintiff argues that the Full Commission failed to carry out its duty to: (1) review in full the evidence and findings of fact contained in the decision of the Deputy Commissioner; and (2) make specific findings of fact and conclusions of law necessary to determine whether the plaintiff had one or more occupational diseases and whether his last injurious exposure occurred at Metro. We agree.

Plaintiff argues that the Full Commission did not review in full the evidence and findings of fact contained in the decision of the Deputy Commissioner because five depositions in evidence before the Deputy Commissioner were missing from the file under review by the Full Commission. We agree.

The nature of the Full Commission's duty to review the decision of the Deputy Commissioner is set forth in N.C. Gen. Stat. § 97-85. The Full Commission has a duty to review the evidence and findings of fact in full. *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374

S.E.2d 610, 613 (1988); *Vieregge v. N.C. State University*, 105 N.C. App. 633, 637-642, 414 S.E.2d 771, 773-776 (1992); *Braswell v. Pitt County Memorial Hospital*, 106 N.C. App. 1, 8, 415 S.E.2d 86, 90 (1992) (Hedrick, C.J., concurring).

Of the five deposition transcripts missing from the file before the Full Commission, three transcripts contained the testimony of the three physicians testifying on behalf of the plaintiff, one transcript contained the testimony of the only physician testifying on behalf of the defendant, and one transcript contained the testimony of a counselor from a vocational rehabilitation service testifying on behalf of the plaintiff. These depositions contained the only medical testimony submitted into evidence.

Plaintiff's right to compensation for the alleged occupational diseases, including the question of whether or not his last injurious exposure occurred at Metro, involved the resolution of medical questions. Yet, the Full Commission issued an order denying plaintiff compensation without the benefit of the depositions of the four physicians and one vocational rehabilitation counselor.

Since none of the testimony of the four physicians was before the Full Commission, it is difficult to understand how Chairman James J. Booker could conclude in finding of fact #14 contained in his opinion:

> Considering the impact of the foregoing factors, the Commission finds that there is no credible testimony from any physician that plaintiff's complained of conditions received any aggravation or significant causal contribution as a consequence of plaintiff's work activities at Metro. As stated by Deputy Commissioner Markham, "medical opinions responding to hypothetical questions embracing facts of dubious credibility cannot be accepted as a basis for a finding of fact."

Without the benefit of the missing depositions, the Chairman simply had no basis for any of the conclusions contained in finding of fact #14. Commissioner Ward stated in dissent:

> I dissent, without reaching the merits of the case, on the ground that five depositions in evidence before the Deputy Commissioner were and remain missing from the file under review by the Full Commission, including those of physicians whose testimony that [sic] figure prominently in the appellant's arguments to the Commission. Until these are found or replaced, the Full Commission cannot carry out its duty to review the award.

Like the dissenting Commissioner, we conclude that the review conducted by the Full Commission without the five missing depositions did not satisfy the mandate of N.C. Gen. Stat. § 97-85 to review the evidence and findings of fact in full. *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). Before the Full Commission attempted to address the merits of plaintiff's claim it should have requested the parties to submit the missing depositions.

Plaintiff also argues that the Full Commission failed to carry out its duty to make specific findings of fact and conclusions of law necessary to determine whether plaintiff had one or more occupational diseases and whether his last injurious exposure occurred at Metro. We agree.

The Industrial Commission has an obligation to make specific findings of fact and conclusions of law determining each issue which is raised by the evidence and upon which plaintiff's right to compensation depends. *Cannady v. Goldkist*, 43 N.C. App. 482, 485, 259 S.E.2d 342, 344 (1979). The Industrial Commission also has an obligation to decide all matters in controversy between the two parties. *Rocky Mount Mills*, 92 N.C. App. at 482, 374 S.E.2d at 613.

Without the five depositions containing all of the medical evidence necessary to resolve the issues, the Full Commission could not have determined what issues might have been raised by the evidence. However, the decision of the Deputy Commissioner does make it clear that the issues of whether plaintiff had one or more occupational diseases and whether his last injurious exposure occurred at Metro were raised by the evidence. These issues had to be resolved in order to determine whether plaintiff should be compensated. Because the Full Commission never considered the medical evidence necessary to determine the issues of occupational disease and last injurious exposure, the findings of fact and conclusions of law of the Full Commission regarding these issues, whether adopted from the decision of the Deputy Commissioner or made by the Full Commission, cannot stand.

We therefore hold that the Full Commission failed to satisfy its duty to review the evidence and findings of fact in full and failed to satisfy its duty to make specific findings of fact and conclusions of law with respect to each issue raised by the evidence, and upon which plaintiff's right to compensation depends. The cause is remanded to the Commission, so that it may consider the five depositions containing the testimony of the four physicians and the voca-

tional rehabilitation counselor. After reviewing those five depositions along with the other evidence submitted by the parties, the Full Commission should make specific findings of fact and conclusions of law on the issues of occupational disease and last injurious exposure.

Reversed and remanded.

Chief Judge ARNOLD and Judge MARTIN concur.

FORSYTH MUNICIPAL ALCOHOLIC BEVERAGE CONTROL BOARD AND NORTH CAROLINA MUNICIPAL LEASING CORPORATION, PLAINTIFFS v. LARRY J. FOLDS, DEFENDANT

No. 9321SC1148

(Filed 6 December 1994)

1. **Contracts § 79 (NCI4th)— contract for sale of real property—obligation to construct driveway—defendant not excused from performance**

Defendant was not excused from constructing a driveway on property sold to plaintiff where plaintiff did not breach the contract; the trial judge, by reading the purchase contract and a subsequently executed easement agreement, could determine the intention of the parties as to what land was to be conveyed; and no genuine issue of material fact existed as to whether the easement agreement, which made no reference to the requirement that defendant construct a driveway, constituted a novation with respect to the original contract and relieved defendant of his obligation under the contract to construct a driveway.

Am Jur 2d, Contracts §§ 355 et seq.

2. **Costs § 26 (NCI4th)— dispute over contract for sale of real property—award of attorney's fees improper**

The trial court erred in allowing attorney's fees in this dispute arising out of a contract for the sale of real property, since contractual provisions for attorney's fees are invalid in the absence of statutory authority.

Am Jur 2d, Costs §§ 72 et seq.

Appeal by defendant from order entered 16 August 1993 by Judge Julius A. Rousseau, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 29 August 1994.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., for plaintiffs-appellees.

Hutchins, Tyndall, Doughton & Moore, by George E. Doughton, Jr. and Kent L. Hamrick, for defendant-appellant.

THOMPSON, Judge.

On 3 December 1992 plaintiffs Forsyth Municipal Alcoholic Beverage Control Board (ABC) and North Carolina Municipal Leasing Corporation (NCMLC) brought this action for breach of a contract of sale of real property. Defendant denied any breach of contract and asserted certain affirmative defenses. Plaintiffs filed a motion for summary judgment on 4 February 1993. On 16 August 1993 the trial court entered summary judgment in favor of plaintiffs. Defendant appealed the trial judge's order granting plaintiffs' motion for summary judgment. We affirm in part and reverse in part.

Defendant is the owner of a certain tract of real estate in Forsyth County bounded on the east by Highway 150 (Peters Creek Parkway) and on the south by Clemmonsville Road. Defendant acquired the property for the purpose of developing the land into a small strip shopping center.

On or about 2 November 1990 defendant and plaintiff ABC entered into a contract whereby ABC agreed to purchase a lot in the tract of land owned by defendant, on which ABC would build a store. Paragraph 15 of the contract provided that:

> Seller hereby agrees to complete construction of the driveway shown as the access easements on Exhibit B (which are not yet constructed) on or before 18 months from the date of closing of this transaction.

The parties also provided in paragraph 15 for certain cross-access and parking easements between the parties. The transaction closed on 31 December 1990 and thus called for completion of the driveway by 30 June 1992.

Paragraph 8 of the contract provided that the deed should be made to ABC or plaintiff NCMLC, a North Carolina non-profit corporation that assists the City of Winston-Salem, all of whose officers and directors are city employees, in acquiring assets with tax-exempt financing, as ABC might direct. ABC directed that the deed be made

to NCMLC and the deed was so drawn. The purchase price was approximately $300,000.00.

Subsequent to the execution of the contract and pursuant to paragraph 15 of the contract, the parties entered into an easement agreement (the easement agreement) that was duly executed and recorded. The easement agreement sought to carry out the provisions of paragraph 15 of the contract relating to the obligation of the parties to provide cross-access and parking easements to each other.

Defendant did not commence construction of the driveway by 30 June 1992 as called for by paragraph 15 of the contract. Plaintiffs filed the complaint in this action on 3 December 1992 in Forsyth County Civil Superior Court. Construction of the driveway had still not commenced at the time the complaint was filed. The complaint alleged, among other things, that defendant breached the contract by failing to construct the driveway referred to in paragraph 15 within 18 months following the closing. Defendant denied any breach of contract and alleged affirmative defenses of breach of contract (by plaintiffs' failure to grant easements to the defendant) and a novation eliminating any obligation of the defendant to construct the driveway (by execution of the easement agreement).

Plaintiffs filed their motion for summary judgment on 4 February 1993. On 16 August 1993 the trial court granted the plaintiffs' motion for summary judgment and ordered the defendant to construct the driveway in question. The trial judge further ordered the defendant to pay plaintiffs, pursuant to paragraph 9 of the contract, the sum of $10,000.00 for expenses incurred as a result of defendant's breach of the contract, including reasonable attorney's fees and other litigation expenses.

On appeal, defendant contends the trial court erred by (1) granting summary judgment for the plaintiffs; (2) ordering him to construct the driveway; and (3) awarding plaintiffs' expenses, including reasonable attorney's fees and other litigation expenses. We affirm the trial court's decision on the first two issues, and reverse the trial court's decision on the third issue.

Defendant breached paragraph 15 when he did not commence construction of the driveway by 30 June 1992. Since defendant had not cured the breach as of 19 January 1994, the date on which the plaintiff-appellees filed their brief on appeal, the only issue before the Court is whether defendant's breach is excused.

[1] Defendant proffers numerous excuses for not constructing the driveway. We first consider defendant's argument that his performance of paragraph 15 is excused by plaintiffs' alleged breach of contract. We find that plaintiffs did not breach the contract and therefore defendant is not excused from his contractual obligation under paragraph 15 to construct the driveway.

Defendant contends that the trial judge, reading the language used to convey the easement contained in the easement agreement in light of all the facts and circumstances referred to in the instrument, could not have determined the intention of the parties as to what land was to be conveyed, and therefore, the easement is void and ineffectual. Defendant further contends that the uncertainty of the language conveying the easement in the easement agreement constitutes a material breach of contract by the plaintiffs and therefore relieves him of his duty to construct the driveway.

No doubt the best way to determine whether or not the defendant has been provided with all easements provided for in the contract is to compare the language of the contract with the language of the easement agreement. The relevant language in the original contract is contained in paragraph 15:

> Access and Cross Parking Easements:
>
> . . . together with a general access easement for ingress, egress and regress over all the roadways, parking areas and service areas behind and in front of any building built by Buyer on the Property and the right for its invitees to park within the parking areas on the property. . . .

The relevant language of the easement agreement is contained in section III:

> . . . together with a perpetual non-exclusive easement for ingress, egress and regress and parking over all the roadways, parking areas and service areas, now existing or hereafter constructed, behind and in front of any building built by NCMLC on the NCMLC Property, including, without limitation, the right for invitees of the owner or lessees of the Folds Property and Partnership Tract to park within the parking areas on the NCMLC Property, said easement being appurtenant to the Partnership Tract and the Folds Property; . . . .

Both documents refer to the Seller's (defendant's) having an easement for ingress, egress, and regress over all the roadways, parking areas and service areas behind and in front of any building built by NCMLC on the NCMLC property, including the right of the invitees of the owners or lessees of the Folds property to park within the parking areas of said property. Although the actual words are not identical, the easement provided is substantially identical to the easement called for in the contract.

We find that all of the easements called for in the contract have been provided for in the easement agreement; therefore, defendant cannot be excused from his contractual obligation to construct the driveway.

Next, we shall consider defendant's argument that a genuine issue of material fact exists as to whether the easement agreement, which made no reference to the requirement that the defendant construct the driveway, constituted a novation with respect to the original contract and relieved him of his obligation under paragraph 15 to construct the driveway. We find that the easement agreement does not create a genuine issue of material fact as to whether a novation occurred and the defendant is not excused from his contractual obligation under paragraph 15 to construct the driveway.

A novation occurs when:

> the parties to a contract substitute a new agreement for the old one. The intent of the parties governs in determining whether there is a novation. If the parties do not say whether a new contract is being made, the courts will look to the words of the contracts, and the surrounding circumstances, if the words do not make it clear, to determine whether the second contract supersedes the first. If the second contract deals with the subject matter of the first so comprehensively as to be complete within itself or if the two contracts are so inconsistent that the two cannot stand together a novation occurs. *See Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964); *Tomberlin v. Long*, 250 N.C. 640, 109 S.E.2d 365 (1959); *Turner v. Turner*, 242 N.C. 533, 89 S.E.2d 245 (1955); *Bank v. Supply Co.*, 226 N.C. 416, 38 S.E.2d 503 (1946).

Whittaker General Medical Corp. v. Daniel, 324 N.C. 523, 526, 379 S.E.2d 824, 827 (1989).

There are no inconsistencies between the contract and the easement agreement; therefore, as a matter of law there is no novation or "substitution," as it is sometimes referred to in North Carolina. *Turner v. Turner*, 242 N.C. 533, 538, 89 S.E.2d 245, 249 (1955); *McDonald v. Technical Institute*, 46 N.C. App. 77, 81, 264 S.E.2d 123, 126 (1980); *Bank v. Supply Company*, 226 N.C. 416, 426, 38 S.E.2d 503, 509-510 (1946).

Moreover, the easement agreement does not deal with the substance of the original contract so extensively as to constitute a novation. The easement agreement simply implements paragraph 15 of the contract and has nothing to do with the other provisions of the contract.

We have reviewed the remaining excuses proffered by the defendant and are not persuaded that the trial judge committed any reversible error.

[2] Finally, defendant challenges the award of attorney's fees and litigation expenses to the plaintiffs pursuant to paragraph 9 of the contract. Defendant argues that paragraph 9 must be read in conjunction with paragraph 7, entitled "Representations and Warranties of the Seller," and is designed to address only those representations and warranties specifically set out in paragraph 7, which contains no requirement that the defendant construct a driveway. Defendant argues that the import of paragraph 9 requires indemnification of plaintiffs only for claims brought against plaintiffs by third persons as the result of some breach on the part of defendant. We find that the language of paragraph 9 of the contract is plain and unambiguous and the trial court was correct in construing the agreement as a matter of law, rather than submitting it to the jury. *Markham v. Improvement Co.*, 201 N.C. 117, 158 S.E 852 (1931).

Paragraph 9 makes it clear that the defendant agreed to hold ABC harmless from any liability and expense, including reasonable attorney's fees and other litigation expenses, resulting from any ". . . breach of warranty or agreement, made by the seller in this contract. . . ." Defendant breached his agreement to construct the driveway, and pursuant to paragraph 9, plaintiffs are entitled to recover certain expenses incurred as a result of that breach. While the contract clearly entitles plaintiffs to recover certain expenses, this is not the end of our inquiry.

Although defendant made no assignment of error with regard to the issue of whether the trial court should have awarded attorney's fees in the absence of statutory authority, he sought to address that question summarily in his brief, and therefore we choose to deal with the question in accordance with our prerogative. N.C. R. App. P. 2; *State v. Petty*, 100 N.C. App. 465, 397 S.E.2d 337 (1990). We find that attorney's fees should not have been allowed.

As a general rule contractual provisions for attorney's fees are invalid in the absence of statutory authority. This is a principle that has long been settled in North Carolina and fully reviewed by our Supreme Court in *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 266 S.E.2d 812 (1980).

This Court has recently enunciated an exception to that principle in the case of separation agreements in particular, *Edwards v. Edwards*, 102 N.C. App. 706, 403 S.E.2d 530, *cert. denied*, 329 N.C. 787, 408 S.E.2d 518 (1991); *Bromhal v. Stott*, 116 N.C. App. 250, 447 S.E.2d 481 (1994) (Greene, J. dissenting in part), and indeed in the case of settlement agreements in general. *Carter v. Foster*, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

Nevertheless, we know of no basis in North Carolina law for the allowance of attorney's fees in a dispute arising out of a contract for the sale of real property, as is involved in this case. Therefore, on the basis of those well-settled principles, we reverse the judgment of the trial court insofar as it allowed attorney's fees to the plaintiffs, and we remand the case for a determination by the trial court of any expenses of plaintiffs, other than attorney's fees, that may have resulted from defendant's breach of contract.

The Order of the trial court is

Affirmed in part and reversed in part.

Chief Judge ARNOLD and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. NORMA JEAN BROWN

No. 9314SC1087

(Filed 6 December 1994)

Homicide § 635 (NCI4th)— self-defense—no duty to retreat in own home—failure to instruct error

Evidence that defendant tried to leave her house on two occasions but was stopped by her husband and that she stabbed her husband with a butcher knife after he tried to choke her was legally sufficient to support a conclusion that defendant was attacked by her husband in her own home and that she was not at fault; thus, defendant was entitled to a jury instruction, as proposed by her at the charge conference, relating to the jury defendant's right not to retreat, and it was error for the trial court to fail to so instruct.

Am Jur 2d, Homicide §§ 162 et seq.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 ALR3d 1296.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary—modern cases. 73 ALR4th 993.

Judge LEWIS concurring in part, dissenting in part.

Appeal by defendant from judgment entered 28 April 1993 in Durham County Superior Court by Judge Robert L. Farmer. Heard in the Court of Appeals 30 August 1994.

Attorney General Michael F. Easley, by Assistant Attorney General John G. Barnwell and Associate Attorney General William B. Crumpler, for the State.

Office of the Public Defender, by Public Defender Robert Brown, Jr. and Assistant Public Defender Sherri L. Royall, for defendant-appellant.

GREENE, Judge.

Norma Jean Brown (defendant) appeals from her conviction of voluntary manslaughter, entered on 28 April 1993 in the Criminal Ses-

sion of the General Court of Justice, Superior Court Division, Durham County. This conviction comes after defendant's trial for first degree murder. As a result of the conviction, defendant was sentenced to six years in prison.

The evidence at trial reveals that defendant stabbed her husband, Jerry Brown (Brown) on 9 July 1992, which wound resulted in the death of Brown. The stabbing occurred in the home where the parties resided.

The evidence viewed in the light most favorable to the defendant, *State v. Marshall*, 105 N.C. App. 518, 521, 414 S.E.2d 95, 95, *disc. rev. denied*, 332 N.C. 150, 419 S.E.2d 576 (1992) (consider evidence of defenses in light most favorable to defendant), reveals that Brown on at least two occasions had assaulted defendant and that on 9 July 1992, immediately before the stabbing, the parties had an argument which turned into a fight. The argument began when defendant tried to leave the house, but Brown told her that she was not leaving. When defendant started out the door anyway, Brown "grabbed [her] by the back of [her] neck and shirt and swung [her] around and [she] fell down." After that, Brown verbally abused defendant, including calling her a "bitch." Brown and defendant shoved and slapped each other, and Brown produced a small knife. When Brown said he wanted to talk, defendant replied that she couldn't talk to him rationally and started to leave the house. Brown then slapped defendant to the floor, and the two began to struggle even more. Brown then pinned defendant against the stove, and he began to choke her. At this point, defendant reached out and grabbed a butcher knife laying near the stove and stabbed Brown in the chest, who then released his hold of defendant. Defendant then left the home and Brown was later found dead in another part of the house.

During the charge conference, after being informed by the trial judge that he was going to instruct on self-defense, defendant specifically requested the following instruction:

> [W]hen a person who is free from fault in bringing on a difficulty, is attacked in her own home or on her own premises, the law imposes on her no duty to retreat before she can justify her fighting in self-defense, regardless of the character of the assault, but is entitled to stand her ground, to repel force with force, and to increase her force, so as not only to resist, but also to overcome the assault and secure herself from all harm. This, of course, would not excuse the defendant if she used excessive force in

repelling the attack and overcoming her adversary. This rule applies even when both defendant and victim reside in the same dwelling.

The trial court did instruct on self-defense but denied the defendant's specific request, stating that "I don't think this is a retreat kind of case . . . ."

The dispositive issue is whether defendant was entitled to a jury instruction informing the jury of the law relating to the right not to retreat when a party is attacked on her own premises.

"Where the defendant's or the State's evidence when viewed in the light most favorable to the defendant discloses facts which are "legally sufficient" to constitute a defense to the charged crime, the trial court must instruct the jury on the defense." *Marshall*, 105 N.C. App. at 522, 414 S.E.2d at 97. If an instruction is required, it must be comprehensive. *State v. Graves*, 18 N.C. App. 177, 181, 196 S.E.2d 582, 585 (1973) (court should "fully, correctly and explicitly instruct"). In this case, the defendant asserts self-defense and is thus entitled to an instruction on this defense that addresses the specific facts of the case. The defendant contends that the facts of this case mandate that a comprehensive self-defense instruction include language regarding her right not to retreat. We agree.

The general rules of self-defense allow a defendant to use the amount of force that is "necessary or apparently necessary to save himself from death or great bodily harm." *State v. Pearson*, 288 N.C. 34, 39, 215 S.E.2d 598, 602 (1975) (quoting *State v. Deck*, 285 N.C. 209, 203 S.E.2d 830 (1974)). When confronted with a nonfelonious assault a party claiming self-defense is required to retreat, "if there is any way of escape open to him." *Id.* at 39, 215 S.E.2d at 602-03. There is, however, no duty to retreat, even when confronted with a nonfelonious assault if "a person, who is free from fault in bringing on a difficulty, is attacked in [her] own dwelling, home, place of business, or on [her] own premises." *Id.* at 40, 215 S.E.2d at 603; *State v. Hearn*, 89 N.C. App. 103, 105, 365 S.E.2d 206, 208 (1988); *State v. Browning*, 28 N.C. App. 376, 378-79, 221 S.E.2d 375, 377 (1976) (rule applies even when assailant and defendant share same living quarters). In such event, the person attacked "may stand [her] ground and kill [her] adversary, if need be." *Pearson*, 288 N.C. at 39-40, 215 S.E.2d at 602-03. A person is not "free from fault" if she "would be guilty of a misdemeanor involving a breach of the peace by reason of the manner in which [she] had provoked or entered into [the] fight." *State v. Jennings*, 276

N.C. 157, 162, 171 S.E.2d 447, 450 (1970) (quoting *State v. Crisp*, 170 N.C. 785, 87 S.E. 511 (1916)). For example, a defendant is at fault if she (1) "has wrongfully assaulted another or committed a battery upon him" or (2) "has provoked a present difficulty by language or conduct towards another *that is calculated and intended to bring*" about the assault on the defendant. *Id.* (emphasis in original).

In this case, the evidence, considered in the light most favorable to the defendant, reveals that the argument and altercation that occurred between Brown and the defendant first began when Brown knocked the defendant to the floor as she was trying to leave their home. After some short period of time, the defendant again tried to leave when Brown again slapped her to the floor. Only after trying to leave the house on two occasions and after Brown tried to choke her, did she stab Brown with the butcher knife. This evidence is legally sufficient to support a conclusion that the defendant was attacked by her husband in her own home and that she was not at fault. Thus defendant was entitled to a jury instruction, as proposed by her at the charge conference, relating to the jury the defendant's right not to retreat and it was error for the trial court to fail to so instruct.

This error violates the defendant's constitutional due process rights, *see Marshall*, 105 N.C. App. at 525, 414 S.E.2d at 99, and the burden is on the State to prove beyond a reasonable doubt that the error was harmless. *Id.*; N.C.G.S. § 15A-1443(b) (1988); *see also State v. Camacho*, 337 N.C. 224, 234, 446 S.E.2d 8, 13 (1994) (finding failure to instruct on a lesser included offense charged in the bill of indictment and supported by the evidence violates the Due Process Clause of the Fourteenth Amendment). The State makes no argument in its brief addressing this issue. In any event, we have reviewed the record and cannot determine that the error was harmless. Defendant is thus entitled to a new trial and it is not necessary for us to address the remaining assignments of error.

New trial.

Judge JOHNSON concurs in the result.

Judge LEWIS concurs in part and dissents in part.

Judge LEWIS concurring in part, dissenting in part.

I respectfully dissent from that part of the opinion which holds that the failure to instruct on the "no duty to retreat" doctrine violates

the defendant's constitutional rights. The majority cites *State v. Marshall*, 105 N.C. App. 518, 414 S.E.2d 95, *disc. review denied*, 332 N.C. 150, 419 S.E.2d 576 (1992), and *State v. Camacho*, 337 N.C. 224, 446 S.E.2d 8 (1994), to support its conclusion. However, I do not believe that those cases control here. In *Camacho*, the Supreme Court recently held that the failure to instruct on a *lesser included offense* of that charged in the bill of indictment and supported by the evidence violates due process. *Id.* at 234, 446 S.E.2d at 13. I would conclude that such a holding is not dispositive on the issue here, as a lesser included offense is a far cry from an instruction on "no duty to retreat."

In *Marshall*, this Court found error in the trial court's failure to instruct on the defense of habitation. 105 N.C. App. at 524, 414 S.E.2d at 99. In their briefs in that case, neither the State nor the defendant suggested that the error was of constitutional significance. However, the Court, relying on cases from other jurisdictions, held that such error did rise to the level of constitutional error. *Id.* at 525, 414 S.E.2d at 99. Therefore, pursuant to N.C.G.S. § 15A-1443(b) (1988), the burden was on the State to prove that the error was harmless beyond a reasonable doubt. *Id.* My research likewise has revealed no cases from this State which have held such error to be constitutional error. I believe that the Court's attempt to elevate the error in *Marshall* to constitutional error was dicta, was without authority, and need not be followed.

Similarly, I have found no cases holding that the failure to instruct on the "no duty to retreat" doctrine is constitutional error. To the contrary, this Court in *State v. Stevenson*, 81 N.C. App. 409, 415, 344 S.E.2d 334, 337 (1986), holding that the failure to give the instruction was error, stated: "We believe that a different result could well have been reached had the requested instruction been given. *See* N.C. Gen. Stat. Sec. 15A-1443(a) (1983)." Thus, it is clear the Court, citing the nonconstitutional standard of subsection (a), did not consider the error to be of a constitutional nature. Likewise, in the case at hand, both the State and the defendant cite in their briefs the nonconstitutional standard found in section 15A-1443(a); neither party argues that the error is of a constitutional nature. To hold such error to be of a constitutional nature would be to elevate virtually every instructional error into a violation of due process, and would, therefore, shift the burden to the State to prove that the error was harmless beyond a reasonable doubt. I cannot agree with the majority's holding on this point as I believe it significantly changes the law.

THE CITY OF WILMINGTON, PLAINTIFF v. NORTH CAROLINA NATURAL GAS CORPORATION, DEFENDANT

No. 935SC1301

(Filed 6 December 1994)

1. Indemnity § 9 (NCI4th)— plaintiff not indemnified against own negligence—summary judgment for defendant proper

In an indemnity action where plaintiff city demanded that defendant gas company indemnify and defend plaintiff against all claims arising as a result of a gas fire, the trial court properly granted summary judgment for defendant on its defense that plaintiff's negligence proximately caused the explosion and resulting damage and that defendant never agreed to indemnify plaintiff from plaintiff's own negligence, since courts do not favor indemnity contracts which relieve the indemnitee from liability and will strictly construe indemnity clauses against the parties asserting them; there was no language in this clause explicitly providing that plaintiff would be insulated from its own negligence; and the agreement clearly provided only that defendant would hold plaintiff harmless for all damages resulting from defendant's operation of a gas system.

Am Jur 2d, Indemnity §§ 15 et seq.

2. Indemnity § 4 (NCI4th)— construction of natural gas system—applicability of N.C.G.S. § 22B-1—plaintiff not indemnified against own negligence

A franchise agreement between the parties was void under N.C.G.S. § 22B-1 insofar as it might require defendant to indemnify plaintiff from plaintiff's own negligence, and there was no merit to plaintiff's contention that the franchise agreement was not a construction contract and the statute therefore did not apply, since the franchise agreement explicitly provided that the indemnity provision was subject to the limitations of the statute; the franchise agreement included much of the same language which appeared in the statute; and the franchise agreement was a contract for the construction of a natural gas system, the kind of contract the statute contemplated.

Am Jur 2d, Indemnity §§ 15 et seq.

3. Indemnity § 7 (NCI4th)— voluntary payments by indemnitee—no reimbursement required

Pursuant to a franchise agreement entered into by the parties, defendant was not required to reimburse plaintiff for amounts voluntarily paid to injured workers above the required workers' compensation payments, since indemnity does not cover payments to a third person for which the indemnitee is not liable and which the indemnitee voluntarily or improperly pays.

Am Jur 2d, Indemnity §§ 15 et seq.

Appeal by plaintiff from order granting summary judgment entered 31 October 1993 by Judge James D. Llewellyn in New Hanover County Superior Court. Heard in the Court of Appeals 15 September 1994.

The City of Wilmington (hereinafter plaintiff) and North Carolina Natural Gas Corporation (hereinafter defendant) entered into a franchise agreement in December 1984 whereby defendant could construct, operate and maintain a gas system in Wilmington, North Carolina. Included in the franchise agreement was an indemnity clause which provided as follows:

Section 18. Indemnity and Insurance

(1)The corporation shall release, indemnify, keep and save harmless the City, its agents, officials and employees, from any and all responsibility or liability for any and all damage or injury of any kind or nature whatever (including death resulting therefrom) to all persons, whether agents, officials or employees of the City or third persons, and to all property proximately caused by, incident to, resulting from, arising out of, or occurring in connection with, directly or indirectly, the design, construction, installation, maintenance, or operation of a gas system by the corporation (or by any persons acting for the corporation of for whom the corporation is or is alleged to be in any way responsible), whether such claim may be based in whole or in part upon contract, tort (including alleged active or passive negligence or participation in the wrong), or upon any alleged breach of any duty or obligation on the part of the corporation, its agents, officials and employees or otherwise. The provisions of this section shall include any claims for equitable relief or for damages (compensatory or punitive) against the City, its agents, officials, and employees including alleged injury to the business of any claimant and shall

include any and all losses, damages, injuries, settlements, judgments, decrees, awards, fines, penalties, claims, costs and expenses. Expenses as used herein shall include without limitation the costs incurred by the City, its agents, officials and employees, in connection with investigating any claim or defending any action, and shall also include reasonable attorneys' fees by reason of the assertion of any such claim against the City, its agents, officials or employees. The corporation expressly understands and agrees that any performance bond or insurance protection required by the corporation or the City, shall in no way limit the corporation's responsibility to release, indemnify, keep and save harmless and defend the City as herein provided. The intention of the parties is to apply and construe broadly in favor of the City the foregoing provisions subject to the limitations, if any, set forth in N.C.G.S. 22B-1.

(2) Corporation shall take out and maintain during the life of this agreement Comprehensive General Liability insurance in an amount not less than $1,000,000 for injuries, including accidental death, and/or property damage for any one occurrence. The insurance must be written on an occurrence basis and must provide for protection against liability arising from the operations of the corporation or its contractors under this franchise. Corporation shall also purchase and maintain Contractual Liability insurance for protection against liability assumed under the indemnity provisions of this agreement, in an amount not less than that specified above for Comprehensive General Liability insurance. The corporation shall furnish the schedule of insurance carried under this franchise in the form of a document attested by the insurance carrier or his agent, stating and itemizing the several coverages as provided above. The corporation shall have the appropriate insurance carriers attach a copy of the Contractual Liability endorsements required evidencing the fact that they are providing this coverage. The insurance carrier shall also certify on these documents that it will notify the City by registered mail at least ten (10) days prior to any cancellation or non-renewal of these coverages. The City reserves the right to inspect any policy and to approve its form, including all exclusions and endorsements.

On 5 August 1987, a tragic gas fire occurred in Wilmington in which several employees of plaintiff were injured or killed. Several employees of defendant and one bystander also were injured. Many of the injured people filed lawsuits or workers' compensation claims

against plaintiff. On 9 November 1987, plaintiff demanded that defendant indemnify and defend plaintiff against the claims and against any other claims that might arise as a result of the fire. On 13 November 1987, defendant responded that it was not required to indemnify plaintiff under the franchise agreement. Nevertheless, plaintiff included a third-party indemnity claim against defendant in plaintiff's answer to the claims by the injured workers. Plaintiff eventually moved for summary judgment on all of the claims, but Judge Coy E. Brewer, Jr. denied the motion on 2 August 1991. In November 1991, the claimants signed releases and plaintiff received dismissals with prejudice.

On 19 November 1992 plaintiff filed suit against defendant claiming that defendant's refusal to indemnify plaintiff damaged plaintiff in an amount in excess of one million dollars. On 10 August 1993, defendant moved for summary judgment. Judge James D. Llewellyn entered an order granting the motion on 31 October 1993 as to the third, fourth and fifth defenses of defendant's answer and granted the motion on the eighth defense for those payments made in excess of the workers' compensation payments. Plaintiff appeals.

Johnson & Lambeth, by Maynard M. Brown, for plaintiff-appellant City of Wilmington.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Jeffrey N. Surles, and Ragsdale, Liggett & Foley, by Peter M. Foley and Stephanie H. Autry, for defendant-appellee North Carolina Natural Gas Corporation.

EAGLES, Judge.

Plaintiff asserts that the trial court erred by granting defendant's motion for summary judgment based on defendant's third, fourth, fifth, and eighth defenses in its answer. After careful review of the record, we affirm. We will separately address each defense on which the trial court granted summary judgment.

First, we review the standard for granting a summary judgment motion. A court grants a motion for summary judgment when "the evidence before the court demonstrates that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law." *Kirkpatrick & Associates v. Wickes Corp.*, 53 N.C. App. 306, 307, 280 S.E.2d 632, 634 (1981), *citing* G.S. 1A-1, Rule 56(c).

I.

[1] Defendant's third defense in its answer stated that plaintiff's negligence proximately caused the explosion and resulting damage and that defendant never agreed to indemnify plaintiff from plaintiff's own negligence. In contrast, plaintiff claims that defendant signed an indemnity provision that indemnified plaintiff from all liability for any damages that its actions might cause. We do not agree with plaintiff's contention. Courts do not favor indemnity contracts that relieve the indemnitee from liability for its own negligence. *New River Crushed Stone v. Austin Powder Co.*, 24 N.C. App. 285, 287, 210 S.E.2d 285, 287 (1974) (citations omitted). Accordingly, courts strictly construe indemnity clauses against the party asserting it. *Hill v. Carolina Freight Carriers Corp.*, 235 N.C. 705, 710, 71 S.E.2d 133, 137 (1952). Courts will not read into an indemnity agreement provisions "which are neither expressly nor reasonably inferable from the terms." *Kirkpatrick & Associates v. Wickes Corp.*, 53 N.C. App. 306, 308, 280 S.E.2d 632, 634 (1981) (citations omitted).

Here, there is no language in the indemnity agreement that explicitly provides that plaintiff will be insulated from its own negligence. In contrast, the agreement clearly provides only that defendant will hold plaintiff harmless for all damages resulting from **defendant's** operation of a gas system. Plaintiff points to the language at the end of the first paragraph of the indemnity clause to argue that the intention of the parties was for defendant to hold plaintiff harmless for all actions. However, this language, stating that the parties will construe the provision broadly in favor of the plaintiff, is not clear and unequivocal. "Mere general, broad, and seemingly all-inclusive language in the indemnifying agreement has been said not to be sufficient to impose liability for the indemnitee's own negligence." 41 Am. Jur. 2d, Indemnity, §15. Accordingly, the trial court did not err in granting summary judgment for defendant on defendant's third defense.

II.

[2] Defendant's fourth defense provided that the franchise agreement was void under G.S. 22B-1 insofar as it might require defendant to indemnify plaintiff from plaintiff's own negligence. G.S. 22B-1 provides that construction indemnity agreements are invalid insofar as they insulate the promisee from liability for its own negligence. Plaintiff argues that the franchise agreement is not a construction contract and therefore G.S. 22B-1 does not apply to void the indemnity provi-

sion of the franchise agreement. Plaintiff's argument fails for several reasons.

First, the franchise agreement explicitly provides that the indemnity provision is subject to the limitations of G.S. 22B-1. If G.S. 22B-1 did not apply, there would have been no reason for plaintiff, who drafted the agreement, to include it in the franchise agreement. Secondly, G.S. 22B-1 applies to the franchise agreement because the franchise agreement includes much of the same language which appears in G.S. 22B-1. G.S. 22B-1 provides that it applies to any indemnity agreement that relates "to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith." The indemnity provision in the franchise agreement provides that defendant will indemnify plaintiff for damages related to "the design, construction, installation, maintenance, or operation of a gas system by [defendant]." Plaintiff cannot persuasively argue that G.S. 22B-1 does not apply to the franchise agreement when the franchise agreement, which plaintiff drafted, describes the scope of defendant's activities by using many of the same terms that G.S. 22B-1 uses.

Finally, plaintiff cannot legitimately assert that G.S. 22B-1 does not apply to the franchise agreement because plaintiff admitted during discovery that "the ordinance granting a natural gas franchise to [defendant] as agreed to between [plaintiff] and [defendant] gives [defendant] the right to construct, repair, and maintain natural gas structures in the public streets, rights-of-way, and other public places." A contract for constructing, repairing, and maintaining structures is exactly what G.S. 22B-1 contemplates. Plaintiff's argument that the statute does not apply to the indemnity provision is without merit. This assignment of error fails.

III.

In its fifth defense, defendant claimed that plaintiff was not entitled to indemnification because of its own negligence. Plaintiff again contends that the indemnity clause provides that defendant will hold plaintiff harmless for plaintiff's own negligence. As we stated in discussing defendant's fourth defense *supra*, we do not accept plaintiff's interpretation of the indemnity clause. Accordingly, we conclude that the trial court did not err in granting summary judgment for defendant on its fifth defense.

IV.

[3] In its eighth defense, defendant asserted that because plaintiff **voluntarily** paid the injured workers sums of money above the required workers' compensation payments, defendant was not required to reimburse plaintiff for these voluntary settlement payments. Plaintiff claims that it made these payments pursuant to a City ordinance which provided that plaintiff could provide injured workers with up to twenty-one days of injury leave in addition to the required workers' compensation payments. However, the ordinance does not mandate additional leave, but merely gives plaintiff the discretionary authority to award the additional days of leave.

Indemnity does not cover payments to a third person for which the indemnitee is not liable and which the indemnitee voluntarily or improperly pays. 41 Am. Jur. 2d, Indemnity, § 35. Here, plaintiff was not legally obligated to pay the amount in excess of the required workers' compensation payments; plaintiff's actions were voluntary. Accordingly, we hold that defendant was not required to reimburse plaintiff for these payments. Here too, the trial court did not err in granting summary judgment for defendant.

Affirmed.

Judges ORR and JOHN concur.

DAVID A. DURHAM, PLAINTIFF v. WILLIAM J. BRITT AND JOHN EDWIN BARROW, DEFENDANTS

No. 948SC249

(Filed 6 December 1994)

Agriculture § 44 (NCI4th)— change from turkey farm to hog production facility—right of neighbor to bring nuisance action

The trial court erred by granting defendant summary judgment in plaintiff's nuisance action since N.C.G.S. § 106-701 does not compromise plaintiff's right to bring a nuisance lawsuit for interference with plaintiff's reasonable use and enjoyment of his property where defendant changes his agricultural operation from operating turkey houses to operating a hog production facility.

Am Jur 2d, Nuisances §§ 154 et seq.

Keeping pigs as nuisance. 2 ALR3d 931.

Appeal by plaintiff from order entered 26 August 1993 by Judge W. Russell Duke in Wayne County Superior Court. Heard in the Court of Appeals 25 October 1994.

Tharrington, Smith & Hargrove, by Mark J. Prak and E. Hardy Lewis, for plaintiff-appellant.

Baddour, Parker, Hine, & Wellons, by Philip A. Baddour, Jr., and Langston and Duncan, by W. Dortch Langston, Jr., for defendant-appellee William J. Britt.

JOHNSON, Judge.

The facts underlying this appeal are as follows: In 1979, plaintiff David A. Durham and his wife built a house on State Road 1719 in Wayne County. The house has served as their permanent residence since that time. In 1988, plaintiff purchased approximately fifty acres of real property located across the street from his residence. Plaintiff purchased the property with the intention of developing it for residential purposes and as a location for his technical design and machine fabrication business. Defendant William J. Britt owns certain real property bordering the eastern border of plaintiff's newly acquired property. When plaintiff purchased his real estate in August 1988, defendant Britt operated three turkey houses on his land and currently operates a fourth. Defendant Britt's farm has been operated as an agricultural operation since the mid-1960's.

On 4 December 1990, defendant Britt wrote plaintiff a letter informing plaintiff of his intent to construct and operate a hog production facility on his property and requesting access to the road adjoining their respective properties for purposes relating to the hog production facility. Plaintiff did not respond to this letter. Plaintiff gave this letter to his surveyor who then submitted the letter along with a proposed subdivision plat to the Wayne County Planning Board. The subdivision plat was approved by the Planning Board in December 1990 and subsequently recorded. As of 6 January 1992, there had been no construction of homes in plaintiff's subdivision, although street lights, paved streets and utilities had been installed. Plaintiff sold four lots in the subdivision on 21 April 1993 and eight more lots on 13 May 1993 to Real Estate Management Services, Inc.

On 20 August 1991, defendant Britt signed a Market Hog Production Agreement with Goldsboro Hog Farms, Inc. In this agreement, defendant Britt agreed to grow hogs on his property for compensation. Defendant Britt was to receive a shipment of hogs and grow them for three months. After three months, Goldsboro Hog Farms, Inc. would pick up the hogs. Defendant Britt expected to receive at least $40,000 a year from Goldsboro Hog Farms, Inc. In September 1991, defendant Britt received approval for a loan from Tarheel Farm Credit for over $140,000 for the purpose of constructing a hog production facility consisting of two buildings and a waste treatment lagoon. As collateral, defendant Britt pledged his entire fifty acre tract of farmland, the buildings to be constructed for the hog operation, the turkey facility already in operation, and all related equipment. Defendant Britt requested and received the assistance of the United States Department of Agriculture Soil Conservation Service in planning and constructing his facility. Before beginning construction of the facility, defendant Britt coordinated with the Wayne County Health Department and the Wayne County Planning Commission, and obtained all necessary permits.

On 2 January 1992, plaintiff filed a verified complaint in Wayne County Superior Court stating claims of common law nuisance and intentional interference with prospective business advantage against defendants Britt and John Edwin Barrow. That same day, the trial court granted plaintiff's motion for a temporary restraining order directing defendants to remove or cover certain signs relating to the facility and prohibiting defendants from operating the facility. On 4 January 1992, the court modified the temporary restraining order to allow commencement by defendant Britt of operations at his facility. Defendant Barrow appeared *pro se* and filed an answer on 13 January 1992; defendant Britt, through counsel, filed an answer and motion to dismiss on 15 January 1992. Defendant Britt's answer set forth as an affirmative defense that because defendant Britt's farm had been "operated as an agricultural operation since the mid 1960's," plaintiff's action for common law nuisance was barred under North Carolina General Statutes §§ 106-700 and 106-701 (Cum. Supp. 1993). Defendant Britt also asserted as an affirmative defense that his facility was in compliance with "a comprehensive federal program[,]" consisting of guidelines promulgated by the United States Department of Agriculture Soil Conservation Service, and that as a result, plaintiff's state law nuisance action was in conflict with federal law and preempted under the constitutional doctrine of supremacy of federal laws.

Plaintiff and defendant Britt conducted substantial discovery, and on 25 January 1993 defendant Britt filed a motion for summary judgment. This motion was heard and on 26 August 1993, the trial court granted defendant Britt's motion for summary judgment. Plaintiff filed timely notice of appeal to our Court. Defendant Barrow was not a party to the motion and resulting order from which plaintiff appeals. Although it appears that plaintiff's suit against defendant Barrow is still pending, we choose to address this appeal in our discretion. N.C.R. App. P. 2.

Plaintiff argues on appeal that the trial court committed reversible error by granting defendant Britt's motion for summary judgment in that a genuine issue of material fact exists with regard to each of plaintiff's claims. Plaintiff states that North Carolina General Statutes § 106-701 does not compromise plaintiff's right to bring a nuisance lawsuit for interference with plaintiff's reasonable use and enjoyment of his property as a result of odors and other conditions caused by defendant Britt's hog production facility.

As a preliminary matter, we note "[i]t is the public policy of North Carolina to encourage farming, farmers, and farmlands." *Baucom's Nursery Co. v. Mecklenburg Co.*, 62 N.C. App. 396, 398, 303 S.E.2d 236, 238 (1983). In furthering this public policy, North Carolina General Statutes § 106-700 states:

> It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land and forestland for the production of food, fiber, and other products. When other land uses extend into agricultural and forest areas, agricultural and forestry operations often become the subject of nuisance suits. As a result, agricultural and forestry operations are sometimes forced to cease. Many others are discouraged from making investments in farm and forest improvements. It is the purpose of this Article to reduce the loss to the State of its agricultural and forestry resources by limiting the circumstances under which an agricultural or forestry operation may be deemed to be a nuisance.

North Carolina General Statutes § 106-701, the "right to farm" law which protects existing farming operations, states in pertinent part:

> **§ 106-701: When agricultural and forestry operation, etc., not constituted nuisance by changed conditions in locality.**
>
> (a) No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any

changed conditions in or about the locality thereof after the same has been in operation for more than one year, when such operation was not a nuisance at the time the operation began; provided, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural or forestry operation or its appurtenances.

(b) For the purposes of this Article, "agricultural operation" includes, without limitation, any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products.

Notwithstanding our State's public policy regarding "farming, farmers, and farmlands[,]" the question presented in the instant case is whether the change in the nature of the agricultural use of the land in question, from the operation of turkey houses to the operation of a hog production facility, is included in North Carolina General Statutes § 106-701 so as to continue to be "not constituted [a] nuisance." This is an issue of first impression in our State.

Plaintiff argues that North Carolina General Statutes § 106-701 does not apply to this case because "plaintiff did not 'come to the nuisance[,]' " but, rather, defendant Britt "imposed the nuisance upon plaintiff" because "[n]o nuisance existed until defendant Britt fundamentally changed the nature of the agricultural activity occurring on his property by constructing a high volume commercial swine facility." Plaintiff argues that "[d]efendant Britt would have this [C]ourt read the statute as meaning that, once he has conducted an agricultural operation on his property for a period in excess of one year, thereafter he may conduct any agricultural activity regardless of its scope and impact on surrounding neighbors, and the neighbors may not be heard to complain."

We find plaintiff's argument persuasive. We observe the wording of North Carolina General Statutes § 106-701, that "[f]or the purposes of this Article, 'agricultural operation' includes, *without limitation, any facility* for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products[.]" (Emphasis added.) We believe the legislature intended this statute to cover any agricultural operation, without limitation, when the operation was initially begun. However, we do not believe the legislature intended North Carolina General Statutes § 106-701 to cover situations in which a party *fundamentally changes the nature of the agricultural activity* which had theretofore been covered under the

statute. For example, a fundamental change could consist of a significant change in the type of agricultural operation, or a significant change in the hours of the agricultural operation. *Compare* Ind. Code. Ann. § 34-1-52-4 (Burns 1986). Certainly, in the instant case, a fundamental change has occurred where defendant, who previously operated turkey houses, has decided to change his farming operation to that of a hog production facility. Therefore, we find the trial court committed reversible error by granting defendant Britt's motion for summary judgment in that North Carolina General Statutes § 106-701 does not compromise plaintiff's right to bring a nuisance lawsuit for interference with plaintiff's reasonable use and enjoyment of his property as a result of odors and other conditions caused by defendant Britt's hog production facility.

We find defendant's argument that defendant's compliance with the provisions of the Federal Watershed Protection and Flood Prevention Act serves as a bar to plaintiff's nuisance claim by virtue of the Supremacy Clause of the United States Constitution without merit. This Act does not specifically preempt or conflict with state law and therefore has no effect on plaintiff's common law right to bring this nuisance claim.

We find the trial court erred in granting defendant Britt's motion for summary judgment. The decision of the trial court is reversed.

Reversed and remanded.

Judges MARTIN and THOMPSON concur.

STATE OF NORTH CAROLINA v. SHELTON LOCKLEAR

No. 9318SC1309

(Filed 6 December 1994)

1. Evidence and Witnesses § 1775 (NCI4th)— requiring defendant to speak—voice identification not necessary for victim—no error

Even though a robbery victim stated that she did not need to hear defendant speak in order to identify him, the trial court did not err in requiring defendant to demonstrate his voice to the victim and the jury for purposes of voice identification.

Am Jur 2d, Evidence § 1018.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification. 24 ALR3d 1261.

2. Indictment, Information, and Criminal Pleadings § 39 (NCI4th)— date changed in habitual felon indictment—no error

Because the date alleged in the indictment was neither an essential nor a substantial fact as to the charge of habitual felon, the trial court properly allowed the State to change the habitual felon indictment to allege the correct date of the offense.

Am Jur 2d, Indictments and Informations § 194.

Power of court to make or permit amendment of indictment with respect to allegations as to time. 14 ALR3d 1297.

Appeal by defendant from judgments entered 24 August 1993 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 18 October 1994.

Attorney General Michael F. Easley, by Associate Attorney General John A. Greenlee, for the State.

McNairy, Clifford & Clendenin, by Robert O'Hale, for defendant-appellant.

JOHNSON, Judge.

On 29 March 1993, defendant Shelton Locklear was indicted by the Guilford County Grand Jury. The first indictment charged defendant with the offense of common law robbery, in violation of North Carolina General Statutes § 14-87.1 (1993), and the second indictment alleged defendant was an habitual felon, pursuant to North Carolina General Statutes § 14-7.1 (1993). The case was tried in Guilford County Superior Court on 26 July 1993.

Prior to the presentation of evidence to the jury, the State made a motion to change the date of the commission of the felony supporting the habitual felon indictment from 19 December 1992 to 2 December 1992. The State argued that defendant had sufficient notice of the alleged date intended to be proved because the correct date of the offense appeared on the first indictment, the one for common law robbery. Counsel for defendant objected, stating that the second indictment did not represent a true bill from the grand jury because

the date listed on the habitual felon indictment was incorrect. The trial court allowed the motion, stating that it was the fact that another felony was committed, not its specific date, which was the essential question in the habitual felon indictment.

Evidence presented at trial showed the following: Carol Hill testified that she was working at the Quality Mart on Randleman Road in Greensboro, North Carolina on 2 December 1992, and that a man came in and spoke to her, saying, among other things, "This is a stick up. Give me all your money[,]" and "[Y]ou didn't push that button, did you[?]" Ms. Hill further testified that this man told her "[h]e wanted the big bills out of the bottom of the register." Ms. Hill identified the man as defendant and testified that defendant kept his hand in his pocket and she thought he had a weapon; that defendant had come in earlier and carried a bottle of wine up to the counter but that she did not sell the wine to defendant because he did not have an I.D. card; and that the person who robbed her did not have anything concealing his face and was not wearing a hat or sunglasses. Ms. Hill further stated that approximately a month and a half after the robbery, she was shown a photographic lineup by Detective J. Sanders and that she picked out defendant's picture. Ms. Hill identified a videotape of the robbery that had been made by the store security camera and described the video tape for the jury. Ms. Hill stated that the person who robbed her did not really have an accent, and that he was soft spoken and did not say much.

After defendant's cross-examination of Ms. Hill, during which time defendant questioned Ms. Hill as to her recollection of the persons she saw that day in her workplace and her identification of defendant, Ms. Hill was asked by the State on re-direct examination to confirm her previous identification of defendant and was asked whether it would help her to hear defendant speak the words he used the night of the robbery. Ms. Hill responded, "No. I don't need any more. I can tell it's him . . . I mean, he can if he wants to, but I can tell by just his face, he's the one." The State then asked the court to order defendant to say, "This is a stick up[,]" and over defendant's objection, the trial court ordered defendant to say this. After defendant spoke, when asked if this was the same voice, the witness said, "Yes." Then, at the request of the prosecution, and overruling one objection but reserving ruling upon a second, defendant was ordered to speak the words, "Have you already pushed the button[?]" When asked if it was the same voice, Ms. Hill again said, "Yes." The objection to a third request, that defendant speak the words, "I want the big bills under

the drawer[,]" was sustained. The trial court later ruled on defendant's second objection that the speaking of the second phrase "was highly prejudicial to my client." Counsel for defendant did not present to the court any constitutional basis in support of his objection. The court ruled that because Ms. Hill had testified that the challenged words were spoken to her by defendant, the probative value in requiring defendant to speak those words outweighed any prejudicial effect.

On 27 July 1993, the jury returned a verdict of guilty of common law robbery. Evidence was then presented at the habitual felon stage and defendant was convicted on 27 July 1993 of being an habitual felon. After being sentenced, defendant gave notice of appeal to our Court.

[1] Defendant presents two arguments on appeal. Defendant's first argument is that the trial court erred in ordering defendant to speak the exact words the robber spoke in the courtroom in the presence of the jury for the witness to make a voice identification. Defendant argues that because Ms. Hill stated that she did not need to hear defendant speak in order to identify him and that it would not make any difference to her, the trial court erred in ordering defendant to repeat the words the robber had stated because "defendant's voice exemplars had no probative value whatsoever and had only prejudicial value." Defendant further argues that the "[voice] demonstration was deemed to involve testimonial compulsion by which the accused was, in effect, compelled to be a witness against himself in violation of his constitutional privilege." Although defendant is raising the constitutional aspect of this issue for the first time on appeal, we choose to address it in our discretion. *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981). N.C.R. App. P. 2.

In *State v. Perry*, 291 N.C. 284, 230 S.E.2d 141 (1976) our Supreme Court held that there was no error when the trial court required the defendant to stand before the jury and place an orange stocking mask over his head and face in the way the victim testified it was worn by the man who robbed and shot her. In *Perry*, 291 N.C. at 289, 230 S.E.2d at 144, the Court quoted *Schmerber v. California*, 384 U.S. 757, 764, 16 L.Ed.2d 908, 916 (1966) in noting that "both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." The

Supreme Court held in *U.S. v. Wade*, 388 U.S. 218, 222-23, 18 L.Ed.2d 1149, 1155 (1967) that compelling a suspect to give a voice sample in a lineup was not violative of the Fifth Amendment because the accused did not have to "utter statements of a testimonial nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt."

Although North Carolina has not directly addressed the issue of voice identification during trial, other states have done so. *See Lusk v. State*, 367 So.2d 1088 (Fla. App. 1979); *Coffey v. State*, 261 Ark. 687, 550 S.W.2d 778 (1977); *State v. Lacoste*, 256 La. 697, 237 So.2d 871 (1970). *See generally* 3 ALR4th 374 § 12. In these cases, compelling the defendant to speak during trial was done for the purpose of allowing a witness to identify the defendant's voice. *See also Burnett v. Collins*, 982 F.2d 922 (5th Cir. (Tex.) 1993); *U.S. v. Williams*, 704 F.2d 315 (6th Cir. (Mich.)), *cert. denied*, 464 U.S. 991, 78 L.Ed.2d 679 (1983). *But see U.S. v. Brown*, 644 F.2d 101 (2nd Cir. (Vt.)), *cert. denied*, 454 U.S. 881, 70 L.Ed.2d 195 (1981) (Oakes, C.J., dissenting) (stating that "by having the defendant uttering the threatening and menacing words that the robber had allegedly used . . . [i]t is hard for me to conceive of a more prejudicial method of establishing a voice identification.") (*Compare State v. Hubanks*, 173 Wis.2d 1, 17, 496 N.W.2d 96, 101 (1992), *disc. review denied*, 497 N.W.2d 130, *cert. denied*, — U.S. —, 126 L.Ed.2d 66 (1993), where a court ordered voice identification was held proper when "used only for the purpose of voice identification"; the Court opined in a footnote, "that is not to say that such a voice sample will be appropriate in every situation. There may be situations where forcing a criminal defendant to utter the words of the crime would be so inherently prejudicial that a conviction would warrant reversal.")

So noting, we find, notwithstanding that Ms. Hill stated that she did not need to hear defendant speak in order to identify him, that the trial court correctly requested and required defendant to demonstrate his voice to Ms. Hill and to the jury for purposes of voice identification. After each instance of requiring defendant to speak, Ms. Hill was asked if this was the same voice, and after each instance, she responded affirmatively. Further, after the voice identification, the court instructed the jury that

> the mere fact that the Court has requested and required the defendant to demonstrate his voice to you in no way is indicative of any fact that he may have been present on that occasion, or

made any statements like that on that occasion. In other words, it was merely for the purpose of illustrating and demonstrating his voice to the witness in this case, and to the jury. And it is in no way indicative of any substantive fact that occurred on that date.

Compare U.S. v. Olivera, 30 F.3d 1195 (9th Cir.(Cal.) 1994) (where, while a witness was on the stand, the trial court ordered the defendant to speak the words uttered by the robber, and the witness was never asked if the voice was similar to that of the robber; the court found prejudicial error and ordered a new trial). Therefore, we reject defendant's argument.

[2] Defendant next argues that the trial court erred in allowing the State to "amend" the habitual felon indictment, noting that North Carolina General Statutes § 15A-923(e) (1988) states "[a] bill of indictment may not be amended." Defendant argues that "in an habitual felon indictment, the changing of a date substantially alters the charge."

The term "amendment" in North Carolina General Statutes § 15A-923(e) has been defined as "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). "Ordinarily, the date alleged in the indictment is neither an essential nor a substantial fact, and therefore the State may prove that the offense was actually committed on some date other than that alleged in the indictment without the necessity of a motion to change the bill." *State v. Cameron*, 83 N.C. App. 69, 72, 349 S.E.2d 327, 329 (1986). "The failure to state accurately the date or time an offense is alleged to have occurred does not invalidate a bill of indictment nor does it justify reversal of a conviction obtained thereon." *Id. See also* North Carolina General Statutes § 15-155 (1983). We agree with the trial court that in the case *sub judice*, it was the fact that another felony was committed, not its specific date, which was the essential question in the habitual felon indictment. Therefore, because the date alleged in the indictment is neither an essential nor a substantial fact as to the charge of habitual felon, we find the trial court properly allowed the State to change the habitual felon indictment.

No error.

Judges MARTIN and THOMPSON concur.

AMY OLIVE CHRISTIAN, ALLEGED DEPENDENT OF JOHN C. CHRISTIAN, DECEASED, EMPLOYEE-PLAINTIFF v. RIDDLE & MENDENHALL LOGGING, EMPLOYER, SELF INSURED, AEGIS ADMINISTRATIVE SERVICES, INC. (FORMERLY ALEXSIS, INC.), SERVICING AGENT, DEFENDANTS

No. 9410IC117

(Filed 6 December 1994)

Workers' Compensation § 263 (NCI4th)— average weekly wage difficult to determine—depreciation on equipment treated improperly—possible alternatives for determining income

In determining the average weekly wage of a hauler of logs and pulpwood, it was proper to deduct certain business expenses from his income received from defendant; however, the Industrial Commission was required to consider a reasonable rate of depreciation on the employee's equipment as a business expense in determining his earnings. To determine the employee's actual compensation, the Commission might consider what he would have been required to pay someone else to perform his work, or his income as reported on the returns from earlier years showing his own income derived from similar work.

Am Jur 2d, Workers' Compensation §§ 418-430.

Appeal by defendants from the Opinion and Award entered 28 October 1993 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 October 1994.

J. Douglas Moretz and Beverly D. Basden for plaintiff-appellee.

Maupin Taylor Ellis & Adams, P.A., by Richard M. Lewis and Timothy S. Riordan, for defendant-appellants.

MARTIN, Judge.

This case comes to us with the following factual and procedural background: Defendant Riddle and Mendenhall Logging (R&M) is a self-insured employer engaged in cutting and hauling timber. R&M contracted with the decedent, John Christian, to haul logs and pulpwood for a fixed amount per ton. On 1 February 1989, Christian was killed as a result of an accident which occurred in the course of his work as a subcontractor for R&M. Plaintiff, Amy Olive Christian, is Christian's only child and was wholly dependent upon him for support. Because R&M had not complied with the provisions of G.S.

§ 97-93, the deputy commissioner found and concluded, pursuant to G.S. § 97-19, that R&M was liable for the payment of compensation for Christian's death.

To establish Christian's average weekly wage for workers' compensation purposes, plaintiff introduced Christian's 1988 income tax return, which represented his earnings for 12 of the 13 months prior to his death. Charles Jeffreys, the accountant who prepared the 1988 tax return for Christian's estate, testified that the earnings as reflected on the tax return would essentially amount to the same earnings Christian received for the 52 weeks prior to his death. According to Jeffreys, a Form 1099 showed that R&M paid Christian $85,445.00 in 1988 and that he was not paid by any other employer. Jeffreys further testified that Christian reported $3,839.00 in net taxable income on his 1988 tax return, which was calculated by taking the following business expense deductions from his gross income of $85,445.00:

1.	$35,037.00	repairs
2.	$ 678.00	business taxes
3.	$ 977.00	utilities & telephone expenses
4.	$ 6,587.00	insurance
5.	$ 4,352.00	interest
6.	$14,027.00	fuel
7.	$ 1,916.00	licenses
8.	$17,996.00	equipment depreciation

The deputy commissioner calculated that Christian's average weekly wage was $73.83 by dividing Christian's net taxable income of $3,839.00 by 52 weeks, and awarded plaintiff compensation at a rate of $49.22 per week for 400 weeks.

Plaintiff appealed to the Full Commission from only that portion of the deputy commissioner's award relating to Christian's average weekly wage. The Full Commission found and concluded that Christian's " 'total discretionary income' or 'total cash flow' as identified by his accountant is the best evidence of his actual earnings, and that . . . a calculation based upon the net income and depreciation deduction figures appearing in the decedent's tax return 'will most nearly approximate the amount which the injured employee would be earning were it not for the injury'. G.S. §97-2(5)." Thus, the Full Commission determined that Christian's income in 1988 was $21,835.00, which was his net income plus the amount allocated to equipment depreciation on the 1988 tax return, yielding an average weekly wage of $419.90. The Full Commission modified the deputy commissioner's

award to provide for compensation to plaintiff at the rate of $279.93 per week for 400 weeks. Defendants appealed.

G.S. § 97-38 provides that death benefits shall be based on the decedent's "average weekly wages" at the time of the accident. G.S. § 97-2(5) sets forth the methods of determining "average weekly wages" for workers' compensation purposes. The statute provides, as one method of determining "average weekly wages", that the earnings of the injured employee during the 52 weeks immediately preceding the date of injury be divided by 52. Where it is impractical to use this method because the employee has been employed for an insufficient period of time prior to the injury, or because of the casual nature of the employment, the statute provides that such wages may be determined by giving regard to the average weekly amount that "was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community." N.C. Gen. Stat. § 97-2(5). However, the statute further provides that if "for exceptional reasons the foregoing [methods are] unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured [or deceased] employee would be earning were it not for the injury." *Id.* In the present case, the Commission proceeded under the latter section of the statute by determing the decedent's total earnings less his business expenses, but declining to deduct equipment depreciation. The Commission reasoned that the equipment had a longer business life than the accelerated depreciation period used by decedent for tax purposes.

In *Baldwin v. Piedmont Woodyards, Inc.*, 58 N.C. App. 602, 293 S.E.2d 814 (1982), we considered a similar question. In *Baldwin*, decedent Willie Baldwin was employed by the defendant Piedmont Woodyards (Piedmont) and was killed in an accident arising out of and in the course of his employment. He did not receive a weekly salary or wages, but was paid a certain amount for each cord of pulpwood delivered to Piedmont. He owned a truck and other equipment which he used in his business. The deputy commissioner found that the entire amount paid to Baldwin by Piedmont the year before his death would be the measure upon which his average weekly wages would be calculated to ascertain the compensation award to be paid to the plaintiff, Baldwin's widow. However, the deputy commissioner did not deduct from the sum paid to Baldwin any of the expenses he incurred in producing the pulpwood. On appeal by Piedmont and its insurance carrier, the Full Commission modified the deputy commis-

sioner's award. Although it agreed with the deputy commissioner that the money paid to Baldwin was the appropriate sum from which to compute his average weekly wage, the Full Commission deducted from that amount insurance and license plates for his truck; gas and oil for his truck; repairs to his equipment and the purchase price of supplies. However, the Full Commission did not deduct depreciation on Baldwin's truck and loader, nor did it deduct interest charges on his business debts or the purchase price of a saw.

This Court reversed, emphasizing that, considering the method the Full Commission used to determine the income Baldwin received from Piedmont, it was proper to deduct certain business expenses from that sum to calculate his average weekly wage, but the Commission also should have treated the depreciation on Baldwin's equipment, the interest incurred on his business debts and the purchase price of the saw as business expenses to be deducted from the amount he was paid. We remanded the case for further consideration, pointing out that "if the Commission [did] not feel the method it first used produce[d] a result fair to the employer and employee, it [could] use an alternate method in determining compensation." *Id.* at 604, 293 S.E.2d at 816. We suggested to the Commission, however, that actual depreciation and interest might differ from that reflected on a tax return or profit and loss statement and that, as an alternative method of determining "average weekly wages" it might consider "what it would have cost the decedent to hire someone to have done his job." *Id. See also, York v. Unionville Volunteer Fire Dept.*, 58 N.C. App. 591, 293 S.E.2d 812 (1982). (This Court reversed and remanded an award of the Full Commission, wherein the Commission, in calculating plaintiff farmer's income, did not deduct, *inter alia*, depreciation on equipment used to produce the crops; the Court further noted that because plaintiff owned and operated his own farm, it would be difficult to determine his income and the profit and loss statement might not reflect plaintiff's contribution to his business; the Court recommended to the Commission to consider "what the plaintiff would have to pay someone else to perform his work or the tax returns of other years in reaching its decision.")

In the present case, due to the unique nature of Christian's employment, it is difficult to make a precise calculation of his income, and the Commission was therefore justified in resorting to an alternative method of determining his average weekly wage as provided by G.S. § 97-2(5). In doing so, however, the statute requires fairness to both employee and employer. *Joyner v. Oil Co.*, 266 N.C.

519, 146 S.E.2d 447 (1966). Clearly, Christian had disposable earnings greater than the amount calculated by the deputy commissioner; just as clearly, he experienced expenses for depreciation, wear and tear to his business equipment which impacted on, and reduced, his net earnings, though perhaps not at the accelerated rate utilized on his tax returns. Our decision in *Baldwin, supra*, and fairness to the employer require that the Commission consider a reasonable rate of depreciation on the equipment as a business expense in determining Christian's earnings. Alternatively, as we suggested in *Baldwin*, the Commission might consider what Christian would have been required to pay someone else to perform his work, or his income as reported on tax returns from earlier years showing his own income derived from similar work.

Thus, we reverse the opinion and award of the Full Commission and remand this case to the Full Commission for further consideration of Christian's average weekly wage in accordance with the principles discussed above.

Reversed and remanded.

Judges JOHNSON and THOMPSON concur.

STATE OF NORTH CAROLINA v. SETH ROBERT COHEN

No. 9318SC1082

(Filed 6 December 1994)

Searches and Seizures § 21 (NCI4th)— objection to search and seizure of briefcase—failure to assert ownership in briefcase—no standing to object

Defendant did not have standing to object to the search and seizure of a briefcase and its contents found in his wife's car trunk when defendant never asserted an ownership or possessory interest in the briefcase.

Am Jur 2d, Evidence § 646.

Interest in property as requisite of accused's standing to raise question of constitutionality of search and seizure. 4 L. Ed. 2d 1999.

STATE v. COHEN

[117 N.C. App. 265 (1994)]

Appeal by defendant from judgment entered 6 August 1993 by Judge Preston Cornelius in Guilford County Superior Court. Heard in the Court of Appeals 29 August 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas D. Zweigart, for the State.

Assistant Public Defenders Walter L. Jones and Richard S. Boulden, Eighteenth Judicial District, for defendant-appellant.

THOMPSON, Judge.

The issue presented by this appeal is whether or not the defendant has standing to object to the search and seizure of a briefcase and its contents when the defendant never asserted an ownership or possessory interest in the briefcase. We hold that the defendant does not have standing to object to the search of the briefcase.

The defendant was indicted on four separate counts of common law robbery. At trial, evidence for the State tended to show that Wachovia Bank branches were robbed on four different dates in 1992 by a white male meeting the same general physical description and wearing a trench coat and ski mask. The robber in each case wore latex gloves, displayed a gun and handed the teller a brown paper bag.

Paul Keys was a driver for an auto parts store in Greensboro. The auto parts store was located about one-half block behind a Wachovia Bank branch located on Wendover Avenue. On 12 January 1993 Mr. Keys saw the defendant behind the auto parts store in a wooded area that separated that store from the nearby Wachovia Bank branch. The defendant was wearing a trench coat. Mr. Keys saw the defendant carrying a bag and attempting to cover the bag with leaves. When the defendant noticed that Mr. Keys was watching him, he walked away carrying the bag. Subsequently, Mr. Keys saw the defendant leaving the parking area in a silver Toyota at a high rate of speed. Because the defendant's behavior seemed strange to Mr. Keys, he followed the defendant and wrote down his license plate number. He then called the police to report the incident.

Following this report, the Greensboro police checked the car's registration and determined that it was owned by Mrs. Alicia Cohen, wife of the defendant. To determine whether the car had been stolen and whether the female owner was in distress, an officer reached Mrs. Cohen by telephone. During the officer's conversation with Mrs.

Cohen the defendant picked up the telephone on another extension, and the officer spoke with him regarding the incident reported by Mr. Keys. While the officer was speaking to the defendant, it became apparent that the defendant had been the individual driving his wife's car at the time it was pursued by Mr. Keys. When questioned over the phone by the officer, the defendant gave several conflicting accounts of his presence behind the auto parts store. Because of the defendant's inconsistent stories, the officer suspected the defendant was being untruthful. Subsequently, officers went to the Cohen residence to further pursue their inquiry.

When questioned at his residence by the officers, the defendant told the officers that he had found several bags in the woods. The defendant then offered to take the officers to his wife's car to show them the contents of the bags. Mrs. Cohen's car was then located at a repair shop, and the defendant told the officers that the items he found were in the trunk. The defendant gave officers several inconsistent stories about his connection with the bags. At the repair shop, the defendant gave the officers several plastic bags and told them that they contained the items he had found in the woods where Mr. Keys had seen him. A police detective asked the defendant to accompany him to the police station where the detective examined the contents of the bags. In one bag he found a trench coat, a black automatic toy pistol in the pocket of the coat, a wig, a stocking mask with eye holes cut out, a hooded sweat shirt, surgical gloves, and a number of brown paper bags. A label in the trench coat displayed a military-type stamp with the name "J.A. White." Another bag contained gray trousers and a pair of white tennis shoes. A third bag contained a wig, a stocking cap, surgical gloves and more brown paper bags. A brown hooded sweatshirt was found in a fourth bag. These items resembled clothing worn by the robber at the various Wachovia Bank locations. The defendant was placed under arrest.

After the defendant was placed under arrest, the Greensboro police returned to the residence of the defendant where Mrs. Cohen was present. Mrs. Cohen agreed to give the police permission to search the apartment and the car registered in her name. She asked a neighbor to accompany an officer to the repair facility and to bring the car back to her residence. After Mrs. Cohen signed a form consenting to the search of her car, police examined its contents, including an unlocked red briefcase. In voir dire testimony, Detective Evers stated that Mrs. Cohen was standing nearby when her car was searched and that she invited the officers to look at anything in the

car. Inside the briefcase, there was a belt matching the trench coat found in the bag the defendant had given police. The same type of military stamp with the name "J.A. White" was on the belt. Also in the case were a Cleveland Browns baseball cap, a bag of disposable latex gloves, a paper sandwich bag and various items with the defendant's name on them.

At trial, the defendant objected to the admission of evidence found in the briefcase on the basis that his wife did not have authority to consent to the search of the briefcase. In support of his motion to suppress that evidence, the defendant moved to admit into evidence an affidavit of his wife, Mrs. Alicia Cohen. The affidavit contained statements of Mrs. Cohen to the effect that she did not knowingly give consent to search the contents of her car because she did not know the briefcase was in the trunk. Mrs. Cohen had been present at the trial that day but was absent from the courtroom when the affidavit was offered. The court refused to accept the affidavit of Mrs. Cohen since she was available as a witness and the court offered to continue the trial until her presence could be arranged. The defendant declined the court's offer of additional time to produce Mrs. Cohen to testify with respect to her consent to the search. At trial the defendant presented no evidence.

On 6 August 1993, the defendant was convicted of four counts of common law robbery in violation of N.C. Gen. Stat. § 14-87.1. On appeal the defendant contends that the search and seizure of the briefcase and its contents violated his rights under the Fourth Amendment to the United States Constitution and Section 20 of the North Carolina Constitution.

We do not address the defendant's argument as to whether either his Fourth Amendment rights or his rights under Section 20 of the North Carolina Constitution were violated because we hold that he does not have standing to assert them.

The Supreme Court of the United States has said:

> "Rights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by the exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons v. United States*, 390 U.S., at 389, 88 S.Ct. 974.

Rakas v. Illinois, 439 U.S. 128, 138, 58 L.Ed.2d 387, 398 (1978), *reh'g denied*, 439 U.S. 1122, 59 L.Ed.2d 83 (1979). This Court has stated that

an "individual's Fourth Amendment rights are personal rights which may not be vicariously asserted by another." *State v. Melvin*, 53 N.C. App. 421, 424, 281 S.E.2d 97, 100 (1981), *cert. denied*, 305 N.C. 762, 292 S.E.2d 578 (1982).

A defendant has the burden of demonstrating that his Fourth Amendment rights have been violated. *State v. Greenwood,* 301 N.C. 705, 273 S.E.2d 438 (1981); *State v. Jones*, 299 N.C. 298, 261 S.E.2d 860 (1980); *State v. Taylor*, 298 N.C. 405, 259 S.E.2d 502 (1979); *State v. Melvin*, 53 N.C. App. 421, 425, 281 S.E.2d 97, 100 (1981). "In order for the defendant to establish that he has standing he must demonstrate that he had a 'legitimate expectation of privacy' in the premises searched." *State v. Melvin*, supra; *Rakas v. Illinois*, supra; *State v. Jones*, supra; *State v. Alford*, 298 N.C. 465, 259 S.E.2d 242 (1979).

In the case at bar the defendant has failed to meet his burden of proof. There is no competent evidence in the record that defendant asserted either an ownership or possessory interest in the briefcase which was searched, and therefore the defendant has failed to demonstrate that he had a "legitimate expectation" of privacy as to the briefcase and its contents. *Melvin*, 53 N.C. App. at 425, 281 S.E.2d at 100 (*citing Rakas v. Illinois*, supra). In his motion to suppress the evidence, the defendant argued that since his wife had indicated to the officers that the briefcase did not belong to her, she did not have the authority to give consent to search the briefcase located in the trunk of her car. In support of his motion, the defendant submitted an affidavit of his wife in which she stated, among other things, that the briefcase found in the trunk of her car belonged to defendant. The trial court properly refused to admit the affidavit since the defendant's wife was available to testify. The defendant presented no evidence at trial; therefore, there is no competent evidence in the record that defendant asserted any ownership or possessory interest in the briefcase.

At trial the defendant made a conscious tactical decision not to assert an ownership or possessory interest in the briefcase. He cannot now on appeal be heard to complain that the officers' search and seizure of the briefcase and its contents violated his Fourth Amendment rights under the United States Constitution or his rights under Section 20 of the North Carolina Constitution.

No error.

Chief Judge ARNOLD and Judge MARTIN concur.

LANDFALL GROUP AGAINST PAID TRANSFERABILITY, AN UNINCORPORATED ASSOCIATION, PLAINTIFF v. LANDFALL CLUB, INC., DEFENDANT

No. 945SC84

(Filed 6 December 1994)

Parties § 12 (NCI4th); Associations and Clubs § 26 (NCI4th)—one member of plaintiff not member of defendant—no representational standing of plaintiff

Plaintiff unincorporated association did not have standing to bring this declaratory judgment action requesting declaration of rights under a club membership plan where one member of plaintiff did not belong to the club operated by defendant.

Am Jur 2d, Associations and Clubs §§ 50 et seq.; Parties §§ 30 et seq.

Appeal by plaintiff from judgment entered 20 September 1993 in New Hanover Superior Court by Judge Gary E. Trawick. Heard in the Court of Appeals 6 October 1994.

Shipman & Lea, by Gary K. Shipman, for plaintiff-appellant.

Murchison, Taylor, Kendrick, Gibson & Davenport, L.L.P., by Michael Murchison, for defendant-appellee.

GREENE, Judge.

Landfall Group Against Paid Transferability, an unincorporated association (plaintiff), appeals from an order entered 20 September 1993 in New Hanover County Superior Court, granting Landfall Club, Inc.'s (defendant) motion for summary judgment in plaintiff's declaratory judgment action concerning the rights of plaintiff and defendant in regard to the transferability of memberships in defendant.

Defendant was incorporated in October 1987 "for the purpose of providing golf, recreational and social facilities within Landfall in Wilmington, North Carolina." The club facilities are owned by Landfall Associates, the developer of Landfall, a residential housing development in Wilmington, but the club facilities are operated by defendant. From October 1987 until 1 November 1990, defendant's by-laws limited transferability to surviving spouses of members and contained no provisions indicating membership would terminate upon sale of a member's property.

Defendant adopted a new membership plan, effective 1 November 1990, which supersedes "the By-Laws of Landfall Club, Inc. in their entirety as of that date." The new plan gives golf and active members who purchased their memberships before 1 September 1990 the opportunity to acquire a transferability feature by paying a $2,500 Conversion Fee on or before 31 December 1990. If a member chooses not to acquire the transferability feature, membership is only transferable to the member's surviving spouse, and the membership terminates when the property is sold with no right to refund of any portion of the Membership Fee. Landfall property owners as of 1 November 1990 are given the opportunity to purchase a membership in defendant which includes the transferability feature at the initial membership fee until 31 December 1990. The new membership plan further provides that for those with the transferability feature, "[t]he amount repaid to a resigning member upon repurchase of his membership will be 50% of the Membership Fee being charged by the Club for the new purchaser's category of membership."

Plaintiff filed a declaratory judgment action against defendant on 1 November 1991, alleging "the Plaintiff is a non-profit Association, whose [46] members are likewise members of the Defendant Landfall Club, Inc." Plaintiff requested in its complaint a judgment declaring "the respective rights, privileges and duties of the Plaintiff and the Defendant, regarding the transferability of memberships in Landfall Club, Inc., and specifically declaring that any changes or modifications to the transferability options of memberships in Landfall Club, Inc., not be made retroactive to the existing members." Defendant filed motions to dismiss for lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, failure "to join the individual members of plaintiff association as a party to this action on the grounds that said members are necessary parties," failure to prosecute the action in the name of the real parties in interest who are the individual members of plaintiff, and lack of standing "to bring this action for its individual members." Defendant made a motion for summary judgment on 27 August 1993 supported by the pleadings, the affidavit of Bruce R. Koch (Mr. Koch), plaintiff's reply to defendant's request for admissions, plaintiff's response to defendant's first set of interrogatories and request for production of documents, and plaintiff's answers to defendant's second set of interrogatories.

Mr. Koch, Senior Vice-President for Sales and Marketing at Landfall Associates, explained in his affidavit the transferability feature of the new membership plan and further stated that "[b]ased on review

of the Club records one member of plaintiff Association, John J. Marks, is not a member of the Landfall Club." Mr. Koch attached as Exhibit H copies of the purchase contracts and applications for membership in the club for members of plaintiff. Exhibit H contains lists of members of plaintiff with columns for property purchased, seller, date of purchase, and date of application for membership in defendant's club. Exhibit H provides that John J. Marks, a member of plaintiff, purchased property from Landfall Associates on 12 July 1990; however, under the column for "Date of Application for Membership," Exhibit H has "(not member)." Mr. Koch also provided the property purchase agreement between John J. Marks and Landfall Associates. Addendum "D" to the purchase agreement provides that John J. Marks and Landfall Associates agree "[t]he purchase price of this lot does not include a Landfall Club membership. This condition supersedes Item 7 of Exhibit A." There is no dispute that the other members of plaintiff are members of defendant.

Plaintiff, in its responses to defendant's request for interrogatories and request for admissions, lists John J. Marks as a member of plaintiff and a member "of the Club operated by the defendant" who has "not purchased the Transferability Feature."

The issue presented is whether plaintiff has standing to bring this declaratory judgment action requesting declaration of rights under a club membership plan where one member of plaintiff does not belong to the club operated by defendant.

The only basis on which plaintiff claims it has standing is as the representative of its members. *See Warth v. Seldin*, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 362 (1975) (association "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy" or "may have standing solely as the representative of its members"). Therefore, plaintiff may properly bring suit only if:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (*quoting Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 394 (1977)). Under

the first prong of the *Hunt* test, an individual member has standing to sue in his own right if he can demonstrate a "distinct and palpable injury" likely to be redressed by granting the requested relief. *Valley Forge College v. Americans United*, 454 U.S. 464, 488, 70 L. Ed. 2d 700, 719 (1982); *see also Maryland Highway Contractors v. State of Maryland*, 933 F.2d 1246, 1252 (4th Cir.) (association did not meet first prong of *Hunt* test for representational standing where there was overwhelming evidence of lack of injury to each member of association), *cert denied*, 502 U.S. 939, 116 L. Ed. 2d 325 (1991); N.C.G.S. § 1A-1, Rule 17 (1991) (relates to standing and requires claim to be prosecuted in name of real party in interest, i.e., one benefited or injured by the judgment in the case).

In this case, in support of its motion for summary judgment, defendant produced Mr. Koch's affidavit, the purchase agreement between Landfall Associates and John J. Marks, and Exhibit H, all of which show that one member of plaintiff, John J. Marks, is not a member of the club operated by defendant. Based on this evidence, John J. Marks cannot demonstrate that he has a "distinct and palpable injury" likely to be remedied by granting the relief requested by plaintiff; therefore, plaintiff has failed to meet the first prong of the *Hunt* test for representational standing. Because defendant met its summary judgment burden by showing that there is no genuine issue of material fact due to lack of standing, the burden shifted to plaintiff to show that John J. Marks is a member of defendant. *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63-64, 414 S.E.2d 339, 342 (1992) (once moving party meets summary judgment burden, non-movant has burden to show it will be able to make out at least a prima facie case at trial or provide an excuse for not so doing). Plaintiff, in its complaint, alleges its "members are likewise members" of defendant, and in its responses to defendant's request for interrogatories and request for admissions, lists John J. Marks as a member of plaintiff and a member "of the Club operated by the defendant" who has "not purchased the Transferability Feature." A mere statement, however, that John J. Marks is a member of defendant's club is not sufficient to raise a genuine issue of fact when defendant has produced an affidavit, the purchase contract between John J. Marks and Landfall Associates, and the club's records listing members of the club which show John J. Marks is not a member of defendant. *See Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 242 S.E.2d 785 (1978) (summary judgment for damages appropriate where plaintiff factually supported claim with certified arbitration award and

court order confirming that award, and defendant did not support its bare denial that alleged sum was owing); *First Citizens Bank & Trust Co. v. Holland*, 51 N.C. App. 529, 277 S.E.2d 108 (1981) (once movant supports summary judgment motion under Rule 56, opposing party must come forth with specific facts showing genuine issue for trial). Because plaintiff failed to meet its summary judgment burden, the trial court did not err in granting defendant's motion for summary judgment. *See Early v. Bowen*, 116 N.C. App. 206, 208, 447 S.E.2d 167, 169 (1994) (summary judgment appropriate in declaratory judgment action where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law). Accordingly, the decision of the trial court is

Affirmed.

Judges WYNN and JOHN concur.

BARBARA K. PHILLIPS, PLAINTIFF-APPELLANT v. WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION AND LARRY D. COBLE, DEFENDANTS-APPELLEES

No. 9321SC961

(Filed 6 December 1994)

1. Libel and Slander § 19 (NCI4th)— statements to school superintendent—qualified privilege

Statements made by defendant board of education's communications officer to the superintendent concerning alleged actions by plaintiff assistant superintendent in attempting to have the superintendent's office broken into and directing janitors to search the superintendent's trash for information which might embarrass him were protected by a qualified privilege since the communications officer had an interest in reporting any conduct to the superintendent which could adversely affect the school system. Therefore, a directed verdict was properly entered for defendant school board where no malice was shown.

Am Jur 2d, Libel and Slander §§ 195 et seq., 444.

Pleading or raising defense of privilege in defamation action. 51 ALR2d 552.

2. Libel and Slander §§ 19, 42 (NCI4th)— statement to newspaper editor—no qualified privilege—not defamatory

Although qualified privilege did not apply to a statement made by defendant board of education's communications officer to a newspaper editor, when asked about alleged actions of plaintiff assistant superintendent in attempting to have the superintendent's office broken into and directing janitors to search the superintendent's trash for embarrassing information, that "You'd be surprised about what went on around here," this statement was not defamatory as a matter of law.

Am Jur 2d, Libel and Slander §§ 195 et seq., 444.

Pleading or raising defense of privilege in defamation action. 51 ALR2d 552.

3. Schools § 175 (NCI4th)— statements by school board member—board not liable

Defendant board of education was not vicariously liable for statements made by its vice chairman to a newspaper editor concerning alleged conduct by plaintiff assistant superintendent where the vice chairman was not acting as an agent of the board when he made the statements.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 184 et seq.

Tort liability of public schools and institutions of higher learning. 86 ALR2d 489.

Appeal by plaintiff from judgment entered 23 February 1993 by Judge F. Fetzer Mills in Forsyth County Superior Court. Heard in the Court of Appeals 22 August 1994.

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

Robinson Maready Lawing & Comerford, L.L.P., by Robert J. Lawing and Jane C. Jackson, and Womble Carlyle Sandridge & Rice, by Allan R. Gitter, for defendants-appellees.

WYNN, Judge.

On 30 November 1988, plaintiff, Barbara K. Phillips, applied for the position of Superintendent of the Winston-Salem/Forsyth County

Schools. Plaintiff was a semi-finalist for the position but defendant Winston-Salem/Forsyth County Board of Education (Board) selected defendant Dr. Larry D. Coble instead.

After Dr. Coble became superintendent he met with plaintiff who informed him of allegations regarding the conduct of Nelson Jessup. Mr. Jessup had been the interim superintendent. Plaintiff told Dr. Coble that Mr. Jessup may have been involved in burning down a school, was selling school furniture for personal profit, and used a school for sexual assignations. Dr. Coble asked the Board to hire a private investigator to explore these charges. The investigator did not uncover any evidence of improper activity.

In March 1990, Donna Oldham, communications officer for the Board, told Dr. Coble that plaintiff had tried to have his office broken into and searched for anything which might embarrass Dr. Coble. Ms. Oldham also told Dr. Coble that plaintiff had directed janitors to search his trash for such information. Ms. Oldham later met with Rudy Anderson, managing editor of the Winston-Salem *Chronicle*, a weekly newspaper, and discussed these allegations regarding plaintiff. Beaufort Bailey, the Board's Vice-Chairman, also met with Mr. Anderson and made similar allegations concerning plaintiff.

Plaintiff had an employment contract with the Board which expired on 30 June 1990. Dr. Coble created a reorganization plan for the school system in which the assistant superintendent positions were eliminated. The Board approved the reorganization plan and notified plaintiff by letter on 19 March 1990 that her contract would not be renewed.

The Winston-Salem *Chronicle* reported in its 29 March 1990 issue that the Board adopted a reorganization plan which did not include plaintiff. In addition the article stated:

> [T]he *Chronicle* has learned, through sources who wish to remain unidentified, that Mr. Coble's recommendation not to renew Dr. Phillips' contract had to do with her conduct after Dr. Eargle's resignation as superintendent and during the subsequent search for a new superintendent. Dr. Phillips had been one of the candidates vying for that job. She was not one of the finalists for the job.
>
> [Dr. Phillips] denied other allegations that she has made critical and unflattering public comments about Dr. Coble and other administration staff personnel. She denied allegations that at her

direction she has had janitors rummaging through the trash of Dr. Coble looking for anything that might put him in a bad light or that she ever tried to have Dr. Coble's office broken into for the purpose of getting information that might put him in a compromising position.

Plaintiff then brought this action against the Board and Dr. Coble for slander, libel, and wrongful discharge in violation of public policy and sought actual and punitive damages against defendants. The trial court granted defendants' motions for summary judgment as to defendant Dr. Coble and as to her claim for punitive damages against the Board. At the close of plaintiff's evidence the trial court granted defendant's motion for a directed verdict and entered judgment against plaintiff. From that judgment, plaintiff appeals.

Plaintiff first argues that the trial court erred by granting defendant's motion for a directed verdict as to plaintiff's defamation and wrongful discharge claims. A motion for a directed verdict by the defendant pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a), presents an identical question for trial and appellate courts: whether the evidence, considered in the light most favorable to the plaintiff and given every reasonable inference, is sufficient to submit to the jury. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977); *Smith v. Pass*, 95 N.C. App. 243, 382 S.E.2d 781 (1989).

I. Defamation Claim

[1] The term defamation covers two distinct torts, libel and slander. In general, libel is written while slander is oral. *Tallent v. Blake*, 57 N.C. App. 249, 291 S.E.2d 336 (1982). Libel *per se* is a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace. *Renwick v. News and Observer Pub. Co.*, 310 N.C. 312, 317, 312 S.E.2d 405, 409, *reh'g denied*, 310 N.C. 749, 315 S.E.2d 704, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). Slander *per se* is an oral communication to a third person which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease. *Raymond U v. Duke University*, 91 N.C. App. 171, 371 S.E.2d 701, *disc. review*

denied, 323 N.C. 629, 374 S.E.2d 590 (1988); *Morris v. Bruney*, 78 N.C. App. 668, 338 S.E.2d 561 (1986). "[W]hen defamatory words are spoken with the intent that the words be reduced to writing, and the words are in fact written, the publication is both slander and libel." *Clark v. Brown*, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990); *Talent*, 57 N.C. App. at 251-2, 291 S.E.2d at 338.

Statements which would otherwise support a defamation action may be protected by a qualified privilege. *See Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 182 S.E.2d 410 (1971). A qualified privilege exists when a communication is made:

> (1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right, or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest.

Clark, 99 N.C. App. at 262, 393 S.E.2d at 138; *Shreve v. Duke Power Co.*, 97 N.C. App. 648, 389 S.E.2d 444, *disc. review denied*, 326 N.C. 598, 393 S.E.2d 883 (1990). Whether the communication is privileged is a question of law unless the circumstances of the communication are in dispute which then makes it a mixed question of law and fact. *Stewart*, 279 N.C. at 284, 182 S.E.2d at 414 (quoting *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891)). The existence of the privilege creates a presumption that the communication was made in good faith and without malice. To rebut this presumption, the plaintiff must show actual malice. *Shreve*, 97 N.C. App. at 651, 389 S.E.2d at 446; *Davis v. Durham City Schools*, 91 N.C. App. 520, 372 S.E.2d 318 (1988).

In the instant case, we find that Ms. Oldham's statements to Dr. Coble regarding plaintiff were entitled to a qualified privilege. Ms. Oldham, as the Board's communications officer, had an interest in reporting any conduct to Dr. Coble which could adversely affect the school system. The statements were made in a private meeting. Plaintiff has failed to show actual malice by Ms. Oldham, therefore, a directed verdict was proper on this issue.

[2] Statements made by Ms. Oldham to Mr. Anderson, however, would not be entitled to a qualified privilege. Mr. Anderson testified to the following:

Q. And on the document that has been marked as Plaintiff's Exhibit Number 3, do you see anywhere in that document a reference where—where she [Ms. Oldham] was asked about Dr. Phillips going through Coble's trash and going through—breaking into his office? Do you see that?

A. Okay.

. . .

A. Yes. About going—what did—going through Coble's trash and going through things in his office, yes.

Q. Okay. What was her statement to you when you asked her about that?

. . .

A. "You'd be surprised about what went on around here. That's no big deal. I told you I don't want to be involved in this. Get your answers someplace else."

Taking this testimony in the light most favorable to plaintiff, we conclude that Ms. Oldham's statement to Mr. Anderson is not defamatory as a matter of law. The trial court properly granted defendant a directed verdict with regard to the statements made by Ms. Oldham.

[3] Plaintiff next argues that defendant Board is liable for similar statements made by Mr. Bailey to Mr. Anderson. We disagree. The Board has waived its governmental immunity pursuant to N.C. Gen. Stat. § 115C-42 by purchasing liability insurance. The statute provides that the waiver applies to "damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment." N.C. Gen. Stat. § 115C-42 (1994). We conclude that Mr. Bailey was not acting as an agent of the Board when he made the statements concerning plaintiff to Mr. Anderson. Therefore, we hold that the Board is not vicariously liable for Mr. Bailey's conduct and that the trial court properly granted a directed verdict on this issue.

II. Wrongful Discharge Claim

Plaintiff next argues that the trial court erred by granting a directed verdict as to her wrongful discharge claim. We disagree. Assuming *arguendo* that plaintiff was discharged by the Board, she has not presented sufficient evidence that this discharge violated the public pol-

icy of North Carolina. *See Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992); *Coman v. Thomas Mfg. Co., Inc.*, 325 N.C. 172, 381 S.E.2d 445 (1989). The trial court properly directed a verdict on this issue.

We have reviewed plaintiff's other assignments of error and find them to be without merit. Therefore, the judgment of the trial court is

Affirmed.

Judges JOHNSON and ORR concur.

CAROLYN SMITHERMAN HUNT, PLAINTIFF v. CARL VANCE HUNT, JR., DEFENDANT

No. 9421DC204

(Filed 6 December 1994)

1. Pleadings § 350 (NCI4th)— reply—admission of allegations in counterclaim allowed

Excluded from a reply is a new cause of action or other matter beyond the scope of the new matter raised in the answer; therefore, a reply, when authorized, may properly admit, as well as deny, allegations contained in a counterclaim.

Am Jur 2d, Pleading §§ 188, 189.

2. Pleadings § 350 (NCI4th)— counterclaim for equitable distribution—joining in claim by reply—striking of reply error

Defendant was estopped from defeating, by submitting to a voluntary dismissal of his counterclaim, plaintiff's right to an equitable distribution of the parties' marital property where defendant husband asserted a counterclaim, though not denominated as such, for equitable distribution; plaintiff joined in the claim by her reply; and the trial court, without objection by defendant husband, preserved the issue of equitable distribution for further proceedings prior to its entry of the judgment of absolute divorce.

Am Jur 2d, Pleading §§ 188, 189.

Appeal by plaintiff from orders entered 5 November and 24 November 1993 by Judge R. Kason Keiger in Forsyth County District Court. Heard in the Court of Appeals 20 October 1994.

Plaintiff instituted this action against defendant, then her husband, on 12 April 1993. Plaintiff's complaint sets forth claims for absolute divorce, child custody and support, and alimony, both *pendente lite* and permanent, but did not contain a claim for an equitable distribution of marital property. Defendant, appearing *pro se*, timely filed an answer, and, four days later, an "Addendum to Answer." In both pleadings, defendant requested the court to enter an order distributing the parties' assets "in an equitable manner", although he did not denominate such requests as a counterclaim in either document.

On 28 June 1993, defendant, then represented by counsel, filed a motion for summary judgment on the issue of absolute divorce. On 8 July 1993, plaintiff filed a pleading captioned "Reply" in which she alleged that defendant had asserted a counterclaim for equitable distribution, admitted that the parties had accumulated marital property, and joined in defendant's request for "an Equitable Distribution of the parties' marital property pursuant to N.C.G.S. §50-20(a) et seq. . . . ." The same day, defendant's summary judgment motion was heard by District Court Judge Margaret L. Sharpe. Both parties consented to the entry of the absolute divorce judgment, however, plaintiff moved in open court for an order severing the issue of equitable distribution from the absolute divorce proceedings. Without objection from defendant, Judge Sharpe allowed plaintiff's motion and withheld entry of the judgment of absolute divorce in order to give counsel an opportunity to agree upon the terms of the order severing equitable distribution. On 9 July 1993, Judge Sharpe entered an order finding that defendant had asserted an undenominated counterclaim for equitable distribution in his answer and providing that the issue of equitable distribution be severed from the absolute divorce action and preserved for further proceedings by the court. No exception to that order was taken by either party. A judgment of absolute divorce was entered on 13 July 1993.

On 3 August 1993, defendant filed a motion to strike plaintiff's Reply on the grounds that the Reply impermissibly raised "a new cause of action" for equitable distribution. A hearing on the motion was held on 27 September 1993 before Judge R. Kason Keiger. On the same date, after the hearing on defendant's motion, plaintiff moved for leave to amend her complaint to allege a claim for equitable distribution. On 1 October 1993, before plaintiff's motion was heard, defendant voluntarily dismissed his counterclaim for equitable distribution.

On 5 November, Judge Keiger entered an order, *nunc pro tunc* for 27 September 1993, allowing defendant's motion to strike plaintiff's Reply. On 24 November 1993, Judge Keiger entered an order denying plaintiff's motion for leave to file an amended complaint. Plaintiff appeals from both orders.

Wolfe and Collins, P.A., by John G. Wolfe, III, George M. Cleland, IV, and Shannon L. Warf, for plaintiff-appellant.

No brief filed for defendant-appellee.

MARTIN, Judge.

Although plaintiff's brief contains multiple arguments in support of fourteen assignments of error, her contentions are essentially twofold: (1) that the trial court committed a legal error by granting defendant's motion to strike her reply, and (2) that the trial court abused its discretion by denying her motion to amend her complaint to allege a claim for equitable distribution. Because we find merit in her first contention, it is unnecessary for us to reach the second.

In his order granting defendant's motion to strike plaintiff's reply, Judge Keiger concluded as a matter of law:

> 2. Although the defendant failed to denominate his equitable distribution counterclaim as such, the Court concludes that the answer and addendum to answer that was filed by the defendant pro se was sufficient to state a claim for relief and to put the plaintiff on notice that the defendant was making an equitable distribution claim.
>
> 3. A party may not admit to a claim for equitable distribution in a reply, the function of a reply being to deny a new matter raised in a counterclaim. The Court concludes that it was improper for the plaintiff to admit or join in claims through a reply pleading since those matters are outside the scope of a denial.

[1] We believe the trial court was too restrictive in its interpretation of the purpose of a reply. The function of a reply is to meet new matter or affirmative defenses set forth in the answer. *Miller v. Ruth's of North Carolina, Inc.*, 69 N.C. App. 153, 316 S.E.2d 622, *disc. review denied*, 312 N.C. 494, 322 S.E.2d 557 (1984). In meeting such new matter, however, a plaintiff's reply is not limited solely to a denial thereof. "It must be limited to *an admission or denial* of the new matter set up in the answer." (Emphasis added.) *Spain v. Brown*, 236 N.C.

355, 357, 72 S.E.2d 918, 919 (1952). What is excluded from a reply is a new cause of action or other matter beyond the scope of the new matter raised in the answer. *Id.* Thus, we hold that a reply, when authorized, may properly admit, as well as deny, allegations contained in a counterclaim.

[2] G.S. § 1A-1, Rule 7(a) governs the pleadings permitted in actions of a civil nature, including domestic relations actions such as the present case. *See* G.S. § 50-21 (claim for equitable distribution may be brought as a separate civil action or joined with any other action brought pursuant to Chapter 50); *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982) (Rules of Civil Procedure applicable to actions for permanent alimony); *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978) (Statutes dealing with marital disputes indicate legislative intent that same procedure be used as in other civil actions unless differing procedure expressly provided for by statute). Our equitable distribution statutes do not provide for pleadings different from those authorized by Rule 7(a).

Rule 7(a) provides "[t]here shall be a complaint and an answer; a reply to a counterclaim *denominated as such*; . . . . No other pleading shall be allowed except that the court may order a reply to an answer or a third party answer." (Emphasis added.) Under the rule, a reply is required only where a counterclaim is denominated as such. *Beal v. Dellinger*, 38 N.C. App. 732, 248 S.E.2d 775 (1978). Indeed, under a strict application of the rule, no reply would be permitted to an undenominated counterclaim such as that contained in defendant's answer and addendum to answer. However, Rule 8(c) provides, *inter alia*, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, *shall* treat the pleading as if there had been a proper designation." (Emphasis added.)

In the present case, defendant, filing *pro se* pleadings in response to plaintiff's complaint, raised the issue of distribution of the parties' marital property and prayed for the affirmative relief of "an order requiring Defendant and Plaintiff to distribute any and all assets in an equitable manner," in effect asserting a counterclaim for equitable distribution. *See McCarley v. McCarley*, 289 N.C. 109, 221 S.E.2d 490 (1976). Pursuant to Rule 8(c), justice requires that the trial court treat the defendant's pleadings as a counterclaim for equitable distribution and permit plaintiff to reply. Accordingly, it was error to strike plaintiff's reply.

In her reply, plaintiff joined in defendant's request for an equitable distribution of the parties' marital property, thus asserting her right for equitable distribution as well. *See McCarley, supra.* Prior to entry of the judgment of absolute divorce, the trial court entered an order, without objection from defendant, preserving the issue of equitable distribution. We hold that defendant was precluded, by principles of equitable estoppel, from defeating plaintiff's right to equitable distribution by submitting to a voluntary dismissal of his counterclaim.

Though not precisely on point, *Gilbert v. Gilbert*, 111 N.C. App. 233, 431 S.E.2d 805 (1993), is instructive. In *Gilbert*, the plaintiff husband filed a complaint for divorce, alleging that an equitable distribution would not be necessary because the marital property would be divided by agreement of the parties. The defendant wife, who was not represented, did not assert a claim for equitable distribution and a judgment of absolute divorce was entered. Sometime thereafter, when the plaintiff husband did not convey title to certain marital property, the defendant wife filed a motion in the cause requesting the court to proceed with equitable distribution of the marital property. The husband claimed that the court was without authority to do so because a judgment of absolute divorce had been entered before the wife had asserted her claim for equitable distribution, thus precluding the wife's right thereto by reason of the provisions of G.S. § 50-11(e). This Court held that although the wife had not timely asserted her claim for equitable distribution, the husband's assertion, in his divorce complaint, that equitable distribution was unnecessary because the parties would agree as to the division of their property, equity estopped him from objecting to the wife's claim for equitable distribution.

The facts before us are even more compelling. Defendant husband asserted a counterclaim for equitable distribution, in which plaintiff joined by her reply. The trial court, without objection by defendant husband, preserved the issue of equitable distribution for further proceedings prior to its entry of the judgment of absolute divorce. We hold, under these facts, that defendant is now estopped from defeating, by submitting to a voluntary dismissal of his counterclaim, plaintiff's right to an equitable distribution of the parties' marital property. *See McCarley, supra.*

The 5 November 1993 order striking plaintiff's Reply to defendants counterclaim for equitable distribution is reversed and this case

is remanded to the District Court for further proceedings to effect an equitable distribution of the parties' marital property. In light of our decision, we do not reach plaintiff's appeal from the 24 November 1993 order denying plaintiff's motion for leave to amend her complaint.

Reversed and remanded.

Judges JOHNSON and THOMPSON concur.

IN THE MATTER OF THE APPEAL OF: FAYETTEVILLE HOTEL ASSOCIATES, A NORTH CAROLINA LIMITED PARTNERSHIP, FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE CUMBERLAND COUNTY BOARD OF EQUALIZATION

No. 9410PTC106

(Filed 6 December 1994)

Taxation § 99 (NCI4th)— failure to follow Property Tax Commission's rule—dismissal appropriate

Dismissal of an appeal for failure to follow rules of the Property Tax Commission is an appropriate sanction.

Am Jur 2d, State and Local Taxation §§ 802 et seq.

Judge ORR dissenting.

Appeal by taxpayer from order entered 29 October 1993 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 4 October 1994.

On 24 September 1992, Fayetteville Hotel Associates, a North Carolina Limited Partnership (hereinafter taxpayer), appeared before the Cumberland County Board of Equalization and Review (hereinafter respondent) to appeal the county's assessment of ad valorem taxes on certain property taxpayer owned in Cumberland County. Respondent ruled against taxpayer and notified taxpayer of its decision on 30 September 1992. On 2 December 1992, taxpayer appealed respondent's decision to the Property Tax Commission (hereinafter Commission). Taxpayer's appeal was scheduled for hearing on 13 October 1993.

On 15 September 1993, respondent wrote to taxpayer requesting discovery of certain items. On 1 October 1993, respondent also called

the offices of taxpayer's attorney in an attempt to discuss a pre-trial order. After receiving no reply from taxpayer regarding its discovery requests and no pre-trial order by 8 October 1993, respondent filed a motion to dismiss taxpayer's appeal. On 12 October 1993, the day before the scheduled hearing, taxpayer informed respondent of the witnesses it intended to call and the documents it intended to introduce at the hearing.

On 13 October 1993, the Commission first considered respondent's motion to dismiss before commencing the scheduled hearing. In its order, the Commission made the following findings of fact and conclusions of law:

> 1. That on September 22, 1993, the Secretary of the Property Tax Commission mailed a Notification of Hearing before the Property Tax Commission to Fayetteville Hotel Associates indicating the date and time of the hearing. The above referenced letter also included instructions for the exchange of documentary evidence and the preparation of a prehearing order with the County Attorney.
>
> 2. That Fayetteville Hotel Associates did not enter into a pretrial order with the County at least ten (10) days before the date of the hearing, and did not exchange documentary evidence, as required by the rules of the Commission.
>
> 3. That Cumberland County had sent copies of its documentary evidence to Fayetteville Hotel Associates twelve (12) days prior to the hearing and had attempted to contact Fayetteville Hotel Associates in order to work out a prehearing order.
>
> After carefully considering the arguments advanced, the Commission concluded that the Taxpayer had failed to abide by the rules of the Commission and that the Taxpayer's appeal should be dismissed.

Taxpayer appeals.

Sandman & Strickland, P.A., by Nelson G. Harris, for taxpayer-appellant.

Cumberland County Attorney's Office, by Deputy County Attorney Danny G. Higgins, for respondent-appellee.

EAGLES, Judge.

In its appeal here, taxpayer contends that the Commission abused its discretion in dismissing taxpayer's appeal for violation of Commission rules. We disagree.

G.S. 105-288(b) provides that the Commission "may adopt rules needed to fulfill its duties." The Commission's rules regarding appeals to the Commission are codified in Title 17, Chapter 11 of the North Carolina Administrative Code. Sections .0213 and .0214 of the Code require that the Commission be furnished documents ten days prior to the date of the hearing and that the parties enter into a pretrial order ten days prior to the hearing date.

.0213 COMMISSION TO BE FURNISHED DOCUMENTS PRIOR TO HEARING

(a) At least ten days prior to the date of the hearing, each party to the appeal shall furnish to the secretary of the Commission six copies of all documents to be introduced at the hearing, including maps, pictures, property record cards and briefs. . . .

(b) In the absence of an agreement to the contrary, a copy of each such document shall also be furnished or made available to the opposing party at the same time.

.0214 PARTIES TO ENTER INTO A PRE-HEARING ORDER

Parties shall enter into a pre-hearing order before the appeal is set for hearing. This order will include stipulations as to parties, exhibits, witnesses, issues, and any other matters which can be stipulated by the parties. . . . The appellant shall forward six copies of the executed order to the secretary at least 10 days prior to the date of hearing.

These two rules require the parties to submit six copies of all documents to be introduced at the hearing and to enter into a pre-hearing order, both at least ten days prior to the hearing.

Here, the Commission found as a fact that the Commission's secretary mailed taxpayer a Notification of Hearing on 22 September 1993 which included instructions for the exchange of documentary evidence and the preparation of a pre-hearing order. The Commission further found that taxpayer did not exchange documentary evidence or enter into a pre-trial order 10 days before the hearing. The Commission found that respondent had submitted its documentation and

had attempted to contact taxpayer 12 days prior to the hearing date. Taxpayer failed to submit its documents until the day before the hearing date and did not enter into a pre-trial order. Based on these findings, the Commission dismissed taxpayer's appeal for failure to follow the rules of the Commission.

> Rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of the agency, are as binding on the agency as if they were statutes enacted by the legislature. Such rules are also binding upon the public of the agency, and the agency does not generally have the discretion to waive, suspend, or disregard them in a particular case . . . .

2 Am. Jur. 2d *Administrative Law* § 269 (1994); *Humble Oil & Refining Co. v. Board of Alderman*, 284 N.C. 458, 468, 202 S.E.2d 129, 135 (1974).

Taxpayer contends that the Commission exceeded its authority by dismissing the appeal. Taxpayer alternatively contends that the Commission abused its discretion in dismissing the appeal because it did not consider any alternative sanctions. We disagree. Since the Commission's rules are binding upon the Commission as well as the public, we conclude that the Commission has an obligation and an implied power to enforce its rules. Dismissal of an appeal for failure to follow the rules is an appropriate sanction. Without the implicit authority to enforce its rules by dismissal, the Commission's effectiveness as a quasi-judicial body would be fatally compromised. Taxpayer argues that the Commission should have considered a less severe sanction but cites no authority for the Commission to tax attorney's fees or costs or impose other less stringent sanctions. Although we conclude that the Commission has the implied authority to enforce its rules and to dismiss appeals for failure to follow them, the power to impose sanctions such as attorney's fees or assessment of costs to a party would require more specific legislative authority. These additional powers would exceed the Commission's general rulemaking authority. G.S. 105-288(b). Accordingly, we affirm the order of the Commission dismissing taxpayer's appeal.

Affirmed.

Judge McCRODDEN concurs.

Judge ORR dissents.

Judge ORR dissenting.

I respectfully dissent from the majority's conclusion that, because the Commission has an obligation and an implied power to enforce its rules, dismissal of an appeal for failure to follow the rules is an appropriate sanction. I disagree because these sanctions are neither statutorily nor legislatively mandated. If, as the majority indicates, lesser sanctions such as attorney's fees require legislative authority, then surely a punitive measure such as dismissing the appeal also requires legislative authority.

Therefore, I vote to reverse the order of the Commission dismissing taxpayer's appeal.

CATHERINE C. ALLEN, EMPLOYEE, PLAINTIFF v. FOOD LION, INC., SELF-INSURED EMPLOYER (ALEXSIS, INC., SERVICING AGENT), DEFENDANT

No. 9410IC95

(Filed 6 December 1994)

Workers' Compensation § 412 (NCI4th)— motion for relief due to excusable neglect—authority of Industrial Commission

The Industrial Commission has the inherent power and authority, in its discretion, to consider defendant's motion for relief due to excusable neglect so as to allow defendant's appeal to proceed to the Commission.

Am Jur 2d, Workers' Compensation § 686.

Appeal by defendant from dismissal entered 25 October 1993 by The North Carolina Industrial Commission. Heard in the Court of Appeals 18 October 1994.

Richard L. Cannon, III for plaintiff-appellee.

Maupin Taylor Ellis & Adams, P.A., by Richard M. Lewis, for defendant-appellant.

JOHNSON, Judge.

Plaintiff Catherine C. Allen sustained a back injury while working for defendant Food Lion, Inc. on 15 March 1990. On 21 January 1993,

Deputy Commissioner Lawrence B. Shuping, Jr. filed an Opinion and Award in which he found and concluded that plaintiff sustained a compensable award on the aforementioned date. This Opinion and Award was received by defendant's counsel on 27 January 1993. Defendant's counsel filed a notice of appeal to the Full Commission (hereafter, the Commission) on 12 February 1993, sixteen days after receipt of the Opinion and Award. Plaintiff moved to dismiss defendant's appeal, contending that defendant's appeal was untimely pursuant to North Carolina General Statutes § 97-85 (1991). Defendant's counsel filed a response to plaintiff's motion to dismiss and a motion for relief due to excusable neglect on 30 March 1993. On 25 October 1993, Commissioner J. Randolph Ward filed an order denying defendant's motion and granting plaintiff's motion to dismiss. Defendant filed timely notice of appeal to our Court.

Defendant argues on appeal that the Commission erred in dismissing defendant's appeal to the Commission and in failing to find and conclude that the Commission has the inherent power and authority to allow defendant's appeal to proceed to the Commission. As an initial matter, we note that North Carolina General Statutes § 97-84 (1991) provides for the determination of disputes by the Commission or a deputy, and that North Carolina General Statutes § 97-85, which discusses review of an award, states in pertinent part:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]

See also Hubbard v. Burlington Industries, 76 N.C. App. 313, 332 S.E.2d 746 (1985).

North Carolina General Statutes § 97-86 (1991), entitled "Award conclusive as to facts; appeal; certified questions of law[,]" states in pertinent part:

> The award of the Industrial Commission, as provided in G.S. 97-84, if not reviewed in due time, . . . shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days from the date of such award or within 30 days after receipt of notice to be sent by registered mail or certified mail of such award, but not thereafter, appeal from the decision

> of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions.

Notwithstanding this statutory language found in North Carolina General Statutes § 97-85 and North Carolina General Statutes § 97-86, we consider whether the Commission has the inherent power and authority, in its discretion, to consider defendant's motion for relief due to excusable neglect. *Crawford v. McLaurin Trucking Co.*, 78 N.C. App. 219, 336 S.E.2d 647 (1985) is instructive on this issue.

In *Crawford*, a claim for workers' compensation was heard on 24 May 1984 before a Deputy Commissioner; on 11 January 1985, the Deputy Commissioner filed an Opinion and Award denying benefits and mailed it to the parties. Attached to the Opinion and Award was a "Notice of Appeal Rights" which indicated that the Opinion and Award was the decision of the Commission and which noted that the parties could appeal to the Court of Appeals within thirty days. On 31 January 1985, the plaintiff's counsel wrote the Commission and stated that he was not aware the matter had been heard before the Commission; the plaintiff requested clarification of this matter and attached a notice of appeal to the Commission. The Commission docketed the appeal for hearing and the defendants moved to dismiss the appeal because it was not taken within fifteen days of notice of the Deputy Commissioner's Opinion and Award. The Commission denied the motion, ruling that the plaintiff "had been excusably misled by the Commission's error." *Id.* at 219, 336 S.E.2d at 648.

Although the denial of the motion in *Crawford* was due to excusable neglect of the Commission, we nonetheless allowed the Commission to deny the defendants' motion. Similarly, we find in the instant case that the Commission has the inherent power and authority, in its discretion, to consider defendant's motion for relief due to excusable neglect. In so observing, we cite *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985). Although *Hogan* did not address the issue of a statutory time limit, we quote the Supreme Court's language regarding the Commission's inherent powers:

> We believe the Industrial Commission . . . has inherent power to set aside one of its former judgments. Although this power is analogous to that conferred upon the courts by N.C.R. Civ. P. 60(b)(6), it arises from a different source. We conclude the statutes creating the Industrial Commission have by implication clothed the Commission with the power to provide this remedy, a

remedy related to that traditionally available at common law and equity and codified by Rule 60(b). This power inheres in the judicial power conferred on the Commission by the legislature and is necessary to enable the Commission to supervise its own judgments.

Id. at 137, 337 S.E.2d at 483.

Defendant further argues that the Commission erred in denying defendant's motion for relief due to excusable neglect and in failing to exercise their discretion to allow defendant's appeal to proceed to the Commission. In light of our ruling as to the first issue in this matter, we remand this case to the Commission so that the Commission may address defendants' motion consistent with this opinion.

Remanded.

Judges MARTIN and THOMPSON concur.

MARY C. STANFIELD v. N. JOHNSON TILGHMAN AS GUARDIAN AD LITEM FOR ROBERT LOUIS STANFIELD

No. 9311SC1072

(Filed 6 December 1994)

Automobiles and Other Vehicles § 460 (NCI4th)— negligence of minor driver imputed to defendant mother

Plaintiff mother, a licensed driver who was sitting in the front passenger seat, had the right to control her minor son's operation of the car under a learner's permit and should therefore bear the responsibility for his driving; therefore, any negligence of plaintiff driver was imputed to defendant mother, and it was immaterial that plaintiff did not give defendant any instructions or commands regarding his driving. N.C.G.S. § 20-11(b).

Am Jur 2d, Automobiles and Highway Traffic §§ 746 et seq.

Appeal by plaintiff from judgment entered 22 July 1993 by Judge Narley J. Cashwell in Harnett County Superior Court. Heard in the Court of Appeals 26 May 1994.

On 2 December 1992, plaintiff filed suit against Robert Louis Stanfield (defendant), a 15-year-old minor, through his guardian *ad litem*, N. Johnson Tilghman, seeking to recover damages for injuries she suffered due to defendant's allegedly negligent operation of an automobile in which she was a front seat passenger. Defendant answered, asserting, among other things, that plaintiff was contributorily negligent. A jury trial of the action began on 15 July 1993. At the close of plaintiff's evidence, defendant moved for a directed verdict on the ground that under N.C. Gen. Stat. § 20-11(b) (1993), the minor defendant's negligence was imputed to plaintiff, barring her action as a matter of law. From the order granting defendant a directed verdict, plaintiff appeals.

Bryan, Jones, Johnson & Snow, by James M. Johnson and Cecil B. Jones, for plaintiff-appellant.

Morgan & Reeves, by Robert B. Morgan and Margaret Morgan, for defendant-appellee.

ARNOLD, Chief Judge.

The facts of this case are not in dispute. On 20 June 1992, plaintiff, a licensed driver, was riding as a passenger in the right front seat of a car owned by plaintiff's sister and driven by her son, the fifteen-year-old defendant. Defendant was driving under a State-issued learner's permit. The only other passenger in the car was defendant's younger sister, who was riding in the back seat.

At the time of the accident, defendant's car was approaching a left-hand curve on a rural unpaved road when it met a car proceeding in the opposite direction. Each car was in its own lane of travel. Defendant suddenly drove his car off the right shoulder, where it jumped a ditch and struck a tree head-on. Plaintiff was seriously injured in the collision. At no point during defendant's driving that day did plaintiff give defendant any instructions or commands regarding his driving.

Relying on one assignment of error, plaintiff argues only that the trial court misconstrued N.C.G.S. § 20-11(b) and this Court's opinion in *McFetters v. McFetters*, 98 N.C. App. 187, 390 S.E.2d 348, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 177 (1990). Plaintiff contends that neither the statute nor the holding in *McFetters* precludes, as a matter of law, a parent who is occupying the seat beside the driver from recovering damages for personal injuries sustained as a result of the minor driver's negligent operation of the vehicle. We disagree.

A trial court may properly enter directed verdict on the ground of contributory negligence only "when the evidence establishes the nonmovant's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom." *Frye v. Anderson*, 86 N.C. App. 94, 96, 356 S.E.2d 370, 372, *disc. review denied*, 320 N.C. 791, 361 S.E.2d 74 (1987).

Defendant's learner's permit authorized him to drive when accompanied by a "parent, guardian, or other person approved by the Division [of Motor Vehicles] who is licensed to operate the motor vehicle being driven and is seated beside the permit holder." N.C.G.S. § 20-11(b). In *McFetters*, this Court held that section 20-11(b) "creates a presumption that the statutorily approved person occupying the front passenger seat has the right to control and direct the operation of the vehicle." 98 N.C. App. at 194, 390 S.E.2d at 352.

As in the instant case, the plaintiff's son in *McFetters* was driving a car pursuant to a learner's permit. In that case, however, the plaintiff was in the front seat only because she had become carsick in the back. The defendant's father, who was in the back seat at the time of the accident, was the one who actually directed the minor's driving. Thus, in *McFetters*, this Court faced irreconcilable presumptions: The general rule that the owner of a vehicle who is a passenger in that vehicle is presumed to have the right to control and direct its operation unless he relinquishes that right, *McFetters*, 98 N.C. App. at 194, 340 S.E.2d at 352 (citing *Shoe v. Hood*, 251 N.C. 719, 112 S.E.2d 543 (1960)), stood in direct conflict with the presumption created by section 20-11(b). Finding that the policy considerations for both presumptions were identical, the Court concluded that the person who actually exercised control should bear responsibility. *McFetters*, 98 N.C. App. at 194, 390 S.E.2d at 352. Thus, the minor's negligence was not imputed to the plaintiff mother, even though she was riding in the front seat. *Id.*

Having carefully reviewed the opinion in *McFetters*, we conclude that, but for the conflicting presumption of control created by the presence of the owner in the car, the negligence of the minor driver would have been imputed to the plaintiff mother, who was occupying the seat beside the driver. In this case, however, there is but one presumption of control. The only person present in the car who was approved by the State to supervise a minor driver was the plaintiff, who occupied the right front seat. Therefore, pursuant to *McFetters* and N.C.G.S. § 20-11(b), we presume that plaintiff had the right to

control and direct the operation of the vehicle, and we impute any negligence of the minor defendant to the plaintiff.

The fact that plaintiff did not give defendant any instructions or commands regarding his driving is immaterial. The crucial question is whether the plaintiff had the legal right to control the manner in which the automobile was being operated, not whether plaintiff ever actually exercised that right. *See Etheridge v. R. R. Co.*, 7 N.C. App. 140, 145, 171 S.E.2d 459, 462 (1970). Moreover, plaintiff has offered no evidence to show that any other person had the right to control the operation of the vehicle or that she relinquished it. *See Harper v. Harper*, 225 N.C. 260, 266, 34 S.E.2d 185, 190 (1945).

We conclude that plaintiff had the right to control the minor defendant's operation of the car and should, therefore, bear the responsibility for his driving. The court properly directed a verdict on this issue, and we, therefore, affirm the court's order.

Affirmed.

Judges MARTIN and JOHN concur.

STATE OF NORTH CAROLINA v. JOHN DURWOOD WATERFIELD

No. 941SC321

(Filed 6 December 1994)

1. Searches and Seizures § 109 (NCI4th)— probable cause for issuance of warrant

There was no merit to defendant's contention that the trial court erred in denying defendant's motion to suppress evidence obtained through a search warrant because there was no substantial basis for the magistrate to conclude that probable cause existed that drugs would be found in defendant's home, since there were three separate sources who stated defendant sold and possessed drugs at his residence, including one who reported such activity within twenty-four hours before the warrant was obtained, and each source corroborated the same information regarding defendant's storage of marijuana in a padlocked cabinet in his bedroom.

Am Jur 2d, Searches and Seizures § 118.

2. Searches and Seizures § 14 (NCI4th)— officers entering and securing defendant's residence—no illegal search and seizure

The actions of police officers in entering and securing defendant's residence while obtaining a search warrant based on independent information did not violate defendant's Fourth Amendment rights.

Am Jur 2d, Searches and Seizures §§ 36, 37.

Appeal by defendant from judgment entered 6 December 1993 by Judge William C. Griffin, Jr., in Dare County Superior Court. Heard in the Court of Appeals 26 September 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas O. Lawton, III, for the State.

Sharp, Michael, Outten & Graham, by John C. Graham, III, for defendant appellant.

COZORT, Judge.

Defendant pled guilty to possession with intent to sell or deliver marijuana while expressly reserving his right to appeal the trial court's denial of his motion to suppress evidence. Defendant was sentenced to four years in prison. We affirm.

Evidence presented by the State tends to show that on 13 May 1993 Sergeant Michael Jasileum, Detective Peter Mora, and Detective James Mulford of the Kill Devil Hills Police Department went to defendant's residence without a search warrant. Defendant refused their request to search the house. The officers stated that one of them would stay with defendant while the others obtained a search warrant. Defendant said that the officer could stay outside on the porch. When the police insisted that the defendant remain in view of the officer at all times, defendant shut the door to his residence and locked it. Detective Mulford kicked the door down, ran into defendant's home and forced him to sit in a chair. Detective Mora remained with defendant inside the residence for approximately one and a half hours while Sergeant Jasileum obtained a search warrant.

In support of his request for a search warrant, Sergeant Jasileum presented the magistrate with an affidavit outlining the information supplied by informants regarding defendant's illegal activities and the police actions to verify the information. On 1 April 1993 three indi-

viduals gave Detective Mora about three grams of marijuana they said defendant had given them. They stated that defendant had shown them marijuana kept in a padlocked cabinet in his bedroom at his residence. On 2 April 1993 a confidential source ("CSI 1") told an officer he had seen marijuana at defendant's residence. He stated defendant kept the contraband in a padlocked cabinet in his bedroom. On 5 April 1993 officers visited defendant's residence and confirmed that defendant lived there. On 12 May 1993 another confidential source ("CSI 2") reported to Sergeant Jasileum that within the last twenty-four hours the source had seen about a half pound of marijuana at defendant's residence and had seen defendant sell marijuana from his home. CSI 2 further stated that defendant kept the marijuana inside a padlocked cabinet in his bedroom. The magistrate issued the search warrant, and the subsequent search resulted in the seizure of 75.9 grams of marijuana and various items of drug paraphernalia.

[1] Defendant first argues on appeal that the trial court erred in denying defendant's motion to suppress evidence obtained through the search warrant because there was no substantial basis for the magistrate to conclude that probable cause existed that drugs would be found in defendant's home. We disagree. The Supreme Court adopted a "totality of circumstances" test to determine the sufficiency of affidavits based on informant hearsay to establish probable cause for Fourth Amendment purposes. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984).

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 638, 319 S.E.2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 76 L.Ed.2d 527, 548, *reh'g denied*, 463 U.S. 1237, 77 L.Ed.2d 1453 (1983)). Proper deference is given to a magistrate's determination of the existence of probable cause. *Arrington*, 311 N.C. 633, 319 S.E.2d 254. In the present case there were three separate sources who stated defendant sold and possessed drugs at his residence, with CSI 2 reporting such activity having occurred within twenty-four hours before the search warrant was obtained. Furthermore, each source corroborated the same information regarding defendant's storage of marijuana in a padlocked cabinet in his bedroom. A common sense

overview of the information supplied to the magistrate in this case provides sufficient probability of defendant's criminal activities to support the issuance of the search warrant.

The evidence itself is also sufficient to support the magistrate's determination of probable cause. Defendant claims the allegations of the first informant were stale and that the affidavit failed to show whether either informant's hearsay information was credible or reliable. This Court has ruled that probable cause may be established through timely and detailed information by an unfamiliar confidential informant when some of that information has been verified. *State v. Barnhardt*, 92 N.C. App. 94, 373 S.E.2d 461, *disc. review denied*, 323 N.C. 626, 374 S.E.2d 593 (1988). Although the affidavit made no mention of the reliability of any of the police sources, it did provide information of the presence and sale of marijuana at defendant's residence within twenty-four hours of the warrant application. It further detailed the location and manner of the storage of the marijuana by defendant which matched information supplied by other sources. We find the information presented was sufficient to support the magistrate's determination of probable cause to issue the search warrant.

[2] Defendant also argues the trial court erred in denying his motion to suppress because the officers' entry and securing of defendant's residence without a search warrant violated his Fourth Amendment right against illegal search and seizure. We find no violation. The exclusionary rule prohibits introduction of evidence obtained during an unlawful search. *State v. Wallace*, 111 N.C. App. 581, 433 S.E.2d 238, *disc. review denied*, 335 N.C. 242, 439 S.E.2d 161 (1993). However, evidence is not to be excluded if the connection between the unlawful entry and the discovery and seizure of the evidence "is so attenuated as to dissipate the taint, as where police had an independent source for discovery of the evidence." *Id.* at 589, 433 S.E.2d at 243. The United States Supreme Court in *Segura v. United States*, 468 U.S. 796, 82 L.Ed.2d 599 (1984), held that where the information used to obtain a search warrant was not derived from the initial unlawful entry and was completely independent from it, the search warrant was valid. The Supreme Court also held that where officers "secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures." *Segura*, 468 U.S. at 798, 82 L.Ed.2d at 604.

In the instant case, the police secured defendant's house to maintain the status quo while officers left to apply for a search warrant. The officers who remained at defendant's residence conducted no initial search. The search warrant did not mention such entry as a source for probable cause, and the information used to obtain the warrant was entirely independent. The actions of the police officers in entering and securing defendant's residence while obtaining a search warrant based on independent information did not violate defendant's Fourth Amendment rights.

Affirmed.

Judges JOHNSON and WYNN concur.

FRANCES RUTH BULLARD, PLAINTIFF v. ROBERT HOWARD BADER, DEFENDANT

No. 945DC248

(Filed 6 December 1994)

Appearance § 1 (NCI4th)— submission of relevant information to court—general appearance—lack of personal jurisdiction waived

By submitting information relevant to the merits of plaintiff's child support case to the court, including financial information and a letter setting forth factors to be considered in setting child support and visitation, defendant made a general appearance prior to his assertions of lack of personal jurisdiction.

Am Jur 2d, Appearance §§ 5 et seq.

Appeal by defendant from order entered 18 October 1993 by Judge Shelly Sveda Holt in New Hanover County District Court. Heard in the Court of Appeals 24 October 1994.

R. Theodore Davis, Jr. for plaintiff-appellee.

Rountree & Seagle, L.L.P., by Charles M. Lineberry, Jr., for defendant-appellant.

LEWIS, Judge.

Defendant appeals from a child support order requiring him to pay monthly child support, child support arrearages, and uninsured

medical expenses, among other things. All of defendant's contentions on appeal concern the court's assertion of personal jurisdiction over him. Plaintiff and defendant dispute whether or not defendant made a general appearance and thereby waived his defense of lack of personal jurisdiction. We find that defendant did make a general appearance, and therefore affirm the trial court's order.

Plaintiff is the natural mother of a minor child born on 4 September 1991 in New Jersey. Defendant, a citizen and resident of New Jersey, is the purported father of the child. The parties were never married to each other. Although paternity has not been established, defendant has not contested that issue. Plaintiff and the child left New Jersey and relocated to North Carolina. They resided in New Hanover County for more than six months before plaintiff instituted the present action. Defendant continues to reside in New Jersey. Defendant points out that he has no connections to North Carolina other than the fact that his child resides here. Defendant owns no real property in this state and has never conducted business in this state.

Plaintiff filed an action in North Carolina against defendant for child custody and child support, among other things, on 19 July 1993. On 22 September 1993, after the court had already entered several orders, plaintiff received the first contact from defendant's attorney in New Jersey. Defendant's attorney sent correspondence including a consent to the continuation of a 19 July 1993 temporary custody order. On 26 September 1993 defendant's attorney wrote to plaintiff's attorney about the pending issues and attached information regarding defendant's income. The package included a letter from defendant's attorney containing arguments on the issues of support and visitation, defendant's 1991 and 1992 tax returns, a balance sheet for defendant's corporation, a child support affidavit, and a certification of wages. Defendant's attorney sent a copy of her correspondence and enclosures to the district court judge.

At a hearing held on 13 October 1993, plaintiff introduced defendant's executed child support affidavit and the employer's certification of wages affidavit into evidence. No one appeared for defendant at the hearing. The court granted plaintiff's request for child support in an order filed 18 October 1993. In its order the court stated that it considered the documents submitted by plaintiff as well as the documents in its file, including the information sent by defendant's attorney.

On 12 November 1993 defendant, through his North Carolina attorney, filed a special appearance motion under Rule 60(b) of the North Carolina Rules of Civil Procedure to set aside the court's order for lack of personal jurisdiction over defendant and to dismiss the child support action. Defendant also filed a notice of appeal from the court's October 1993 order granting plaintiff's claims for child support. On 25 January 1994 the court denied defendant's Rule 60(b) motion. Defendant did not appeal this decision. This case is before us on defendant's appeal from the October 1993 child support order on the basis of defendant's assertion of lack of personal jurisdiction.

An action for child support is an action *in personam*. *Lynch v. Lynch*, 96 N.C. App. 601, 604-05, 386 S.E.2d 607, 609 (1989); N.C.G.S. § 50-13.5(c)(1) (Cum. Supp. 1994). According to N.C.G.S. § 1-75.7(1) (1983), a court with proper subject matter jurisdiction may exercise personal jurisdiction over a person who makes a "general appearance" in an action. Because defendant has no significant contacts with North Carolina, the court could have asserted personal jurisdiction only if defendant had made a general appearance in the case.

An appearance constitutes a general appearance if the defendant invokes the judgment of the court on any matter other than the question of personal jurisdiction. *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 318, 438 S.E.2d 471, 474 (1994). The appearance must be for a purpose in the cause, not a collateral purpose. *Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E.2d 25, 27 (1980). The court will examine whether the defendant asked for or received some relief in the cause, participated in some step taken therein, or somehow became an actor in the cause. *Id.* Our courts have applied a very liberal interpretation to the question of a general appearance and almost anything other than a challenge to personal jurisdiction or a request for an extension of time will be considered a general appearance. *Humprey v. Sinnott*, 84 N.C. App. 263, 265, 352 S.E.2d 443, 445 (1987).

We find that by submitting information relevant to the merits of the case to the court, defendant made a general appearance prior to his assertions of lack of personal jurisdiction. The documents contained financial information relevant to the issue of the establishment of child support, and were accompanied by a letter setting forth other factors to be considered in setting an amount for child support, such as defendant's upcoming expenses. The letter also discussed the issue of visitation. Defendant submitted these documents for a purpose in

the cause, and by so doing sought affirmative relief from the court on the issues of child support and visitation. Submission of these documents is inconsistent with defendant's later claim of lack of personal jurisdiction.

By making a general appearance, defendant waived the defense of lack of personal jurisdiction. *See Sims v. Mason's Stores, Inc.*, 285 N.C. 145, 156, 203 S.E.2d 769, 777 (1974). Finding no error with the court's assertion of personal jurisdiction over defendant, we hereby affirm the trial court's October 1993 child support order.

Affirmed.

Chief Judge ARNOLD and Judge COZORT concur.

ALICE R. HARPER, ADMINISTRATRIX OF THE ESTATE OF WILLIAM P. HARPER, JR., PLAINTIFF v. ALLSTATE INSURANCE COMPANY, DEFENDANT

No. 9410SC66

(Filed 6 December 1994)

Insurance § 527 (NCI4th)— insured riding motorcycle not listed in policy—UIM coverage not excluded

The family member exclusion in an automobile policy issued by defendant did not exclude UIM coverage for injuries sustained by the insured while riding a motorcycle owned by insured which was not listed in the policy, since such exclusion would be contrary to the terms of N.C.G.S. § 20-279.21(b)(4) because it attempted to impose a restriction which was not intended by the Financial Responsibility Act.

Am Jur 2d, Automobile Insurance §§ 293 et seq.

Rights and liabilities under "uninsured motorists" coverage. 79 ALR2d 1252.

Uninsured motorist coverage: validity of exclusion of injuries sustained by insured while occupying "owned" vehicle not insured by policy. 30 ALR4th 172.

Uninsured motorist insurance: injuries to motorcyclist as within affirmative or exclusionary terms of automobile insurance policy. 46 ALR4th 771.

Appeal by defendant from judgment entered 13 December 1993 by Judge Coy E. Brewer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 29 September 1994.

Smith & Holmes, P.C., by Robert E. Smith and Mary M. McHugh, for defendant-appellant.

Edwards and Kirby, by David F. Kirby, for plaintiff-appellee.

WYNN, Judge.

On 4 November 1992, William P. Harper, Jr. was killed in an accident while riding a motorcycle. At the time of the accident, Mr. Harper was the named insured on a policy with defendant, Allstate Insurance Co., which provided underinsured motorist (UIM) coverage of $100,000.00 per person/$300,000.00 per accident on Mr. Harper's 1986 Mercedes automobile. Defendant denied coverage based upon an exclusion in the uninsured motorist (UM) coverage of Mr. Harper's policy which provided in pertinent part:

> A. We do not provide Uninsured Motorists Coverage for **property damage** or **bodily injury** sustained by any person:
>
> . . .
>
> 7. While **occupying** or when struck by any motor vehicle owned by you or any **family member** which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.

Plaintiff, Alice R. Harper, administratrix of Mr. Harper's estate, brought a declaratory judgment action against defendant seeking UIM coverage under defendant's policy. The trial court granted plaintiff's motion for summary judgment and held that defendant's policy provided UIM coverage for Mr. Harper. From this judgment, defendant appeals.

Defendant assigns error to the trial court's order granting plaintiff's motion for summary judgment. Defendant argues that the family member exclusion in the UM section of the policy is effective to exclude coverage for injuries sustained by Mr. Harper while riding a motorcycle owned by him which is not listed in the policy. We disagree.

Mr. Harper, as the named insured, is a member of the first class of persons insured as defined by N.C. Gen. Stat. § 20-279.21(b)(3). *Harrington v. Stevens*, 334 N.C. 586, 434 S.E.2d 212 (1993); *Bass v.*

North Carolina Farm Bureau Mut. Ins. Co., 332 N.C. 109, 418 S.E.2d 221 (1992). A first class insured "is entitled to UIM benefits under his . . . policy regardless of whether he is riding in the insured vehicles or on his motorcycle, or just walking down the street. *Bass*, 332 N.C. at 112, 418 S.E.2d at 223.

Defendant argues that the family member exclusion in its policy excludes UIM coverage for injuries sustained by the insured while occupying a vehicle owned by the insured which is not listed in the policy. This Court rejected the "owned vehicle" or "family member" exclusion with regard to UM coverage in *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 115 N.C. App. 438, 445 S.E.2d 79, *review allowed*, 337 N.C. 800, 449 S.E.2d 565 (1994) and with regard to UIM coverage in *Nationwide Mutual Ins. Co. v. Mabe*, 115 N.C. App. 193, 444 S.E.2d 664, *review allowed*, 337 N.C. 802, 449 S.E.2d 748 (1994). In *Mabe*, this Court found that the exclusion was contrary to the terms of N.C. Gen. Stat. § 20-279.21(b)(4) because it attempted to impose a restriction which was not intended by the Financial Responsibility Act. *Id.* at 205, 444 S.E.2d at 671. As this Court stated in *Mabe*, "[A]s long as an individual is a first class insured person, he or she is covered." *Id.* at 206, 444 S.E.2d at 672. Therefore, the trial court's judgment is

Affirmed.

Chief Judge ARNOLD and Judge COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 6 DECEMBER 1994

BROWN v. NATIONWIDE MUTUAL INS. CO. No. 9426SC42	Mecklenburg (91CVS542)	Affirmed
DAVIS v. DAVIS No. 9426DC19	Mecklenburg (90CVS3373-HWC)	Affirmed
GREENBERG v. BULLIS No. 934SC626	Onslow (89CVS1646)	Remanded
HOFFMAN v. McHUGH No. 9329SC1298	Henderson (89CVS948)	Reversed & Remanded
HOGSED v. HOGSED No. 9329DC1202	Transylvania (85CVD225)	Reversed
HUNTER v. GARNER REALTY No. 9322DC1264	Davidson (93CVD738)	Affirmed
IN RE APPEAL OF IVY ASSOC. No. 9310PTC1155	Prop. Tax Comm. (91PTC392)	Affirmed
IN RE ESTATE OF WORSLEY No. 9419SC177	Randolph (91E91) (91E615)	Affirmed
IN RE LONG No. 937SC1227	Edgecombe (93SP55)	Affirmed
IN RE TYLER No. 9419DC100	Randolph (90J104)	Affirmed
JONES v. LYONS CONSTRUCTION CO. No. 9410IC326	Ind. Comm. (103774)	Affirmed
PARSONS v. MEDLIN No. 9419DC346	Randolph (92CVD1303)	Affirmed
PATTERSON v. CITY OF FAYETTEVILLE No. 9412SC165	Cumberland (92CVS5524)	Affirmed
PROGRESSIVE TECHNOLOGIES v. HARTFORD INS. No. 9417SC3	Surry (92CVS1304)	Affirmed
SEARCY v. SEARCY No. 9418DC79	Guilford (90CVD2347) (90CVD10669)	Affirmed
STATE v. BRAXTON No. 9410SC230	Wake (93CRS17260) (93CRS17261)	No Error

STATE v. DILLARD No. 9426SC335	Mecklenburg (91CRS074460)	No Error
STATE v. HOLLAND No. 9326SC1307	Mecklenburg (92CRS77848)	No Error
STATE v. HOLLEY No. 9429SC253	McDowell (92CRS3515)	No Error
STATE v. HOOVER No. 9426SC510	Mecklenburg (91CRS80481)	No Error
STATE v. JACKSON No. 9421SC390	Forsyth (93CRS10110) (93CRS10111) (93CRS10112)	No Error
STATE v. McDUFFIE No. 9412SC266	Cumberland (92CRS45883)	No Error
STATE v. MILES No. 9418SC192	Guilford (92CRS51373) (92CRS51374) (92CRS51375) (92CRS51376) (92CRS51377)	No Error
STATE v. SELLERS No. 9418SC274	Guilford (91CRS24998)	No Error
STATE v. SWAIN No. 942SC333	Martin (93CRS2229)	No Error
STATE v. WEBB No. 9423SC181	Wilkes (93CRS3971) (93CRS3972)	No Error
STATE v. YOUNG No. 9418SC391	Guilford (93CRS20732) (93CRS20733) (93CRS20734) (93CRS61200) (93CRS61201) (93CRS61202)	No Error

MARK V. HARTMAN, PLAINTIFF v. W.H. ODELL AND ASSOCIATES, INC., DEFENDANT

No. 9422SC83

(Filed 20 December 1994)

Labor and Employment § 85 (NCI4th)— covenant not to compete overly broad—agreement not saved by "blue penciling"

A covenant not to compete which attempted to forbid plaintiff from working in every city, whether defendant did business there, in eight states for five or more years was overly broad and could not be saved by "blue penciling" the agreement.

Am Jur 2d, Master and Servant §§ 23, 106, 107.

Enforceability of restrictive covenant, ancillary to employment contract, as affected by duration of restriction. 41 ALR2d 15.

Enforceability of restrictive covenant, ancillary to employment contract, as affected by territorial extent of restriction. 43 ALR2d 94.

Appeal by defendant from judgment entered 4 August 1993 by Judge James A. Beatty, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 3 October 1994.

Womble, Carlyle, Sandridge & Rice, by Thomas D. Schroeder and David A. Shirlen, for plaintiff-appellee.

House & Blanco, P.A., by John S. Harrison and Peter J. Juran, for defendant-appellant.

THOMPSON, Judge.

The issue presented by this appeal is whether or not the defendant can enforce a covenant not to compete contained in two successive employment agreements signed by the plaintiff. We hold the covenant not to compete is overly broad and cannot be saved by "blue penciling" the agreement. Therefore, we affirm.

The plaintiff was an employee of the defendant from 1986 to 1991. In 1987 and again in 1989, the plaintiff signed employment agreements containing covenants not to compete.

After plaintiff's resignation in 1991, defendant, through its attorneys, wrote numerous letters to plaintiff concerning the covenants. Plaintiff filed this action in Davidson County Superior Court on 4 March 1992.

The case was called for trial before the Honorable James A. Beaty, Jr. during the 29 March 1993 civil session of Davidson County Superior Court. Pursuant to defendant's motion and by agreement of the parties, the trial court held a bifurcated trial. In the first portion of the trial, a bench trial was held for the purpose of interpreting the contract and determining the enforceability of the covenant not to compete. The trial court held that: (1) the restrictive covenant survived termination of employment; (2) the covenant protected a legitimate interest of the defendant; (3) portions of the covenant were overly broad as to the nature of the restricted activity; (4) portions of the covenant were overly broad as to one of the time periods; and (5) portions of the geographic restriction were unreasonable. The trial court "blue penciled" Article 13(a) and directed that a written statement of its holding as to the enforceable provisions of Article 13(a) of the covenant not to compete be prepared and read to the jury at the subsequent jury trial.

The original covenant reads in part as follows:

ARTICLE 13. COVENANTS AGAINST COMPETITION

(a) Employee agrees that during his term as an employee of the Corporation and for five (5) years thereafter, he will not, either directly or indirectly, on his own account, or in the service of others, own, manage, lease, control, operate, participate, consult or assist any person or entity providing actuarial services or any other services of the same nature as the services currently offered by the Corporation to the insurance industry and others or otherwise compete against the Corporation in the actuarial or consulting business. This covenant shall be binding upon employee within the geographic territory of North Carolina, South Carolina and Georgia (the "Primary Territory") and those five (5) states, not including the Primary Territory, from which the Corporation has derived the greatest revenues during the twenty-four (24) month period preceding the termination of the Employee's employment, which five (5) states, along with the Primary Territory, shall constitute the "Restricted Territory." Notwithstanding the foregoing, if Employee ceases to be employed by the Corporation, he shall have the right to work as a

full-time employee of an insurance company so long as he renders services only for the exclusive benefit of such company.

(b) Employee shall have the right to render actuarial or consulting services to the insurance industry outside of the Restricted Territory; however, he covenants and agrees that if he does render such services outside of the Restricted Territory to any Client (as hereinafter defined) of the Corporation, he shall pay to the Corporation an amount equal to forty percent (40%) of the aggregate fees paid to him or his affiliates by a client during the first three (3) years after the termination of his employment with the Corporation and thirty percent (30%) of the aggregate fees paid to him or his affiliates by a Client during the next two (2) years. For purposes of this agreement, a "Client" shall mean any person, firm, or corporation in the insurance industry for which the Corporation has provided actuarial or consulting services at any time during the twenty-four (24) month period preceding termination of Employee's employment or any person, firm, or corporation with which the Corporation was engaged in discussions at the time of the termination of Employee's employment or within six (6) months prior thereto about the rendering of actuarial or consulting services by the Corporation to such person, firm or corporation. The percentage payment due to the Corporation shall be payable to it within ten (10) days after receipt of any payment by Employee or his affiliates. Further, Employee shall render an annual accounting to the Corporation identifying all Clients served by him or his affiliates during the previous year and the gross fees charged to and paid by such clients to him or his affiliates. To the extent that Employee fails or refuses to make any payment hereunder or provide any accounting, the Corporation shall have the right to seek immediate injunctive relief prohibiting Employee or his affiliates from rendering in the future actuarial or consulting services to any Client, as well as the recovery of all sums thereunder.

(c) Employee further agrees that during such time and within the above-described Restricted Territory he will not induce any client of the Corporation to patronize any other actuarial or consulting business similar to the business of the Corporation, nor will he request or advise any Client of the Corporation to withdraw, curtail or cancel such Client's business with the Corporation.

Paragraph (a) of the "blue penciled" or modified covenant submitted to the jury read as follows:

(a) Employee agrees that during his term as an employee of the Corporation and for five (5) years thereafter, he will not, either directly or indirectly, on his own account, or in the service of others, own, manage, lease, control, operate, participate, consult or assist any person or entity providing actuarial services or any other services of the same nature as the services currently offered by the Corporation to the insurance industry and others ~~[or otherwise compete]~~ {**in competition**} against the Corporation in the actuarial or consulting business. This covenant shall be binding upon Employee within the geographic territory of North Carolina, South Carolina and Georgia ~~[(the "Primary Territory") and those five (5) states, not including the Primary Territory, from which the Corporation has derived the greatest revenues during the twenty four (24) month period preceding the termination of the Employee's employment, which five (5) states, along with the Primary Territory, shall constitute the "Restricted Territory].["]~~ Notwithstanding the foregoing, if Employee ceases to be employed by the Corporation, he shall have the right to work as a full-time employee of an insurance company so long as he renders services only for the exclusive benefit of such company.

With these modifications to the covenants in effect, the trial court conducted a jury trial on the issues of whether the plaintiff breached the modified Article 13(a) and whether damages resulted from any such breach. The court chose not to submit issues to the jury concerning the breach of Articles 13(b) and 13(c), and defendant did not challenge that decision. The jury found a breach of the modified Article 13(a) and awarded damages of $42,380.00. The court enjoined the plaintiff from engaging in conduct in violation of the modified covenant.

The plaintiff then filed motions for judgment notwithstanding the verdict, judgment for plaintiff, relief from the verdict, and a new trial. In an extensive order dated 17 May 1993 the trial court acknowledged that the covenants were overly broad, recognized that it should not have rewritten the covenants, granted judgment in favor of the plaintiff, and stated the following:

> The Court therefore concludes as a matter of law that the covenant not to compete contained in the employment agreement between the plaintiff and the defendant is unenforceable and therefore void.

After the court granted judgment for the plaintiff, the defendant moved for modification or reconsideration of that decision. The defendant specifically argued that the trial court had not addressed the covenants in Articles 13(b) and 13(c). The plaintiff opposed the motion, specifically arguing that the language of the judgment clearly invalidated the entire "covenant not to compete contained in the employment agreement." The trial court denied the defendant's motion, and the defendant appealed.

On appeal the defendant contends that the covenant not to compete is not overly broad and is enforceable as written; and if the covenant not to compete is overly broad, it can be saved by "blue penciling." We disagree.

A covenant in an employment agreement providing that an employee will not compete with his former employer is "not viewed favorably in modern law." *Safety Equipment Sales & Service, Inc. v. Williams*, 22 N.C. App. 410, 414, 206 S.E.2d 745, 749 (1974). To be enforceable a covenant not to compete must be:

> (1) in writing; (2) reasonable as to time and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) designed to protect a legitimate business interest of the employer (citations omitted).

Young v. Mastrom, Inc., 99 N.C. App. 120, 122-123, 392 S.E.2d 446, 448, disc. *review denied*, 327 N.C. 488, 397 S.E.2d 239 (1990). "The reasonableness of a noncompetition covenant is a matter of law for the court to decide." *Beasley v. Banks*, 90 N.C. App. 458, 460, 368 S.E.2d 885, 886 (1988) (citations omitted).

The party who seeks the enforcement of the covenant not to compete has the burden of proving that the covenant is reasonable. *E.g. Kadis v. Britt*, 224 N.C. 154, 158, 29 S.E.2d 543, 545 (1944); *Harwell Enterprise, Inc. v. Heim*, 6 N.C. App. 548, 552, 170 S.E.2d 540, 543 (1969), *aff'd in part and rev'd in part*, 276 N.C. 475, 173 S.E.2d 316 (1970).

To carry its burden defendant must prove that the covenant not to compete is reasonable as to both time and territory. In evaluating reasonableness, the time and territory restrictions must be read in tandem:

> Although a valid covenant not to compete must be reasonable as to both time and area, these two requirements are not independ-

> ent and unrelated aspects of the restraint. Each must be considered in determining the reasonableness of the other.

Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 665, 158 S.E.2d 840, 844 (1968); *Triangle Leasing Co. v. McMahon*, 96 N.C. App. 140, 149, 385 S.E.2d 360, 365 (1989), *aff'd in part and rev'd in part*, 327 N.C. 224, 393 S.E.2d 854 (1990). At trial the defendant failed to meet its burden of proof, and the trial court correctly concluded that the covenants are unenforceable.

I. ENFORCEABILITY OF THE COVENANTS

A. REASONABLENESS AS TO TERRITORY

One of the primary purposes of a covenant not to compete is to protect the relationship between an employer and its customers. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 408, 302 S.E.2d 754, 763 (1983). Accordingly, to prove that a geographic restriction in a covenant not to compete is reasonable, an employer must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships.

> A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in *maintaining* [its] customers.

Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C. App. 515, 523, 257 S.E.2d 109, 115 (1979) (emphasis added). The employer must show that the territory embraced by the covenant is no greater than necessary to secure the protection of its business or good will. *A.E.P.*, 308 N.C. at 408, 302 S.E.2d at 763. If the territory is too broad, "the entire covenant fails since equity will neither enforce nor reform an overreaching and unreasonable covenant." *Beasley*, 90 N.C. App. at 460, 368 S.E.2d at 886. In deciding what is "reasonable," the court in *Clyde Rudd & Associates, Inc. v. Taylor*, 29 N.C. App. 679, 684, 225 S.E.2d 602, 605 (1976), *cert. denied*, 290 N.C. 659, 228 S.E.2d 451 (1976), listed six factors relevant to determining whether the geographic scope of a covenant not to compete is reasonable:

> (1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

Where the alleged primary concern is the employee's knowledge of the customers, "the territory should only be limited to areas in which the employee made contacts during the period of his employment." *Manpower*, 42 N.C. App. at 522, 257 S.E.2d at 114-115.

With respect to the covenants in Articles 13(a) and 13(c), defendant failed to show where its customers were located. Bill Odell, a shareholder and president of defendant firm, attempted to support the covenants by testifying "the business is nationwide in scope. We have done client work from New Hampshire to California, from Ohio down to Texas." Defendant relies on this testimony to support the geographic scope of the covenants. Mr. Odell's testimony is, at best, an "indefinite generality" that is insufficient to support a covenant not to compete. *Beasley*, 90 N.C. App. at 461, 368 S.E.2d at 887.

Moreover, defendant's trial Exhibit 11 belies Mr. Odell's statement. Exhibit 11 lists, for the two years prior to plaintiff's resignation, the following: (1) the total (lump sum) revenue defendant received from undisclosed locations in the territory comprised of North Carolina, South Carolina and Georgia (called the "Primary Territory" in the covenants); (2) the revenue defendant received individually from undisclosed location(s) in Indiana, Kentucky, Texas, Louisiana, and Pennsylvania (in combination with the Primary Territory called the "Restricted Territory" in the covenants); and (3) the revenue defendant received from all other states. Exhibit 11 reveals that there are 36 states from which defendant received no revenue whatsoever during the two years prior to the plaintiff's resignation, thus refuting the contention that defendant's business is "nationwide."

With respect to the "Primary Territory," Exhibit 11 states only aggregate gross revenues from those states as a group. Defendant fails to provide any breakdown of the revenues obtained within any state. In response to questions from the trial court, Mr. Odell could not testify concerning the revenues derived from any of the three states and could not even state whether South Carolina or Georgia ranked among the top three revenue-producing states for defendant in the two years preceding plaintiff's resignation.

With respect to some states there was no evidence whatsoever as to how many clients defendant had in each state. In the case of those states as to which there was any such evidence, the evidence failed to support a statewide covenant. Mr. Odell testified that he had a number of clients in Indiana. "[It] may have been one or it may have been two or three. It was not a large number." Mr. Odell further testified

that the number of clients in Texas "would be three, four or five." Two or three clients in Indiana or Texas does not justify a covenant covering those entire states, particularly where the covenant runs for such a lengthy period of time. *Cf. Harwell Enterprises, Inc. v. Heim*, 276 N.C. 475, 481, 173 S.E.2d 316, 320 (1970). Finally, there was very little specific evidence concerning the location of the clients for whom plaintiff worked or with whom he was in contact. In short, we find that the defendant failed to justify the broad geographic scope of the covenants.

The evidence presented at trial by the defendant also indicated that the geographic scope of the covenants in Article 13(a) and 13(c) was unreasonable in view of the size of defendant's business. As of 30 January 1989, the date of the 1989 covenant, the defendant employed between six and eight persons. It had only one office, located in Winston-Salem, North Carolina. Consistent with its size, defendant worked for a very small number of clients, typically twenty to twenty-five each year. In view of this evidence, the trial court correctly concluded that the covenants were unreasonable in that they attempted to forbid plaintiff from working in every city (whether or not defendant did business there) in eight states for five or more years.

No evidence was presented at trial to prove that the worldwide covenant in Article 13(b) was reasonable. Under that covenant, if a national insurer had engaged defendant to perform some modest assignment for it in Winston-Salem, plaintiff would have been required to pay defendant 30% to 40% of all fees he collected from that insurer for work he did for any office of that insurer *in any part of the world*. Bill Odell acknowledged that some of defendant's clients have other offices in states in which he does no business. Moreover, Article 13(b) defines "clients" as including persons whom defendant was "engaged in discussions with" at the time plaintiff left the defendant's employ or six months prior thereto, but who may never actually have become clients. Clearly, there is no evidence to support any such scope for this restriction.

B. Reasonableness as to Time Periods

Although plaintiff's covenants are ostensibly for five years, the time period of the covenants is considerably extended by Article 13(d). Article 13 (d) provides:

> In the event it becomes necessary for the Corporation to enforce any covenant contained in this paragraph, the five (5)-year time

> period specified above shall be measured from the date of entry by a court of competent jurisdiction of a final judgment enforcing such covenant.

This is not a tolling provision for the duration of the litigation. *See Manpower of Guilford County, Inc. v. Hedgecock*, 42 N.C. App. 515, 522, 257 S.E.2d 109, 115 (1979). Rather, Article 13(d) purports to start the full five-year period anew after judgment. The covenant as written has the potential to last for more than ten years and is patently unreasonable.

Even if the covenants were read to encompass only a five-year period, we hold that any such lengthy period is unreasonable on these facts.

The North Carolina Supreme Court has stated that only "extreme conditions" will support a five-year covenant: "It may be held that in some instances and *under extreme conditions* five years would be held to not be unreasonable." *Engineering Associates, Inc. v. Pankow*, 268 N.C. 137, 139, 150 S.E.2d 56, 58 (1966) (emphasis added). No "extreme circumstances" exist in this case. In response to a question concerning why the covenants run for five years, Mr. Odell replied that some clients do not send any business for several years and then decide to do so again. Testimony that a client may send business one year and then five years later does not support a five-year covenant any more than testimony that a client may send business in one year and then ninety-nine years later would support a ninety-nine year covenant. We hold that five years is particularly excessive in view of the broad territory covered and the small number of clients whom defendant would have to contact in order to safeguard its business from plaintiff's proselytizing efforts. *Jewel Box Stores*, 272 N.C. at 665, 158 S.E.2d at 844 ("a longer period of time is justified where the area in which the competition is prohibited is relatively small.") For example, in *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961), the court upheld a five-year covenant, where the restricted territory was only one city. In contrast, the covenants not to compete in Articles 13(a) and 13(c) cover eight states, and the covenant in Article 13(b) covers the entire world. In *Masterclean of North Carolina, Inc. v. Guy*, 82 N.C. App. 45, 50, 345 S.E.2d 692, 696 (1986), this Court found a five-year covenant purporting to cover any county in the United States where the employer worked "patently unreasonable."

C. LEGITIMATE BUSINESS INTEREST

A covenant "must be no wider in scope than is necessary to protect the business of the employer." *Manpower of Guilford County*, 42 N.C. App. at 521, 257 S.E.2d at 114. "If a contract by an employee in restraint of competition is too broad to be a reasonable protection to the employer's business it will not be enforced." *Whittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989).

In its argument to this Court, defendant focused on the job description of the plaintiff as it related to dealing with clients, contending that because of the nature of the services provided by defendant, geographic proximity to clients is not so important as is the continuing long-term relationships with clients. Defendant argued that the noncompetition clause in question is reasonably necessary to protect its interest because of the compensation and training it provided the plaintiff.

Plaintiff, on the other hand, contends that *Electrical South, Inc. v. Lewis*, 96 N.C. App. 160, 385 S.E.2d 352 (1989), *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990) is dispositive of this aspect of the case. In *Electrical South*, the employer prepared a covenant which provided that the employee could not "own, manage, operate, be employed by, participate in, or be connected in any manner with" any business which manufactures, designs, repairs or services industrial solid state electronic equipment "or which competes, directly or indirectly, with the company in such endeavors" within a radius of 200 miles. Reading this provision, the court found that the covenant, among other things, prevented the employee from working anywhere in the world with any business that competed with the employer in a 200-mile radius. The court indicated that the covenant was fatally defective because it focused on "[e]mployee's association with another company, wherever located, which may be linked with the company's competitors within the 200-mile circle by any slender thread" instead of on the "employee's competition for the Company's customers in the 200-mile" area. The court pointed out that the employer's " 'shotgun' approach to drafting this provision produces oppressive results" and held the covenant invalid. *Electrical South, Inc. v. Lewis*, 96 N.C. App. at 168, 385 S.E.2d at 357.

In language which mirrors that of *Electrical South*, defendant's covenant is much broader than necessary to protect its legitimate business interest. Article 13(a) purports to preclude the plaintiff from working with any actuarial business in North Carolina (or seven other

states), even if the business by which he was engaged did not service any customers located in the eight states. Like the *Electrical South* covenant, the covenant was not limited so as to prevent plaintiff's "competition for [defendant's] customers" only in the applicable territory.

Article 13(a) is also overly broad in that, by using the phrase "or competes," it (like the *Electrical South* covenant) can be read to prohibit plaintiff from working for any business that provides actuarial services, without reference to whether or not that business competes with defendant. The trial court recognized this defect and attempted at first to cure the defect by rewriting the covenant.

Article 13(a) is also overly broad in that, rather than attempting to prevent plaintiff from competing for actuarial business, it requires plaintiff to have no association whatsoever with any business that provides actuarial services. Article 13(a) provides that plaintiff may not "own, manage, lease, control, operate, participate, consult or assist" any "entity" that provides "actuarial services." Such a covenant would appear to prevent plaintiff from working as a custodian for any "entity" which provides "actuarial services."

Similarly Article 13(b) protects no legitimate business interest of defendant. As previously discussed, if a national insurer currently provides work to defendant in this part of the country, plaintiff would have to pay defendant 30% to 40% of any fees it earned from that insurer for work done in any part of the world. No legitimate business interest supports any such world-wide restriction on competition. *Electrical South, Inc. v. Lewis*, 96 N.C. App. 160, 385 S.E.2d 352 (1989), disc. *review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990).

II. Application of the "Blue Penciling" Doctrine

When the language of a covenant not to compete is overly broad, North Carolina's "blue pencil" rule severely limits what the court may do to alter the covenant. A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant.

> The courts will not rewrite a contract if it is too broad but will simply not enforce it (citations omitted). If the contract is separable, however, and one part is reasonable, the courts will enforce the reasonable provision (citations omitted).

Whittaker, 324 N.C. at 528, 379 S.E.2d at 828. In this case, the trial court correctly overturned the jury verdict and ruled that the covenants could not be saved by "blue penciling." Moreover, even if we were to undertake to "blue pencil" the covenants, they would remain too overly broad to be enforced.

III. Resale of Plaintiff's Stock to Defendant

Finally, we reject the defendant's argument that plaintiff's covenant involves the sale of a business rather than an employer-employee relationship and is therefore subject to a more relaxed standard. While it is true that a buy-sell agreement required plaintiff to resell his shares of stock to his employer, it is clear that this covenant not to compete was executed ancillary to an employment agreement and therefore the more stringent test applies.

The covenant not to compete is void, and we affirm the decision of the trial court.

Affirmed.

Judges JOHNSON and MARTIN concur.

I. CARY NAILING, Appellee, v. UNC-CH, Appellant

No. 9315SC1299

(Filed 20 December 1994)

1. Public Officers and Employees § 63 (NCI4th)— appeal from dismissal—failure to file petition—no jurisdiction of OAH

The Office of Administrative Hearings did not have subject matter jurisdiction over petitioner's appeal from her dismissal as an employee of UNC-CH under N.C.G.S. § 126-35 for lack of "just cause" or under N.C.G.S. § 126-36 since petitioner did not file a timely petition for a contested case hearing and thus did not follow respondent's grievance procedure regarding the appeal from her dismissal, nor did she file a petition within 30 days after receipt of notice of the decision or action which triggered the right of appeal to commence a contested case hearing. Further, petitioner's amendment of her prehearing statement in her original pending contested case hearing for removal of disciplinary

warnings to include the issue of her termination was not equivalent to the filing of a petition as required under Article 3 of Chapter 150B to commence a contested case hearing in the OAH.

Am Jur 2d, Civil Service §§ 52 et seq.

Termination of public employment: right to hearing under due process clause of Fifth or Fourteenth Amendment—Supreme Court cases. 48 L. Ed. 2d 996.

2. Public Officers and Employees § 63 (NCI4th)— warnings not removed from personnel file—right of employee to appeal—status as former employee irrelevant

Petitioner had the right to appeal respondent's action of not removing all the warnings from the personnel file and the decision that another warning could be put in place of one that was removed to the OAH, and petitioner's status as a "former" State employee did not render her petition moot. N.C.G.S. § 126-25.

Am Jur 2d, Civil Service §§ 52 et seq.

Rights of state and municipal public employees in grievance proceedings. 46 ALR4th 912.

On writ of certiorari to review order entered 2 August 1993 by Judge George R. Greene in Orange County Superior Court. Heard in the Court of Appeals 15 September 1994.

Prior to this action, Petitioner I. Cary Nailing was an employee of Respondent University of North Carolina at Chapel Hill. On 13 April 1992, while still employed by respondent, petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings (the "OAH") alleging that she had received from respondent "a series of disciplinary warnings which were unjust and retaliatory." The parties filed prehearing statements, and a hearing in this action was scheduled for January 1993.

Thereafter, respondent notified petitioner that she had been terminated effective 28 September 1992, and petitioner attempted to amend her prehearing statement to include her termination as an issue for review. On 20 April 1993, Administrative Law Judge Becton entered a final decision finding that petitioner could not appeal her dismissal by attempting to amend her prehearing statement and that petitioner had failed to follow the proper procedure for appealing her dismissal. Judge Becton also found that since petitioner had been dis-

missed from employment, the issues involved in the contested case regarding the warnings were moot. Based on these findings, Judge Becton dismissed petitioner's petition for a contested case hearing.

On 19 May 1993, petitioner filed a petition for judicial review in Orange County Superior Court. Respondent filed a motion to dismiss petitioner's petition based on lack of subject matter jurisdiction. On 2 August 1993, Judge George R. Greene filed an order finding that "[t]here was a continuing sequence of actions in this Contested Case[,]" the last being "the firing of [p]etitioner." Further, Judge Greene found that "no earlier acts which were timely and properly contested could be 'moot' and no later continuing acts could be untimely nor [sic] improperly contested." Based on these findings, Judge Greene remanded the contested case to the OAH "for a full hearing on all of the issues in this case . . . ." On 24 September 1993, respondent filed a petition for writ of certiorari with this Court, and on 13 October 1993, this Court granted respondent's petition.

Alan McSurely for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Barbara A. Shaw, for respondent-appellant.

ORR, Judge.

The issues raised by this appeal are whether the trial court erred in remanding this case to the OAH for a hearing on (1) whether respondent's termination of petitioner violated petitioner's substantive and procedural rights, and (2) the issues regarding respondent's warnings to petitioner. Because we find that OAH lacked subject matter jurisdiction over petitioner's case regarding her dismissal, we conclude that as to this issue, the trial court erred. On the issue of respondent's warnings, however, we conclude that the trial court properly remanded this action for a hearing on whether the warnings should be removed from petitioner's file.

Prior to this action, petitioner was employed by respondent as a Medical Laboratory Technologist III in the Department of Pediatrics in the Cytogenetics Laboratory of respondent's medical school. On 22 February 1991, petitioner received an oral warning regarding her conduct and work performance. Thereafter, on 6 March 1991, petitioner received a written warning concerning her work performance, which petitioner alleged was a result of her contacting the Human

Resources Department "to ask for guidance about how to deal with the Oral Warning."

Subsequently, pursuant to respondent's internal grievance procedure, petitioner filed a grievance regarding these warnings with her supervisor. Petitioner's grievance was reviewed by the head of the Cytogenetics Laboratory and denied. Petitioner appealed the denial of her grievance to the Office of the Associate Vice Chancellor for Human Resources pursuant to Step 2 of respondent's internal grievance procedure, and it was denied again. Petitioner then filed an appeal with the Office of the Associate Vice Chancellor for Human Resources to be heard by a panel of three Staff Grievance Committee members consisting of one faculty member and two staff employees appointed by the Chair of the Committee in accordance with Step 3 of the grievance procedure.

Subsequently, on 19 September 1991, while her appeal was pending at Step 3, petitioner received two more written warnings, one warning regarding petitioner's work performance and the other warning regarding petitioner's unexcused absences from work. Petitioner's grievance regarding these two warnings was denied at Step 1 and 2, and petitioner appealed to Step 3.

The two grievances were consolidated at Step 3, and a hearing was held on these four warnings. Following the hearing, by letter dated 11 March 1992, Chancellor Hardin notified petitioner of his decision that the 22 February 1991 oral warning would be withdrawn; however, "[i]f the supervisor chooses, a Report of Oral Warning for performance (the weekend rotation) and conduct (leaving work without permission) may be substituted." Further, Chancellor Hardin notified petitioner that he agreed with the panel's finding that the written warning of 6 March 1991 "was issued in retaliation for the earlier grievance" and informed petitioner that this warning would be withdrawn from petitioner's file. Chancellor Hardin also notified petitioner that the 19 September 1991 warnings would remain in petitioner's file.

On 13 April 1992, petitioner filed a petition for a contested case hearing in the OAH for "[u]njust [d]iscipline and violation of UNC-CH Rules." Administrative Law Judge Becton entered an order directing the parties to each file a prehearing statement containing their positions with regard to the following:

1. The issues to be resolved, and the statutes, rules, and legal precedent involved;

2. A brief statement of the facts and reasons supporting the party's position on each matter in dispute;

3. A list of proposed witnesses;

4. Whether you wish to pursue discovery. If so, the length of time required;

5. Requested location of hearing(s);

6. Estimated length of hearing;

7. If you do not have an attorney, your home and business addresses and telephone numbers;

8. The date by which you will be ready to have a hearing in this case; and

9. Other special matters.

During the pendency of this action, by letter dated 29 September 1992, the Director of Cytogenetic Laboratory informed petitioner that she was terminated from her employment with respondent as of 28 September 1992 "for personal conduct reasons[.]" The letter stated that the decision to terminate petitioner's employment was based on petitioner's conduct on 23 September 1992 and 24 September 1992 which the letter described as constituting "verbal abuse," "physical intimidation," and "insubordination."

Specifically, the letter described petitioner's conduct upon which her termination was based as follows: In September 1992, petitioner switched a "rush" case that was assigned to petitioner to Ms. Parker, a technologist who was out on sick leave, and assigned a routine case of Ms. Parker's to petitioner. Upon finding out that petitioner had switched these cases, on 23 September 1992, the Laboratory Lead Technologist and petitioner's direct supervisor approached petitioner about the switch. At first petitioner told these two supervisors that she had "initially made the switch because [she] had mistakenly picked up the wrong tube of patient cells and had prepared slides on Ms[.] Parker's case . . . rather than [petitioner's] own case." Petitioner then assigned herself back to the previous rush case, which had almost been completed, and assigned another rush case of petitioner's to Ms. Parker. At that time, one of the supervisors informed petitioner that a technologist out on sick leave could not be assigned a "rush" case, and petitioner "became progressively more hostile, more angry, and verbally abusive." Petitioner raised her "assignment clip

board over [her] head in a threating [sic] manner and screamed abusively at both of [the supervisors]."

Thereafter, one supervisor left and the other supervisor "chose to stay in the room and talk with [petitioner] until she was sure that [petitioner] understood exactly what [her] instructions were concerning the patient assignments." This supervisor "made it clear to [petitioner] that [she was] to start the rush case that [petitioner] had just reassigned to Ms. Parker] and at a minimum screen the case that day . . . ." On 24 September 1992, petitioner came to work and approached Ms. Parker, who was back from her sick leave, and "requested that she switch cases with [petitioner], accepting responsibility for . . . the rush case which was under discussion the day before, while [petitioner] took one of Ms[.] Parker's more routine cases."

Further, the letter stated:

> You have the right to appeal this action through the University's Dispute Resolution and Staff Grievance Procedure. A copy of the procedure is attached for your reference. You may contact the Counseling Service Department for assistance in using this procedure or, if eligible, you may file a Step 4 Appeal with the State Personnel Commission.

Step 4 of the Staff Grievance Procedure states, "[i]f the Step 3 decision is unsatisfactory to the employee, the employee may appeal to Step 4, the State Personnel Commission, if eligible, according to State Personnel Commission rules."

Petitioner initiated a Step 2 grievance of her dismissal as allowed by respondent's internal grievance procedures. By letter dated 16 November 1992, respondent notified petitioner of the decision to uphold her dismissal and of the filing deadline for a Step 3 appeal. Petitioner did not, however, file a Step 3 appeal or file a petition for a contested case hearing in the OAH regarding her dismissal. Instead, petitioner moved to amend her prehearing statement in the contested case that was pending before Judge Becton in the OAH involving the four warnings to include the issue of her termination for review by the OAH. On appeal, respondent first contends that the OAH lacks subject matter jurisdiction to review petitioner's dismissal because petitioner failed to properly file a petition for a contested case hearing in the OAH with regards to her dismissal.

[1] Petitioner is a former employee of the University of North Carolina at Chapel Hill. The University of North Carolina is expressly exempt from the administrative hearings provisions of the North Carolina Administrative Procedure Act (the "NCAPA"), *see* N.C. Gen. Stat. § 150B-1(f); thus, "under the plain meaning of the NCAPA, [petitioner] can be entitled to an administrative hearing to appeal [her] grievance to the OAH only by virtue of another statute." *Empire Power Co. v. N.C. Dep't of Env't, Health and Natural Resources, Div. of Envtl. Management*, 337 N.C. 569, 579, 447 S.E.2d 768, 774 (1994).

Chapter 126 of the North Carolina General Statutes gives State employees the right to an administrative hearing in the OAH for actions arising under Chapter 126. Specifically, N.C. Gen. Stat. § 126-37(a) provides, "[a]ppeals involving a disciplinary action, alleged discrimination, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B . . . ."

In the present case, the only provisions under Chapter 126 that could possibly provide petitioner with an avenue of appeal from her dismissal to the OAH are N.C. Gen. Stat. §§ 126-35, 126-36. At the time of this action, N.C. Gen. Stat. § 126-35 stated, "[n]o permanent employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." Under N.C. Gen. Stat. § 126-36,

> [a]ny State employee or former State employee who has reason to believe that employment, promotion, training, or transfer was denied him or that demotion, layoff or termination of employment was forced upon him in retaliation for opposition to alleged discrimination or because of his age, sex, race, color, national origin, religion, creed, political affiliation, or handicapped [handicapping] condition as defined by G.S. 168A-3 . . . shall have the right to appeal directly to the State Personnel Commission.

In order for the OAH to have jurisdiction over petitioner's appeal pursuant to N.C. Gen. Stat. §§ 126-35, -36 however, petitioner is required to follow the statutory requirements outlined in Chapter 126 for commencing a contested case. *See Lewis v. North Carolina Dep't of Human Resources*, 92 N.C. App. 737, 739, 375 S.E.2d 712, 714 (1989) ("The right to appeal to an administrative agency is granted by statute, and compliance with statutory provisions is necessary to sustain the appeal.").

N.C. Gen. Stat. § 126-37(a) requires that appeals under Chapter 126 involving a contested case be conducted as provided in Article 3 of Chapter 150B. Article 3 of Chapter 150B provides:

> A contested case shall be commenced by filing a petition with the Office of Administrative Hearings . . . . The party who files the petition shall serve a copy of the petition on all other parties . . . . A party who files a petition shall file a certificate of service together with the petition. A petition shall be signed by a party or a representative of the party and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:
>
> (1) Exceeded its authority or jurisdiction;
>
> (2) Acted erroneously;
>
> (3) Failed to use proper procedure;
>
> (4) Acted arbitrarily or capriciously; or
>
> (5) Failed to act as required by law or rule.
>
> . . .
>
> A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the same manner as any other petitioner.

N.C. Gen. Stat. § 150B-23 (emphasis added). Further, N.C. Gen. Stat. § 126-37(a) provides "that no grievance may be appealed unless the employee has complied with G.S. 126-34" which, at the time of this action, stated,

> [a]ny permanent State employee having a grievance arising out of or due to his employment and who does not allege discrimination because of his age, sex, race, color, national origin, religion, creed, handicapping condition as defined by G.S. 168A-3, or political affiliation shall first discuss his problem or grievance with his supervisor and follow the grievance procedure established by his department or agency.

N.C. Gen. Stat. § 126-34; *See Batten v. N.C. Dep't of Correction*, 326 N.C. 338, 343, 389 S.E.2d 35, 38-39 (1990). In addition to these require-

ments under Chapter 126, a petition for a contested case must be filed with the OAH "as provided in G.S. 150B-23(a) no later than 30 days after receipt of notice of the decision or action which triggers the right of appeal." N.C. Gen. Stat. § 126-38.

In the present case, it is undisputed that petitioner did not follow respondent's grievance procedure regarding the appeal from her dismissal. Pursuant to N.C. Gen. Stat. §§ 126-37(a), -34, the OAH would not, therefore, have subject matter jurisdiction over petitioner's appeal from her dismissal under N.C. Gen. Stat. § 126-35 for lack of "just cause" that does not allege discrimination. Thus, we turn to the issue of whether the OAH had jurisdiction over petitioner's case involving alleged discrimination for her alleged handicapping condition pursuant to N.C. Gen. Stat. § 126-36.

Under N.C. Gen. Stat. § 126-36, petitioner has an automatic right to appeal her dismissal to the Commission without following respondent's internal grievance procedure. Petitioner is still, however, bound to follow the other requirements of Chapter 126 of filing a petition within thirty days after receipt of notice of "the decision or action which triggers the right of appeal" to commence a contested case in the OAH.

With regard to petitioner's receipt of notice of her dismissal, Judge Becton found:

> On September 29, 1992, the [r]espondent sent a letter to the [p]etitioner notifying her of her dismissal from employment, effective September 28, 1992, as a result of unacceptable personal conduct.
>
> The [r]espondent hand-delivered a copy of the September 29, 1992 letter of termination to the [p]etitioner on October 6, 1992.

Petitioner did not, however, file a petition for a contested case hearing in the OAH regarding her dismissal within thirty days from either 29 September 1992 or 6 October 1992. Instead, in October 1992, petitioner filed a motion to amend her prehearing statement to add the issue of whether respondent violated her substantive and procedural rights by terminating her employment and to add N.C.G.S. § 126-35 to the portion of the prehearing statement entitled "Statutes, Rules and Legal Precedents Involved." As already discussed, petitioner could not proceed under N.C. Gen. Stat. § 126-35 for a "just cause" violation without first following respondent's internal grievance procedure.

Thereafter, in January, 1993, petitioner filed her second motion to amend her prehearing statement to add the issue of whether petitioner's termination violated her substantive and procedural rights "including the right not to be discriminated against because of a handicapping condition" and to add N.C. Gen. Stat. § 126-36 to the section of the prehearing statement entitled "Statutes, Rules and Legal Precedents Involved." Assuming *arguendo* that petitioner could properly amend her prehearing statement, we do not find such amendment equivalent to the filing of a petition as required under Article 3 of Chapter 150B to commence a contested case hearing in the OAH. In addition, we also find that this amendment was filed after the statutory thirty days.

Because Chapter 126 makes compliance with the procedures of Article 3 mandatory, *see* N.C. Gen. Stat. § 126-37(a) ("[a]ppeals involving a disciplinary action, alleged discrimination, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B"), jurisdiction over a contested case hearing arising under Chapter 126 is not conferred upon the OAH unless petitioner follows such procedures. (Emphasis added.) *See, e.g., Gummels v. North Carolina Dep't of Human Resources*, 98 N.C. App. 675, 392 S.E.2d 113 (1990) (upholding dismissal of petition for a contested case involving a decision of the Department of Human Resources for failing to comply with the statutory deadline for filing the petition in the OAH); *Lewis*, 92 N.C. App. 737, 375 S.E.2d 712 (upholding dismissal of employee's grievance for failure to timely file grievance with employer as established by employer's internal grievance procedure when G.S. § 126-34 required the employee to follow such procedures). In the present case, petitioner has failed to follow the procedure outlined in Article 3 of Chapter 150B for commencing her contested case hearing; the OAH does not, therefore, have subject matter jurisdiction over petitioner's case regarding her dismissal.

Petitioner argues, however, that amending her prehearing statement is equivalent to amending her petition. We disagree. Filing a petition in the OAH to commence a contested case hearing is a mandatory step for the OAH to exercise subject matter jurisdiction over petitioner's appeal under Chapter 126. *See* N.C. Gen. Stat. §§ 126-37(a), 150B-23. Whether a prehearing statement should be filed is within the discretion of the administrative law judge. *See* N.C. Gen. Stat. § 150B-23(a2) ("An administrative law judge assigned to a contested case may require a party to the case to file a prehearing state-

ment." (Emphasis added.)). If the administrative law judge requires a party to file a prehearing statement, the prehearing statement is filed *after* the contested case has already been commenced by filing the petition pursuant to N.C. Gen. Stat. § 150B-23.

We note, however, that the issue of whether petitioner could have properly amended her petition for a contested case, as opposed to her prehearing statement, in a timely fashion to allege a claim for discrimination under N.C.G.S. § 126-36 in order to confer jurisdiction over her claim for discrimination due to a handicapping condition is not before us, and we do not decide that issue today.

[2] Having determined that the OAH lacks subject matter jurisdiction over petitioner's appeal from her dismissal, we turn to the question of whether the trial court erred in remanding this case for a hearing on respondent's warnings to petitioner.

Again, we look to Chapter 126 to determine whether petitioner had the right to maintain her appeal of these warnings in the OAH. N.C.G.S. § 126-25 provides:

> An employee, former employee or applicant for employment who objects to material in his file because he considers it inaccurate or misleading may seek the removal of such material from his file in accordance with the grievance procedure of that department, including appeal to the State Personnel Commission.

In the present case, after receiving two warnings, petitioner filed a grievance with respondent alleging that her supervisor had "given the lab [d]irector . . . misleading reports of [petitioner's] actions." While this grievance was pending, petitioner received two more warnings, for which she filed another grievance with respondent. In response to these grievances, the Chancellor of the University removed one of the warnings from petitioner's file as being inappropriate and retaliatory, removed another warning from petitioner's file but informed the supervisor that he could replace this warning with a different warning, and left the other two warnings in petitioner's file. Our review of petitioner's first grievance filed with respondent and respondent's response to both grievances shows that petitioner sought to have these warnings removed from her personnel file as misleading.

Thereafter, petitioner filed her petition for a contested case hearing in the OAH for "[u]njust [d]iscipline and violation of UNC-CH Rules." In support of this petition, petitioner listed the following allegations:

(1) At the agency level, I grieved [sic] a series of disciplinary warnings which were unjust and retaliatory.

(2) The agency head [a]rbitrarily and in violation of [g]rievance rules, [a]dvised that one disciplinary action should be removed BUT something else could be put in its place.

During the pendency of this appeal, petitioner was terminated.

Subsequently, by the plain language of N.C. Gen. Stat. § 126-25, we conclude that petitioner had the right to appeal the respondent's action of not removing all the warnings from her file and the decision that another warning could be put in place of one that was removed to the OAH. Additionally, petitioner's status as a "former" state employee does not render her petition moot as N.C. Gen. Stat. § 126-25 gives a former state employee the right to appeal under this provision.

Accordingly, we conclude that the trial court properly remanded this action for a hearing on whether the warnings should be removed from petitioner's file; we reverse, however, the trial court's decision to remand this action for a hearing on petitioner's dismissal.

Affirmed in part, reversed in part.

Judges EAGLES and JOHN concur.

MARLENE R. GRIMSLEY AND DENNY A. GRIMSLEY, PLAINTIFFS v. LEROY JEROME NELSON, DEFENDANT

No. 943SC145

(Filed 20 December 1994)

1. Appearance § 10 (NCI4th)— answer filed by UM carrier— no general appearance by defendant

An answer filed by an attorney for plaintiffs' UM carrier did not constitute a general appearance by defendant, and defendant was not precluded from later raising the defense of lack of personal jurisdiction, since the answer revealed that it was filed by an attorney known by plaintiffs to be representing their UM carrier, and the answer was filed "in the name of the defendant," the language permitted by N.C.G.S. § 20-279.21(b)(3)(a), thus raising no presumption that the lawyer represented defendant.

Am Jur 2d, Appearance § 10.

2. Insurance § 512 (NCI4th); Pleadings § 145 (NCI4th)— lack of personal jurisdiction over defendant—failure of UM carrier to raise defense

Although plaintiffs could not obtain a judgment against defendant because he properly asserted the defense of lack of personal jurisdiction, this action could proceed against plaintiffs' UM carrier to determine whether plaintiffs were entitled to UM coverage; furthermore, the UM carrier, by failing to properly assert the defense of lack of personal jurisdiction in its answer, could not rely on the defense that plaintiffs could not reduce their right to judgment against defendant because of lack of personal jurisdiction in determining whether plaintiffs were legally entitled to recover damages from defendant.

Am Jur 2d, Automobile Insurance §§ 297, 332, 333; Pleading §§ 226 et seq.

Judge WYNN dissenting.

Appeal by plaintiffs from orders entered 5 April 1993, 21 September 1993, and 1 November 1993 in Craven County Superior Court by Judge Herbert O. Phillips, III. Heard in the Court of Appeals 4 October 1994.

Bailey & Dixon, by Gary S. Parsons and Kenyann G. Brown, and Anderson & Anderson, by Michael J. Anderson and Albeon G. Anderson, for plaintiff-appellants.

Dunn, Dunn & Stoller, by David A. Stoller and Andrew D. Jones, for defendant-appellee.

Johnson & Lambeth, by Beth M. Bryant, for appellee Travelers Indemnity Company, an unnamed party.

GREENE, Judge.

Marlene R. Grimsley and Denny A. Grimsley (plaintiffs) appeal from orders entered 5 April 1993, 21 September 1993, and 1 November 1993 in Craven County Superior Court, granting Leroy Jerome Nelson's (defendant) motion to dismiss for lack of personal jurisdiction, denying plaintiffs' written motion to enlarge and oral motion for extension of time to serve the original summons, and granting

Travelers Indemnity Company's (Travelers) motion for judgment on the pleadings.

On 18 May 1992, plaintiffs filed a complaint against defendant for personal injuries and loss of consortium arising out of an automobile accident on 4 June 1989 allegedly caused by defendant's negligence. At the time of the accident, Travelers provided uninsured motorist (UM) coverage for plaintiffs. On 21 May 1992, plaintiffs, pursuant to N.C. Gen. Stat. § 20-279.21(b)(3)(a), served Travelers a copy of the summons and complaint. On 22 May 1992, Deputy Sheriff Paul Mathes allegedly personally served a summons on defendant at 2005 New Bern Avenue, New Bern, North Carolina. Travelers retained the law firm of Johnson & Lambeth to represent it.

By letter dated 11 June 1992, Robert White Johnson of Johnson & Lambeth wrote Mr. Albeon G. Anderson (Mr. Anderson), counsel for plaintiffs, confirming their telephone conversation in which Mr. Johnson advised Mr. Anderson "that Travelers had retained me to represent its interest as uninsured motors carrier . . . . If at some time it appears that you are unable to settle the case I will be notified and will file a response of pleadings and will undertake to get the discovery answered." By letter dated 13 July 1992, Ms. Beth M. Bryant (Ms. Bryant) of Johnson & Lambeth wrote Mr. Anderson acknowledging "the extension of time within which to file defensive pleadings which you granted Bob Johnson in the referenced case." On 12 October 1992, Ms. Bryant filed an answer which stated "[t]he undersigned Counsel, appearing in the name of the Defendant, answers the Complaint of the Plaintiff as follows." She signed the answer "Beth M. Bryant Appearing in the name of the Defendant." This answer denied the allegations set forth in plaintiffs' complaint and further alleged that Marlene R. Grimsley (Mrs. Grimsley) was contributorily negligent. On 22 October 1992, plaintiffs filed a reply, denying that Mrs. Grimsley was contributorily negligent and further alleging that defendant had the last clear chance to avoid the accident.

On 9 November 1992, Ms. Bryant filed an amended answer which provided:

> NOW COMES THE TRAVELERS INDEMNITY CO., WITHIN 30 DAYS OF FILING OF ITS ORIGINAL ANSWER . . . AND AMENDS ITS ANSWER IN THIS PROCEEDING . . . BY DELETING SAID ANSWER IN ITS ENTIRETY AND SUBSTITUTING THE FOLLOWING:
>
> The Travelers Indemnity Co., appearing in the name of Defendant Leroy Jerome Nelson pursuant to N.C. Gen. Stat. 20-279.21(b), answers the Complaint of the Plaintiff as follows.

In its amended answer, Travelers moved to dismiss plaintiffs' action under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim against defendant upon which relief can be granted and moved to dismiss under Rules 12(b)(2), 12(b)(4), and 12(b)(5) of the North Carolina Rules of Civil Procedure for lack of personal jurisdiction over defendant, insufficiency of process, and insufficiency of service of process. Travelers also denied the allegations contained in plaintiffs' complaint and alleged Mrs. Grimsley was contributorily negligent. Ms. Bryant signed the amended answer "Beth M. Bryant . . . Attorney for The Travelers Indemnity Co., Appearing in the name of the Defendant."

On 24 November 1992, plaintiffs made a motion pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure to strike Traveler's amended answer filed 6 November 1992 because "plaintiffs did not consent to the amended answer and leave of court has not been given." Also on 24 November 1992, plaintiffs moved for "an order for an enlargement of time within which to file an alias & pluries summons . . . on the ground that the failure to act within the time prescribed was due to excusable neglect" because Ms. Bryant and plaintiffs did not discover until later that the summons had been delivered to Leroy Jerome Nelson, Jr. instead of defendant. Plaintiffs also made an oral motion to extend time in which to serve the original summons. On 1 December 1992, Ms. Bryant filed a motion to amend answer which provided "NOW COMES Travelers Indemnity Co., through Counsel, and moves the Court for leave to amend its original Answer in this cause and file an Amended Answer" "because subsequent to receipt of Plaintiff's Reply, Counsel for the Movant learned that the named Defendant herein, Leroy Jerome Nelson, was never served with Complaint and Summons, notwithstanding purported service by the Sheriff reflected in the Court file." By order entered 5 April 1993, the trial court denied plaintiff's motions to enlarge and extend the time in which to serve the original summons, denied Traveler's motion to amend its answer, and allowed plaintiffs' motion to strike.

On 24 May 1993, David A. Stoller (Mr. Stoller), an attorney for the law firm of Dunn, Dunn & Stoller, filed a motion to dismiss which provided "COMES NOW Defendant, Leroy Jerome Nelson, by and through the undersigned counsel and moves the Court to dismiss this action as against Defendant" because "[n]o Summons, Complaint or other process have been served upon this Defendant. The Summons issued with Complaint has expired. Because of an insufficiency of process,

an insufficiency of service of process, or both, this Court lacks jurisdiction over the person of Defendant, Leroy Jerome Nelson." Mr. Stoller signed this motion "DUNN DUNN & STOLLER Attorneys for Defendant By: David A. Stoller."

By order dated 21 September 1993, the trial court found it lacked jurisdiction over the person of defendant, granted defendant's motion to dismiss for lack of personal jurisdiction, and dismissed plaintiffs' action against defendant. Travelers then made a motion for judgment on the pleadings on the grounds that the 21 September 1993 order, dismissing the action as to defendant, resolved all issues raised by plaintiffs' complaint. By order entered 1 November 1993, the trial court allowed Travelers' motion and dismissed plaintiffs' action.

The issues presented are whether (I) Ms. Bryant was the attorney for defendant so that the answer filed by Ms. Bryant constitutes a general appearance by the defendant thereby waiving his defense of lack of personal jurisdiction; and (II) the UM carrier's motion for judgment on the pleadings should have been granted.

I

[1] It has long been the law in North Carolina that "a general appearance by a party's attorney will dispense with process and service" on the defendant. *Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E.2d 25, 27 (1980). Thus, the filing of an answer by the defendant's attorney (which constitutes a general appearance) which does not include the defense of lack of personal jurisdiction constitutes a waiver by the defendant of this defense if the defense had not been raised in a prior motion. *Id.* at 790, 266 S.E.2d at 28; N.C.G.S. § 1A-1, Rule 12(h)(1) (1990) (defense must be raised in pre-answer motion or in the answer). In this case, the issue is raised as to whether Ms. Bryant, in filing the 12 October 1992 answer, appeared as the defendant's attorney. If she did not, the answer she filed did not bind the defendant, and the defendant cannot be said to have made a general appearance and therefore waived his defenses to personal jurisdiction. If she did appear on behalf of the defendant, the filing of the answer was a waiver of the defendant's right to raise the defense of lack of personal jurisdiction.

Plaintiffs argue that Ms. Bryant's signing of Travelers' answer "Appearing in the name of the Defendant" raises the presumption that Ms. Bryant had "authority to act for the client he or she professes to

represent." *J.I.C. Elec., Inc. v. Murphy*, 81 N.C. App. 658, 660, 344 S.E.2d 835, 837 (1986). We disagree.

Under N.C. Gen. Stat. § 20-279.21(b)(3)(a), if an insured institutes suit against an uninsured motorist, the insurer is bound by a final judgment against the uninsured motorist "if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist." N.C.G.S. § 20-279.21(b)(3)(a) (1993). Once an insurer is served with a copy of the summons, complaint or other process in a suit brought by an insured against an uninsured motorist, the insurer "shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name." *Id.*; *see also* James E. Snyder, Jr., *North Carolina Automobile Insurance Law* § 36-5 at 289-90 (2d ed. 1988).

Plaintiffs, in serving Travelers a copy of the summons and complaint pursuant to Section 20-279.21(b)(3)(a), were aware that Travelers became an unnamed party to the action, entitled to file responsive pleadings if it so chose. Allowing a UM carrier to be an unnamed party that "may defend the suit in the name of the uninsured motorist" allows a UM carrier to file an answer "in the name of defendant" to protect its interests, not defendant's interests, without the UM carrier identifying itself by name. *See* Paul W. Pretzel, *Uninsured Motorists* §§ 60-61 at 143-46 (1972) (discussing possible conflicts of interest between UM carrier and uninsured motorist when suit is filed by insured against uninsured motorist).

The 12 October 1992 answer, viewed on its face, does not reveal that it was filed on behalf of Travelers. It does, however, reveal that it was filed by Ms. Bryant, an attorney known by the plaintiffs to be representing Travelers, and filed "in the name of the defendant," the very language permitted by Section 20-279.21(b)(3)(a). Thus, because the filing of the 12 October 1992 answer was entirely consistent with Section 20-279.21(b)(3)(a) and because the record reveals that the plaintiffs were fully aware of the fact that Ms. Bryant, the attorney signing the answer, represented Travelers, there arises no presumption that Ms. Bryant represented the defendant. Accordingly, the answer did not constitute a general appearance by the defendant, and the defendant was not precluded from later raising the defense of lack of personal jurisdiction. Because there is no dispute that the defendant was not served with process, the trial court therefore correctly allowed the defendant's motion to dismiss.

II

[2] Travelers argues that because "Travelers has no liability to Plaintiffs if Plaintiffs cannot obtain a judgment against Defendant Nelson, all issues raised by the pleadings were resolved by virtue of the dismissal of this action as to Defendant Nelson and judgment on the pleadings was therefore appropriate." We disagree.

Judgment on the pleadings is only proper where the pleadings fail to present any issue of fact for determination by a jury. *Flexolite Elec. v. Gilliam,* 55 N.C. App. 86, 88, 284 S.E.2d 523, 524 (1981). In an uninsured motorist case, a UM carrier's liability depends on whether the plaintiff is "legally entitled to recover damages" from the uninsured motorist, i.e., "can reduce his right to damage to judgment." *Brown v. Casualty Co.*, 285 N.C. 313, 319, 204 S.E.2d 829, 833 (1974); *see* 1 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 7.2, at 247 (2d ed. 1992) ("term 'legally entitled' means that the injuries must result from the negligent conduct of an uninsured motorist"). Although the action by the insured against an uninsured motorist is one "for the tort allegedly committed by the uninsured motorist" so that "[a]ny defense available to the uninsured tort-feasor should be available to the [UM] insurer," *id.* at 319, 204 S.E.2d at 834, the UM carrier must avail itself of that defense in order to benefit from it.

Section 20-279.21(b)(3)(a) gives Travelers the right to participate in plaintiffs' lawsuit against defendant, but does not require Travelers' participation, does not relieve plaintiffs' duty to serve defendant, and does not deprive defendant of his rights to participate in the lawsuit himself. *See In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (when statute uses word "may," its provisions will ordinarily be construed as permissive and not mandatory). Travelers, who exercised its option to participate in plaintiffs' lawsuit against defendant pursuant to Section 20-279.21(b)(3)(a) after becoming an unnamed party to the action, filed an answer without asserting the defense of lack of personal jurisdiction over defendant. Therefore, although Travelers did have this defense available to it, Travelers waived its ability to avail itself of that defense by filing an answer without asserting the defense. *See Humphrey v. Sinnott*, 84 N.C. App. 263, 265, 352 S.E.2d 443, 445 (1987) (party waives defense of lack of personal jurisdiction by filing motion for discretionary change of venue without first or simultaneously asserting defense). Under these circumstances, although plaintiffs cannot obtain a judgment against defendant because he properly asserted the defense of lack of personal juris-

diction, this action may proceed against Travelers to determine whether plaintiffs are entitled to uninsured motorist coverage. Furthermore, Travelers, by failing to properly assert the defense of lack of personal jurisdiction in its answer, may not rely on the defense that plaintiffs cannot "reduce its right to judgment" against defendant because of lack of personal jurisdiction in determining whether plaintiffs are "legally entitled to recover damages" from defendant. The order of the trial court granting Travelers' motion for judgment on the pleadings is accordingly reversed.

Because plaintiffs presented no argument in their brief supporting their assignments of error to the trial court's denial of plaintiffs' motions for enlargement of time for filing alias and pluries summons and extension of time in which to serve the original summons, we need not address these issues. N.C.R. App. P. 28(b)(5).

Affirmed in part, reversed in part, and remanded.

Judge JOHN concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I respectfully dissent because I believe that the uninsured motorist (UM) coverage statute does not permit a direct action by plaintiffs against their UM carrier, the consequence of the majority's holding. I believe the better procedure would be to remand this case to the trial court for a determination of whether plaintiffs should be permitted to serve defendant Leroy Jerome Nelson in accordance with N.C. Gen. Stat. § 1A-1, Rule 6.

The procedural history of this case is rather complex. On 4 June 1989, plaintiff Marlene R. Grimsley was injured in a automobile accident when she was allegedly hit from behind by a vehicle driven by defendant Leroy Jerome Nelson. Plaintiffs filed this action on 18 May 1992 and a summons was issued to defendant and to Travelers Insurance Co. ("Travelers"), plaintiffs' UM carrier, on that same date. On 22 May 1992, Craven County Deputy Sheriff Paul Mathes certified service of the summons and complaint upon defendant and Travelers.

On 9 October 1992, Travelers filed its answer and filed an amended answer on 9 November 1992 asserting the defenses of failure to state a claim, lack of personal jurisdiction, insufficient process, and

insufficient service of process. On 24 November 1992, plaintiffs filed a motion to strike Travelers's amended answer and a motion for enlargement of time to file alias and pluries summons. Plaintiffs filed a notice on 9 December 1992 "pursuant to Rule 11 of the North Carolina Rules of Civil Procedure" informing the trial court that this Court's opinion in *Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635 (1992) "appears to hold that the trial court does not have the authority to extend the time in which an alias and pluries summons can be issued under the facts of this case." In an order filed on 26 March 1993, the trial court granted plaintiffs' motion to strike Travelers's amended answer but denied their motion for an enlargement of time.

On 24 May 1993, defendant filed a motion to dismiss for insufficient process, insufficient service of process, and lack of personal jurisdiction. Defendant filed affidavits from himself, his former wife Fannie Cox, and his son Leroy Jerome Nelson, Jr. which attested that Leroy Jerome Nelson, Jr. of 2005 New Bern Avenue, New Bern was served with the complaint instead of the proper defendant Leroy Jerome Nelson of 1004 New Bern Avenue, New Bern. The trial court granted defendant's motion and then granted Travelers' motion for judgment on the pleadings. The final result of this procedural morass was that even though plaintiffs and Travelers believed plaintiffs had brought a proper action, plaintiffs' action was dismissed because Leroy Jerome Nelson had not been served despite a certificate from the deputy sheriff to the contrary.

The majority concludes that Travelers did not appear in defendant's name so as to waive his personal jurisdiction defense when Travelers' attorney signed its amended answer as "Appearing in the name of the defendant." I agree with this conclusion. It is clear from the record that Travelers' attorney did not represent defendant and could not take any action which would bar defendant from raising a valid defense. As a result, the action is dismissed with regard to defendant Leroy Jerome Nelson. The majority then holds that since Travelers did not raise the personal jurisdiction defense in its answer, it has waived the defense. The majority remands this case in order that plaintiffs may proceed against Travelers to determine whether they are entitled to UM coverage. The majority holds that on remand Travelers cannot raise the defense of lack personal jurisdiction.

I do not believe the UM statute permits plaintiffs to proceed solely against their UM carrier to determine whether plaintiffs are entitled

to UM coverage. N.C. Gen. Stat. § 20-279.21(b)(3) mandates that motor vehicle liability insurance be available "for the protection of persons insured thereunder who are *legally entitled to recover damages* from owners or operators of uninsured motor vehicles." N.C. Gen. Stat. § 20-279.21(b)(3) (1993) (emphasis added). The UM carrier's liability is derivative of the tortfeasor's liability. *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 294, 378 S.E.2d 21, 25 (1989). In *Brown v. Lumbermens Mut. Cas. Co.*, 285 N.C. 313, 204 S.E.2d 829 (1974), our Supreme Court held that for a plaintiff to 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." *Id.* at 319, 204 S.E.2d at 833. *See also Spivey v. Lowery*, 116 N.C. App. 124, 446 S.E.2d 835 (1994) (The complete release of the tortfeasor releases the underinsured motorist carrier as well); *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) (The release of the tortfeasor without the consent of the underinsured motorist carrier discharges the carrier because of the derivative nature of the insurer's liability.).

In the instant case, under the majority's analysis, the defendant tortfeasor, Leroy Jerome Nelson, is dismissed from the case since plaintiffs did not properly serve him. Plaintiffs' insurance policy is not contained in the record on appeal so I cannot determine whether the policy contains the standard provision that a plaintiff is not entitled to UM coverage unless the plaintiff is "legally entitled to recover damages" from the tortfeasor. Under the statute, Travelers' liability is derivative of the tortfeasor's liability. If plaintiffs cannot obtain a judgment against Leroy Jerome Nelson, then they are not "legally entitled to recover" under their policy with Travelers.

The majority notes that Travelers has waived the defense of lack of personal jurisdiction by failing to raise the defense in its answer. Whether Travelers can raise this defense, however, is irrelevant when considering whether Travelers is liable to plaintiffs under the UM provisions of their policy. Since, under the majority's analysis, plaintiffs can never obtain a judgment against the tortfeasor, Travelers cannot be held liable. *See Brown*, 285 N.C. at 319, 204 S.E.2d at 833.

In my opinion, plaintiffs should be granted an enlargement of time under N.C. Gen. Stat. § 1A-1, Rule 6(b) to serve defendant. Defendant appeared in this action and challenged the service of summons by the deputy sheriff. N.C. Gen. Stat. § 1-75.10(1)(a) provides

that proof of service shall be the "officer's certificate thereof, showing place, time and manner of service." N.C. Gen. Stat. § 1-75.10(1)(a) (1983). "When the return upon its face shows legal service by an authorized officer, that return is sufficient, at least *prima facie*, to show service in fact." *Williams v. Burroughs Wellcome Co.*, 46 N.C. App. 459, 462, 265 S.E.2d 633, 635 (1980). A deputy's return of service cannot be set aside unless the evidence is clear and unequivocal. *Harrington v. Rice*, 245 N.C. 640, 642, 97 S.E.2d 239, 241 (1957); *see also, Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977); *Sun Bank/South Florida v. Tracy*, 104 N.C. App. 608, 410 S.E.2d 509 (1991); *Olschesky v. Houston*, 84 N.C. App. 415, 352 S.E.2d 884 (1987).

In the instant case, defendant presented several affidavits that he was not properly served, and the trial court, by granting defendant's motion to dismiss, found that this evidence was sufficient to rebut the presumption of proper service. Since the deputy sheriff's return of service indicated defendant had been properly served, plaintiffs may be awarded an enlargement of time under N.C. Gen. Stat. § 1A-1, Rule 6(b) in which to serve defendant. The Supreme Court has held, "Rule 6(b) grants our trial courts broad authority to extend any time period specified in any of the Rules of Civil Procedure for the doing of any act, after expiration of such specified time, upon a finding of 'excusable neglect.' " *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988).

In my opinion, the fact the deputy sheriff's certificate indicated that defendant was properly served and that both plaintiffs and Travelers proceeded in reliance upon this certificate, is a sufficient indication of "excusable neglect" which should permit plaintiffs an enlargement of time in which to serve defendant. I therefore vote to remand this case to the trial court for a determination of whether plaintiffs are entitled to an enlargement of time under Rule 6(b). This analysis permits plaintiffs to proceed against defendant and their UM carrier which would have occurred if the father had been served instead of the son. For the foregoing reasons, I respectfully dissent.

CITY OF WINSTON-SALEM v. J.R. YARBROUGH AND WIFE, RUTH N. YARBROUGH; JERONE C. HERRING, TRUSTEE, BRANCH BANKING AND TRUST COMPANY; R. LARRY FEIMSTER, TRUSTEE; AND RAMEY, INC.

No. 9321SC688

(Filed 20 December 1994)

1. Eminent Domain § 103 (NCI4th)— condemnation by municipality—traditional test for unity of lands applicable

There was no merit to plaintiff's contention that, with respect to condemnation by municipalities, N.C.G.S. § 40A-67 has displaced the traditional test for unity of lands as enunciated in *Barnes v. Highway Commission*, 250 N.C. 378, *i.e.*, substantial unity of ownership, physical unity, and use as an integrated economic unit.

Am Jur 2d, Eminent Domain § 315.

Unity of ownership necessary to allowance of severance damages in eminent domain. 95 ALR2d 887.

2. Eminent Domain § 103 (NCI4th)— tracts owned by husband and wife—unity of ownership

The trial court did not err in finding that substantial unity of ownership existed with regard to seven tracts of land owned by defendant husband and wife, since N.C.G.S. § 40A-2 provides that, for purposes of eminent domain, an owner is any person having an interest or estate in the property; property means any right, title, or interest in land; a person's inchoate dower interest in his spouse's real property in some quality of interest; and defendants each had some interest in the other's land.

Am Jur 2d, Eminent Domain § 315.

Unity of ownership necessary to allowance of severance damages in eminent domain. 95 ALR2d 887.

3. Eminent Domain § 104 (NCI4th)— tracts held for future development—present unity of use

The trial court properly found that defendants' tracts of land which defendants were holding for future development were being presently used in the same manner, and the court thus correctly concluded that the tracts were unified in use.

Am Jur 2d, Eminent Domain § 315.

Unity of ownership necessary to allowance of severance damages in eminent domain. 95 ALR2d 887.

4. Pleadings § 378 (NCI4th)— amendment of counterclaim—claims futile—denial of amendment proper

The trial court did not err in denying defendants' motion to amend their answer to add individual members of plaintiff condemnor's board of aldermen as parties to their counterclaim, since an amendment claiming individual liability of aldermen in the ratification of a contract would be futile. Nor did the trial court err in denying defendants' motion to amend their answer to assert a claim against the city attorney for negligent misrepresentation absent an allegation that plaintiff city waived its sovereign immunity by the purchase of liability insurance.

Am Jur 2d, Pleading §§ 306 et seq.

Appeals by plaintiff and defendants from orders entered 28 April 1993 by Judge F. Fetzer Mills in Forsyth County Superior Court. Heard in the Court of Appeals 10 March 1994.

Plaintiff instituted these actions to exercise its power of eminent domain and acquire three parcels of land for the construction of a new public road, pursuant to Chapter 40A of the General Statutes. Defendants Ruth and J.R. Yarbrough (defendants) answered the complaints, alleging that the three tracts named in the complaints were being used with four other tracts as an integrated economic unit which would be adversely affected by the taking. In addition, defendant J.R. Yarbrough (Yarbrough) asserted a counterclaim against plaintiff for the breach of an alleged agreement regarding the construction and exact location of a road project which had been abandoned in favor of the project giving rise to the instant condemnation actions.

On 22 October 1992, plaintiff filed a motion to dismiss the counterclaim, asserting that the statute of limitations barred Yarbrough's breach of contract claim. Plaintiff amended its motion to dismiss to include an assertion that the alleged agreement was *ultra vires*, void and therefore unenforceable against plaintiff. Following a hearing, in an order entered 4 January 1993, Judge James A. Beaty, Jr. denied the motion to dismiss.

On 2 March 1993, defendants moved the court to determine all issues raised by the pleadings other than the issue of compensation, pursuant to N.C. Gen. Stat. § 40A-47 (1984). On 4 March 1993, defend-

ants filed a motion to amend their answer, seeking to add a claim for *quantum meruit* against plaintiff and to add claims for breach of contract against the members of the Board of Aldermen at the time of the alleged agreement and a claim for negligent misrepresentation against the city attorney, Ronald Seeber (Seeber).

The trial court held hearings on defendants' motions on 19 April 1993. On 28 April 1993, the court entered an order allowing defendants to add a *quantum meruit* claim but denying the motion to add additional counterclaim defendants. From this order, defendants appeal. That same day, the court also entered an order concluding that six of the seven parcels should be treated as a single tract for purposes of compensation. From this order, plaintiff appeals.

City Attorney Ronald. G. Seeber and Assistant City Attorney Charles C. Green, Jr. and Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr. and Gusti W. Frankel, for plaintiff-appellant.

Petree Stockton, by G. Dudley Humphrey, F. Joseph Treacy, Jr. and Charles H. Rabon, Jr., for defendant-cross-appellants.

McCRODDEN, Judge.

Plaintiff's Appeal

Plaintiff brings forward four assignments of error and four arguments in support thereof. Each of plaintiff's arguments concerns the trial court's determination that defendants' parcels should be treated as one tract for purposes of compensation. We find no merit in plaintiff's arguments.

Municipalities such as plaintiff are empowered to condemn property for, among other things, the opening of roads. N.C. Gen. Stat. § 40A-3 (1984). This power is subject, of course, to the requirement that the municipality provide just compensation to the owner of the property to be taken. *Mount Olive v. Cowan*, 235 N.C 259, 69 S.E.2d 525 (1952). When, as here, a portion of a tract is to be taken, the measure of just compensation is the amount by which fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking, or the fair market value of the portion actually taken. N.C. Gen. Stat. § 40A-64 (1984). For purposes of determining a property owner's damages, "all contiguous tracts of land that are in the same ownership and are being used as an integrated economic unit shall be treated as if the

combined tracts constituted a single tract." N.C. Gen. Stat. § 40A-67 (1984).

[1] Plaintiff's first argument is that the trial court used the wrong test in determining that the defendants' lands constituted a single tract. The court concluded "that as to the lands owned by [defendants] . . . there is substantial unity of ownership . . . there is physical unity . . . [and] the lands . . . are (and were at the time of taking) being used as an integrated economic unit."

In reaching these conclusions, the court applied the traditional test for unity of lands, as enunciated in *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E.2d 219 (1959):

> The factors most generally emphasized are unity of ownership, physical unity and unity of use. . . . Usually unity of use is given greatest emphasis.
>
> The parcels claimed as a single tract must be owned by the same party or parties. It is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all parts of the tract. . . . [T]here must be a substantial unity of ownership.
>
> The general rule is that parcels of land must be contiguous in order to constitute them a single tract for severance damages and benefits. . . .
>
> As indicated above, the factor most often applied and controlling in determining whether land is a single tract is unity of use. Regardless of contiguity and unity of ownership, ordinarily lands will not be considered a single tract unless there is unity of use.

Id. at 384-85, 109 S.E.2d at 224-25.

Plaintiff observes that the condemnation actions in *Barnes* and subsequent cases which have followed its reasoning were instituted pursuant to Chapter 136 of the General Statutes. *See Barnes*; *N.C. Dept. of Transportation v. Kaplan*, 80 N.C. App. 401, 343 S.E.2d 182, *disc. review denied*, 317 N.C. 705, 347 S.E.2d 437 (1986); *City of Winston-Salem v. Tickle*, 53 N.C. App. 516, 281 S.E.2d 667 (1981), *disc. review denied*, 304 N.C. 724, 288 S.E.2d 808 (1982); *and Board of Transportation v. Martin*, 296 N.C. 20, 249 S.E.2d 390 (1978). Plaintiff then concedes that with regard to condemnation by the Department of Transportation, this test is still applicable, but, argues

that, with respect to condemnation by municipalities, section 40A-67 has displaced the traditional *Barnes* test. We disagree.

We must assume that the General Assembly is fully aware of all prior and existing law when it enacts legislation on the same subject. *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). When interpreting the General Statutes, our primary rule of construction is that the intention of the legislature controls. *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972).

N.C.G.S. § 40A-67 requires that the lands which are sought to be joined for purposes of compensation be under the "same ownership," while the *Barnes* test requires that there be "substantial unity of ownership." To read these phrases as having different meanings would lead to an absurd result: Whether lands were considered together for compensation might depend on whether the property was being condemned by a municipality or the State. We must presume that the legislature acted with reason and common sense and that it did not intend such an unjust result. *King v. Baldwin*, 276 N.C. 316, 325, 172 S.E.2d 12, 18 (1970). We believe that the General Assembly, in enacting N.C.G.S. § 40A-67, intended merely to codify the long standing common law test. Hence, we find that the trial court applied the proper test, and we reject plaintiff's first argument.

In its next three arguments, plaintiff takes issue with the trial court's conclusions as to each of the three elements of the *Barnes* test.

[2] As to the unity of ownership portion of the test, the trial court found:

> All of the lands sought to be joined by defendants in this action pursuant to N.C. Gen. Stat. § 40A-67 are owned by the Yarbroughs. Ruth N. Yarbrough has some quantity and quality of interest and estate in the lands of her husband, J.R. Yarbrough; and J.R. Yarbrough has some quantity and quality of interest and estate in the lands of his wife, Ruth N. Yarbrough. Although the City contended that spousal interests under N.C. Gen. Stat. § 29-30 are not sufficient to constitute an interest and estate in land for purposes of unity of ownership, the Court disagrees and finds that substantial unity of ownership exists with regard to the Yarbroughs' land and notes that the City itself sued the non-title owner spouse in Case numbers 92-CVS-1551 and 92-CVS-1552

because of their interests under § 29-30. In addition, the Yarbroughs offered the Affidavit of J.R. Yarbrough which amply demonstrated that he and his wife were engaged in a common plan of development for the property that was owned both in their separate and joint names in an informal partnership. The City offered no evidence to the contrary. The Court therefore finds that substantial unity of ownership exists with regard to all tracts sought to be included by the Yarbroughs.

N.C. Gen. Stat. § 40A-2 (1984) provides that, for purposes of eminent domain, an owner is "any person having an interest or estate in the property," and property means "*any* right, title, or interest in land." (Emphasis added). N.C. Gen. Stat. § 29-30 (1984) provides that, in lieu of taking his intestate share, a surviving spouse may take a life estate in one third in value of all of the real estate owned by his spouse during the time they were married, subject only to a few exceptions. This section preserves the benefits of the former rights of curtesy and dower. *Taylor v. Bailey*, 49 N.C. App. 216, 219, 271 S.E.2d 296, 298 (1980). While both spouses are alive, the dower interests are inchoate. "An inchoate dower interest is not an estate in land nor a vested interest, but nevertheless, it acts as an encumbrance upon real property." *Id.* Although it has been said that an inchoate dower interest is not properly denominated a future interest, Lewis M. Simes, *The Law of Future Interests* § 2 at 3 (1966), it is, nonetheless, a "substantial right of property." *Shelton v. Shelton*, 83 S.E.2d 176, 177 (S.C. 1954). We conclude that a person's inchoate dower interest in his spouse's real property is "some quality" of interest, *see City of Winston-Salem v. Tickle*, 53 N.C. App. 516, 281 S.E.2d 667 (1981), and defendants each had some interest in the other's land. Accordingly, we find that the trial court properly determined that there was substantial unity of ownership among the tracts.

[3] Next plaintiff argues that the trial court erred in determining that there was unity of use among the defendants' tracts. We disagree.

The trial court found that the parcels at issue "are, and were at the time of the taking, zoned for multi-family development and are (and were at the time of taking) being held for development under a common plan and scheme."

As stated previously, the *Barnes* test for unity of use is the applicable standard. Plaintiff argues that defendants' tracts may not be considered unified in use because they were not being actively used at all.

In *Barnes*, the Court stated:

> It has been said that "there must be such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used." The unifying use must be a *present* use. A mere intended use cannot be given effect.

250 N.C. at 385, 109 S.E.2d at 225 (citation omitted). The *Barnes* Court found that the trial court had properly joined the petitioners' parcels, despite the fact that "[n]o actual present use was being made of the tracts at the time of the taking. The petitioners were holding the land for possible future sale for subdivision or for future sale of lots." *Id.* at 386, 109 S.E.2d at 226. Thus, the Court decided, *sub silentio*, that holding property for anticipated development is a present use. We believe that *Board of Transportation v. Martin*, 296 N.C. 20, 249 S.E.2d 390, which plaintiff cites for the proposition that holding land for future development is not a present use for purposes of the *Barnes* test, is not to the contrary. In *Martin*, one of the parcels sought to be joined was developed and occupied by a shopping center, while the other tract was undeveloped, although the owner planned to develop it as part of the shopping center. 296 N.C. at 30, 249 S.E.2d at 397. The Court found that there was no unity of use between those two tracts because the undeveloped tract was not presently being used in the same manner as the developed tract. *Id.* However, we believe that *Martin* merely stands for the proposition that the uses must be the same, not that they must be active.

Following *Barnes*, we conclude that the defendants' tracts, which defendants were holding for future development, were being presently used in the same manner. Thus, the trial court correctly concluded that the tracts were unified in use, or, in the language of section 40A-67, were "being used as an integrated economic unit."

Finally, plaintiff argues that the court erred in concluding that the tracts are contiguous. Yet, plaintiff concedes that the tracts "abut each other in succession." This admission is fatal to plaintiff's contention. We find that the tracts are contiguous and reject plaintiff's final argument.

Thus, the trial court correctly found that there was substantial unity of ownership, that the tracts were being used as an integrated

economic unit, and that the tracts were contiguous. It properly united the tracts for compensation.

Defendants' Appeal

[4] Defendants assign error to the trial court's denial of their motion to amend the answer to add parties in their counterclaim. They offer one argument which we reject.

First, however, we must address plaintiff's motion to dismiss defendants' appeal. Plainly, the trial court's order denying the motion to amend was interlocutory, since it did not determine the entire controversy. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). As the issue was not certified by the trial judge pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990), the order is immediately appealable only if it affects a substantial right. N.C. Gen. Stat. §§ 1-277 (1983), 7A-27(d) (1989).

Defendants' claim against the individual members of the Board of Aldermen was made as an alternative to its claim for breach of contract. Had the court determined that the contract was void as *ultra vires*, then defendants would have sought to recover against the individual board members. If these alternative theories were not joined, defendants would face the possibility of inconsistent verdicts on the same factual issue in separate trials. We find that, in this case, the avoidance of such a possibility is a substantial right which would be prejudiced by delaying the defendants' appeal. *See Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). We deny plaintiff's motion to dismiss, and address the merits of defendants' appeal.

Since plaintiff had responded to defendants' original counterclaim, defendants could only amend their answer by leave of the court. N.C.R. Civ. P. 15(a). Generally, trial courts are to grant such amendments freely. *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986). A motion to amend, however, is addressed to the sound discretion of the trial court and we will not disturb its ruling absent a clear showing of abuse of this discretion. *Hassett v. Dixie Furniture Co.*, 104 N.C. App. 684, 688, 411 S.E.2d 187, 190 (1991), *rev'd on other grounds*, 333 N.C. 307, 425 S.E.2d 683 (1993).

From the face of the order, we cannot determine the trial court's reason for denying the motion. This, however, will not preclude our examining any apparent reasons for the denial. *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985). Reasons which might

justify such a denial include the futility of a proposed amendment. *Id.* Where the facts alleged in a proposed amendment would not state a claim for relief, it is not error to deny the motion to amend. *Smith v. McRary*, 306 N.C. 664, 666, 295 S.E.2d 444, 445 (1982). In this case, we believe that the trial court did not abuse its discretion in denying the motion because the facts alleged in the proposed amendment would not state a claim for relief against any of the individual counterclaim defendants.

Defendants alleged in their proposed amendment that "[t]he Counterclaim Defendants are being named as defendants herein in their individual capacities rather than their official or representative capacities as Aldermen or City Attorney for the City of Winston-Salem." This allegation is not controlling, however. We must "inspect the text of the complaint as a whole to determine the true nature of the claim." *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 279 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). In the absence of any allegations in the complaint separate and apart from official duties which would hold a non-official liable, the complaint cannot be found to state a claim against defendants individually. *Whitaker v. Clark*, 109 N.C. App. 379, 383-84, 427 S.E.2d 142, 145, *disc. review denied and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). We have reviewed the proposed amendment and find that all of the relevant factual allegations concern the performance by the individual defendants of their official duties. Accordingly, we will address the proposed counterclaims as claims against the individual defendants in their official capacities.

When the government enters into a contract, it implicitly waives its immunity from an action on that contract. *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). This does not mean, however, that the aldermen may be held liable on the contract. Although they approved the alleged contract with defendants, the aldermen were no more parties to that agreement than "the president of a corporation is a party to the contract he executes in his official capacity for the corporation." *Id.* at 332, 222 S.E.2d at 431.

In a case strikingly similar to the one at hand, *Jenkins v. Henderson*, 214 N.C. 244, 199 S.E. 37 (1938), our Supreme Court held that aldermen of the town of Henderson could not be held liable on a contract to grade the plaintiff's lot to the street level when such a contract was *ultra vires* to the town. The Court relied on agency principles, stating:

> There is no implied warranty by an agent that his principal has authority to make a contract signed by the agent; and the agent, acting within the scope of his authority, is not answerable upon such a contract where his principal is not bound by it merely because he had no authority to enter into the particular contract.

Id. at 247, 199 S.E. at 39.

As was the case in *Jenkins*, the purported contract here was between defendants and the municipal plaintiff, and the aldermen were acting within their authority to approve contracts entered into by the plaintiff. Defendants could not hold the aldermen liable on the alleged agreement, and an amendment that added a claim to that effect would be futile.

Likewise, defendants' proposed counterclaim would not state a claim against Seeber for negligent misrepresentation. For purposes of sovereign immunity, a claim against a public official in his official capacity is a suit against the public body he represents. *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 193, 371 S.E.2d 503, 507 (1988), *disc. review denied*, 323 N.C. 706, 377 S.E.2d 229 (1989), *cert. denied*, 493 U.S. 808, 107 L. Ed. 2d 19 (1989), *overruled in part on other grounds in Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). A city attorney is a public officer; his position is a creation of statute, N.C. Gen. Stat. § 160A-173 (1987) (the governing body of a municipality "shall appoint a city attorney to serve at its pleasure and to be its legal adviser"), and his job, the rendering of legal opinions, involves the exercise of personal deliberation, decision and judgment. *See Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

After reviewing the proposed amended answer, we observe that defendants have not alleged that the municipal plaintiff waived its sovereign immunity by the purchase of liability insurance. Such an omission renders their claim for negligence against Seeber in his official capacity fatally deficient. *Fields v. Board of Education*, 251 N.C. 699, 701, 111 S.E.2d 910, 912 (1960).

We conclude that the defendants' proposed amendment would have been futile because it would have stated no claim for relief. The trial court properly denied defendants' motion to amend their answer.

In summary, we affirm each of the actions of the trial court.

Affirmed.

Judges EAGLES and MARTIN concur.

Opinion written and concurred in prior to 16 December 1994.

BONNIE WOOTEN, PLAINTIFF v. LORA E. WARREN, BY HER GUARDIAN AD LITEM, LORETTA GILMER, DEFENDANT

No. 9422SC298

(Filed 20 December 1994)

1. Trial § 261 (NCI4th)— summary judgment denied—basis for denial of subsequent directed verdict motion—error

The earlier denial of a motion for summary judgment should not in any way be considered a barrier to later consideration of a motion for directed verdict; however, the trial court's refusal to consider the directed verdict motion, though improper, did not prejudice defendant since plaintiff met her burden of proving that the action was instituted within the period required by the applicable statute of limitations, and the trial court therefore would not have granted the motion had it been considered.

Am Jur 2d, Trial § 861.

2. Evidence and Witnesses § 2246 (NCI4th)— expert in chiropractic—testimony within expertise of chiropractor

In an action to recover for injuries sustained in an automobile accident, the trial court did not err in allowing an expert in chiropractic to testify concerning his treatment of plaintiff, his diagnosis, and his opinion that her injuries in the accident caused her subsequent complaints, since such testimony was within the expertise of a chiropractor as authorized by N.C.G.S. § 90-157.2.

Am Jur 2d, Expert and Opinion Evidence § 226.

Chiropractor's competency as expert in personal injury action as to injured person's condition, medical requirements, nature and extent of injury, and the like. 52 ALR2d 1384.

3. Damages § 165 (NCI4th)— personal injury—instruction on permanency proper—instruction on pre-existing injury improper

In an action to recover for injuries sustained by plaintiff in an automobile accident, the evidence was sufficient to support an instruction on permanent injury but insufficient to support instructions on the aggravation or activation of a preexisting condition.

Am Jur 2d, Damages §§ 1009, 1010.

4. Damages § 142 (NCI4th)— life expectancy—necessity for introducing mortuary tables

Though life expectancy may be determined from evidence of the plaintiff's health, constitution, habits and the like, as well as mortuary tables, the better practice is to introduce the mortuary tables in addition to other evidence.

Am Jur 2d, Damages §§ 988 et seq.

Appeal by defendant from judgment entered 6 December 1993 by Judge John Mull Gardner in Davidson County Superior Court. Heard in the Court of Appeals 26 October 1994.

Plaintiff sued defendant for negligently causing personal injuries which plaintiff sustained in an automobile collision. The complaint alleged that on 2 April 1987, defendant, while travelling north on Highway 52 and while approaching the vehicle plaintiff was travelling in, made a left-hand turn directly in front of plaintiff's vehicle and into plaintiff's lane of travel, causing a collision between the two vehicles. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(a), plaintiff filed a motion on 19 October 1990 to amend her complaint to allege damages in excess of $10,000 and to add a claim for attorneys' fees. On 23 November 1991, plaintiff filed another motion to amend her complaint to reflect that the date of the accident was 2 April 1985 instead of 2 April 1987. These motions were allowed by orders entered 2 May 1991 and 5 March 1992. The amended complaints were filed respectively on 2 May 1991 and 26 October 1992.

Defendant answered, asserting as a defense that the action was barred by the statute of limitations. Defendant moved for summary judgment, which motion was orally denied by Judge James M. Long at the 26 October 1992 Civil Session of Davidson County Superior Court. The action was tried before a jury during the 25 October 1993 Civil

Session of Davidson County Superior Court, the Honorable John Mull Gardner presiding. At the close of the evidence, defendant moved for a directed verdict in her favor, asserting that the action was barred by the statute of limitations. Judge Gardner refused to rule on the motion on the ground that the defendant had earlier asserted the same defense by a motion for summary judgment which the other superior court judge had denied. Therefore, Judge Gardner said that he lacked the authority to rule on the motion. The jury found defendant negligent and awarded damages of $65,000. Defendant appeals. The facts pertaining to the issues are set forth below.

James E. Snyder, Jr. for plaintiff-appellee.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Charles H. McGirt, for defendant-appellant.

THOMPSON, Judge.

Defendant assigns error to (1) the denial of her motion for directed verdict, (2) the admission of expert testimony, and (3) the jury charge.

I. MOTION FOR DIRECTED VERDICT

[1] We first discuss defendant's assignment of error relating to the trial court's refusal to consider her motion for a directed verdict. Defendant argues that the trial court should have considered the motion and that if it had done so, it would have granted the motion. We agree that the trial court should have considered the motion. " '[T]he earlier denial of a motion for summary judgment should not, in any way, be considered a barrier to later consideration of a motion for directed verdict.' " *Edwards v. Northwestern Bank*, 53 N.C. App. 492, 495, 281 S.E.2d 86, 88, *disc. review denied*, 304 N.C. 389, 285 S.E.2d 831 (1981) (citation omitted). *See also Clinton v. Wake County Board of Education*, 108 N.C. App. 616, 621, 424 S.E.2d 691, 694, *disc. review denied*, 333 N.C. 574, 429 S.E.2d 570 (1993) (pretrial order denying summary judgment has no effect on one's right to a later order granting or denying a directed verdict on the same issue). However, we disagree that the trial court should have granted the motion.

When the statute of limitations has been properly pleaded as a defense, the burden of proof is on the party against whom the statute is pleaded to show that his claim is not barred. *Silver v. Board of Transportation*, 47 N.C. App. 261, 266, 267 S.E.2d 49, 54 (1980). A directed verdict is proper where plaintiff fails to introduce evidence

to carry the burden of proving that the action was instituted within the prescribed period. *See Poore v. Railway*, 30 N.C. App. 104, 106, 226 S.E.2d 170, 171, *disc. review denied*, 290 N.C. 777, 229 S.E.2d 33 (1976). Defendant contends that plaintiff failed to meet her burden of proving that the action was instituted within the period required by the statute of limitations applicable to plaintiff's claim for personal injuries. We disagree.

Under the terms of N.C. Gen. Stat. § 1-52(16) (1994), plaintiff's cause of action would be time barred if she failed to institute the action within three years of 2 April 1985, the date of the accident. N.C. Gen. Stat. § 1A-1, Rule 3 (1990) provides that "[a] civil action may . . . be commenced by the issuance of a summons when (1) a person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and (2) the court makes an order stating the nature and purpose of the action and granting the requested permission." The record shows that, pursuant to Rule 3, plaintiff commenced this action on 31 March 1988, before the statute of limitations expired, by filing an application and order extending time to file a complaint. The application and order stated that the nature and purpose of the action was a "civil suit for damages for personal injuries sustained in an autombile accident" and that the time for filing the complaint should be extended to 20 April 1988. Plaintiff filed the complaint and served defendant with a copy thereof on 19 April 1988.

Defendant also argues that the amended complaint of 26 October 1992, which alleged that the accident occurred on 2 April 1985 instead of 2 April 1987, does not relate back to the original complaint since the original complaint does not "give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" as required by Rule 15(c) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990). In such event, plaintiff's cause of action would be deemed commenced as of 26 October 1992, well beyond the statute of limitations. We disagree. Both the original and amended complaints allege that plaintiff was injured in a collision on Highway 52 between a vehicle driven by defendant and another vehicle in which plaintiff was a passenger. Aside from the changes made by the first amended complaint, the only difference between the original and the second amended complaint of 26 October 1992 is the year in which the accident occurred and that is sufficient to give the notice called for by Rule 15(c).

II. ADMISSION OF EXPERT TESTIMONY

[2] Defendant assigns error to the admission of the expert testimony of Stephen J. Brodar, a doctor of chiropractic. Dr. Brodar was allowed to testify as an expert in the science of chiropractic. Dr. Brodar treated plaintiff from 6 June 1991 to 12 October 1993 for myofacial pain syndrome. Dr. Brodar testified in detail as to the findings of his initial examination, in which he took a patient history and performed chiropractic, orthopedic and neurological examinations as well as the standard physical assessment. Defendant argues that portions of Dr. Brodar's testimony were unresponsive and beyond the expertise of chiropractic as set forth in N.C. Gen. Stat. § 90-157.2 (1993). The bulk of defendant's objections to Dr. Brodar's testimony were general objections. Defendant did object to portions of Dr. Brodar's testimony as unresponsive to the questions asked.

We have reviewed the portions of Dr. Brodar's testimony which defendant contends were unresponsive and to the extent that Dr. Brodar's testimony was unresponsive, we find it harmless. N.C. Gen. Stat. § 1A-1, Rule 61 (1990).

Defendant did not, however, specify as ground for objection that Dr. Brodar's testimony was beyond the expertise of chiropractic. Thus, defendant failed to properly preserve that question for appellate review. N.C.R. App. P. 10(b)(1) (1994). Despite defendant's failure to properly preserve the question, we also reviewed Dr. Brodar's testimony in light of N.C. Gen. Stat. § 90-157.2 and find that it fell within the scope of his expertise as a chiropractor.

N.C. Gen. Stat. § 90-157.2 provides:

> A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified, may testify in a court of law as to:
>
> (1) The etiology, diagnosis, prognosis, and disability including anatomical, neurological, physiological, and pathological considerations within the scope of chiropractic, as defined in G.S. 90-151; and
>
> (2) The physiological dynamics of contiguous spinal structures which can cause neurological disturbances, the chiropractic procedure preparatory to, and complementary to the correction thereof, by an adjustment of the articulations of the vertebral column and other articulations.

Subsection (2) of the statute was added by amendment in 1989. In *Thomas v. Barnhill*, 102 N.C. App. 551, 403 S.E.2d 102 (1991), this Court considered whether the testimony of a chiropractor in that case fell within the scope of a doctor of chiropractic, as set forth in the amended statute. In holding that the testimony was within the scope, this Court stated that "the legislative history suggests that the General Assembly intended 'to allow chiropractors to testify as to the spinal column and the physical structures that support and/or complement it.' " *Barnhill*, 102 N.C. App. at 554, 403 S.E.2d at 103.

The greater part of Dr. Brodar's testimony concerned his treatment and diagnosis of plaintiff's myofascial pain syndrome which resulted from the improper healing of the structures of her neck and back. The substance of Dr. Brodar's testimony to which defendant assigns error follows: that in taking plaintiff's history, plaintiff stated that she injured her head and neck in a car collision in which she was thrown forward from the right front passenger seat and that she had experienced a worsening of her symptoms since the accident. Plaintiff had the following complaints and symptoms:

> severe neck pain, and severe headaches from the back to the front at the top of her head, dizziness, ringing in her ears, pain down both arms with a tingling-type sensation, low back pain, tightness and like a knot in her throat; nausea, her head felt heavy. She was having sleeplessness, nervousness, blurred vision, weakness in her legs, depression, a lack of concentration and forgetfulness and decrease of the right rotation, turning the head to the right; fatigue and lethargy, which is a very tired type feeling.

Dr. Brodar's examination of plaintiff's x-rays revealed a loss of the normal curve in the neck and a break in the George's line, a line that is drawn down the back of the vertebra. Dr. Brodar testified to the effect that the normal curve of the neck enables the body to adapt to injuries or painful situations by taking the pressure off the spinal cord and nerves that come down from the brain and through the spinal column. When the curve is straightened, it increases the diameter of the hole that runs down through the spinal column to help take the pressure off the spinal cord and nerves. A misaligned George's line indicates damage to the ligaments and supporting structures of the spine, which results in instability in the bones of the spine. Instability in the bones of the spine can cause neurological and muscular complaints which "can run anywhere from affecting the vertebral artery, which is the blood supply to the brain, to the nerves that come

out to the muscles that surround it. So you can get dizzines, migraine headaches, vascular-type syndromes to the hand."

Dr. Brodar determined plaintiff's grip strength by dyanometer testing. The dyanometer revealed a weakness of the upper extremity which can be caused by myofascial pain syndrome, an inflammation of the muscles where the nerve inserts into the muscle, or by a decreased nerve response down in the hand and the arm muscle. Myofascial pain syndrome is an ultrasensation in an active myofascial point, which is the point at which the nerve enters the muscle, and is usually based on five major criteria, all of which plaintiff had. Dr. Brodar opined that plaintiff suffered from myofascial pain syndrome and that the syndrome was a result of improper healing of the structures of her neck and back which were injured in the 1985 automobile accident. Dr. Brodar explained that because these structures did not heal properly from the beginning, the muscles became overworked and scarred. The scarring produced the myofascial pain that caused the chronic pain syndrome and chronic complaints over many years.

Dr. Brodar's diagnosis of plaintiff's condition after all of his treatment was "a severed cervicobrachial syndrome and multiple cervical sublaxations, lumbar segmental disfunction, chronic hypertension [sic], hyperflexion and cervical strain syndrome." In addition, Dr. Brodar testified that

> she had abnormal involuntary muscle spasms, headaches, tingling, or paresthesia. Pain in her neck; pain in her back. She was extremely nervous. She had difficulty sleeping, dizziness, ringing in her ears, blurred vision, fatigue and myofascial pain syndrome, which eventually results in the chronic pain syndrome.

Dr. Brodar opined further that plaintiff's initial injury in the 2 April 1985 accident caused the "subsequent non-healing of her injuries properly, leading to the complaints and presentations that she showed us at her visit on 6-91." We hold that the foregoing testimony was within the expertise of a chiropractor as authorized by N.C. Gen. Stat. § 90-157.2.

Defendant also argues that the court's denial of her motion to strike the testimony of Dr. Rauch, an expert in the field of anesthesia and the subspecialty of pain medicine, constituted prejudicial error. Dr. Rauch saw plaintiff in the Pain Clinic at North Carolina Baptist Hospital on referral from Dr. Brodar. Dr. Rauch testified that he diagnosed plaintiff as suffering from myofascial pain syndrome in the cer-

vical area and in the low back and stated that he had an opinion to a reasonable degree of medical certainty whether the automobile accident could have resulted in the myofascial pain syndrome. Since Dr. Rauch never stated his opinion, at the close of the evidence defendant moved to strike Dr. Rauch's testimony as irrelevant. Dr. Rauch's testimony followed Dr. Brodar's testimony to the effect that in his opinion plaintiff's myofascial pain syndrome resulted from the improper healing of the injuries she suffered in the automobile accident. For this reason, we find no error in the admission of Dr. Rauch's testimony.

III. JURY INSTRUCTIONS

[3] Finally, we consider defendant's assignments of error to the jury charge. The trial court made the following instruction to the jury to which defendant assigns error:

> Now, I instruct you in this case the defendant contends and the plaintiff denies that any aggravation or activation of the plaintiff's emotional or physical condition was not reasonably foreseeable and that, therefore, the defendant's conduct could not be a proximate result of the plaintiff's injury. I instruct you that when a defendant's negligent conduct would not have resulted in any injury to a plaintiff of ordinary susceptibility[,] [t]he defendant would not be liable for the harmful consequences which result from the plaintiff's peculiar susceptibilities such as an activation or aggravation of a pre-existing physical condition or mental or emotional state unless under the circumstances the defendant knew or should have known of such peculiar condition.
>
> Now, if the negligent conduct of the defendant would have resulted in any injury to a person of ordinary susceptibility, then the negligent conduct of the defendant would be a proximate cause of the plaintiff's injury and the defendant would be liable for all the harmful consequences which occur even though these harmful consequences may be unusually extensive because of the aggravation or activation of a pre-existing physical condition or mental or emotional state.
>
> . . .
>
> If you find by the greater weight of the evidence that the injury is permanent, and that such permanent injury was proximately caused by the defendant's negligence, then what is fair compensation to the plaintiff will depend in part on the plaintiff's life

> expectancy. That is on how much longer she may reasonably expect to live. This is to be considered by you in determining what is fair compensation for those elements of damages which you find by the greater weight of the evidence will continue throughout the plaintiff's life. . . .

Defendant contends that there was no evidence to support the trial court's instructions on the aggravation or activation of a pre-existing condition, permanent injury, or formulation of damages based on plaintiff's life expectancy and thus these instructions constituted prejudicial error.

When instructing the jury in a civil case, the trial court has the duty to explain the law and apply it to the evidence on the substantial issues of the action. N.C. Gen. Stat. § 1A-1, Rule 51 (1990). *Pallet Co. v. Wood*, 51 N.C. App. 702, 703, 277 S.E.2d 462, *disc. review denied*, 303 N.C. 545, 281 S.E.2d 393 (1981). Pursuant to this duty, the trial court must instruct on a claim or defense if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense. *Id.* at 703, 277 S.E.2d at 463-64. Conversely, it is error for the trial court to instruct on a claim or defense where the evidence, when viewed in the light most favorable to the proponent, does not support a reasonable inference of such claim or defense. We find this case similar to *Smith v. Buckhram*, 91 N.C. App. 355, 372 S.E.2d 90, (1988), *disc. review denied*, 324 N.C. 113, 377 S.E.2d 236 (1989). In *Buckhram*, this Court held instructions on permanent injury were proper where evidence of permanency was properly introduced at trial and comprised a substantial feature of the case. The Court reasoned that under those circumstances Rule 51 requires an instruction on the issue. *Id.* at 359, 372 S.E.2d at 93. The Court further held, however, that instructions on aggravation of a pre-existing condition were improper because the evidence, when viewed in the light most favorable to the plaintiff, did not support any inference of the aggravation of a pre-existing injury. The Court awarded defendant a new trial. *Id.* at 360-62, 372 S.E.2d at 93-94.

In the case *sub judice*, plaintiff properly introduced evidence of permanency. Dr. Edmundson, who testified as an expert in the field of neurosurgery, stated that in his expert medical opinion plaintiff has a five percent permanent partial disability of the cervical spine. Dr. Brodar testified that in his expert opinion plaintiff had an impairment rating to her neck of four percent as a result of her injury, an impair-

ment rating to her "low" back of five percent, and to her head (for headaches) of three percent, resulting in a 12 percent impairment of her physical being. We find this evidence sufficient to support an instruction on permanent injury.

We find no evidence, however, to support the trial court's instructions on the aggravation or activation of a pre-existing condition. Therefore, the trial court's instructions were improper in that respect. The only evidence which plaintiff points to as supporting the instruction on pre-existing condition consists of the testimonies of Dr. Brodar and Dr. Rauch to the effect that plaintiff manifested symptoms of depression and that it is common for persons with chronic pain to become depressed. That testimony did not relate to a pre-existing condition, but rather to a condition caused by the injuries suffered in the accident in suit. For this reason, we are constrained to vacate the judgment awarding plaintiff damages of $65,000 and remand for a new trial on the issue of damages only.

[4] Defendant also contends that the instruction on life expectancy should not have been given because plaintiff failed to introduce any evidence of her life expectancy. In particular, defendant notes that plaintiff did not introduce either her age or the mortuary tables into evidence. Plaintiff contends that the jury could determine her life expectancy from their observation of her demeanor and physical appearance. We need not decide this issue since we are remanding the case for a new trial on damages.

Nevertheless, we note that life expectancy is determined from evidence of the plaintiff's health, constitution, habits, and the like, as well as from mortuary tables. *See Harris v. Atlantic Greyhound Corp.*, 243 N.C. 346, 355, 90 S.E.2d 710, 716 (1956). N.C. Gen. Stat. § 8-46 (1986) allows the mortuary tables to be "received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person" of life expectancy without the introduction of the mortuary tables into evidence. Although the mortuary tables are not conclusive evidence of life expectancy, we are aware of only one case in North Carolina which has found evidence of health, constitution and habits of a person sufficient evidence from which a jury can determine life expectancy. *See Rea v. Simowitz*, 226 N.C. 379, 382, 38 S.E.2d 194, 196 (1946) (in suit for wrongful death of a nine-year-old girl, where the mortuary tables under G.S. 8-46 did not afford evidence of the life expectancy of a child under 10 years of age, jury could determine

girl's life expectancy from evidence of her health, constitution and habits). Other jurisdictions have likewise found that the mortuary tables are not indispensible to a determination of life expectancy. *See Gaber Co. v. Rawson*, 549 S.W.2d 19 (1977); *Gardner v. Hobbs*, 69 Idaho 288, 206 P.2d 539 (1949); *Shwer v. New York, C. & St. L.R. Co.*, 161 Ohio St. 15, 117 N.E.2d 696 (1954). Nevertheless, we think the better practice is to introduce the mortuary tables in addition to evidence of health, constitution and habits.

The judgment for plaintiff in the amount of $65,000 in damages is

Vacated and remanded for a new trial on damages.

Judges JOHNSON and MARTIN concur.

DUNES SOUTH HOMEOWNERS ASSOCIATION, INC., PLAINTIFF v. FIRST FLIGHT BUILDERS, INC., DEFENDANT

No. 941SC116

(Filed 20 December 1994)

1. **Seals § 1 (NCI4th)— instrument not under seal—three-year statute of limitations applicable—summary judgment improper**

The three-year statute of limitations applied to bar certain of plaintiff's claims for maintenance fees on time share units, since the operative instruments had a corporate seal affixed, but lacked the requisite "specialty" language to make them sealed instruments to which the ten-year statute of limitations would apply.

Am Jur 2d, Seals §§ 8 et seq.

2. **Housing § 74 (NCI4th)— time share units—maintenance fees—meaning of unit weeks remaining unsold—summary judgment improper**

In an action to recover maintenance fees on time share units, the trial court erred in granting summary judgment for plaintiff where there was a genuine issue of material fact with regard to the meaning of "Unit Weeks then remaining unsold" in the con-

text of all the circumstances surrounding defendant developer's initial sale and reacquisition of time share units or unit weeks.

Am Jur 2d, Condominiums and Co-operative Apartments § 34.

Judge EAGLES dissenting.

Appeal by defendant from Order entered 30 November 1993 by Judge Thomas S. Watts in Dare County Superior Court. Heard in the Court of Appeals 4 October 1994.

On 17 February 1993, plaintiff Dunes South Homeowners Association, Inc. ("Association") filed an action for money judgment and to foreclose on a lien for maintenance assessments on South Dunes condominium units owned by defendant First Flight Builders, Inc. ("Developer"). In its answer, Developer "does not admit the validity of the liens claimed against such units for unpaid assessments nor the validity of the assessment amount." The Association then filed a Motion for Summary Judgment with an Affidavit setting forth the amount that Developer allegedly owes the Association. On 24 November 1993, defendant filed a Motion for Leave to Amend its Answer and an Amendment to Answer alleging that at least a portion of plaintiff's claim was barred by N.C. Gen. Stat. § 1-52(1), the three-year statute of limitations for filing an action based on a "contract, obligation or liability arising out of a contract. . . ." On that same day, Mr. Gerald Friedman, President of defendant corporation, filed an Affidavit stating the following:

. . .

2. That in August of 1980, I executed as president of First Flight Builders, Inc. the Declaration of Covenants, and Restrictions for Dunes South. . . .

3. At the time of the execution of the foregoing Declaration of Covenants and Restrictions, First Flight Builders, Inc. was the owner of the development known as Dunes South which is the subject matter of this action.

4. That on the 2nd day of August, 1982, I executed as president of First Flight Builders, Inc. the Supplemental Declaration of Covenants and Restrictions. . . .

5. Pursuant to the terms of the Supplemental Declaration of Covenants and Restrictions, First Flight Builders, Inc. was only

responsible for the actual operating expenses incurred by plaintiff in excess of the collections of assessments on units within Dunes South and was not responsible for paying per unit annual assessments on unit [sic] owned by First Flight Builders, Inc.

6. First Flight Builders, Inc. has paid all operating expenses which have been incurred by the plaintiff in excess of the collection of assessments on units within Dunes South for which plaintiff has made a demand.

7. The sums plaintiff alleges to be due are incorrect in that they represent a per unit assessment rather than the excess operating expenses as provided in the Supplemental Declaration of Covenants and Restrictions.

On 29 November 1993, an Order was entered allowing defendant's Amendment. On 30 November 1993, Judge Watts entered an Order allowing plaintiff's Motion for Summary Judgment. From this Order, defendant timely appealed.

Aycock, Spence & Butler, by Charlie Aycock, for plaintiff-appellee.

Sharp, Michael, Outten & Graham, by Robert L. Outten, for defendant-appellant.

ORR, Judge.

Dunes South is a condominium development in which units are sold by time share weeks. Defendant is the original developer of the Dunes South project and at the time of the institution of this action, had reacquired a number of interval ownership units or weeks within the development from time share owners to whom Developer had initially sold the units. On 7 August 1980, when Dunes South was originally developed, in accordance with § 47A of the North Carolina General Statutes, Developer filed the original "Declaration of Covenants and Restrictions" ("Declaration"). Subsequently, on 21 January 1983, Defendant filed a "Dunes South Supplemental Declaration of Covenants and Restrictions" ("Supplemental Declaration").

At issue in this appeal is whether, and how much, Developer owes the Association annual per unit maintenance assessments which developer admits he has not paid for units Developer initially sold and then reacquired. Resolution of these questions turns on the court's interpretation of provisions contained in the Declaration and

Supplemental Declaration dealing with the assessments. "Section 3. Assessments" of the Declaration provides that Developer as well as the other owners pay annual, per unit, maintenance assessments.

> (a) Commencing on the date of conveyance of the first Dwelling Unit in the Development and thereafter, the Developer, for each Dwelling Unit in the Development owned by the Developer, hereby covenants, and each subsequent Owner of any such Dwelling Unit by acceptance of a deed or other conveyance, shall be deemed to covenant and agree to pay to the Association: (1) annual assessments (maintenance charges), and (2) special assessments for capital improvement, such assessments to be fixed, established and collected from time to time as hereinafter provided.

Article III of the Supplemental Declaration specifically modified the original Declaration to state:

> (a) *With the exception of First Flight Builders, Inc., its successors and assigns, with respect to Dwelling Units and Unit Weeks remaining unsold,* each Time Share Owner shall pay, in addition to assessments for maintenance and improvements to the Common Areas, a prorata share . . . of all other costs incurred by the Management Firm and the Association in the maintenance, upkeep and operation of all Dwelling Units Committed to Time Share Ownership. . . . *First Flight Builders, Inc. shall be responsible for actual operating expenses in excess of the collections of said assessments to the extent that said excess would be otherwise payable for Unit Weeks then remaining unsold.*

Defendant assigns as error the trial court's granting of plaintiff's Motion for Summary Judgment on the grounds that plaintiff was not entitled to judgment as a matter of law because (1) plaintiff's claim or a portion of plaintiff's claim is barred by the statute of limitations as provided in N.C. Gen. Stat. § 1-52(1); (2) the Supplemental Declaration exempted defendant from payment of the sums alleged to be due; and (3) material issues of fact exist concerning the amount, if any, due from defendant to plaintiff.

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 a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (1990). "An issue is material if the facts

alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Williams v. Paley*, 114 N.C. App. 571, 442 S.E.2d 558, 559, *disc. review denied*, 337 N.C. 699, 448 S.E.2d 541 (1994). All inferences are to be drawn against the moving party and in favor of the opposing party. *Id.*

I.

[1] With respect to Developer's first assignment of error that the Association's claim or a portion of the Association's claim is barred by the three-year statute of limitations for "a contract, obligation, or liability arising out of a contract, express or implied" as provided in N.C. Gen. Stat. § 1-52(1) (Supp. 1994), we agree.

A cause of action accrues at the time of the breach which gives rise to the right of action. *United States Leasing Corporation v. Everett, Creech, Hancock, and Herzig*, 88 N.C. App. 418, 363 S.E.2d 665, *disc. review denied*, 322 N.C. 329, 369 S.E.2d 364 (1988). In this case, plaintiff is seeking recovery for annual maintenance assessments for the years 1986 through and including 1993. Plaintiff filed this action on 17 February 1993. The units that defendant owns and for which plaintiff seeks to recover maintenance fees, are not the original units owned by defendant, but are units which had been sold but were reconveyed to defendant. Plaintiff's cause of action against defendant would have accrued when defendant breached the contract with plaintiffs. This breach by defendant could only have occurred at the point that defendant reacquired the units. Defendant urges this Court to conclude that the question of whether the Declaration and Supplemental Declaration were sealed instruments and thus, had a ten-year statute of limitations is one for the jury and should not have been decided as a matter of law by the trial judge.

Defendant Developer argues that the operative instruments have a corporate seal affixed thereto, but since they are without language indicating an intention on their part that they be sealed instruments, the instruments are not under seal. On the other hand, the Association argues that the Declaration and Supplemental Declaration are sealed instruments and explicitly show that they were intended to be sealed instruments because Developer's corporate seal is affixed thereto, and more significantly, because the Notary Acknowledgment contained in the Declaration states as follows:

> This is to certify that on the 7th day of August 1980, before me personally Gerald J. Friedman, with whom I am personally acquainted, who, being by me duly sworn, say that . . . he is the President, and Nancy Friedman is the Secretary of FIRST FLIGHT BUILDERS, INC., the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said President, and that said President and Secretary subscribed their names thereto, and said common seal was affixed, all by order of the Board of Directors of said corporation, and that the said instrument is the act and deed of said corporation.

The Acknowledgement contained in the Supplemental Declaration is virtually the same. As noted, if the documents are "sealed instruments", they come under the purview of the ten-year statute of limitations provided for in N.C. Gen. Stat. § 1-47(2) (Supp. 1994).

There is no dispute that the corporate seal of the defendant is impressed upon the Declaration and the Supplemental Declaration. However, "the seal of a corporation is not in itself conclusive of an intent to a make a specialty [sealed instrument]." *Square D Company v. C.J. Kern Contractors, Inc.*, 314 N.C. 423, 426, 334 S.E.2d 63, 65 (1985). In *Square D Company*, our Supreme Court was confronted with the issue of whether the impression of a corporate seal on a contract would transform the contract into a specialty so that the ten-year statute of limitations under N.C. Gen. Stat. § 1-47(2) would apply. The Court stated that "the question to be answered in order to determine whether the corporate seal transforms the party's contract into a specialty is whether the body of the contract contains any language that indicates that the parties intended that the instrument be a specialty or whether extrinsic evidence would demonstrate such an intention." *Id.* at 428, 334 S.E.2d at 66. In concluding that the contract at issue did not evince any intention on the part of the parties to create a specialty, the court stated that

> [t]he contract contains no language in the body which would indicate that the parties intended the contract to be a specialty. There is no language such as "I have hereunto set my hand and seal," "witness our hands and seals," or other similar phrases contained within the contract that would explicitly support plaintiff's assertion that the instrument is a specialty under seal. *See 68 Am. Jur.*

2d, Seals § 3-4 (1973). Neither is there any extrinsic evidence that would indicate the parties intended the instrument to be a specialty.

Id.

In *Blue Cross and Blue Shield of North Carolina v. Odell Associates, Inc.*, 61 N.C. App. 350, 301 S.E.2d 459, *disc. review denied*, 309 N.C. 319, 306 S.E.2d 791 (1983), this Court held that the trial court correctly granted summary judgment in favor of the corporate defendant because the evidence showed no intention to create a specialty. We reasoned that "[b]ecause routine use of a corporate seal is merely to demonstrate authority to execute a document, the mere presence of a corporate seal, without more, does not convert the document into a specialty." *Square D* Company, 314 N.C. at 429, 334 S.E.2d at 66 (quoting *Blue Cross and Blue Shield*, 61 N.C. App. at 362, 301 S.E.2d at 459).

We find *Square D Company* and *Blue Cross and Blue Shield* applicable to the instant case. Here, however, in addition to Developer's corporate seal being impressed on both of the documents, the Notary Acknowledgement, on which the Association's argument that the documents are under seal is based, states only that the impressed seal is the common seal of the corporation; that it was affixed by order of the Board of Directors; and that the instrument is the "act and deed" of the corporation. We conclude that, absent the requisite "specialty" language, there is no evidence that would tend to indicate that the parties intended that the Declaration and Supplemental Declaration be sealed instruments. Rather, the Acknowledgment merely shows Developer's authority to execute the documents. "[T]he determination of whether an instrument is a sealed instrument . . . is a question for the court", *Square D Company*, 314 N.C. at 426, 334 S.E.2d at 65, and therefore, we conclude, that as a matter of law, the Declaration and Supplemental Declaration are not sealed instruments. Thus, the three-year statute of limitations pursuant to N.C. Gen. Stat. § 1-52(1) applies and bars at least a portion of plaintiff's claim. Accordingly, the trial court's ruling on the Association's Motion for Summary Judgment in favor of the Association with respect to those portions of the Association's claim for unpaid assessments allegedly due between 1986 and 1990 was, as matter of law, error.

II.

[2] Defendant's next assignment of error is that the trial court erred in granting the Association's Motion for Summary Judgment on the

ground that the Association was not entitled to judgment as a matter of law because the Supplemental Declaration explicitly exempts defendant from paying the unpaid assessments allegedly due. Upon review of the evidence and forecast of evidence presented to the trial court, viewed in the light most favorable to the defendant, we hold that the trial court did err in granting summary judgment in plaintiff's favor.

"A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law." *Cleland v. Children's Home, Inc.*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983). "If an agreement is ambiguous, on the other hand, and the intention of the parties unclear, interpretation of the contract is for the jury." *Id.*

Article III "Maintenance and Assessments Therefor" of the Supplemental Declaration provides that Developer pay for any operating expenses which were in excess of the collections of the per unit assessments "to the extent that said excess would be otherwise payable for Unit Weeks then remaining unsold."

It is in light of these circumstances that the words "remaining unsold" must be considered. While the words appear clear and unambiguous, their meaning is less certain when they are considered in the context of all the circumstances surrounding the Developer's initial sale and reacquisition of time share units or unit weeks. The president of defendant corporation states by Affidavit that Developer "was only responsible for the actual operating expenses incurred by plaintiff in excess of the collections of assessments on units ['remaining unsold'] and was not responsible for paying per unit annual assessments. . . ." Defendant argues in its brief that,

> [s]ince it is undisputed that defendant owns units within the Dunes South project, there cannot be a question that these units are "unsold". If they were "sold" units, defendant would not now own them. Since the units are "unsold" then by the specific provisions of Article III(a) of the Supplemental Declaration, defendant is exempted from paying the per unit annual assessment fee.

The Association, by Affidavit, distinguishes between units which were originally sold by Developer and those which were sold and then reacquired by Developer at a later date. The Association argues that the word "unsold" in Article III(a) only makes exception for original units still owned by Developer and that the units which were

initially sold and then reacquired by Developer, but now remain unsold, are not exempt from the assessment.

Because neither interpretation of the words "remaining unsold" can be said to be unreasonable as a matter of law, the provision must be treated as ambiguous. Ambiguities in contracts are to be resolved by the jury upon consideration of the "expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Id.* at 157, 306 S.E.2d at 590 (quoting *Silver v. Board of Transportation*, 47 N.C. App. 261, 268, 267 S.E.2d 49, 55 (1980)). Because a genuine issue of material fact exists with respect to defendant's intention, summary judgment was not appropriate. Summary judgment for plaintiff is thus vacated and the cause is remanded to Superior Court for further proceedings.

In light of the foregoing reasons, we need not address Developer's last contention that the trial court erred by entering summary judgment for the Association on the ground that there exists a genuine issue of material fact as to the amount, if any, due from Developer to the Association.

Vacated and remanded.

Judge McCRODDEN concurred prior to 15 December 1994.

Judge EAGLES dissents.

Judge EAGLES dissenting:

I respectfully dissent from Part II of the majority opinion which reverses summary judgment for the plaintiff based on interpretation of Article III, paragraph (a) of the Supplemental Declaration language.

The critical error in the majority opinion lies in its erroneous conclusion that the language quoted is ambiguous:

> (a) With the exception of First Flight Builders, Inc., its successors and assigns, with respect to Dwelling Units and Unit Weeks remaining unsold, each Time Share Owner shall pay, in addition to assessments for maintenance and improvements to the Common Area, a prorata share . . . of all other costs incurred by the Management Firm and the Association in the maintenance, upkeep and operation of all Dwelling Units Committed to Time

> Share Ownership. . . . First Flight Builders, Inc. shall be responsible for actual operating expenses in excess of the collections of said assessments to the extent that said excess would be otherwise payable for Unit Weeks then remaining unsold.

The majority finds the language ambiguous and accepts the contention that if the developer now owns the units, the units necessarily must be within the group of units and unit weeks described in the Supplemental Declaration as "remaining unsold," even though the units already have been sold by the defendant developer but, for whatever reason, have since been reacquired. To fully accept this specious logic, one must conclude that (1) all units and unit weeks owned now (whether once sold and reacquired or not) are available for sale, and (2) the word "remaining" in "remaining unsold" means nothing at all. Here the language "dwelling units and unit weeks remaining unsold" necessarily means units and unit weeks held by the developer which have not yet been sold and therefore remain in the developer's inventory of units and time share weeks available to be sold. No other meaning is even remotely likely.

Finally, if the developers who drafted the Supplemental Declaration intended, as defendant argues now, to include units and unit weeks once sold and subsequently reacquired, the appropriate all encompassing language would have been units and unit weeks "owned by the developer," not those "remaining unsold."

I vote to affirm the summary judgment except as barred by the statute of limitations.

TERRY BENEDICT, PLAINTIFF v. DEBORAH L. COE, DEFENDANT

No. 9325DC1247

(Filed 20 December 1994)

1. Divorce and Separation § 377 (NCI4th)— modification of visitation sought—visitation order modified—no error

The trial court did not err in modifying an earlier child custody order where only modification of visitation was sought and only visitation was modified.

Am Jur 2d, Divorce and Separation §§ 999 et seq.

2. Divorce and Separation § 378 (NCI4th)— visitation modified—no finding of substantial change of circumstances—order improper

The trial court's order modifying visitation was deficient in that it contained insufficient findings and no conclusion of law that a substantial change of circumstances affecting the welfare of the child had occurred, and, without such a finding, a modification based solely on the ground that the defendant mother was over-protective was improper.

Am Jur 2d, Divorce and Separation §§ 999 et seq.

Appeal by defendant from Order entered 29 July 1993 by Judge Nancy L. Einstein in Catawba County District Court. Heard in the Court of Appeals 13 September 1994.

On 20 November 1991, the plaintiff filed an action to establish paternity and legitimation of the parties' minor child, Johnathan Chase Lester Benedict, who was born on 4 November 1990. Both parties acknowledged plaintiff as the biological father of the minor child and an Order of Paternity was entered on 27 November 1991. On that same day, the parties waived findings of fact and conclusions of law and signed a Consent Order, in which they agreed to the following custody, visitation and child support arrangements:

> 2. Plaintiff and defendant shall have joint custody of their minor child, JOHNATHAN CHASE LESTER BENEDICT, with the defendant having primary custody of the minor child subject to the secondary custody by the plaintiff with the plaintiff having physical custody of the minor child at least one week of every calendar month recognizing that since the plaintiff is from the State of California, it is impractical to set specific times for his secondary custody. Said secondary custody with the minor child by plaintiff shall be within the 25th Judicial District. Plaintiff shall not remove the child from the State of North Carolina without the consent of Defendant, said consent is not be be [sic] unreasonably withheld. Secondary custody by the plaintiff is encouraged at such times as the plaintiff is in the State of North Carolina, and especially Caldwell County, North Carolina, and said secondary custody shall not be unreasonably withheld.
>
> 3. Secondary custody by plaintiff shall be at all such other times as the parties mutually agree with said secondary custody encouraged and not to be unreasonably withheld.

In addition, plaintiff agreed to pay $440.00 per month as child support until the minor child reaches the age of 18 or graduates from high school, whichever last occurs.

On 10 November 1992, plaintiff filed a Motion in the Cause seeking a modification of the visitation schedule and a reduction in child support due to a decrease in his income. Plaintiff set forth the following changes in circumstances with respect to the visitation schedule which he alleged justified the requested modification:

> A. The Plaintiff has not been allowed to exercise the visitation outlined in the Court's Order because the Defendant has refused said visitation.
>
> B. On numerous occasions the Plaintiff has spent enormous amounts of money in flying back and forth from California to North Carolina to see his child, only to be told where and under what circumstances he could spend time with said child.
>
> C. The Plaintiff is [sic] need of a specific Order by the Court allowing him to visit with the minor child.
>
> D. The child is older now and the Plaintiff should be allowed to take the child with him out of the State of North Carolina without the consent of the Defendant, since she has continually and consistently unreasonably withheld her consent in this regard. In fact, the Defendant has never allowed the Plaintiff to take the minor child to see his family or to family events that would obviously benefit the child.
>
> E. The Defendant has consistently unreasonably withheld visitation, and it is time for the Court to set specific times and parameters therefore.

Defendant filed no response to the plaintiff's Motion in the Cause. On 23 December 1992, plaintiff filed a Motion to peremptorily set a hearing on his Motion in the Cause since plaintiff, who resides in California, needed time to make travel arrangements. The hearing was set for 6 January 1993. At the hearing, the parties entered a Memorandum of Judgment setting forth a more specific visitation schedule. This Memorandum of Judgment was reduced to written Order 13 July 1993. Pursuant to this Order, the parties agreed that all issues before the court would remain open until rescheduled and also that joint custody would remain as set forth in the 16 December 1991 Consent Order. However, "secondary custody", which concerned the

visitation schedule, was more specifically outlined. In addition, the parties agreed to a reduction in child support to $100.00 per week with plaintiff having a $100.00 credit applied for any full week that plaintiff had the child. The Order contains no findings of fact or conclusions of law.

The matter was heard on 23 July 1993. On 29 July 1993, after hearing the evidence, Judge Einstein entered an Order, which is the subject of this appeal, and concluded that the "best interests of the minor child" would be served by modifying the visitation schedule. This conclusion was based on the following findings of fact by the court:

1. The Court has proper jurisdiction over the parties and the subject matter of this action.

2. The parties stipulate in open court that the Court may enter an order in this cause outside this term of Court.

3. An Order was entered with the consent of the parties pursuant to a Memorandum of Judgment during the January 6, 1993 term of Court by the Honorable L. Oliver Noble, Jr.; however, this order was not reduced to typewritten version, signed and filed until July 13, 1993.

4. The above-mentioned Order set a court review of the visitation order for the July 21-23, 1993 term of court. The Order also transferred venue by consent of the parties to Caldwell County where the Defendant resides. The parties have agreed that this file may be transferred to Caldwell County after this term's review hearing.

5. Plaintiff currently resides in Santa Monica, California where he is a free lance production supervisor for commercials, movies and other media projects. Since the January 1993 Order, Plaintiff has had to turn down certain production jobs in order to enjoy visitation with his son and comply with the Court order. It is not reasonable to expect the Plaintiff to work outside his chosen field, when more flexibility in the visitation schedule would allow him to continue his career and earn a substantial salary from it.

6. Plaintiff is looking for employment in his field closer to North Carolina to be closer to his son, and specifically is looking at Atlanta for freelance production work or a salaried position with one company.

7. Under the current order, Plaintiff has been obligated to physically pick up his son from the Hickory or Charlotte airport, take him to California or to Memphis, where he has family, and personally return Chase to Hickory all at great expense and inconvenience. He has, however, procured a safe and reasonable plan with a career US Air flight attendant who lives in Charlotte but travels to California frequently.

8. Plaintiff is a well spoken, responsible and mature adult who clearly loves his son and wants to be an important part of his son's life. He is, in fact, a very fit and proper person to have the care, custody and control of his son, Chase and to enjoy all of the rights of visitation with him.

9. Defendant testified that the one week visitation between father and son went well, but that the two week period was difficult on the minor child. The Court realizes that cross-country visitation for any child is out of the ordinary; however, Chase is only two and one-half years old, and any travel or difference in routine can be an adjustment and difficult for parents. The Court has no evidence that such visitation is emotionally or physically harmful to the minor child.

10. The minor child has some apparent allergies that require avoidance of many irritants, including dairy products. Plaintiff has shown an ability and willingness to deal with these health problems reasonably and responsibly.

11. Defendant, on the other hand, appears to the Court to be an over-protective mother. While she clearly loves her son and states that she wants him to have good relationship with his father, she makes the ability to have the father/son relationship very difficult with her demands for Chase's care. The Court refers specifically to Plaintiff Exhibit No. 2 received in evidence and incorporated as findings of fact as if fully set out herein, which is a nine (9) page list of instructions for Plaintiff to follow. These instructions include requiring that Plaintiff place a harness or leash on Chase when out with him, requiring that Chase be given popcorn every night as a snack "(for constipation)," and requires Plaintiff to affirm with his signature that he has read the instructions and agrees with it all.

12. Because of this over-protectiveness, the Court wonders whether this young child has a chance to be an active, normal

young toddler. He needs to be able to play, get dirty, explore safely in order to develop into a well-adjusted child.

13. It is in the minor child's best interests that this visitation schedule be adjusted so that the Plaintiff be able to spend more significant time with his father and obtain a healthy schedule at his father's house.

From this Order, defendant appealed.

Gaither, Gorham and Crone, by John W. Crone, III and Veronica M. Guarino, for plaintiff-appellee.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellant.

ORR, Judge.

[1] The dispositive issue before this Court is whether the trial court abused its discretion in modifying the 16 December 1991 Order, which set forth the original child custody and visitation schedule for the parties in this action. Defendant first contends that the trial court improperly modified custody, not visitation, when the only relief plaintiff sought was modification of the visitation schedule. We find this contention to be without merit.

It is well established that a court decree awarding custody of a minor child is never final in nature. *Ellenberger v. Ellenberger*, 63 N.C. App. 721, 723, 306 S.E.2d 190, 191, *disc. review allowed*, 309 N.C. 631, 308 S.E.2d 714 (1983). "Such a decree determines only the *present rights* with respect to such custody. . . ." *Id.* (quoting *Neighbors v. Neighbors*, 236 N.C. 531, 533, 73 S.E.2d 153, 154 (1952) (emphasis added) (citations omitted)). With respect to modification of a custody order, N.C. Gen. Stat. § 50-13.7 states in part as follows:

> (a) An order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. . . .

N.C. Gen. Stat. § 50-13.7(a) (1987).

Thus, "[o]nce the custody of a minor child is judicially determined, that order of the court cannot be altered until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child, *Hamilton v. Hamilton*, 93 N.C. App. 639,

647, 379 S.E.2d 93, 97 (1989); N.C.G.S. § 50-13.7(a) (1987); and (2) a change in custody is in the best interest of the child." *Dobos v. Dobos*, 111 N.C. App. 222, 226, 431 S.E.2d 861, 863 (1993) (quoting *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992)). "Changed circumstances" as used in N.C. Gen. Stat. § 50-13.7(a), means "such a change as affects the welfare of the child." *In re Harrell*, 11 N.C. App. 351, 354, 181 S.E.2d 188, 189 (1971). In *Ramirez-Barker*, this Court stated:

> It is not necessary that adverse effects on the child manifest themselves before a Court can alter custody . . . . It is sufficient if the changed circumstances show that the child will likely or probably be adversely affected.

Ramirez-Barker, 107 N.C. App at 78, 418 S.E.2d at 679 (citation omitted). "It is neither 'necessary nor desirable to wait until the child is actually harmed to make a change' in custody." *Id.*, (quoting *Domingues v. Johnson*, 323 Md. 486, 500, 593 A.2d 1133, 1139 (1991)).

The moving party has the burden of showing a substantial change of circumstances affecting the welfare of the child. *Kelly v. Kelly*, 77 N.C. App. 632, 636, 335 S.E.2d 780, 783 (1985). If the party with the burden of proof does not show that there has been a substantial change in circumstances, the "best interest" question is not reached. *Ramirez-Barker*, 107 N.C. App at 77, 418 S.E.2d at 678.

Under N.C. Gen. Stat. § 50-13.2, the best interest and welfare of the child is the paramount consideration in determining the custody and visitation rights. N.C. Gen. Stat. § 50-13.2 (1987); *In re DiMatteo*, 62 N.C. App. 571, 303 S.E.2d 84 (1983). However, trial court judges have broad discretion to determine what is in the best interest of the child in custody and visitation cases.

> [C]ustody cases often involve difficult decisions. However, it is necessary that the trial judge be given wide discretion in making his determination for "the trial judge has the opportunity to see the parties in person and to hear the witnesses."

Pruneau v. Sanders, 25 N.C. App. 510, 516, 214 S.E.2d 288, 292, *cert denied*, 287 N.C. 664, 216 S.E.2d 911 (1975) (quoting *Greer v. Greer*, 5 N.C. App. 160, 161, 167 S.E.2d 782, 783 (1969)). "The trial judge is entrusted by this section with the delicate and difficult task of choosing an environment which will, in his judgment, best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties." *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667

(1982). The trial judge's decision shall not be upset on appeal absent a clear showing of abuse of discretion. *Falls v. Falls*, 52 N.C. App. 203, 209, 278 S.E.2d 546, 551, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 831 (1981). Our Supreme Court has said "visitation privileges are but a lesser degree of custody" and that the word "custody", as used in N.C. Gen. Stat. § 50-13.7(a), was intended to encompass visitation rights as well as general custody. *Clark v. Clark*, 294 N.C. 554, 575, 243 S.E.2d 129, 142 (1978); *Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d 900, 906 (1991) ("The word custody under the statute also includes visitation").

The parties in the case at bar entered into a Consent Order on 12 December 1991 providing for the custody and support of their child. This Court has stated that any modification of a consent order for custody and visitation must be based on a showing of a substantial change in circumstances adversely affecting the welfare of the minor child. *See Woncik v. Woncik*, 82 N.C. App. 244, 246, 346 S.E.2d 277, 279 (1986).

In the instant case, the trial court ordered that joint custody remain the same and that "secondary custody" be modified. The court ordered that "Plaintiff shall exercise visitation with the minor child during the months of September, January, April, and June of each year for the entire month, returning the minor child the last day of those months." The court also ordered that plaintiff or his designate, of appropriate age and character, accompany the minor child between California and North Carolina; that plaintiff shall "enjoy all custodial rights while the minor child is in his care . . ."; and that the parties keep one another informed of significant events in the life of the minor child while the child is in the parties' care. The court reserved the issue of child support for a later date.

Nowhere in the trial judge's Order or in the record was primary custody awarded to the plaintiff. Defendant retains primary custody for thirty-six out of fifty-two weeks per year, which is still the majority of the year. Plaintiff merely will visit with the minor child sixteen weeks per year in segments of one month per visit instead of twelve weeks spread out over twelve months as provided for in the 16 December 1991 Order.

We emphasize that we intend no change in well established law that the trial court may not modify child custody except upon proper motion with service and notice upon the opposing party that custody (as opposed to visitation) modification is being sought. *See Jones v.*

Jones, 109 N.C. App. 293, 295-96, 426 S.E.2d 468, 469-470 (1993), and *Clayton v. Clayton*, 54 N.C. App. 612, 614, 284 S.E.2d 125, 127 (1981). Our decision herein is founded upon the determination that only modification of visitation was sought and only visitation was modified. This assignment of error is, therefore, overruled.

[2] Defendant next argues in her brief that the trial court applied the wrong legal standard in modifying the 16 December 1991 Order. She further argues that the court's finding of fact that defendant is an "over-protective mother" is not sufficient to support a conclusion that there had been substantial change in circumstances, justifying modification of the custody order.

Modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child. *Best v. Best*, 81 N.C. App. 337, 343, 344 S.E.2d 363, 367 (1986). "If the evidence supports the findings of fact by the trial court and those findings of fact form a valid basis for the conclusions of law, the judgment entered will not be disturbed on appeal." *Paschall v. Paschall*, 21 N.C. App. 120, 122, 203 S.E.2d 337, 337 (1974). While it is well established that the trial judge is in the best position to observe the parties and witnesses and to hear the evidence,

> [i]t is not sufficient that there may be evidence in the record sufficient to support findings that could have been made. . . . The trial court is required to make specific findings of fact with respect to factors listed in the statute. . . . Such findings are required in order for the appellate court to determine whether the trial court gave "due regard" to the factors listed.

Greer, 101 N.C. App. at 355, 399 S.E.2d at 402 (citations omitted).

At the hearing on 13 July 1993, the evidence was limited to the testimony of the parties and three exhibits. The record shows that no evidence was presented as to the circumstances of the parties on 16 December 1991, 6 January 1993, or 13 July 1993. Rather, all evidence presented concerned the parties' and minor child's then current circumstances. Moreover, the 29 July 1993 Order contains no findings as to the existing circumstances on 16 December 1991, 10 November 1992, 6 January 1993 or 13 July 1993. It contains no findings of changed circumstances since these dates. It contains no Conclusion of Law that a substantial change of circumstances affecting the welfare of the child has occurred. Finally, the Order contains no Conclu-

sion of law that the child will be adversely affected if the Order is not modified. In fact, with respect to the cross-country visitation, the trial judge stated in Finding of Fact No. 9 that "[t]he Court has no evidence that such visitation is emotionally or physically harmful to the minor child."

The court's discretion in child custody and visitation cases is limited by the well established legal standard for modification of custody and visitation orders. Evidence of "speculation or conjecture that a detrimental change may take place sometime in the future" will not support a change in custody. *Ramirez-Barker*, 107 N.C. App. at 78, 418 S.E.2d at 679 (quoting *Wehlau v. Witek*, 75 N.C. App. 596, 599, 331 S.E.2d 223, 225 (1985)). The trial court's order is deficient in that it contains insufficient findings and no conclusion of law that "a substantial change of circumstances affecting the welfare of the child has occurred." Without such finding, a modification based solely on the ground that the defendant mother is over-protective is improper. In this case, additional findings of fact and conclusions of law were in order.

We vacate the order of the trial judge and remand this case for new hearing.

Vacated and remanded for new hearing.

Judges EAGLES and JOHN concur.

BETTY LOU GRAGG SMITH, ADMINISTRATRIX OF THE ESTATE OF SHAWN NICHOLAS GRAGG, AND THE STATE OF NORTH CAROLINA, EX REL. BETTY LOU GRAGG SMITH, ADMINISTRATRIX OF THE ESTATE OF SHAWN NICHOLAS GRAGG v. CLINTON IRA PHILLIPS AND WESTERN SURETY COMPANY

No. 9324SC719

(Filed 20 December 1994)

1. Sheriffs, Police, and Other Law Enforcement Officers § 13 (NCI4th)—sheriff's official immunity—waiver shown by bond and insurance

Waiver of a sheriff's official immunity may be shown by the county's purchase of liability insurance as well as by the existence of his official bond. Thus the liability of a sheriff for negligence in the performance of his official duties is not limited to the

amount of his bond where the county has purchased liability insurance which covers the sheriff. N.C.G.S. §§ 153A-435, 58-76-5.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90 et seq.

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

2. Jails, Prisons, and Prisoners § 70 (NCI4th)— inmate threat to self—jailers on notice—no summary judgment in negligence action

The trial court did not err in denying defendant sheriff's motion for summary judgment in an action for negligence in a jail inmate's death by suicide where plaintiff's forecast of evidence was sufficient to support a finding by the jury that the county jailers were on notice that the decedent posed a threat to himself but failed to take adequate measures to safeguard the inmate.

Am Jur 2d, Penal and Correctional Institutions §§ 174 et seq.

Civil liability of prison or jail authorities for self-inflicted injury or death of prisoner. 79 ALR3d 1210.

Appeal by defendants from order entered 5 May 1993 by Judge Charles C. Lamm, Jr., in Avery County Superior Court. Heard in the Court of Appeals 23 March 1994.

On 29 August 1991, plaintiff filed suit against defendant Phillips, the Avery County Sheriff, for negligence resulting in the death of Shawn Gragg, who was an inmate at the Avery County Jail, and joined Western Surety Company, the issuer of Phillips' official bond, as a defendant. Defendants answered plaintiffs' amended complaint, asserting, among other things, governmental immunity to the extent that the County's immunity had not been waived by the purchase of liability insurance and qualified immunity.

On 13 April 1993, defendants filed a motion for summary judgment based on their public official's immunity defense, their governmental immunity defense and their contention that the plaintiff failed to present sufficient evidence to prove each element of her negligence claim. On 5 May 1993, the trial court denied defendants' motion for summary judgment. From this denial, defendants appeal.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Robert C. Ervin, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Tyrus V. Dahl, Jr. and Lawrence Pierce Egerton, for defendant-appellants.

McCRODDEN, Judge.

At the outset we note that appeals from denial of motions for summary judgment, such as the instant one, are interlocutory and typically not allowed because they do not affect a substantial right of the parties. *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). However, when the motion is made on the grounds of sovereign and qualified immunity, such a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity. *Corum v. University of North Carolina*, 97 N.C. App. 527, 532, 389 S.E.2d 596, 599 (1990), *rev'd in part on other grounds*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 61 U.S.L.W. 3369, 121 L. Ed. 2d 431 (1992). In the case *sub judice*, defendants have asserted a claim of governmental immunity and, therefore, their appeal is properly before this Court.

Relying upon two assignments of error, defendants present two arguments for our consideration: (I) the trial court erred in denying defendants' summary judgment motion based upon governmental immunity; and (II) the trial court erred in failing to grant the defendants' motion for summary judgment on the grounds that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law. We reach only the first of these questions.

I.

[1] Defendants first argue that summary judgment should have been granted as to plaintiffs' claims regarding damages in excess of the sheriff's bond. They contend that because sheriffs are subject to official bonds, defendant Phillips may only be liable for negligence in the performance of his official duties to the extent of his official bond, regardless of the county's purchase of liability insurance. We disagree.

Summary judgment is appropriate 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 mat-

ter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The movant bears the burden of establishing that no triable issue exists, and he may do this 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. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

Absent waiver or consent, the doctrine of sovereign immunity provides the State, its counties, and its public officials with absolute and unqualified immunity from suits against them in their official capacities. *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993); *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 172-73, 118 S.E.2d 792, 795 (1961). The general rule is that a public official is immune from suit in his individual capacity for negligence in the performance of his duties unless his alleged actions were corrupt or malicious, or he acted outside the scope of his employment. *Thompson Cadillac-Oldsmobile, Inc. v. Sink Hope Automobile Inc.*, 87 N.C. App. 467, 469, 361 S.E.2d 418, 420 (1987), *disc. review denied*, 321 N.C. 480, 364 S.E.2d 672 (1988). It is generally established that a sheriff is a public official entitled to sovereign immunity and, unless the immunity is waived pursuant to a statute, is protected from suit against him in his official capacity. *Slade v. Vernon*, 110 N.C. App. 422, 426, 429 S.E.2d 744, 746 (1993).

Here, plaintiffs have alleged only that defendant Phillips was negligent in the performance of his official duties. Plaintiffs make no allegations of malicious or corrupt action, actions outside the scope of defendant's duties, or gross negligence. Thus, defendant Phillips, as a public official, may not be sued unless his immunity has been waived somehow.

Counties may waive their governmental immunity for injuries arising out of the negligent or wrongful performance of governmental functions by the purchase of liability insurance. N.C. Gen. Stat. § 153A-435 (1991). Initially, we note that Avery County's liability insurance policy through the North Carolina Counties Liability and Property Insurance Pool Fund explicitly includes the office of county sheriff within the terms of its coverage. While not dispositive of the issue in this case, this does show that Avery County, at least, anticipated that it might be liable for its sheriff's negligence.

Relying on *Messick* and *Slade*, defendants contend that the only applicable waiver of immunity against a sheriff sued in his official capacity is N.C. Gen. Stat. § 58-76-5 (1991), which provides:

> Every person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . or other officer, may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State . . . and every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue or under color of his office.

However, we believe neither case supports defendants' argument.

In *Messick*, the plaintiff filed a cause of action against Catawba County, the sheriff of Catawba County, two of the sheriff's officers, and the Catawba County Board of Commissioners, alleging among other things, negligence on the part of the sheriff and his officers in investigating a child abuse allegation. 110 N.C. App. at 712, 431 S.E.2d at 492. The plaintiff appealed from the trial court's order of summary judgment for the defendants. Noting that the plaintiff did not contend, nor did anything in the record indicate, that the County had purchased liability insurance, the Court held that the action against the County and the County Commissioners was barred by governmental immunity. *Id.* at 714, 431 S.E.2d at 494. The Court then turned to the issue of the sheriff and the officers sued in their official capacities, holding that the bond statute removed the sheriff from the protection of governmental immunity, but only where the surety is joined as a party to the action. *Id.* at 715, 431 S.E.2d at 494.

In *Slade*, the plaintiffs brought suit against both the Sheriff and Chief Jailer of Rockingham County for various acts of negligence. 110 N.C. App. at 424, 429 S.E.2d at 745. The trial court denied defendant's motion for summary judgment based on the immunity defenses, and defendants appealed. In its opinion, this Court gave as an example of a waiver of governmental immunity the County's purchase of liability insurance pursuant to N.C.G.S. § 153A-435. *Id.* at 426, 429 S.E.2d at 746. However, the Court did not analyze the defendants' immunity with respect to this statute, but looked instead to N.C.G.S. § 58-76-5, holding that through this legislation the General Assembly had provided for a cause of action against a sheriff or other officer and his surety. *Id.* Again, there was nothing in the record on appeal in *Slade* to indicate that the county had purchased liability insurance.

Defendant claims that because this Court did not address the governmental immunity issue under section 153A-435 in either *Messick* or *Slade*, it concluded that section 58-76-5 was the only means to effect a waiver of a sheriff's governmental immunity. This does not follow. In both cases, the Court simply turned to the only means available to waive immunity, in the absence of evidence of the purchase of liability insurance. We believe the bond is not the only way to waive immunity as to the negligence of sheriffs and other bonded county officers.

The legislature has prescribed two ways for a sheriff to be sued in his official capacity. Pursuant to N.C.G.S. § 58-76-5, a plaintiff may maintain a suit against a sheriff or other officer and the surety on their official bond for acts of negligence in the performance of their official duties. *William v. Adams*, 288 N.C. 501, 219 S.E.2d 198 (1975). This statute, which works to remove the sheriff from the shield of governmental immunity, has existed for over two centuries. The purpose of the bond was, and still is, to ensure that all persons are made secure in their rights and have an adequate remedy for wrongs done to them. *Kivett v. Young*, 106 N.C 567, 569, 10 S.E. 1019, 1020 (1890).

In 1955, the General Assembly adopted further legislation by which a county may waive its immunity from tort liability to the extent that it has purchased liability insurance for negligence caused by an act or omission of the county or any of its officers, agents, or employees when performing government functions. N.C. Gen. Stat. § 153-9(44) (1955) (current version at N.C.G.S. 153A-435). North Carolina courts, in applying this statute, have held that a police officer may be held liable to the extent that insurance has been purchased. *Fowler v. Valencourt*, 108 N.C. App. 106, 113, 423 S.E.2d 785, 789 (1992), *rev'd in part on other grounds*, 334 N.C. 345, 435 S.E.2d 530 (1993).

Nowhere in this more recent enactment did the legislature expressly or impliedly provide that this statute does not waive governmental immunity as to an official already covered by a mandatory official bond. Rather, we find that when considered in light of the strong trend toward limiting governmental immunity, this latter provision serves to complement the purpose of the bond statute, insuring an adequate remedy for wrongs done to the plaintiff if, as might be found in this case, the bond does not provide an adequate remedy. *See Casey v. Wake County*, 45 N.C. App. 522, 523, 263 S.E.2d 360, 361, *disc. review denied*, 300 N.C. 371, 267 S.E.2d 673 (1980); *Smith v.*

State, 289 N.C. 303, 311, 222 S.E.2d 412, 418 (1976); *Lyon & Sons, Inc. v. Board of Education*, 238 N.C. 24, 27, 76 S.E.2d 553, 555 (1953). To hold as defendants suggest could leave some plaintiffs who have suffered genuine injury from a sheriff's negligent performance of his duties without adequate redress. We believe that this could not have been the intention of the legislature. Therefore, we conclude that waiver of a sheriff's official immunity may be shown by the existence of his official bond as well as by his county's purchase of liability insurance. Since plaintiff in this case alleged and offered proof of Avery County's liability insurance policy, the trial court properly denied defendants' motion to dismiss based upon governmental immunity.

II.

The balance of defendants' issues are unrelated to the issue of immunity and defendants have failed to demonstrate how any substantial right would be affected if these issues are not reviewed now. *See Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978). Nevertheless, in the interest of judicial economy, we exercise our discretionary power to suspend the rules pertaining to interlocutory appeals and address the remainder of defendants' appeal. N.C.R. App. 2.

[2] Defendants argue that the trial court erred in denying their motion for summary judgment because there was a "complete absence" of evidence to show that the jailers were aware of the likelihood of the decedent's suicide. We disagree.

A prison officer may be held liable when he knows of, or in the exercise of reasonable care should anticipate, danger to his prisoner and fails to take adequate measures to safeguard the prisoner, *Williams v. Adams*, 288 N.C. 501, 504, 219 S.E.2d 198, 200 (1975), and a jailer may be held liable for the suicide of a prisoner if he had knowledge, or reason to know, that the prisoner was a danger to himself and failed to take adequate precautions. *Helmly v. Bebber*, 77 N.C App. 275, 335 S.E.2d 182 (1985).

Summary judgment is not favored in negligence cases, particularly in cases such as this one, in which the foreseeability of a prisoner's suicide is generally an issue for the jury. *Id.* at 280-81, 335 S.E.2d at 186. When facing a motion for summary judgment, the trial court must consider all the evidence in the light most favorable to the nonmovant, giving him the benefit of every doubt and drawing every rea-

sonable inference in his favor. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

In the light most favorable to plaintiff, the forecast of evidence reveals the following: Shawn Gragg, a seventeen-year-old, was an inmate at the Avery County Jail pending charges from 3 August 1990 until his death by suicide on 18 September 1990. On 18 September 1990, at approximately 4:30 p.m., jailer Patrick Tolley was making his rounds when Gragg asked to speak to another officer, Mark Phillips. Gragg also stated that he would like to take a shower later that afternoon. Tolley informed Gragg that he would speak to Phillips and would return in a few minutes to take Gragg for his shower. When Tolley returned approximately twenty-four minutes later, he discovered that Gragg had hanged himself with a sheet.

The Avery County Jail Manual provided that officers should:

> [R]outinely observe all inmates, especially those newly admitted or just sentenced, for abnormal behavior indicative of potential suicide, such as:
>
> 1. Depression
> 2. Sleeping difficulties
> 3. Withdrawal from others
> 4. Apathy, despondency
> 5. Slow walking
> 6. Slumped sitting
> 7. Frequent crying
> 8. Easily fatigued
> 9. Weight loss
> 10. Loss of appetite
> 11. Talks of suicide
> 12. Sudden mood changes
> 13. Agitation
> 14. Overt psychosis

Although these indicia are not dispositive of the standard of care, they are significant in that they show what defendant considered to be outward manifestations of a suicidal intent, and represent some evidence of what a reasonable jailer would have observed in a pris-

oner. *See Slade v. Board of Education*, 10 N.C. App. 287, 296, 178 S.E.2d 316, 321-322, *cert. denied*, 278 N.C. 104, 179 S.E.2d 453 (1971). Plaintiff presented evidence tending to show that the decedent had exhibited at least four of these indicia.

Several witnesses who visited the decedent in jail testified that they believed that he was depressed. Decedent's mother testified that she asked jail officials to keep an eye on him.

Dawn Dellinger (Dellinger), a friend of the decedent who had been his seventh grade teacher, averred in her affidavit that decedent had called her on several occasions at night and had told her that he had been having difficulty sleeping.

Prior to his death, the decedent had been confined to an isolation cell. Dellinger stated that decedent had told her that "he was going nuts because of being kept off by himself."

There was evidence that the decedent had cried while incarcerated. One of his jailers testified that she had seen decedent cry, and Dellinger stated that the decedent had been crying during at least half of the telephone conversation she had had with him while he was in jail.

Each of these behaviors was observable by the jailers, who presumably supervised decedent at all times.

We conclude that plaintiff's forecast of evidence was sufficient to support a finding by the jury that the Avery County jailers were on notice that the decedent posed a threat to himself and the trial court properly denied summary judgment on that ground.

We affirm the order of the trial court.

Affirmed.

Judges EAGLES and MARTIN concur.

Opinion written and concurred in prior to 16 December 1994.

FLEET NATIONAL BANK, PLAINTIFF v. RALEIGH OAKS JOINT VENTURE, RALEIGH OAKS SHOPPING CENTER INC. AND SEYMOUR VOGEL, DEFENDANTS

No. 9310SC1276

(Filed 20 December 1994)

1. Mortgages and Deeds of Trust § 117 (NCI4th)— deficiency action—actual notice of foreclosure proceeding—personal service not required

The individual defendant could not argue that he could not be held liable for the deficiency after a foreclosure sale because he was not personally served with notice of the foreclosure hearing, where defendant had actual knowledge of the foreclosure proceeding. N.C.G.S. § 45-16.21(b)(2)

Am Jur 2d, Mortgages §§ 905 et seq.

2. Mortgages and Deeds of Trust § 117 (NCI4th)— foreclosure sale—purchase by mortgagee—leasehold interest—G.S. 45-21.36 inapplicable

Defendants in an action to recover a deficiency after a foreclosure were not permitted to assert the defense of N.C.G.S. § 45-21.36 that at any foreclosure sale at which the mortgagee is the purchaser and thereafter sues for a deficiency remaining on the indebtedness secured by the property, the mortgagor may assert as a defense that the property foreclosed upon was worth the amount of the debt secured by it at the time of the sale or that the amount bid was substantially less than the property's true value, since by its own terms, the statute applies only to sales of real estate, and the leasehold interest sold here was not "real estate" within the meaning of the statute.

Am Jur 2d, Mortgages § 922.

Judge THOMPSON concurring.

Appeal by defendants from judgment entered 20 September 1993 by Judge Wiley F. Bowen in Wake County Superior Court. Heard in the Court of Appeals 14 September 1994.

Defendant Raleigh Oaks Joint Venture (ROJV) is a Tennessee joint venture. Its principals are defendants Raleigh Oaks Shopping Center Inc. (ROSC) and Seymour Vogel. In December 1988 Fleet

National Bank (Fleet) loaned ROJV money to build a shopping center in Raleigh, North Carolina, on property which ROJV leased for ninety-nine years from Lois and Randolph Jeffreys. ROJV executed a promissory note for the loan amount which was secured by a deed of trust on the leasehold estate.

The loan agreement and the deed of trust required ROJV to keep the lease in full force and effect. ROJV apparently defaulted on the lease, after which Fleet accelerated the indebtedness. In September 1990 Fleet filed a complaint against all three defendants for recovery of the amount due on the note. In April or May 1991 Fleet instituted foreclosure proceedings on the leasehold estate. The trustee served notice of foreclosure personally on ROJV and ROSC, but, after a failed attempt to serve Vogel personally, the trustee served him by posting notice on the shopping center property. At the foreclosure hearing the Clerk of Wake County Superior Court found that all parties were properly notified and allowed the trustee to proceed with the foreclosure sale. Fleet, the only bidder at the sale, purchased the lease for less than the amount remaining due on the note.

When Fleet sought recovery of the deficiency, Vogel moved to dismiss on the ground that he was never personally served with notice of the foreclosure. All defendants moved to supplement their answer to include the defense in N.C. Gen. Stat. § 45-21.36 (1991). Both defense motions were denied, but plaintiff's subsequent motion for summary judgment was allowed. The superior court judge entered judgment for Fleet for the amount remaining due on the note. From this judgment defendants appeal.

McMillan, Kimzey & Smith, by James M. Kimzey and Katherine E. Jean, for Lois and Randolph Jeffreys, assignees of plaintiff appellee.

Howard, From, Stallings & Hutson, P.A., by Lewis E. Lamb III and John N. Hutson, Jr., for defendant appellants.

ARNOLD, Chief Judge.

[1] Vogel argues that he cannot be held liable for the deficiency after the foreclosure sale because he was not personally served with notice of the foreclosure hearing. The record reveals that the trustee attempted personal service on Vogel by mailing notice of the hearing by certified mail to the address specified by Vogel in the deed of trust. This attempt at service failed because Vogel had moved to Florida.

The trustee also mailed notice by certified mail to ROJV "c/o Seymour Vogel" at ROJV's Raleigh address. This notice was accepted by one of ROJV's agents. The trustee also served notice by posting on the property pursuant to N.C. Gen. Stat. § 45-21.16(a).

Vogel's attorney, who represents ROJV and ROSC as well, stated in an affidavit that he was not aware of a service problem until twenty-two months after the foreclosure hearing. Nonetheless, Vogel contends that his attorney appeared at the hearing only on behalf of ROJV. Vogel admits he had actual notice of the hearing, but he did not attend the hearing or raise an objection to service, nor did he appeal from the clerk's finding that all parties were properly served. The objection to service was raised shortly before Fleet's action on the note arose for trial.

G.S. § 45-21.16 provides that the notice required for foreclosure under a power of sale

> [S]hall 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 for a period of not less than 20 days before the date of the hearing; 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 for a period of not less than 20 days before the date of hearing. . . .

Vogel contends that Fleet knew his Florida address because Fleet corresponded with him in Florida several times in late 1990 and early 1991. Because his Florida address was easily ascertainable, Vogel argues that the trustee did not use reasonable and diligent efforts to personally serve him, and notice by posting was therefore invalid. Vogel further argues that because notice by posting was invalid he is not liable for the deficiency on the note by virtue of G.S. § 45-21.16(b)(2) which provides that any person liable on an indebtedness who does not receive notice "shall not be liable for any deficiency remaining after the [foreclosure] sale."

Deciding whether or not the trustee used reasonable and diligent efforts to personally serve Vogel is unnecessary, because Vogel may

not assert the defense in G.S. § 45-21.16(b)(2) since he had actual knowledge of the foreclosure hearing. In *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975), our previous foreclosure statute was declared unconstitutional because it did not provide adequate notice of foreclosure and did not provide a foreclosure hearing. G.S. § 45-21.16 was enacted to satisfy these minimum due process requirements. *In re Foreclosure of Sutton Invs.*, 46 N.C. App. 654, 266 S.E.2d 686, *disc. review denied, appeal dismissed*, 301 N.C. 90 (1980). It was designed to insure that the mortgagor receive actual notice of the foreclosure hearing. *See Federal Land Bank v. Lackey*, 94 N.C. App. 553, 380 S.E.2d 538 (1989), *aff'd per curiam*, 326 N.C. 478, 390 S.E.2d 138 (1990). Due process demands that the trustee make diligent efforts to give the mortgagor actual notice of the foreclosure hearing so that the mortgagor may assert any available defenses to foreclosure or take advantage of the equitable relief found in G.S. § 45-21.34. *See In re Watts*, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

It is undisputed that Vogel received actual notice of the foreclosure hearing and could have taken advantage of the relief provided in G.S. § 45-21.34, assuming he had grounds, or he could have objected to the method of service. Instead, he chose to sit on his rights and allow the foreclosure to proceed. He may not argue now that service on him was inadequate.

Vogel argues that this Court's decision in *PMB Inc. v. Rosenfeld*, 48 N.C. App. 736, 269 S.E.2d 748 (1980), *disc. review denied*, 301 N.C. 722, 274 S.E.2d 231 (1981), renders actual notice irrelevant. Although actual notice was deemed irrelevant in *PMB*, that holding was limited to the facts of that case. In *PMB*, the only evidence of notice to the mortgagor was a purported letter to, and telephone conversation with, the mortgagor's attorney. The Court in *PMB* stated that the "[m]ortgagor's actual knowledge is irrelevant in *this case*. G.S. § 45-21.16 is clear in its requirement that notice shall be served in such a manner that there will be unbiased and reliable extrinsic evidence of the fact notice was served." *PMB*, 48 N.C. App. at 737, 269 S.E.2d at 749 (emphasis added). These concerns over record evidence of service are not present here where the record shows compliance with the posting requirements in G.S. § 45-21.16.

[2] All defendants argue that they should be permitted to assert the defense in G.S. § 45-21.36. G.S. § 45-21.36 provides that at any foreclosure sale at which the mortgagee is the purchaser and thereafter sues for a deficiency remaining on the indebtedness secured by the

property, the mortgagor may assert as a defense that the property foreclosed upon was worth the amount of the debt secured by it at the time of the sale, or that the amount bid was substantially less than the property's true value. Defendants produced evidence that the lease was worth substantially more than Fleet's bid, but the superior court judge denied defendants' motion to include this defense in their answer because "the property foreclosed was a leasehold interest in real property rather than 'real estate' as specified in the statute . . . ." The judge's ruling was correct.

By its own terms G.S. § 45-21.36 applies only to sales of real estate. "[A] lease is a species of personal property[,]" *Real Estate Trust v. Debnam*, 299 N.C. 510, 513, 263 S.E.2d 595, 597 (1980), and as such it is outside the scope of G.S. § 45-21.36. Defendants contend, however, that when the General Assembly amended Chapter 45 to include sales of leasehold interests within the meaning of "sales" in Article 2A, it intended to include sales of leasehold interests within the meaning of "any sale of real estate" in G.S. § 45-21.36. We disagree.

Defendants refer to the amendment of G.S. § 45-21.1, the definitions section of Article 2A. G.S. § 45-21.1 plainly states, however, that the definitions in that section apply to the provisions of Article 2A. G.S. § 45-21.36 is in Article 2B. Defendants' interpretation of Chapter 45 is therefore precluded by the terms of G.S. § 45-21.1.

Furthermore, the General Assembly has twice amended Chapter 45 to clarify that foreclosures of leasehold interests are governed by the procedural guidelines in Article 2A. On neither occasion did the General Assembly make changes indicating an intention to include leasehold interests within the coverage of Article 2B. If the General Assembly had such an intention, it easily could have stated it. The General Assembly's silence on this subject is convincing proof that defendants, as lessees, lack standing to assert the defense in G.S. § 45-21.36.

The superior court's order is affirmed.

Affirmed.

Judge MARTIN concurs.

Judge THOMPSON concurs with separate opinion.

Judge THOMPSON concurring.

I concur in the decision that the superior court's order should be affirmed. I would, however, base the decision upon the ground that, under the circumstances, the substitute trustee made reasonable and diligent efforts to serve Vogel personally. These efforts included the following:

(1) The trustee mailed notice of the hearing addressed to Vogel personally by certified mail to the address which was stipulated in the deed of trust as the address to which notice of forfeiture should be sent for "Raleigh Oaks Joint Venture, c/o Seymour Vogel." Under the terms of that instrument "any party may designate a change of address by written notice to the other. . . ." There is no evidence in the record that Vogel ever sent Fleet a notice of change of address.

(2) Although the notice that the trustee sent to Vogel personally was returned unaccepted, an identical notice that the trustee sent by certified mail to "Raleigh Oaks Joint Venture, c/o Seymour Vogel" at the same Raleigh address, "4600 Marriott Drive, Suite 130," was accepted by a Wm. Loggins, who was present in that office on May 15, 1991. Vogel presented no evidence that the person who accepted service for him at the Raleigh address was not authorized to do so. Moreover, in his answer to the complaint in this action, filed on November 19, 1990, just six months before the trustee instituted the foreclosure proceedings, and a year after he contends he moved to Florida, Vogel admitted that he was then a citizen and resident of North Carolina.

(3) When the notice of hearing addressed to Vogel personally was returned undelivered, the trustee undertook to serve Vogel through the Wake County Sheriff's Department, which returned the service indicating that Mr. Vogel could not be found at that address.

(4) It was then that the trustee posted the notice of hearing on the property to be foreclosed, as described in the court's opinion. I conclude that, despite the fact that Fleet's Tennessee attorneys had corresponded with Vogel with regard to a loan on Tennessee property at a time when Vogel was in Florida, the trustee made reasonable and diligent efforts to serve Vogel personally. *Compare Federal Land Bank v. Lackey*, 94 N.C. App. 553, 380 S.E.2d 538 (1989), *aff'd per curiam*, 326 N.C. 478, 390 S.E.2d 138 (1990). The fact that Vogel had actual notice of the foreclosure hearing merely establishes the equitable nature of this result and further supports the trial court's decision.

I conclude that all of the factors present in this case acted in complimentary fashion to validate the service.

STATE OF NORTH CAROLINA v. SCOTT AARON GARREN

STATE OF NORTH CAROLINA v. MARK STEVEN DENNY

No. 9330SC1029

No. 9330SC1034

(Filed 20 December 1994)

Counties § 91 (NCI4th); Municipal Corporations § 328 (NCI4th)— county noise ordinance—one section overbroad and unconstitutional—one section constitutional and enforceable

A provision of a county noise ordinance declaring any singing, yelling, or playing of any radio, amplifier, musical instrument, phonograph, loudspeaker or other device producing sound to be a "loud, raucous and disturbing noise" in violation of the ordinance regardless of the level of sound or actual impact upon a person was unconstitutionally overbroad. However, a provision of the ordinance prohibiting any "loud, raucous and disturbing noise" which is defined as any sound which "annoys, disturbs, injures or endangers the comfort, health, peace or safety of reasonable persons of ordinary sensibilities" was valid and separable from the unconstitutional provision.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 443 et seq.

Appeal by the State from order entered 4 August 1993 in Jackson County Superior Court by Judge Julia V. Jones. Heard in the Court of Appeals 7 June 1994.

W. Paul Holt, Jr., P.A., by W. Paul Holt, Jr. and B. David Steinbicker, Jr., for State-appellant.

Haire, Bridgers & Spiro, P.A., by R. Phillip Haire, for defendant-appellee Mark Steven Denny.

No brief filed by defendant Scott Aaron Garren.

GREENE, Judge.

The State of North Carolina (the State) appeals from an order entered by Superior Court Judge Julia V. Jones on 4 August 1993, affirming the 27 May 1993 orders of District Court Judge Steven J. Bryant, declaring Section 1-1(b)(3) of the Jackson County Noise Ordinance unconstitutional and dismissing charges brought against Mark Steven Denny (Denny) and Scott Aaron Garren (Garren). *See* N.C. R. App. P. 40 (1994) (this Court may consolidate cases which involve common questions of law).

The Jackson County Board of Commissioners adopted a noise ordinance on 2 December 1991 which provides in pertinent part:

Section 1-1. Loud, Raucous and Disturbing Noise.

(a) It shall be unlawful for any person or group of persons, regardless of number, to willfully make, continue or cause to be made or continue any loud, raucous and disturbing noise, which term shall mean any sound which, because of its volume level, duration and character, annoys, disturbs, injures or endangers the comfort, health, peace or safety of reasonable persons of ordinary sensibilities within the limits of the County of Jackson. The term loud, raucous and disturbing noise shall be limited to loud, raucous and disturbing noises heard upon the public streets, in any public park, in any school or public building or upon the grounds thereof while in use, in any church or hospital or upon the grounds thereof while in use, upon any parking lot open to members of the public as invitees or licensees, or in any occupied residential unit which is not the source of the noise or upon the grounds thereof.

(b) In addition to the common meaning of words, the following definitions shall be used in interpreting this ordinance and the following acts, among others, **are declared to be loud, raucous and disturbing noises in violation of this ordinance**, but said enumeration shall not be deemed to be exclusive: . . .

(3) Radios, amplifiers, phonographs, group gatherings, etc. Singing, yelling, or the using, operating or permitting to be played, used or operated any radio, amplifier, musical instrument, phonograph, interior or exterior loudspeak-

> ers, or other device for the producing or reproducing of sound in such manner as to cause loud, raucous and disturbing noise.

Jackson County, N.C., Noise Ordinance art. I, §§ 1-1(a), (b)(3) (1991).

On 12 November 1992, Denny was charged with violating the noise ordinance "by playing sterio [sic] to [sic] loud." On 22 March 1993, Denny made a motion to dismiss the charge as unconstitutionally vague, indefinite and ambiguous in that the noise ordinance "does not allege an offense," "fails to adequately charge [Denny] with any offense against the laws of the State of North Carolina and ordinances of the County of Jackson," "does not apprise [Denny] of the charge against him with sufficient specificity to permit him to adequately prepare a defense," and "deprive[s] [Denny] of the rights guaranteed to him under the due process clause of the Fifth Amendment and under that clause of the Sixth Amendment guaranteeing to a Defendant the right to be informed of the nature and cause of the accusation." On 27 May 1993, Judge Bryant declared Section 1-1(b)(3) of the noise ordinance unconstitutional and allowed Denny's motion to dismiss.

On 3 April 1993, Garren was charged with violating the noise ordinance by having "a live band outside of residance [sic] playing very loud causing a disturbance to the neighbors." Before trial, Garren made an oral motion to dismiss. Judge Bryant declared Section 1-1(b)(3) unconstitutional and allowed Garren's motion on 19 April 1993. The State appealed to Jackson County Superior Court, contending "the Noise Ordinance is not unconstitutionally vague" and requesting "the matter be reviewed as provided by law."

The issue presented is whether Section 1-1(b)(3) of Jackson County's noise ordinance is unconstitutional where the ordinance declares that certain sounds are, as a matter of law, "loud, raucous and disturbing" noises and therefore violative of the ordinance.

Jackson County, pursuant to N.C. Gen. Stat. § 153A-133, enacted a noise ordinance on 2 December 1991. *See* N.C.G.S. § 153A-133 (1991) ("county may by ordinance regulate, restrict, or prohibit the production or emission of noises or amplified speech, music, or other sounds that tend to annoy, disturb, or frighten its citizens"). Noise ordinances present a great deal of problems in drafting and enforcing them because "[t]he nature of sound makes resort to broadly stated definitions and prohibitions not only common but difficult to avoid."

People v. New York Trap Rock Corp., 442 N.E.2d 1222, 1226 (N.Y. 1982). A court may forbid enforcement of a noise statute or ordinance for overbreadth where it "reaches more broadly than is reasonably necessary to protect legitimate state interests" "at the expense of First Amendment freedoms." *Reeves v. McConn*, 631 F.2d 377, 383 (1980), *reh'g denied*, 638 F.2d 762 (5th Cir. 1981). As the Fifth Circuit explained in *Reeves*,

> most citizens desire protection from unreasonable or disruptive levels of noise on the streets and from uninvited noise within the privacy of their homes. We say nothing today that prevents the city from granting that protection. When the city fears disruption, it may prohibit conduct that actually causes, or imminently threatens to cause, material and substantial disruption of the community or invasion of the rights of others. Or the city may reasonably prohibit kinds or degrees of sound amplification that are clearly incompatible with the normal activity of certain locations at certain times. But the city may not broadly prohibit reasonably amplified speech merely because of an undifferentiated fear that disruption might sometimes result. When First Amendment freedoms are involved, the city may protect its legitimate interests only with precision.

Reeves, 631 F.2d at 388. Music, be it singing, from the radio, played on a phonograph, etc., falls within these protected freedoms. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 L. Ed. 2d 671 (1981). An ordinance which is overbroad, however, may be upheld as valid where it has "been afforded a narrowing construction by the state courts sufficient to limit its application to unprotected expression" or "the provision is readily susceptible to such an interpretation." *Fratiello v. Mancuso*, 653 F. Supp. 775, 791 (D.R.I. 1987); *see Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031 (1942) (Court upheld statute prohibiting use of "offensive, derisive or annoying word[s]" in public because New Hampshire Supreme Court had construed statute to forbid only "fighting words").

In this case, Section 1-1(b) of Jackson County's noise ordinance attempts to give some examples and definitions as to what constitutes the "loud, raucous and disturbing" noise which is prohibited in Section 1-1(a) by "declaring" certain acts to be "loud, raucous and disturbing noises in violation of this ordinance." Although the ordinance therefore addresses a matter within the county's power to regulate, Section 1-1(b)(3) is drafted too broadly to be upheld as constitution-

al. Section 1-1(b)(3) seeks to ban any singing, yelling, or the playing of any radio, amplifier, musical instrument, phonograph, loudspeakers, or other device producing sound regardless of their level of sound or actual impact on a person. Therefore, at the expense of First Amendment freedoms, Section 1-1(b)(3) "reaches more broadly than is reasonably necessary to protect legitimate state interests," has not been given a narrowing construction, and is not readily susceptible to a narrow interpretation. *See Moore v. City of Gulf Shores*, 542 So. 2d 322 (Ala. Crim. App. 1988) (noise ordinance defining unreasonable noise as playing of any musical instrument, appliance, amplifier, loudspeaker, or sound reproduction device as to result in sound being projected off premises so as to be audible in any residential district at any time overbroad); *Fratiello*, 653 F. Supp. 775 (forbidding all "unnecessary noises or sounds . . . which are physically annoying to persons" unconstitutionally overbroad because it extends beyond narrowly-defined classes of unprotected expression, has not been given narrowing construction, and is not necessary to further state interests); *Phillips v. Folcroft*, 305 F. Supp. 766 (E.D. Pa. 1969) (ordinance defining disorderly conduct to include "making of loud and/or unnecessary noises" unconstitutionally overbroad in impinging on free speech and vague in leaving to officials unlimited discretion in choosing who makes "unnecessary" noises). For these reasons, the district court correctly held Section 1-1(b)(3) to be unconstitutional, and we need not address the arguments made that Section 1-1(b)(3) is unconstitutionally vague.

The constitutional infirmity of Section 1-1(b)(3), however, does not require the entire noise ordinance to be declared unconstitutional because Section 1-1(a) is constitutionally valid and separable from Section 1-1(b)(3) and may therefore be given effect. *Decker v. Coleman*, 6 N.C. App. 102, 108, 169 S.E.2d 487, 491 (1969) (constitutional provisions of statute which are separable from unconstitutional provision of same statute will be given effect). Section 1-1(a) does not reach more broadly than is reasonably necessary to protect legitimate state interests and defines "loud, raucous and disturbing" noise as any sound which "annoys, disturbs, injures or endangers the comfort, health, peace or safety of reasonable persons of ordinary sensibilities." Because of this objective standard for measuring what noise is prohibited, Section 1-1(a) is not unconstitutionally overbroad or vague and is therefore valid. *See Grayned v. City of Rockford*, 408 U.S. 104, 33 L. Ed. 2d 222 (1972) (although "noise . . . which disturbs or tends to disturb" are vague terms, they are not unconstitutionally

vague because Court could expect, based on decisions of state court construing similar terms, that state court would give a reasonable, valid and objective construction to terms); *Reeves*, 631 F.2d 377 (based on expectation state court will interpret "disturbing . . . to persons within the area of audibility" objectively, ordinance is constitutional); *City of Madison v. Baumann*, 470 N.W.2d 296 (Wis. 1991) (prohibiting noise tending to unreasonably disturb peace and quiet of persons in vicinity was not unconstitutionally vague because ordinance imposed reasonable person standard that had long been relied on in all branches of law); *City of Marietta v. Grams*, 531 N.E.2d 1331 (Ohio App. 1987) (disturbing order and quiet by clamors or noises at night was not unconstitutionally vague because ordinance could reasonably be construed to outlaw loud continuous noise offensive to reasonable person's common sensibilities and disruptive to basic nighttime activities); *Hooks v. Speedways, Inc.*, 263 N.C. 686, 691-92, 140 S.E.2d 387, 392 (1965) (whether noise rises to level of nuisance depends on their effect, "not on peculiar and unusual individuals but on ordinary, normal and reasonable persons of the locality"); *Jones v. Speedways, Inc.*, 276 N.C. 231, 239-40, 172 S.E.2d 42, 47-48 (1970) (quoting objective standard from *Hooks*); *Trap Rock*, 442 N.E.2d at 1226-27 (defining "unnecessary noise" as "any excessive or unusually loud sound . . . which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a person" is unconstitutionally vague; conviction could be supported on "malice or animosity" or "boiling point" of a particular person); *see also Kovacs v. Cooper*, 336 U.S. 77, 79, 93 L. Ed. 513, 518, *reh'g denied*, 336 U.S. 921, 93 L. Ed. 1083 (1949) (terms "loud and raucous" constitutionally valid because "[w]hile these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden"); *State v. Dorsett*, 3 N.C. App. 331, 335, 164 S.E.2d 607, 610 (1968) (citing *Kovacs* to uphold noise ordinance against vagueness challenge). If, however, "actual experience" with Section 1-1(a) "were to demonstrate that it represents a subjective standard . . . we would not hesitate to change our judgment accordingly." *Reeves*, 631 F.2d at 386. We expect that the ordinance will be enforced based on this objective standard; therefore, there must be some evidence at trial based on this objective standard to support a conviction under Section 1-1(a). Examples include testimony that a person could not hear a person standing next to them or that furniture or windows were rattling from vibrations created by the noise. *See Dorsett*, 3 N.C. App. 331, 164 S.E.2d 607 (State's evidence under noise ordinance showed occupant of house

could not hear her television, windows of occupant's house rattled, and person sitting beside occupant on porch could not hear him, all because of noise from motorcycles).

For these reasons, the district court did not err in declaring Section 1-1(b)(3) to be unconstitutional. This partial unconstitutionality of Jackson County's noise ordinance, however, does not support the granting of Denny and Garren's motions to dismiss the charges, and the trial court erred in allowing their motions. Section 1-1(a) remains a valid and enforceable ordinance, and the State is entitled to proceed with the prosecution of Denny and Garren under this ordinance.

Reversed and remanded.

Judges JOHN and McCRODDEN concur.

Judge McCRODDEN concurred in this opinion prior to 15 December 1994.

HAZARD CANNON, ALVIN OLDS AND NORMAN PHILLIPS v. N.C. STATE BOARD OF EDUCATION, DURHAM COUNTY BOARD OF COMMISSIONERS, DURHAM CITY BOARD OF EDUCATION, DURHAM COUNTY BOARD OF EDUCATION, AND DURHAM COUNTY BOARD OF ELECTIONS

No. 9210SC1211

(Filed 20 December 1994)

Schools § 9 (NCI4th)— school merger ruled unconstitutional by trial court—legislation not curative

The General Assembly could not, by enacting legislation ratifying all school merger plans adopted during a specified period, make constitutional a Durham school merger plan which a court had ruled unconstitutional.

Am Jur 2d, Schools §§ 29 et seq.

Judge WYNN dissenting.

Appeal by plaintiffs from order entered 18 September 1992 by Judge D.B. Herring, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 October 1993.

This appeal arises out of plaintiffs' lawsuit, filed 12 February 1992, to nullify the merger of the Durham County and City school systems, on several bases, including the basis that the merger and the enabling statute, N.C. Gen. Stat. § 115C-68.1 (1991), were unconstitutional. Plaintiffs and defendants moved for summary judgment and after a hearing on the motions, Judge D.B. Herring, Jr. granted summary judgment in favor of the plaintiffs.

From this order, plaintiffs and defendants appealed to this Court. Thereafter both parties petitioned the North Carolina Supreme Court, pursuant to N.C. Gen. Stat. § 7A-31 (1989), for discretionary review prior to determination by this Court, and that Court granted review. In the meantime, however, the General Assembly enacted Chapter 767 of the 1991 Session Laws, which ratified all school merger plans adopted between 9 June 1969 and 26 May 1992, including the Durham merger. Upon motion of the defendants and prior to any determination of the substantive issues, the Supreme Court remanded the case to the Wake County Superior Court for reconsideration of the judgment in light of Chapter 767.

In superior court, defendants filed a motion to dismiss for mootness. Plaintiffs responded to the motion and also moved for summary judgment. On 18 September 1992, Judge Herring entered an order denying plaintiffs' motion for summary judgment and granting defendants' motion to dismiss. From this order, plaintiffs appeal.

Randall, Jervis & Hill, by John C. Randall, for plaintiff-appellants.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Edwin M. Speas, Jr., for defendant-appellee N.C. State Board of Education.

Tharrington, Smith & Hargrove, by Michael Crowell, and Durham County Attorney's Office, by Thomas Russell Odom, for defendant-appellees Durham County Board of Commissioners, Durham City Board of Education, Durham County Board of Education and Durham County Board of Elections.

McCRODDEN, Judge.

In determining whether the trial court erred in finding plaintiffs' claim moot, we must consider whether the legislature's enactment of legislation cured action, *i.e.*, the merger of the Durham schools systems, that the trial court had previously ruled unconstitutional. We find that it did not, and we reverse the trial court.

In their original complaint, plaintiffs alleged, among other things that they would lose "substantial voting rights" as a result of the merger, that the enabling statute unconstitutionally delegated legislative power to county commissioners, that the statute contained a funding mandate that was arbitrary and capricious and denied plaintiffs due process and equal protection of the laws, and that the merger plan was in conflict with N.C. Gen. Stat. §§ 115C-35 and -37 (1991). In its judgment, the trial court found that the merger was unlawful because of "its conflict with each of N.C. Gen. Stat. 115C-35, 153A-76, Chapter 657 of the Session Laws of 1975, Chapter 249 of the Session Laws of 1977, and the following provisions of the North Carolina Constitution: Article II, Sec. 1; Article I, Sec. 19; and Article IX."

Chapter 767 of the 1991 General Assembly Session Laws provides:

> Sec. 2. Article 7 of Chapter 115C of the General Statutes is amended by adding a new section to read:
>
> "§ 115C-68.3. Validation of plans of consolidation and merger.
>
> All plans for consolidation and merger of school administrative units entered into between June 9, 1969, and May 26, 1992, under G.S. 115C-67, 115C-68.1, 115C-68.2, former G.S. 115-74.1, or under any local act authorizing such mergers, are ratified and considered to have been adopted by act of the General Assembly. This Article prevails over G.S. 153A-76(4)."
>
> Sec. 3. For the purpose of clarification, G.S. 115C-67(3)b reads as rewritten:
>
> > "b. . . . To the extent that the method [detailed in the proposed merger plan] conflicts with G.S. 115C-35, G.S. 115C-37, or with any local act concerning any of the units being merged and consolidated, the plan of merger and consolidation shall prevail."

1991 N.C. Sess. Laws ch. 767, §§ 2-3.

Assuming, without deciding, that the curative act was effective to ratify the merger as if it had been accomplished directly by act of the General Assembly, the determination that the merger violated N.C.G.S. §§ 115C-35, 153A-76, the local acts, and Article II, Section 1, *i.e.*, that it was the product of improperly delegated legislative authority, would, indeed, be moot. The trial court's determination that the merger violates Article I, section 19 and Article IX, however, is

distinct. Section 19 of Article I guarantees that: "No person shall be . . . deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws . . . ." N.C. Const. art. I, § 19. Article IX deals with, among other things, uniform systems of schools. N.C. Const. art. IX, § 2. It is important to note that defendants have not cross-assigned as error, pursuant to N.C. R. App. P. 10, the original conclusion of the trial court that the Durham merger violated these two constitutional provisions. It is also noteworthy that the Supreme Court failed to address plaintiffs' constitutional challenges when the case was before it.

"[A] retrospective law, curing defects in acts that have been done, or authorizing or confirming the exercise of powers, is valid in those cases in which the Legislature originally had authority to confer the power or to authorize the act." *Edwards v. Comrs.*, 183 N.C. 58, 60, 110 S.E. 600, 601 (1922). The legislature has no power to enact a law in conflict with the Constitution. *See Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). In this case, the General Assembly could not ratify the merger because, under the previous, uncontested ruling of the trial court, the merger was unconstitutional.

Contrary to the assertion of the dissent, our primary focus is not on the first trial court order. Indeed, as we have pointed out, the parties to this appeal did not present the constitutional issues revolving around that order, and our opinion in no way determines the issue of the first appeal, *i.e.*, the constitutionality of the school merger in Durham County. Our holding is simply that the General Assembly cannot, by enacting legislation, make constitutional that which a court has ruled unconstitutional.

We, therefore, hold that because, under the ruling of the first trial court, the Durham merger plan violated the North Carolina Constitution, Chapter 767 was ineffective as a curative statute vis a vis the Durham school merger. We reverse the trial court's determination of mootness.

Reversed.

Judge LEWIS concurs.

Judge WYNN dissents.

Opinion written and concurred in and dissent written prior to 16 December 1994.

Judge WYNN dissenting.

I respectfully dissent because I believe the majority misidentifies the order which was presented for appellate review. The procedural history of this matter is quite complex. On 12 February 1992, plaintiffs filed an action against defendants challenging a plan adopted pursuant to N.C. Gen. Stat. § 115C-68.1 to merge the Durham City and Durham County school systems. The trial court entered judgment for plaintiffs on 14 April 1992 and defendants appealed. (*"Cannon I"*) On 13 May 1992, both parties petitioned the Supreme Court for review prior to a determination by the Court of Appeals. These petitions were granted on 25 June 1992. On 17 June 1992, the General Assembly enacted Chapter 767 of the 1991 Sessions Laws. Chapter 767 ratified all school merger plans adopted between 9 June 1969 and 26 May 1992, including the Durham merger plan, and declared that the plans were to be "considered to have been adopted by act of the General Assembly."

On 20 July 1992, the Supreme Court remanded this case to the trial court for reconsideration in light of Chapter 767. After a hearing, the trial court entered an order on 18 September 1992 dismissing plaintiffs' action as moot. (*"Cannon II"*) *Cannon II* is the order presented for review before this Court.

In reviewing *Cannon II*, the majority reaches back and reviews *Cannon I*.[1] I believe, however, that the only order presented for our review is the order referred to in plaintiffs' notice of appeal, *Cannon II*. The Supreme Court remanded this case to the trial court for reconsideration in light of the enactment of Chapter 767. The trial court then determined that plaintiffs' claims became moot when Chapter 767 was enacted by the General Assembly. Therefore, the only question before this Court is whether the trial court was correct in concluding that plaintiffs' claims were moot. *See State v. McDowell*, 310 N.C. 61, 310 S.E.2d 301 (1984) (When findings are made in light of a prevailing legal standard, a new explication of the standard requires reconsideration *de novo* based upon the new explication.); *Helms v. Rea*, 282 N.C. 610, 194 S.E.2d 1 (1973) (If a matter is considered under

1. While the majority asserts that its primary focus is not on *Cannon I*, the majority holds "that because, under the ruling of the first trial court, the Durham merger plan violated the North Carolina Constitution, Chapter 767 was ineffective as a curative statute vis a vis the Durham school merger." Upon remand from the Supreme Court, however, the trial court found the enactment of Chapter 767 made plaintiffs' claims moot. This ruling replaced the trial court's previous order upon which the majority relies in reaching its holding.

misapprehension of the law it should be remanded for consideration in its true legal light.). I conclude that plaintiffs' claims became moot after the enactment of Chapter 767 and vote to affirm. *See Benvenue Parent-Teacher Ass'n. v. The Nash County Bd. of Educ.*, 275 N.C. 675, 170 S.E.2d 473 (1969). (When a development occurs by reason of which the question originally in controversy between the parties is no longer at issue, the appeal will be dismissed as moot.).

The majority concludes that in *Cannon I* the trial court found that the school merger violates Article I, section 19 and Article IX of the North Carolina Constitution. The majority places great weight on defendants' failure to cross-assign as error the trial court's conclusion that the merger violated these constitutional provisions pursuant to N.C. R. App. P. 10(d).

I find, however, that defendants were the *appellants* with regard to *Cannon I* and that they properly appealed that order. N.C. R. App. P. 10(d) states in pertinent part: "Without 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." (emphasis added). Defendants, as the appellants in *Cannon I*, were neither required nor expected to make a cross-assignment of error. *See generally, Stevenson v. North Carolina Dept. of Ins.*, 45 N.C. App. 53, 262 S.E.2d 378 (1980).

For the foregoing reasons, I respectfully dissent.

COLLINS COIN MUSIC CO. OF NORTH CAROLINA, INC. AND NORTH CAROLINA AMUSEMENT MACHINES ASSOCIATION, INC. v. NORTH CAROLINA ALCOHOLIC BEVERAGE CONTROL COMMISSION; WILLIAM PAUL POWELL, JR., CHAIRMAN OF THE NORTH CAROLINA ALCOHOLIC BEVERAGE CONTROL COMMISSION; NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY; JOSEPH W. DEAN, JR., SECRETARY OF NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY; AND HORACE M. KIMEL, JR., DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT

No. 9318SC439

(Filed 20 December 1994)

Gambling § 33 (NCI4th)— video card games—chance over dexterity—coupons in excess of $10—illegal slot machines

Plaintiff's video card games were illegal slot machines not falling within the exception of N.C.G.S. § 14-306, since the operation of the games depended upon chance rather than a player's skill or dexterity, and a player could win from a single hand coupons worth more than ten dollars.

Am Jur 2d, Gambling §§ 1-4.

Appeal by plaintiffs from order entered 27 January 1993 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 7 February 1994.

On 16 September 1994, plaintiff filed a Petition for Rehearing this case which had resulted in an unpublished opinion filed 16 August 1994. On 14 November 1994, we allowed that petition but stipulated that the case would be reconsidered without the filing of additional briefs. The following opinion supersedes and replaces the unpublished opinion filed 16 August 1994.

On 14 November 1991, plaintiff Collins Coin Music Co. of North Carolina, Inc. ("Collins") brought this suit, seeking a declaratory judgment that video card games that they owned and operated were not illegal slot machines as defined by N.C. Gen. Stat. § 14-306 (1993). Plaintiff-intervenor North Carolina Amusement Machines Association, Inc. (the "Association"), a non-profit organization that is made up of distributors, suppliers, operators, and manufacturers of amusement machines, joined Collins in this action pursuant to Rule 24(b) of the North Carolina Rules of Civil Procedure. On 4 January 1993, defendants filed a motion for partial summary judgment. Ruling that the video card games were illegal slot machines, the trial court grant-

ed partial summary judgment for defendants on 27 February 1994. From this order, plaintiffs appeal.

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

Carruthers & Roth, P.A., by Richard L. Vanore and Kenneth L. Jones, for plaintiff-appellant.

Daughtry, Woodard, Lawrence & Starling, by N. Leo Daughtry, for plaintiff-intervenor-appellant.

McCRODDEN, Judge.

Our task in reaching the merits of this case is to determine whether the trial court properly entered partial summary judgment based upon its decision that the video card games were illegal slot machines.

Summary judgment is an appropriate device "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact to be tried by the jury and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1 Rule 56(c) (1990). The party moving for summary judgment has the burden of showing 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). The trial court must draw all inferences of fact from the evidence offered at the hearing against the movant and in favor of the party opposing the motion. *Id.*

Evidence presented at the summary judgment hearing, considered in the light most favorable to plaintiffs, tended to show that plaintiff Collins is engaged in the business of owning, installing, and maintaining video games, which include video poker games. The video poker machines, which are at issue in this litigation, operate as follows. The game is activated when a player inserts one or more quarters, or one or five dollar bills into the machine. For each quarter deposited, the player receives one credit. The microprocessor inside the computerized machine then randomly "deals" a video image of five playing cards out of a 52-card deck. The player may then discard as many as five cards and "choose" new cards through the "skill stop" function, which causes the game's microcomputer to flash cards in the positions of the discarded cards. The player may press a button to

stop the images and "choose" his card. A player can "win" a paper coupon with a number of specified credits that can be exchanged for merchandise or food and beverages.

Plaintiffs contend the video poker game is specifically exempt under N.C.G.S. § 14-306 as a game that "depends upon the skill or dexterity of the player," and aver that the game does not constitute a form of gambling but is a permitted form of entertainment.

Section 14-306 defines an illegal slot machine as:

> Any machine, apparatus or device . . . that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such a manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value . . ., or the user may secure additional chances or rights to use such machine . . . .

N.C.G.S. § 14-306. Both plaintiffs and defendants agree that the video game at issue fits within this statutory definition of an illegal slot machine. Plaintiffs, however, contend that the game is expressly excepted from the statutory definition of an illegal slot machine, pursuant to another portion of section 14-306, which provides:

> The definition [of an illegal slot machine] contained in the first paragraph of this section and G.S. 14-296, 14-301, 14-302 and 14-305 does not include coin-operated machines, video games, and devices designed and manufactured for amusement only, the operation of which depends upon the skill or dexterity of the player. Included within this exception are pinball machines, video games, and other mechanical amusement devices that enable the player, based on his skill or dexterity, to make varying scores or tallies and to receive free replays or paper coupons that may be exchanged for prizes with a value not exceeding Ten Dollars ($10.00), but may not be exchanged or converted to money.

N.C.G.S. § 14-306. To except their machine from the definition of an illegal slot machine, plaintiffs must show (1) that the video poker game was designed and manufactured for amusement only, (2) that a player's ability to make varying scores and receive coupons depends upon the skill or dexterity of the player, and (3) that the coupons a player may win are not worth more than ten dollars. The second and third requirements are dispositive.

I.

Plaintiffs assert that the operation of the video machines at issue here depends upon the skill or dexterity of the player, not upon chance. We disagree.

A game of chance is "such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." *State v. Eisen*, 16 N.C. App. 532, 535, 192 S.E.2d 613, 615 (1972) (citation omitted). "A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory." *Id.* at 535, 192 S.E.2d at 615-16 (citation omitted). In *State v. Stroupe*, 238 N.C. 34, 76 S.E.2d 313 (1953), a case involving the legality of the game of pool, our Supreme Court stated:

> It would seem that the test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment.

Id. at 38, 76 S.E.2d at 316-317.

The Supreme Court's test is particularly instructive here. At the summary judgment hearing in the instant case, plaintiffs presented affidavits of experts on mathematics and statistics to the effect that a knowledge of the law of probabilities can sway the outcome of the video game, and that the game's "skill stop" feature allows a player with good hand/eye coordination to fare better than a player whose coordination and dexterity is poor. Plaintiffs acknowledge, however, that except for knowledge of the law of probabilities, all of the skill elements associated with the ordinary game of draw poker are absent in the video version. The game of draw poker, played against other individuals, permits a player to use psychology, bluffing, and knowledge of the law of probabilities relative to the game of poker, to increase his potential win relative to the total number of games played. Psychology and bluffing have no effect on the final outcome of play when playing electronic video poker. *See U.S. v. 294 Various Gambling Devices*, 718 F.Supp. 1236, 1243 (W.D.Pa. 1989).

An additional and perhaps more important fact in our decision is that, although a player's knowledge of statistical probabilities can maximize his winnings in the short term, he cannot determine or influence the result since the cards are drawn at random. *See id.* In the long run, the video game's program, which allows only a predetermined number of winning hands, negates even this limited skill element. The machines have an internal record keeping system to track the number of games played and the number of points won, and allow only a set percentage of winning hands to be dealt. Therefore, over time even the astute player cannot defeat the retention ratio.

Considering the overall operation of the video game, it is clear that a player's knowledge of statistical probabilities can maximize his winnings in the short term, but that he cannot determine or influence the result over the long haul. *See 294 Various Gambling Devices*, 718 F.Supp. at 1243. Hence, we conclude that the element of chance dominates the element of skill in the operation of the video card game.

II.

The evidence also shows that, for one game, a player of the video card game can win coupons which he can exchange for merchandise exceeding ten dollars in value, thus violating the third requirement for an excepted machine. Plaintiffs admit that if a sufficient amount of money is deposited into the machine, a player can use twenty credits in a single game. For each credit of play, the player can be awarded 100 credits of play, and each credit is worth twenty-five cents. If a player uses twenty credits, he may acquire 2,000 credits by keeping or discarding unwanted cards for the purpose of achieving winning combinations. He may then convert 2000 credits from a single hand into coupons which may be exchanged for $500.00 worth of merchandise.

Plaintiffs appear to believe that, because the paper coupons state that they may not be exchanged for prizes with a value exceeding ten dollars, they may award numerous coupons for a single hand and not be an illegal slot machine. It makes no difference whether a single hand of play awards a paper coupon for fifty dollars or ten coupons, each with a value of five dollars. Since a player can win $500.00 worth of prizes in a single hand, the video poker game in this case does not fall within the exception to the definition of illegal gambling.

In sum, we find that the operation of the video card game depends upon chance rather than a player's skill or dexterity and that

a player can win from a single hand coupons worth more than ten dollars. Consequently, plaintiff Collins' machines do not fall within the exception in section 14-306 and are illegal slot machines.

We affirm the trial court's order granting partial summary judgment for defendants.

Affirmed.

Chief Judge ARNOLD and Judge LEWIS concur.

Opinion written and concurred in prior to 16 December 1994.

WAYNE ROBIN JOHNSON, PLAINTIFF v. SANDRA E. JOHNSON, DEFENDANT

No. 9410DC227

(Filed 20 December 1994)

Divorce and Separation § 129 (NCI4th)— equitable distribution—disability retirement benefits—separate property

Evidence in an equitable distribution action was sufficient to support the trial court's conclusion that plaintiff's "disability retirement benefits" above $97.75 per month which he began to receive during the course of the marriage were his separate property, since the benefits would cease if plaintiff recovered from his disability and they were thus intended to reimburse plaintiff for his loss of earning capacity due to his disability.

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.

Appeal by defendant from order entered 3 September 1993 by Judge Joyce A. Hamilton in Wake County District Court. Heard in the Court of Appeals 20 October 1994.

Plaintiff and defendant married in November 1974 and separated after almost twelve years of marriage on 15 June 1986. They were divorced 14 October 1987. On 1 September 1971, plaintiff began working for the City of Raleigh as a firefighter. He became a member of the

Local Governmental Employees Retirement System and began to make regular contributions to the employees' retirement fund as required by G.S. 128-27. Plaintiff continued to work as a firefighter until September 1983 when he took full disability retirement because of glaucoma. At that time, plaintiff began receiving monthly "disability retirement benefits."

After plaintiff and defendant separated, a dispute arose as to whether the "disability retirement benefits" should be classified as marital or separate property for equitable distribution purposes. The trial court noted in its equitable distribution order that the issue concerning the proper characterization of disability benefits was one of first impression in North Carolina. The court then adopted an analytic approach to characterizing the property and made the following findings:

> That the portion of the monthly disability benefits received by [plaintiff] which represent his contributions during the period of his employment while married to [defendant] represents marital property. . . . That the portion of monthly disability benefits which [plaintiff] receives which represents contributions made by him during his employment but prior to the date of the marriage, and all interest thereon, is separate property. . . . That the increased monthly disability benefits received by [plaintiff] which is due to his medical disability is deemed by this Court to replace his loss of future income, and is therefore [plaintiff's] separate property."

From the evidence presented, the trial court determined that the portion of the monthly benefits that represented the accumulated contribution that plaintiff had made to his retirement fund before he took full disability retirement was $97.75 per month. The trial court then stated that the present value of the marital portion of plaintiff's disability benefits was $9,830.00 and that defendant was entitled to one-half of this portion.

Defendant appeals.

Gary S. Lawrence and John H. McWilliam, for plaintiff-appellee Wayne Robin Johnson.

Meredith J. McGill, for defendant-appellant Sandra E. Johnson.

EAGLES, Judge.

Defendant argues on appeal that the "disability retirement benefits" retained their classification as marital property even though dis-

ability rather than age caused plaintiff's retirement. G.S. 50-20(b)(1) classifies vested "pension, retirement, and other deferred compensation rights" as marital property. Whether "disability retirement benefits" fall within the definition of marital property is an issue of first impression in North Carolina. We have carefully considered defendant's contentions but are not persuaded and accordingly, we affirm.

Different jurisdictions have adopted different methods for determining whether to label property as marital or separate. Our Supreme Court has adopted an analytic approach for classifying personal injury awards. Under the analytic approach, the key to determining whether benefits are separate property rather than marital property is to ask what plaintiff's benefits were intended to replace. *Johnson v. Johnson*, 317 N.C. 437, 446-47, 346 S.E.2d 430, 435 (1986). In *Johnson*, our Supreme Court found that a lump sum personal injury award could be classified as partially marital and partially separate property. *Id.* at 454, 346 S.E.2d at 440. There the court stated that courts which use the analytic approach "consistently hold that the portion of [a personal injury] award representing compensation for non-economic loss—i.e., personal suffering and disability—is the separate property of the injured spouse; the portion of an award representing compensation for economic loss . . . during the marriage . . . is marital property." *Id.* at 437-38, 346 S.E.2d at 436. While damages paid to a spouse for personal injuries are not precisely the same as "disability retirement benefits" paid to a spouse, the two situations are in some respects analogous. Accordingly, the issue here, employing the analytic method, is whether the benefits that plaintiff received were truly disability benefits or were retirement benefits (compensation for economic loss).

Here, the trial court's pertinent findings of fact are:

> [T]he local Governmental Employee's Retirement system under which the Plaintiff is covered is such that if . . . [p]laintiff obtains gainful employment, and earns on a monthly basis a sum greater than the difference between the amount . . . [p]laintiff was earning at the time of his retirement and the amount which . . . [p]laintiff is receiving in disability retirement, then . . . [p]laintiff's monthly disability award will be reduced dollar for dollar for each dollar earned by . . . [p]laintiff over and above the difference between his income while employed and his disability payment. . . . [I]f . . . [p]laintiff were to become gainfully employed earning the same amount he was earning at the time he was

placed on disability, then [he] would only receive the amount which he had contributed to his plan. . . . [S]hould . . . [p]laintiff recover from his disability and resume employment from a participating local governmental agency, then . . . [p]laintiff would receive no further disability benefits until such time as his normal retirement.

By employing the analytic method, the trial court found that the amount of plaintiff's "disability retirement benefits" above $97.75 per month was clearly attributable to his physical disability because it was intended to reimburse plaintiff for his loss of earning capacity due to his disability. Accordingly, the trial court found that this amount was plaintiff's separate property.

On appeal, our review is limited to whether there was any competent evidence to support the trial court's findings. *Taylor v. Taylor*, 92 N.C. App. 413, 417, 374 S.E.2d 644, 646 (1988). If there was competent evidence to support the findings, they are conclusive on appeal "*even though the evidence might sustain findings to the contrary.*" *Matter Of Estate Of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991). Here, plaintiff presented evidence at the equitable distribution hearing that if plaintiff recovered from his disability and resumed employment with the City of Raleigh or a participating member in the Retirement System, plaintiff would no longer receive any "disability retirement benefits." Plaintiff would simply resume his contributions to the retirement fund like all other employees and would receive retirement benefits when he retired due to age or number of years of service.

There also was evidence that once an employee's right to retirement benefits vests (plaintiff's right to retirement benefits here vested after five years of service) and the employee retires, the employee "can earn any amount and it [will not] affect [the employee's] retirement benefit[s]." However, under the Local Governmental Employees Retirement System, plaintiff would stop receiving "disability retirement benefits" if plaintiff's disability ended. All of this evidence supports the conclusion that the "disability retirement benefits" are not true retirement benefits.

The better practice would have been for the trial court to specifically state that the monthly disability benefits received by plaintiff were due to his medical disability and were to replace his loss of earning capacity. Here, the trial court stated that the "disability retirement benefits" were "to replace [plaintiff's] loss of future income"

due to his disability. However, it is clear from all of the trial court's findings of fact that it found that the "disability retirement benefits" were to replace plaintiff's loss of earning capacity. Accordingly, we hold that the evidence presented at trial was sufficient to support the trial court's conclusion that plaintiff's "disability retirement benefits" above $97.75 per month are his separate property.

Cases from other jurisdictions are divided as to how disability benefits should be allocated. "Some states have held that they are similar in nature to personal injury awards and should be categorized under the same rules." Lawrence J. Golden, *Equitable Distribution of Property*, § 6.11 n. 123 (1983 & Brett R. Turner, Supp. 1993). Other states perceive the benefits as replacing lost earnings and as marital property. J. Thomas Oldham, *Divorce, Separation And The Distribution Of Property*, § 8.03[1] (1994). We agree with the states finding that disability benefits which truly compensate for disability are separate property.

For example, in *In re Marriage of Anglin*, 759 P.2d 1224 (Wash. Ct. App. 1988), the court found that the husband's benefits were "subject to review, and [could] be terminated if a medical examination determine[d] that the employee [was] no longer disabled." *Anglin*, 759 P.2d at 1228. From this evidence, the court found that the benefits were truly disability benefits rather than retirement benefits because the award was based solely on his disability. *Id.* at 1229. Accordingly, the court held that the disability benefits were the husband's separate property. *Id.* In *Dolan v. Dolan*, 562 N.Y.S.2d 875, 877 (1990), *aff'd*, 583 N.E.2d 908 (N.Y. 1991), a New York court analyzed payments designated as disability benefits and determined that a portion of the benefits awarded the husband was for length of service and was not truly disability compensation. However, the court also held that the portion of the disability benefits that actually compensated the husband for his physical disabilities was the husband's separate property. *Id.* Similarly, the trial court here recognized that a portion of the "disability retirement benefits" was based upon plaintiff's contribution to the state retirement fund and was not plaintiff's separate property. Like the cases above, the trial court here determined that the remainder of the benefits was plaintiff's separate property.

Public policy also supports our holding that benefits which are truly "disability" benefits should be the separate property of the disabled spouse. When a spouse contributes a portion of his monthly salary to a retirement fund, both spouses actually contribute marital

labor to this fund. If the spouse retires early and begins receiving retirement benefits, it follows that if the spouses divorce, the non-retired spouse still is entitled to a portion of those retirement benefits because that spouse contributed to their acquisition. Here, no marital labor contributed to plaintiff's acquisition of the "disability retirement benefits." Plaintiff did not contribute money specifically to a disability fund. Disability benefits are personal to the spouse who receives them and are that person's separate property.

When a party receives disability benefits after divorce arising from a disability that occurred during the marriage,

> it would be wise for courts to choose an analysis that will allow the award to go the spouse with the greatest need for the benefits. Courts generally should characterize such benefits as the separate property of the disabled spouse. The disabled spouse normally will have higher living expenses post-divorce than the other spouse, and frequently will not be able to earn a significant income.

J. Thomas Oldham, *Divorce, Separation And The Distribution Of Property*, § 8.03[2][e] (1994). This reasoning applies equally well where the disabled spouse begins receiving the benefits during the marriage.

Affirmed.

Judge ORR concurs.

Judge McCRODDEN concurred prior to 15 December 1994.

WADDELL JONES, PLAINTIFF v. KENNETH MICHAEL SUMMERS, DEFENDANT

No. 9413DC115

(Filed 20 December 1994)

Trial § 640 (NCI4th)— authority of court to grant year to refile action—dismissal order not appealed—question not before court on appeal

The court on appeal did not address defendant's contention that the trial court had no authority under N.C.G.S. § 1A-1, Rule 41(b) to grant plaintiff an additional year in which to refile his

action, since defendant did not appeal the trial court's dismissal order which allowed plaintiff the additional year in which to refile.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 41 et seq.; Trial §§ 897 et seq.

Appeal by defendant from judgment entered 6 October 1993, Nunc Pro Tunc 30 September 1993, by Judge Napoleon B. Barefoot, Jr. in Columbus County District Court. Heard in the Court of Appeals 4 October 1994.

This action arises out of an automobile accident that occurred in Wake County on 1 September 1988. On 23 June 1989, plaintiff filed suit against defendant for negligence (89 CVD 661; hereinafter Jones I). On 14 January 1991, plaintiff voluntarily dismissed Jones I without prejudice pursuant to G.S. 1A-1, Rule 41(a).

On 9 September 1991, plaintiff refiled his claim against defendant (91 CVD 826; hereinafter Jones II). Defendant answered and moved for an involuntary dismissal pursuant to G.S. 1A-1, Rule 12(b)(4) for insufficient service of process. On 25 August 1992, the trial court found that service of process on defendant was insufficient and ordered an involuntary dismissal. In its order granting defendant's motion for an involuntary dismissal, the trial court stated:

> 2. That the Defendant's Motion to Dismiss based upon insufficiency of service of process is hereby allowed, but that because of the nature of the technicality upon which this lawsuit is being dismissed, this dismissal shall be without prejudice, and pursuant to Rule 41(b) this dismissal shall not operate as an adjudication on the merits, and that Plaintiff may file a new action based upon the same claim within one (1) year of the date of this order.

Defendant did not appeal from the trial court's dismissal order which *inter alia* granted plaintiff an additional year in which to refile the claim.

On 27 August 1992, plaintiff filed his claim a third time (92 CVD 867; hereinafter Jones III). Defendant answered and alleged as an affirmative defense the statute of limitations. On 27 October 1992, defendant moved for summary judgment based upon the statute of limitations defense. The trial court denied defendant's motion on 13 January 1993. At trial on 27 September 1993, the jury awarded plaintiff $3,500 in damages. Judgment was entered on the jury's verdict. Defendant appeals.

Willis & Sessions, by Michael W. Willis, for plaintiff-appellee.

Johnson & Lambeth, by Maynard M. Brown, for defendant-appellant.

EAGLES, Judge.

Defendant's sole assignment of error is that the trial court erred in denying defendant's Motion For Summary Judgment on 13 January 1993. We disagree.

Plaintiff has filed this lawsuit three times since the occurrence of the automobile accident on 1 September 1988. An action for personal injury must be commenced within three years of the date of the injury or it is barred by the statute of limitations. G.S. 1-52(16). Here, plaintiff filed his first suit (Jones I) on 23 June 1989, well within the three year period allowed by the statute of limitations. On 14 January 1991, plaintiff took a voluntary dismissal of that action without prejudice pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure. G.S. 1A-1, Rule 41(a). Rule 41(a) provides that,

> [i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

Although the statute of limitations would have expired on 1 September 1991, plaintiff's voluntary dismissal under Rule 41(a) permitted plaintiff to file a new action based upon the same claim within one year of the date of the Rule 41(a) dismissal, 14 January 1991. The statute of limitations was now extended to 14 January 1992.

Plaintiff filed Jones II on 9 September 1991 well within the one year extension granted under Rule 41(a). Jones II was dismissed for insufficiency of the service of process on 25 August 1992. In its order of dismissal, the trial court dismissed the action without prejudice pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure and allowed plaintiff one year from 25 August 1992 in which to file a new action. Plaintiff filed Jones III on 27 August 1992, two days after the dismissal of Jones II.

Defendant contends here that Jones III was filed after the one year extension granted under Rule 41(a) and that the statute of limitations had expired on 14 January 1992. Defendant argues that

although Jones II was commenced within the one year extension granted under Rule 41(a), the action was discontinued by operation of law by plaintiff's insufficient service of process and plaintiff's failure to issue an alias or pluries summons or to get an extension on the original summons. Rule 4(e) of the North Carolina Rules of Civil Procedure states:

> Summons-Discontinuance—When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed.

G.S. 1A-1, Rule 4(e). Rule 4(d) provides that an endorsement by the clerk for an extension or the issuance of an alias or pluries summons must be made within 90 days. Defendant argues that plaintiff did not obtain an endorsement from the clerk or issue an alias or pluries summons within the 90 day period. Accordingly, defendant contends that Jones II had expired by operation of law.

Defendant further contends that once Jones II was discontinued under Rule 4(e), the statute of limitations took effect and that the trial court did not have the authority to grant a one year extension under Rule 41(b). Defendant cites this court's opinions in *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 30 N.C. App. 526, 227 S.E.2d 301 (1976) (overruled on other grounds by *Wiles v. Welparnel Const. Co., Inc.*, 295 N.C. 81, 86, 243 S.E.2d 756, 758-59 (1978)) and *Long v. Fink*, 80 N.C. App. 482, 342 S.E.2d 557 (1986) as authority for its position.

We need not address, however, defendant's contention that the trial court had no authority under Rule 41(b) to grant plaintiff an additional year in which to refile. We do not address this issue because defendant did not appeal the trial court's dismissal order which allowed plaintiff an additional year in which to refile. Since defendant did not appeal that part of the order that was adverse to him, he is bound by that order. *Gower v. Aetna Insurance Co.*, 281 N.C. 577, 189 S.E.2d 165 (1972).

In *Gower*, the plaintiff filed a breach of contract action against defendant insurer for failure to pay a claim. The contract provided that a suit should be commenced within one year after inception of the loss. The plaintiff in *Gower* sustained the loss on 7 June 1969 and filed the initial suit 7 April 1970, within one year after the loss. On 15 October 1970, the trial court dismissed the action without prejudice

on the grounds of insufficient service of process. The court in its discretion under Rule 41(b) allowed plaintiff to refile the action within 30 days of the order. Defendant did not appeal that portion of the order. Plaintiff filed the second action on 5 November 1970, within the 30 day period allowed by the trial court. Defendant moved for summary judgment and argued that plaintiff's suit was barred because it was not commenced within a year of the loss. Defendant's motion was denied and this Court granted certiorari. This Court affirmed the trial court's denial of summary judgment and this Court's judgment was reviewed by the North Carolina Supreme Court on writ of certiorari.

The Supreme Court affirmed the decision on the grounds that defendant was bound by his failure to appeal that portion of the dismissal order allowing plaintiff 30 days in which to refile.

> [A] judgment by a court determining its statutory authority to dismiss an action in such a way as not to bar further litigation on the merits therein may be questioned only by appeal and not collaterally. . . . Absent appeal, all provisions of [the trial court's] judgment are determinative as between plaintiff and defendant.
>
> . . . .
>
> [W]e hold that defendant, having failed to seek appellate review, is estopped to attack in the present action that portion of [the trial court's] judgment which granted plaintiff the right to commence a new action within thirty days.

Id. at 580-81, 189 S.E.2d at 168.

As in *Gower*, we hold that defendant is bound by the trial court's unappealed-from order of dismissal. Defendant here is attempting to attack the trial court's judgment in Jones II collaterally by appealing the final judgment entered in Jones III. As the Supreme Court stated in *Gower*, "Absent appeal, all provisions of [the trial court's] judgment are determinative as between plaintiff and defendant." *Id.* at 580, 189 S.E.2d at 168. Accordingly, we affirm the trial court's judgment on the jury verdict awarding plaintiff $3,500 in damages and affirm the trial court's denial of defendant's motion for summary judgment.

Affirmed.

Judge ORR concurs.

Judge McCRODDEN concurred prior to 15 December 1994.

STATE OF NORTH CAROLINA v. MITCHELL GIBBARD KALEY

No. 948SC142

(Filed 20 December 1994)

Homicide § 583 (NCI4th)— decedent killed by vehicle in which defendant passenger—no evidence of acting in concert

The trial court erred in instructing the jury that it could find defendant guilty of involuntary manslaughter on the theory of acting in concert where the evidence tended to show that deceased was leaning into the passenger side of a vehicle where defendant was sitting; the vehicle accelerated and eventually ran over decedent; but there was no evidence that the driver began to drive away pursuant to any plan or purpose with defendant and no evidence that defendant actively participated in the encounter so as to support an inference of a common plan or purpose.

Am Jur 2d, Homicide § 507.

Judge COZORT dissenting.

Appeal by defendant from judgment and commitment entered 16 April 1993 by Judge Paul M. Wright in Wayne County Superior Court. Heard in the Court of Appeals 24 October 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Ranee S. Sandy, for the State.

Barnes, Braswell & Haithcock, P.A., by Glenn A. Barfield, for defendant-appellant.

LEWIS, Judge.

Defendant was convicted by a jury of involuntary manslaughter. The trial court sentenced defendant to seven years imprisonment. From the judgment and commitment, defendant appeals.

The evidence at trial tended to show that on 6 June 1992 between 6:30 and 6:45 p.m., Dorothy Wynn was in her parked car on Pine Street near the intersection of Pine and James Streets in Goldsboro. Wynn's car was facing away from the intersection. Wynn was familiar with the decedent, Evelyn Parks, and, before getting into her car,

noticed Parks standing at the intersection. Before starting her car, Wynn looked in her left side mirror and saw a white Pontiac pull up to the intersection in Wynn's lane. Defendant was seated in the passenger seat of the Pontiac. Defendant and the driver had come to the intersection to purchase crack cocaine. Defendant waived to Parks, and Parks approached the Pontiac. The driver was holding a twenty-dollar bill in his hand. Parks lunged through the open passenger's window in an attempt to grab the money. The driver then immediately began to drive away with Parks still partly in the car. At this point, defendant's statement to the police and Wynn's testimony differ. Defendant told the police that when the driver accelerated, the door post caught Parks under the arm, causing her to spin and fall out of the car. She then fell underneath the car and was run over. Wynn testified that once the Pontiac began moving, she turned around in her seat to see the car. She testified that Parks, while either holding onto defendant or being held onto by defendant, began to walk or trot along side of the car, and then began to run as the car sped up, eventually falling and being run over. Wynn was not certain as to who held onto whom.

After the Pontiac had run over Parks, the driver did not stop. Defendant told the police that he told the driver to stop but that the driver refused. Wynn followed the Pontiac and recorded the tag number.

Defendant's first argument on appeal is that the trial court erred in instructing the jury that it could find defendant guilty of involuntary manslaughter on the theory of acting in concert. Because there was insufficient evidence to support the trial court's instruction on acting in concert, we agree.

The theory of acting in concert has been stated as follows:

> It is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979).

In the case at hand, the trial court instructed the jury on acting in concert as follows:

> For a person to be guilty of a crime it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together for a common purpose to commit the crime of murder or voluntary manslaughter or involuntary manslaughter, then each of them is held responsible under the law for the acts of the others done in the commission of the crime of murder or voluntary manslaughter or involuntary manslaughter.

We conclude, however, that there was no evidence that defendant and the driver acted pursuant to a common plan or purpose to commit the crime of involuntary manslaughter. The evidence did clearly show that the driver began to drive off with Parks still partly in the car. The evidence did not show, however, that the driver did so pursuant to any plan or purpose with defendant. Wynn, the only eyewitness to testify, was unsure whether Parks was holding onto defendant or defendant was holding onto Parks. Similarly, she did not know whether Parks let go of defendant or defendant let go of Parks. Thus, there was no evidence that defendant actively participated in the encounter so as to support an inference of a common plan or purpose. Nor was there any direct evidence of a common plan or purpose. We conclude that the evidence was not sufficient to show a common plan or purpose to harm or kill Ms. Parks.

We note that *State v. Joyner* provides that a defendant is guilty of not only the planned crime, but of any crime committed by the other person in pursuance of the common plan or purpose, or as a natural or probable consequence thereof. 297 N.C. at 357-58, 255 S.E.2d at 396. The dissent argues that there was a common plan or purpose to commit the crime of purchasing crack cocaine and that the involuntary manslaughter was a natural or probable consequence of that crime. However, the trial court did not instruct the jury based on that theory. The instructions made no reference whatsoever to any crimes other than murder, voluntary manslaughter, and involuntary manslaughter. Further, defendant was not even charged with a drug-related crime. As stated above, there was insufficient evidence to support the instruction given.

It is generally prejudicial error for the trial court to instruct the jury upon a theory of a defendant's guilt which is not supported by the evidence. *State v. Brown*, 80 N.C. App. 307, 311, 342 S.E.2d 42, 44

(1986). There being no evidence to support the instruction on acting in concert, defendant must receive a new trial. *See id.* In light of our decision, we deem it unnecessary to address defendant's remaining assignments of error.

For the reasons stated, defendant must have a new trial.

New trial.

Chief Judge ARNOLD concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

The standard for acting in concert was set forth by our Supreme Court in *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979):

> "[I]f 'two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime committed by the other in pursuance of the common purpose . . . or *as a natural or probable consequence thereof*.' "

Id. at 357-58, 255 S.E.2d at 396 (quoting *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971)), *death penalty vacated*, 408 U.S. 939, 33 L.Ed.2d 761 (1972) (emphasis added). The question in the present case is whether involuntary manslaughter is a natural or probable consequence of an attempt to purchase crack cocaine.

Defendant should have been aware of the risks inherent in a "drive-up" purchase of illegal drugs. Death is a natural and sometimes probable consequence of an attempt to purchase drugs on the street. Defendant was engaged in attempting to purchase drugs, and it was proper for the trial court to instruct the jury that it could find him guilty of involuntary manslaughter through acting in concert. Our courts have held that a defendant is responsible when a death occurs during the commission of an armed robbery in which he acts in concert. *See State v. Miller*, 315 N.C. 773, 340 S.E.2d 290 (1986); *State v. Miller*, 69 N.C. App. 392, 317 S.E.2d 84 (1984); *State v. Barnett*, 307 N.C. 608, 300 S.E.2d 340 (1983). The same standard should apply when a death occurs during the commission of an attempted drug purchase. Because the trial court properly applied this standard, I respectfully dissent from the majority's opinion holding it was error to instruct on acting in concert.

STATE OF NORTH CAROLINA v. SCOTT CANUP

No. 9426SC184

(Filed 20 December 1994)

1. Rape and Allied Offenses § 122 (NCI4th)— attempted second-degree rape—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of attempted second-degree rape where defendant's actions of undressing himself, holding the prosecutrix down, forcing her to fondle his penis, spreading her legs apart, pulling her pants and underpants down, and then lying on top of her were all overt acts showing intent to rape, going beyond mere preparation but falling short of the completed offense of second-degree rape.

Am Jur 2d, Rape §§ 88 et seq.

2. Rape and Allied Offenses § 197 (NCI4th)— evidence supporting second-degree rape—conviction for attempted second-degree rape—defendant not prejudiced

There was no merit to defendant's contention that the evidence submitted indicated that only the greater charge of second-degree rape should have been submitted to the jury, since the evidence submitted would have supported defendant's being charged with either second-degree rape or attempted second-degree rape and convicted of either offense; the fact that the State elected to prosecute defendant for the lesser crime of attempted second-degree rape and that the jury found defendant guilty did not prejudice defendant; and if there was error, it was favorable to defendant.

Am Jur 2d, Rape § 110.

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

Appeal by defendant from judgment entered 2 September 1993 by Judge Charles C. Lamm, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 October 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Ellen B. Scouten, for the State.

Office of the Public Defender, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

THOMPSON, Judge.

Defendant Scott Canup appeals from a judgment imposing a split active sentence of 150 days and probation of five years for the attempted second degree rape of the prosecutrix. Defendant assigned as error the ruling of the trial court denying his motion to dismiss. We find no error.

In October of 1992 the prosecutrix was 14 years old and in the 9th grade at West Mecklenburg High School. The prosecutrix lived with her parents and her younger sister in Charlotte. Defendant resided two houses away. Defendant was 18 years old and would sometimes come to visit the prosecutrix's father who restored old cars. The prosecutrix had seen the defendant at her father's garage several times and had also seen him inside the house on several occasions when he had used the bathroom.

The prosecutrix arrived home on the school bus each day at about 2:45 p.m. Both of her parents worked outside the home and did not return home until about 4:00 to 4:30 p.m. One weekday in October of 1992, shortly after the prosecutrix arrived home from school, she was sitting near the back door talking on the telephone with her girlfriend when she heard someone knocking at the back door. She told her girlfriend to hold on and laid the telephone down while she went to the back door where she saw the defendant. The defendant asked if her dad had any cigarettes. The prosecutrix responded that he did but he smoked a different brand than defendant smoked. She then offered him some money to buy them each a pack of cigarettes.

The prosecutrix told the defendant to stand by the back door and she would be back with the money. She did not invite him into the house. The prosecutrix went to her bedroom to get some money out of a chest of drawers. When she turned around she saw the defendant in the hallway. She picked up an extension phone which was in her bedroom and told her girlfriend that she would have to call her back because she was going to get the defendant out of the house.

Defendant entered the prosecutrix's bedroom where she gave him money for the cigarettes. Defendant then asked her for a hug, which

she gave him. Defendant began kissing the prosecutrix's neck. She pushed him away and asked him to leave. Defendant asked her for another hug, which she gave him. Defendant then picked the prosecutrix up and laid her on her bed. He began kissing her and she told the defendant she did not want to do anything. Defendant then grabbed her arms and put them above her head. He held her arms with his right hand. The prosecutrix tried to pull away from the defendant but could not get away. Defendant was six feet tall and weighed 200 pounds. Defendant lay on top of the prosecutrix and used his leg to spread her legs apart. He used his left hand to pull down her pants and underpants. Defendant pulled his shorts down around his waist and exposed his penis. He then grabbed the prosecutrix's hand and made her fondle his penis. Defendant then pulled his shorts down to his knees and held the prosecutrix's hand behind her head again. He then "stuck his penis in her vagina" and ejaculated in his hand. Defendant then went to the bathroom and left the house.

Defendant was arrested on 6 January 1993 and indicted on 22 March 1993 for attempted second degree rape of the prosecutrix. The case was tried at the 30 August 1993 criminal session of Mecklenburg County Superior Court before the Honorable Charles C. Lamm, Jr. and a jury. Defendant's defense was in the nature of an alibi. He testified that he spent every afternoon after school at the home of his girlfriend and that every day he had to pick up his girlfriend at her place of work at 3:00 p.m. He also testified that he had never sexually assaulted the prosecutrix in any way and that he did not participate in the incident that she described. On 2 September 1993 the jury found defendant guilty as charged.

[1] On appeal defendant contends that the trial court erred in denying his motion to dismiss on the ground that the evidence was insufficient for a rational trier of fact to find each and every element of the crime charged beyond a reasonable doubt and there was a fatal variance between the indictment and the evidence presented at trial. We disagree.

With respect to the defendant's contention that the evidence was insufficient for a rational trier of fact to find each element of the crime charged beyond a reasonable doubt, the accepted test is whether the conviction is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (cita-

tion omitted). We find that defendant's acts of undressing himself, holding the prosecutrix down, forcing her to fondle his penis, spreading her legs apart, pulling her pants and underpants down, and then lying on top of her are all overt acts showing intent to rape, going beyond mere preparation but falling short of the completed offense of second degree rape. *State v. Boone*, 307 N.C. 198, 210, 297 S.E.2d 585, 592 (1982).

In support of his contention that there was a fatal variance between the proof and the indictment which required dismissal, the defendant relies upon *State v. Williams*, 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981). In *Williams*, our Supreme Court stated:

> It is well settled that the evidence in a criminal case must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, there is a fatal variance between the allegations and the proof requiring dismissal (citations omitted).

Id. Defendant's reliance upon *Williams* is misplaced. In *Williams* the evidence introduced was of a sexual offense of an entirely different nature from the offense charged. Here, the acts of the defendant irrefutably establish an intent to rape and his dogged pursuit of that purpose.

[2] Defendant relies upon *State v. Jeffries*, 57 N.C. App. 416, 291 S.E.2d 859, *disc. review denied and appeal dismissed*, 306 N.C. 561, 294 S.E.2d 374 (1982), to support the proposition that when all of the evidence tends to show a completed act of intercourse it is not proper to submit to the jury the lesser offense, in that case "assault on a female." In *Jeffries*, however, the question presented was quite different. There the issue was whether the trial court was obligated to *instruct* the jury as to the lesser offense when there was evidence that the greater offense (with which defendant was charged) had been committed. The same is true of *State v. Green*, 95 N.C. App. 558, 383 S.E.2d 419 (1989).

We find the case of *State v. Wade*, 49 N.C. App. 257, 271 S.E.2d 77 (1980), *cert. denied*, 315 N.C. 596, 341 S.E.2d 37 (1986), dispositive of this issue. There, the trial court instructed the jury with regard to assault with intent to commit rape, and the defendant contended that " '[t]here was no evidence whatsoever presented that [defendant] committed the offense of assault with intent to commit rape. The evidence of the State indicated that he was guilty of either first or sec-

ond degree rape or not guilty.' " *State v. Wade*, 49 N.C. App. at 261, 165 S.E.2d at 80. This Court rejected the defendant's argument and stated:

> We hold the evidence supported the verdict returned, and there was no reasonable possibility that a verdict of not guilty would have been returned had the judge failed to instruct on the lesser included offense. If there were error from the instruction complained of, such was favorable to the defendant and harmless.

Id. 49 N.C. App. at 262, 165 S.E.2d at 80; *see also*, *State v. Shull*, 268 N.C. 209, 150 S.E.2d 212 (1966).

Evidence that this defendant continued to pursue his malevolent purpose and achieved penetration does not decriminalize his prior overt acts. The completed commission of a crime must of necessity include an attempt to commit the crime. As Rollin Perkins states in his treatise on criminal law, "nothing in the philosophy of juridical science requires that an attempt must fail in order to receive recognition." Rollin M. Perkins and Ronald N. Boyce, Criminal Law, 612 (3rd ed. 1982). The treatise goes on to say:

> A successful attempt to commit a crime will not support two convictions and penalties, one for the attempt and the other for the completed offense. This is for the obvious reason that whatever is deemed the appropriate penalty for the total misconduct can be imposed upon conviction of the offense itself, but this does not require the unsound conclusion that proof of the completed offense disproves the attempt to commit it.

Id. at 612 (emphasis supplied).

As in *State v. Wade*, defendant, in the case at bar, contends that the evidence submitted indicated that only the greater charge of second degree rape should have been submitted to the jury. We find that the evidence submitted would have supported the defendant's being charged with either second degree rape or attempted second degree rape and convicted of either offense. The fact that the State elected to prosecute the defendant for the lesser crime of attempted second degree rape and that the jury found the defendant guilty of attempted second degree rape did not prejudice the defendant. The evidence supported that verdict. Moreover, as in *State v. Wade*, we find that if there were error, it was favorable to the defendant and harmless.

We consider defendant's other assignments of error, even if valid, to have been harmless error.

No error.

Judges JOHNSON and MARTIN concur.

STATE OF NORTH CAROLINA v. DONALD R. FARRIOR

No. 944SC21

(Filed 20 December 1994)

1. **Burglary and Unlawful Breakings § 141 (NCI4th)— constructive possession—instructions adequate**

The trial court's instructions adequately informed the jury that it was not compelled to infer that defendant was aware of the presence of stolen articles in his car trunk and that he thus constructively possessed them, and the instructions adequately informed the jury that the State retained the burden of proof.

Am Jur 2d, Burglary § 72.

What constitutes "constructive" possession of stolen property to establish requisite element of possession supporting offense of receiving stolen property. 30 ALR4th 488.

2. **Criminal Law § 1284 (NCI4th)— habitual felon indictment—failure to allege underlying felony—fatal error**

Defendant's indictment as a habitual felon was fatally flawed where it did not refer to any underlying felony with which defendant was currently charged.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

Appeal by defendant from judgment entered 27 May 1993 by Judge J. Richard Parker in Onslow County Superior Court. Heard in the Court of Appeals 18 October 1994.

In December 1991, Cheryl Baker (hereinafter Baker) of Jacksonville, North Carolina, left her home to visit relatives for Christmas. When she returned to Jacksonville with her children, she found a note on her door from the Sheriff's Department stating that her house had been broken into and that items had been stolen. The series of events which led to the arrest of the defendant are as follows:

Michael Rochelle (hereinafter Rochelle), who was visiting his in-laws during Christmas 1991, was watching television in bed early in the morning on 22 December 1991 when he heard a car drive up to the intersection in front of his in-laws' house. He heard the car because it sounded as if it did not have a muffler or had a bad muffler. The car remained at the intersection for three to five minutes. The car drove away but returned approximately fifteen minutes later. When the engine was turned off, Rochelle went to see where the car was. As he walked out the back door, he saw the car pull out of Baker's driveway and noticed that it was "a cream color or light-colored car."

Rochelle then woke his mother-in-law, Beverly Wilkinson (hereinafter Wilkinson), to say that something was going on down the street. They waited for approximately twenty minutes, and then saw the car return. Rochelle saw two men approach the area of Baker's house. Rochelle could tell that both men were black, one was 5'8" or 5'9" and one was 6'2". Wilkinson saw the men when they returned from the direction of Baker's house and saw that they were carrying something large. Rochelle stepped outside and yelled, "Hey, what you got there?" When he did, both men ran. Wilkinson called the Sheriff's Department.

A deputy sheriff received the description of the car that Rochelle and Wilkinson had seen and at approximately 4:00 a.m., the deputy saw a vehicle matching the description. The vehicle was parked in front of a house not far from Baker's home and had a towel draped over the license plate. When other officers arrived, they felt the hood of the car and discovered that it was warm, indicating that someone had driven it within the last few hours. They then knocked on the door of the home and defendant eventually came to the door. Defendant consented to a search of the trunk. The trunk contained pillow cases full of items later determined to belong to Baker. Defendant declared that he did not know where the items came from and that he had not put the items in the trunk. Defendant accompanied the officers to the Sheriff's Department and told one of the deputies that he always left his keys in his car and that anyone could have come along and driven his car while he was asleep.

At trial, defendant presented evidence that he was with his fiance during the entire night of the break-in at the home of defendant's sister, Etta Farrior, (hereinafter Farrior). Defendant and Farrior's boyfriend, Larry Faison, (hereinafter Faison) lived in the home with Farrior. Faison testified that between 1:00 a.m. and 2:00 a.m. on 22

December 1991, he came home and saw the items in the front yard. He put them in defendant's trunk because he said that he thought the items belonged to Farrior's children.

The defendant was indicted 27 May 1992 for felonious breaking and entering, felonious larceny, and felonious possession of stolen goods. On 23 June 1992, defendant also was indicted as an habitual felon. The habitual felon indictment referred to three previous felony convictions which occurred in 1977, 1986, and 1988.

On 27 May 1993, the jury found the defendant guilty of felonious breaking and entering, felonious larceny, and felonious possession of stolen goods. Defendant then pled guilty to the habitual felon indictment. The trial court arrested judgment on the conviction of possession of stolen goods and sentenced defendant to consecutive terms of fifteen years for the convictions of felonious breaking and entering and felonious larceny.

Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Jill Hickey, for the State.

Nora Henry Hargrove, for defendant-appellant Donald R. Farrior.

EAGLES, Judge.

Defendant brings forward two assignments of error. After careful review, we remand for resentencing.

I.

[1] Defendant argues that the trial court erred by failing to instruct the jurors that they were not compelled to infer constructive possession of the stolen articles found in the vehicle merely because defendant exercised control over the vehicle. "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict." N.C. R. App. P. 10(b)(2). Here, defendant neither requested the trial court to give a particular instruction on constructive possession nor objected to the instructions given. However, defendant argues that despite his failure to request a particular instruction or object to the instructions given, it was plain error for the court not to give the following instruction:

> A person has constructive possession of an article if he does not have it on his person, but is aware of its presence and has both the power and intent to control its disposition or use. A person's awareness of the presence of the article and his power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances. If you find beyond a reasonable doubt that articles were found in a certain vehicle, that the defendant exercised control over that vehicle whether or not he owned it this would be a circumstance from which you may infer that the defendant was aware of the presence of the articles and had the power and intent to control their disposition or their use. You must understand that you are not compelled to infer that the defendant was aware of the presence of the articles.

The "plain error" rule provides that an appellate court may review an alleged error not preserved for appellate review if the error affects a substantial right. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). However, our Supreme Court has emphasized that courts should apply the plain error rule "cautiously and only in the exceptional case where . . . it can be said that the claimed error is . . . so prejudicial . . . that justice cannot have been done." *Odom* at 660, 300 S.E.2d at 378, *quoting United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L.Ed.2d 513 (1982).

Here, the trial court instructed the jury as follows:

> A person has constructive possession of an article if he does not have it on his person, but is aware of its presence and has both the power and intent to control its disposition or use. A person's awareness of the presence of the article and his power and intent to control it's [sic] disposition or use may be shown by direct evidence or may be inferred from the circumstances. If you find beyond a reasonable doubt that articles were found in a certain vehicle, that the defendant exercised control over that vehicle whether or not he owned it this would be a circumstance from which you may infer that the defendant was aware of the presence of the articles and had the power and intent to control their disposition or use.

The trial court also instructed the jury that the State had to prove the defendant's guilt beyond a reasonable doubt. We find that the trial court's instructions adequately informed the jury that they were not compelled to infer that the defendant was aware of the presence of the articles and that the instructions adequately informed the jury

that the State retained the burden of proof. Accordingly, we hold that the trial court committed no "plain error." This assignment of error fails.

II.

[2] Defendant also argues that he is entitled to have his plea of guilty to being an habitual felon set aside because the indictment failed to refer to any substantive felony for which the defendant was currently charged. We first determine whether this Court has jurisdiction to address defendant's argument. Pursuant to G.S. 15A-1444(a1), a defendant who has entered a plea of guilty to a felony is not entitled to appeal as a matter of right unless his sentence exceeds the presumptive term set by G.S. 15A-1340.4. However, he may petition this Court for review of the issue by writ of certiorari. Here, defendant petitioned this Court for writ of certiorari in his brief filed 23 February 1994. In our discretion we grant defendant's petition for writ of certiorari and will consider the assignments of error brought forward.

When the State charges a defendant as an habitual felon, the habitual felon indictment must refer to the underlying substantive felony. *State v. Hawkins*, 110 N.C. App. 837, 840, 431 S.E.2d 503, 506 (1993), *citing State v. Moore*, 102 N.C. App. 434, 438-39, 402 S.E.2d 435, 437 (1991). Otherwise, "the 'defendant [does] not have sufficient notice of [the] particular charge against him.' " *Hawkins* at 840, 431 S.E.2d at 506, *quoting Moore* at 438, 402 S.E.2d at 437.

Here, the habitual felon indictment did not refer to any underlying felony with which defendant was charged. Accordingly, defendant's indictment as an habitual offender was fatally flawed and the trial court erred in enhancing defendant's sentence on that basis. ("[Being] an habitual felon is a status rather than a crime, [so] the only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which [the defendant] allegedly committed while in that status." *State v. Oakes*, 113 N.C. App. 332, 337, 438 S.E.2d 477, 480 (citation omitted), *review denied*, 336 N.C. 76, 445 S.E.2d 43 (1994)).

We vacate the judgment and remand this matter for resentencing in accordance with Chapter 15A of the North Carolina General Statutes. We note that "the State may elect . . . to try defendant as an habitual felon upon a subsequent indictment proper in form, and in accordance with procedures approved in *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977)." *State v. Hawkins*, 110 N.C. App. 837, 843, 431

S.E.2d 503, 507 (1993). *(But cf. State v. Oakes*, 113 N.C. App. 332, 438 S.E.2d 477 (1994). When allowing the State to seek a second indictment alleging habitual felon status, "the critical issue is whether defendant had notice of the allegation of habitual felon status at the time of his plea to the underlying substantive felony charge." *Oakes* at 339, 438 S.E.2d at 481).

Vacated and remanded for resentencing.

Judge ORR concurs.

Judge McCRODDEN concurred prior to 15 December 1994.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS WEAVER

No. 949SC388

(Filed 20 December 1994)

1. **Evidence and Witnesses § 2482 (NCI4th)— victim's mother excluded from courtroom—social workers and therapists allowed to stay—no error**

In a prosecution of defendant for first-degree rape and first-degree sexual offense committed against seven- and nine-year-old girls, the trial court did not err by excluding the mother of the victims from the courtroom during their testimony while not excluding social workers and therapists. N.C.G.S. § 15A-1225.

Am Jur 2d, Trial §§ 252 et seq.

2. **Evidence and Witnesses § 2542 (NCI4th)— seven- and nine-year-old victims—ability to understand oath and truthfulness**

There was no merit to defendant's contention that the trial court erred by permitting the seven- and nine-year-old rape victims to testify "in light of their difficulty in understanding the importance of the oath," since both exhibited a capacity to understand and relate facts that would assist the jury and a comprehension of the difference between truth and untruth. N.C.G.S. § 8C-1, Rule 601(a) and (b).

Am Jur 2d, Witnesses §§ 90, 91.

Witnesses: child competency statutes. 60 ALR4th 369.

3. Rape and Allied Offenses § 83 (NCI4th)— rape of child—discrepancy between testimony and physical evidence—sufficiency of evidence

Testimony by a child that defendant inserted his penis at least partially into her vagina was sufficient to show that defendant engaged in vaginal intercourse with the child, and any discrepancies between the victim's testimony and the physical evidence were for the jury to resolve.

Am Jur 2d, Rape §§ 88 et seq.

4. Evidence and Witnesses § 868 (NCI4th)— sheriff's investigation—relevancy of testimony

Where various witnesses testified that the sheriff and his deputies did not investigate other potential perpetrators in a rape case involving children, it was relevant for the sheriff to testify that "if [defendant] had any innocence, we would check it all" and that he had told defendant's father that "if [defendant] is not guilty we will prove that he is not guilty."

Am Jur 2d, Evidence §§ 307 et seq.

Appeal by defendant from judgments entered 4 October 1993 by Judge Richard B. Allsbrook in Person County Superior Court. Heard in the Court of Appeals 10 October 1994.

Defendant was charged with two counts of first-degree rape and two counts of first-degree sexual offense. Defendant was convicted on all charges and sentenced to two concurrent life sentences and two consecutive life sentences. Evidence by two girls, one nine and one seven, tended to show that the defendant committed acts sufficient to allow the jury to reach guilty verdicts. Several social workers and expert witnesses testified on behalf of the State.

The defendant testified on his own behalf, denying all acts alleged and indicating that the crimes were perpetrated by others. The jury found defendant guilty of all charges. The trial court entered judgment for four life terms from which defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Jane Rankin Thompson, for the State.

Mark Galloway for defendant appellant.

LEWIS, Judge.

[1] Defendant first argues that the trial court erred by excluding the mother of the victims from the courtroom during their testimony while not excluding social workers and therapists. We disagree.

N.C. Gen. Stat. § 15A-1225 (1988) provides:

> Upon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian may be present while the child is testifying even though his parent or guardian is to be called subsequently.

A motion to sequester witnesses is addressed to the sound discretion of the trial court and will not be reviewed absent a showing of an abuse of discretion. *State v. Royal*, 300 N.C. 515, 268 S.E.2d 517 (1980). Because the statute allows the exclusion of "all or some of the witnesses," the trial court did not abuse its discretion by allowing a social worker and a therapist to remain in the courtroom during the victims' testimony. *See State v. Stanley*, 310 N.C. 353, 312 S.E.2d 482 (1984). That a parent *may* be present while a child is testifying does not mean that such presence is required. Defendant's argument is meritless.

[2] Defendant next argues that the trial court erred by permitting the victims to testify "in light of their difficulty in understanding the importance of the oath." We disagree.

N.C. Gen. Stat. § 8C-1, Rule 601 (1992), provides that "[e]very person is competent to be a witness except . . . when the court determines that he is . . . incapable of understanding the duty of a witness to tell the truth." § 8C-1, Rule 601(a), -(b). *See State v. Gordon*, 316 N.C. 497, 342 S.E.2d 509 (1986). Our Supreme Court has addressed the standard for determining whether a child is competent to testify:

> There is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide. This is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness.

State v. Turner, 268 N.C. 225, 230, 150 S.E.2d 406, 410 (1966). Absent a showing that the ruling as to competency could not be the result of a reasoned decision, the ruling will not be disturbed on appeal. *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987).

During *voir dire* examination, the prosecutor questioned H. about her understanding of truthfulness:

Q. [H.], do you know the difference betweenxt [sic] right and wrong?

A. Yes.

Q. Do you know what it is to tell a lie?

A. Yes.

Q. If I were to say it's Christmas Day, would that be the truth or a lie?

A. A lie.

Q. If I were to say that you were eleven years old, would that be the truth or a lie?

A. A lie.

Q. Is it right or wrong to tell a lie?

A. Wrong.

Q. And if you were to tell these people in the Courtroom, the people that would be in the Courtroom tomorrow or the people today a lie —

A. No.

Q. Or something that wasn't true, what would happen to you?

A. I don't know.

Q. Would it be wrong to tell a lie?

A. Yeah.

Q. Do you promise to say only things that are true?

A. Yes.

Q. While you're in this Courtroom?

A. Yes.

Q. Do you understand the importance of doing that?

A. Yes.

Q. Do you promise to tell only the truth?

A. Yes.

Q. Do you promise not to tell any lies?

A. Yes.

On cross-examination, H. could not answer why she raised one hand and placed the other on the Bible nor who wrote the Bible.

Despite H.'s lack of understanding of an obligation to tell the truth from a religious point of view, she stated on direct examination an understanding of the difference between the truth and lies and the importance of telling the truth. Having done so she exhibited a capacity to understand and relate facts that would assist the jury and a comprehension of the difference between truth and untruth. *See Hicks*, 319 N.C. at 88-89, 352 S.E.2d at 426. Defendant has failed to show that the trial court abused its discretion by finding H. competent to testify.

D. likewise testified on *voir dire* that she understood the difference between the truth and lies. She testified that if she told a lie "something bad" would happen, and she promised to tell the truth. In light of this testimony, defendant has failed to show that the trial court abused its discretion in finding D. competent to testify. Defendant's argument is without merit.

Defendant further argues that the trial court erred by allowing Jean Neimeyer to express an opinion as "to the age at which the children began to understand dates." Specifically, defendant contends this testimony was beyond the scope of her expertise. We disagree.

Neimeyer was accepted as an expert in clinical social work particularly in the area of child sexual abuse. Over defendant's objection, Neimeyer testified that until the age of eight "we certainly don't expect children . . . to be able to name dates, or to give more than a general approximation of how many times something happened, you know, if it is more than, say, one time."

Expert testimony is admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 702 (1992), when such testimony can assist the jury to draw inferences from facts because the expert is better qualified.

State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984). In this case, the testimony in question was within the realm of expertise of the witness and was of assistance to the jury. Therefore, the trial court did not err by allowing the testimony.

[3] Defendant also argues that the trial court erred by denying his motion to dismiss the rape charge as to D. Specifically, defendant contends there was a discrepancy between D.'s testimony and the physical evidence.

In ruling upon a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the offense charged, or of a lesser-included offense of that charged, and of the defendant being the perpetrator. *State v. Roseman*, 279 N.C. 573, 184 S.E.2d 289 (1971). Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Bromfield*, 332 N.C. 24, 418 S.E.2d 491 (1992). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . ." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Pursuant to N.C. Gen. Stat. § 14-27.2(a)(1) (Cum. Supp. 1994), a person is guilty of first-degree rape if he "engages in vaginal intercourse" with a child under the age of thirteen and the defendant is at least twelve years old and four years older than the victim. The slightest penetration of the female sexual organ by the male sexual organ is all that is required to prove vaginal intercourse. *State v. Sneeden*, 274 N.C. 498, 164 S.E.2d 190 (1968). D. testified that defendant inserted his penis at least partially into her vagina. This evidence is sufficient to show that defendant engaged in vaginal intercourse with D. Assuming *arguendo* that there were discrepancies between the victim's testimony and the physical evidence, these discrepancies were for the jury to resolve and do not warrant dismissal of the charge. *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977). Defendant's argument is meritless.

[4] Finally, defendant argues that the trial court erred by permitting Sheriff Oakley to testify as follows: "if [defendant] had any innocence, we would check it all. We would check every story. We would check everybody, every witness that he said check. . . . I told [defendant's father], I said, if [defendant] is not guilty we will prove that he is not guilty." Specifically, defendant contends the testimony was not relevant, was prejudicial, and amounted to hearsay.

The record shows that various witnesses testified that the Sheriff and his deputies did not investigate other potential perpetrators in this case. In light of that evidence, the testimony of Sheriff Oakley was relevant. Even assuming *arguendo* that it should not have been admitted, defendant has failed to show a reasonable possibility that, absent the error, a different result would have been reached by the jury. *See* N.C. Gen. Stat. § 15A-1443(a) (1988). Defendant's argument is without merit.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges JOHN and McCRODDEN concur.

Judge McCRODDEN concurred prior to 15 December 1994.

MARGARET SIMMONS, EMPLOYEE, PLAINTIFF v. KROGER COMPANY, EMPLOYER, DEFENDANT AND TRANSPORTATION INSURANCE COMPANY, CARRIER, DEFENDANT

No. 9410IC355

(Filed 20 December 1994)

Workers' Compensation § 378 (NCI4th)— plaintiff's disability—burden on defendants to rebut plaintiff's showing

There was no merit to defendants' contention that the Industrial Commission erred in placing the burden on defendants to show that plaintiff was not disabled after 9 July 1990 and in finding that she continued to be disabled after that date, since plaintiff offered medical testimony that she had not reached maximum medical improvement and that she was capable of being employed at nonstrenuous work; there was no evidence that plaintiff would be able to actually obtain a job, given her age, physical limitations, educational background (completion of the ninth grade), and lack of work experience in anything other than grocery stores; and defendants did not present convincing evidence that they offered or obtained employment for plaintiff which was consistent with her limitations.

Am Jur 2d, Workers' Compensation §§ 566 et seq.

SIMMONS v. KROGER CO.

[117 N.C. App. 440 (1994)]

Appeal by defendants from opinion and award filed 17 December 1993 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 1994.

The Law Offices of John T. Orcutt, by Laurie G. Peregoy, for plaintiff-appellee.

Young Moore Henderson & Alvis P.A., by J.D. Prather, for defendants-appellants.

JOHNSON, Judge.

Plaintiff Margaret Simmons sustained an injury on 30 May 1990 when a pallet fell and lacerated her right heel. Plaintiff was taken to Raleigh Community Hospital where she was given a tetanus shot and the wound was sutured. Plaintiff was referred to Wake Internal Medicine where she had been seen previously by Dr. Parrish for the suture removal. Plaintiff was then referred to the Cary Orthopaedic Center.

On 9 July 1990, Dr. Desman of the Cary Orthopaedic Center examined plaintiff's right heel area. Dr. Desman's assessment at that time was a laceration of the right calf achilles tendon area with no evidence of a disruption of the achilles tendon. Dr. Desman noted there was no significant swelling on the date of the examination and indicated that she was experiencing the natural course of healing of the injury and that it could last for up to six months. Dr. Desman released plaintiff to return to work without restriction on that date and instructed her to return as needed.

Plaintiff was not satisfied with Dr. Desman's treatment and obtained a second opinion from podiatrist Dr. Broadus Rose on 30 July 1990. Dr. Rose diagnosed a partial tear of the right achilles tendon based on his noninvasive examination of her right ankle area.

As of the 11 June 1991 hearing, plaintiff had not returned to work. Plaintiff testified that she never really discussed her ability to return to work with Dr. Rose. Dr. Rose stated that all he would have been concerned about would have been her ability to stay off her feet. Dr. Rose felt that a sedentary position would have presented minimal risk to her even immediately after the injury.

Plaintiff had not returned to work or real estate school by the date of the hearing but she submitted an application with one employer, a water system company, for a "sit-down" job that she believed was for forty hours per week. She did not follow-up with the employer after her first interview.

Deputy Commissioner Richard B. Ford filed an opinion and award on 8 January 1993 which awarded plaintiff disability compensation benefits through 11 June 1991. Plaintiff appealed to the Full Commission claiming that the Deputy Commissioner erred in failing to award benefits continuing beyond 11 June 1991. Defendants also appealed based on the doctor's authorization for plaintiff to return to work as of 9 July 1990.

The Full Commission found that plaintiff was disabled since she had not reached maximum medical improvement and had not returned to wages equal to those she was earning prior to her injury. The Full Commission further found that defendants had not met their burden of rebutting the presumption that plaintiff remained disabled from 30 May 1990 until further order of the Commission. Defendants appeal from this opinion and award.

Defendants first argue that the Full Commission erred in placing the burden on defendants to show that plaintiff was not disabled after 9 July 1990 and in finding that she continued to be disabled after that date.

Appellate review of an opinion and award of the Full Commission is determined by whether the Full Commission has competent evidence to support its findings of fact and whether its findings of fact justify its legal conclusions and decisions. *Watkins v. City of Asheville*, 99 N.C. App. 302, 392 S.E.2d 754, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding." *Gilbert v. Entenmann's Inc.*, 113 N.C. App. 619, 624, 440 S.E.2d 115, 118 (1994). "[T]he Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982).

Our Courts have continuously said that the employee must prove the extent and degree of disability. *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 374 S.E.2d 483 (1988). North Carolina General Statutes § 97-2(9) (Cum. Supp. 1994) defines disability as "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."

The employee makes a showing of disability in one of four ways:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable

> of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. (Citations omitted.)

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Once the burden of disability is met, there is a presumption that disability continues until "the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971). In the instant case, plaintiff has met her burden.

Our Supreme Court has held that:

> In order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment. An unsuccessful attempt to obtain employment is, certainly, evidence of disability. Where, however, an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist.

Peoples v. Cone Mills Corp., 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986). In the instant case the Full Commission found that plaintiff has carried her initial burden of showing that she was disabled. Further, defendants even approved settlements on behalf of plaintiff.

The Full Commission did not accept the testimony of Dr. Desman as convincing in light of the whole record. Dr. Rose testified that plaintiff had not reached maximum medical improvement and that she was capable of being employed at nonstrenuous work. Additionally, the Full Commission found the record "completely lacking in evidence that plaintiff would be able to actually obtain a job, given her age, physical limitations, educational background [plaintiff only finished the ninth grade], and her lack of work experience in anything other than grocery stores." Thus, plaintiff was unable to return to work and earn the same wages she earned prior to her injury. Plain-

tiff, therefore, has satisfied her burden of proving disability after 9 July 1990.

Our Court has stated:

> After plaintiff meets her initial burden, the burden then shifts to defendants who must show that plaintiff is employable. "[B]efore it can be determined that this plaintiff is employable and can earn wages it must be established, not merely that jobs are available or that the average job seeker can get one, but that [the plaintiff] *can obtain a job taking into account his specific limitations.*" (emphasis retained) (citation omitted).

Lackey v. R. L. Stowe Mills, 106 N.C. App. 658, 662, 418 S.E.2d 517, 519-20, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 150 (1992). Thus, defendants must come forward with evidence showing that suitable jobs are available, and that plaintiff is capable of getting these jobs, taking into account her physical and vocational limitations.

Defendants contend that plaintiff applied for a physically suitable job and did not follow-up after the initial interview and did not obtain the position. Defendants, however, fail to present evidence that she would have gotten the job if she had followed-up. Furthermore, the Full Commission found that defendants have not presented convincing evidence in light of the whole record that defendant-store had offered or obtained employment for plaintiff which was consistent with her limitations. Because plaintiff has met the initial burden of showing injury to her wage earning capacity, and defendants did not offer evidence showing that plaintiff has retained the wage earning capacity, the Full Commission was correct in finding that the disability continued after 9 July 1990.

Defendants also argue that the Full Commission erred in awarding plaintiff continuing benefits after 11 June 1991, the date of the hearing, because there is no evidence in the record to support a finding that she remained disabled after that date.

The Full Commission found that plaintiff has not reached maximum medical improvement and was still under treatment with Dr. Rose. Furthermore, defendants have failed to show that the disability has ended and that plaintiff has regained the ability to return to work at wages equal to those she received prior to the injury; thus, ongoing

award of disability benefits is the appropriate remedy in accordance with North Carolina General Statutes § 97-2(9). Therefore, the decision of the Full Commission is affirmed.

Affirmed.

Chief Judge ARNOLD and Judge MARTIN concur.

KAREN D. WELLING, PLAINTIFF v. SHELLY RENEE WALKER, DEFENDANT

No. 9326SC1312

(Filed 20 December 1994)

1. Declaratory Judgment Actions § 20 (NCI4th)— insurer not party to action—request for declaratory judgment properly denied

The trial court properly denied plaintiff's motions for partial summary judgment and for a declaratory judgment that there was an agreement that defendant's liability insurer would pay its policy limit plus prejudgment interest in exchange for a complete release, since defendant's insurer had an interest in the proceeding, namely, whether its policy provided prejudgment interest, and the insurer was not a party to the action. N.C.G.S. § 1-260.

Am Jur 2d, Declaratory Judgments §§ 203 et seq.

Construction, application, and effect of section 11 of the Uniform Declaratory Judgments Act that all persons who have or claim any interest which would be affected by the declaration shall be made parties. 71 ALR2d 723.

2. Automobiles and Other Vehicles § 730 (NCI4th)— duty to decrease speed—failure to give requested instruction—error

The trial court erred by refusing to instruct the jury, as requested by plaintiff in writing, that defendant had a duty to decrease her speed as necessary to avoid a collision. N.C.G.S. § 20-141(m).

Am Jur 2d, Automobiles and Highway Traffic §§ 1112 et seq.

3. Appeal and Error § 342 (NCI4th)— evidentiary matters— no cross-assignment of error

Defendant could not cross-assign as error the admission of evidence regarding plaintiff's claim for permanent disability, since an appellee may cross-assign as error any action or omission of the trial court which deprived appellee of an alternative basis in law for supporting the judgment, and these evidentiary arguments did not provide an alternate basis to support the judgment. N.C. R. App. P. 10(d).

Am Jur 2d, Appeal and Error § 653.

Appeal by plaintiff from judgment entered 27 July 1993 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 September 1994.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by James F. Wood, III; and Charles M. Welling, for plaintiff-appellant.

Caudle & Spears, P.A., by Harold C. Spears and Timothy T. Leach, for defendant-appellee Shelly Renee Walker.

Wishart, Norris, Henninger & Pittman, P.A., by Kenneth R. Raynor and Michael J. Rousseaux, for defendant-appellee The Travelers Insurance Co.

WYNN, Judge.

This action arises out of an automobile accident on 8 May 1990. Plaintiff, Karen D. Welling, stopped at the intersection of Albemarle Road and Royal Oaks Road in Charlotte and defendant, Shelly Renee Walker, hit plaintiff in the rear. Defendant testified that she saw plaintiff's brake lights and attempted to apply her brakes, but her shoe slipped off the pedal and she collided with plaintiff. Plaintiff brought this action alleging she was injured by defendant's negligence. The trial court submitted the case to the jury which found plaintiff was not injured by defendant's negligence. The trial court entered judgment for defendant and from that judgment plaintiff appeals.

I.

[1] Plaintiff first argues that the trial court erred by denying plaintiff's motions regarding defendant's liability insurance policy. Plaintiff made motions under N.C. Gen. Stat. § 1A-1, Rule 56 for partial sum-

mary judgment and under Rule 57 for a declaratory judgment that there was an agreement that defendant's liability insurer, North Carolina Farm Bureau Mutual Insurance Co. ("Farm Bureau"), would pay the plaintiff its policy limit of $25,000 in exchange for plaintiff executing a complete release of defendant from liability, and that this policy provided for prejudgment interest. This Court granted plaintiff's petition for certiorari to review this issue. Assuming, *arguendo*, that plaintiff can initiate a declaratory judgment action by a motion in the cause, we find that Farm Bureau was not a party to the action. N.C. Gen. Stat. § 1-260 of the Declaratory Judgment Act provides that "all persons shall be made parties who have or claim any interest which would be affected by the declaration." N.C. Gen. Stat. § 1-260 (1983). Since Farm Bureau has an interest in the proceeding, namely whether its policy provides for prejudgment interest, and it was not a party to the action, the trial court properly denied plaintiff's motions. This assignment of error is overruled.

II.

[2] Plaintiff next assigns error to the trial court's instructions to the jury. Plaintiff argues that the trial court erred by not instructing the jury with regard to defendant's duty to decrease her speed as necessary to avoid a collision as required by N.C. Gen. Stat. § 20-141(m). We agree.

Defendant The Travelers Insurance Co. ("Travelers") contends that plaintiff did not comply with Rule 10(b)(2) of the Rules of Appellate Procedure and make a timely objection to the jury instructions and therefore has waived her right to appellate review. We note, however, that plaintiff made a written request for a particular jury instruction which the court denied. Plaintiff is therefore not required by Rule 10(b)(2) to repeat her objection to preserve it for appellate review. *See State v. Smith*, 311 N.C. 287, 316 S.E.2d 73 (1984); *Wall v. Stout*, 310 N.C. 184, 311 S.E.2d 571 (1984).

If a party properly makes a written request for a specific instruction which is correct in itself and supported by the evidence, it is error for the trial court to fail to give the instruction at least in substance. *Williams v. Randolph*, 94 N.C. App. 413, 380 S.E.2d 553, *disc. review denied*, 325 N.C. 437, 384 S.E.2d 547 (1989). N.C. Gen. Stat. § 20-141(m) provides:

> The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the operator of a vehicle from the duty to

> decrease speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, and to avoid injury to any person or property.

N.C. Gen. Stat. § 20-141(m) (1993). *State v. Worthington* held that this statute does not impose liability except in cases "where a reasonable and ordinarily prudent person could, and would have, decreased his speed to avoid a collision." *State v. Worthington*, 89 N.C. App. 88, 92, 365 S.E.2d 317, 320, *appeal dismissed*, 322 N.C. 115, 367 S.E.2d 134 (1988).

In *Hinnant v. Holland*, 92 N.C. App. 142, 374 S.E.2d 152 (1988), *disc. review denied*, 324 N.C. 335, 378 S.E.2d 792 (1989), the defendant was driving around a curve well within the posted speed limit when his automobile skidded and flipped over resulting in the death of a passenger. This Court held that the trial court erred by not instructing the jury on the defendant's duty to decrease speed under N.C. Gen. Stat. § 20-141(m). Even though the defendant drove under the speed limit, "a person may not drive at a speed greater than is reasonable and prudent under the conditions existing." *Hinnant*, 92 N.C. App. at 149, 374 S.E.2d at 156.

In *Stutts v. Adair*, 94 N.C. App. 227, 380 S.E.2d 411 (1989), this Court discussed its holding in *Hinnant*. In *Stutts*, the defendant turned left at an intersection and collided with the plaintiff's decedent. The defendant cited *Hinnant* and argued that the trial court erred by failing to instruct the jury regarding the plaintiff's duty to decrease her speed. *Stutts*, 94 N.C. App. at 232, 380 S.E.2d at 414. The Court rejected this argument and held that the trial court must give the instruction only when the evidence suggests a breach of the duty to decrease speed, "even if the judge *does* instruct on the driver's duty to observe a reasonable and prudent speed under the existing conditions." *Id.* at 232, 380 S.E.2d at 415. In *Stutts*, since the defendant did not introduce any evidence concerning the decedent's speed, the trial court correctly refused to give the requested instruction. *Id.*

In the instant case, plaintiff requested that the trial court instruct the jury regarding defendant's duty under N.C. Gen. Stat. § 20-141(m) to decrease her speed to avoid a collision. On cross-examination defendant testified as follows:

> Q. What was your speed at the time that you saw her brake lights?

A. I did not look at my speedometer, so I cannot tell you exactly what my speed was. I stated that I never left third gear. I, approximately, shift to second gear at about ten miles an hour, and I shift to third gear at approximately twenty miles an hour, and then I would shift to fourth gear somewhere in the neighborhood of the mid-thirties, and I never got to third gear.

Q. So, you could have been anywhere between twenty and the mid-thirties, but not into fourth gear yet?

A. That is approximately correct.

Q. And how far were you when you saw her brake lights come on?

A. I would approximately say two car lengths.

We conclude that this testimony is sufficient evidence of defendant's speed at the time of the accident to raise the issue of whether a reasonable and prudent person could, and would have, decreased her speed to avoid a collision. *Worthington*, 89 N.C. App. at 92, 365 S.E.2d at 320. Therefore, the trial court erred by refusing to instruct the jury that defendant had a duty to decrease her speed under N.C. Gen. Stat. § 20-141(m). *Hinnant*, 92 N.C. App. at 149, 374 S.E.2d at 156.

III.

[3] Defendant and Travelers cross-assign as error the admission of evidence regarding plaintiff's claim for permanent disability. Defendant and Travelers argue that the trial court erred by admitting into evidence a mortuary table and a letter written by plaintiff's physician. Defendant and Travelers also argue that the trial court erred by instructing the jury on plaintiff's future medical expenses. These arguments are not the proper subject of a cross-assignment of error under Rule 10(d) of the Rules of Appellate Procedure. Rule 10(d) provides that an appellee may cross-assign as error any action or omission of the trial court "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). These evidentiary arguments do not provide an alternate basis to support the judgment; therefore, they cannot be cross-assigned as error. *See Stevenson v. North Carolina Dept. of Insurance*, 45 N.C. App. 53, 262 S.E.2d 378 (1980).

We conclude that the error in the charge to the jury entitles plaintiff to a

New trial.

Judge COZORT concurs.

Judge McCRODDEN concurred in this opinion prior to 16 December 1994.

MANLIN CHEE AND JUAN FORGAY, PLAINTIFFS V. KENNETH EUGENE ESTES AND MARGARET DUDLEY MOSES, DEFENDANTS

No. 9418SC561

(Filed 20 December 1994)

Appeal and Error § 209 (NCI4th)— notice of appeal—no appeal from denial of new trial motion

Plaintiffs' notice of appeal indicated that an appeal was being taken from the judgment entered in accordance with the verdict, and it could not fairly be inferred from the notice that plaintiffs intended as well to appeal the denial of their motion for new trial. N.C. R. App. P. 3(d).

Am Jur 2d, Appeal and Error §§ 316 et seq.

Appeal by plaintiffs from judgment entered 20 August 1993 by Judge F. Fetzer Mills in Guilford County Superior Court. Heard in the Court of Appeals 19 December 1994.

Harris & Iorio, by Douglas S. Harris, for plaintiff appellants.

Smith Helms Mulliss & Moore, L.L.P., by Stephen P. Millikin, for defendant appellee Kenneth Eugene Estes.

Henson Henson Bayliss & Sue, by Perry C. Henson, Sr., for defendant appellee Margaret Dudley Moses.

ARNOLD, Chief Judge.

Plaintiff Manlin Chee and her husband, Juan Forgay, instituted this civil action seeking to recover damages arising from the alleged negligence of the defendants in operating their motor vehicles. Ms. Chee alleged that she was injured on 6 October 1987 when the vehicle in which she was a passenger ran off the road and overturned when its driver, defendant Moses, attempted to avoid a collision with

a vehicle driven by defendant Estes. Plaintiff Chee sought to recover damages for pain and suffering, bodily injury, medical expenses, and lost wages. Her husband sought to recover for loss of consortium. The jury determined that Chee was injured by the negligence of defendant Estes but not by any negligence on the part of defendant Moses and awarded Chee damages of $20,000. The jury further determined that Forgay was not entitled to any recovery for loss of consortium. By judgment rendered 13 August 1993 and filed 20 August 1993, the trial court entered judgment in accordance with the verdict.

On 23 August 1993, plaintiffs filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (1990), seeking either a new trial or additur. As grounds for relief, plaintiffs alleged that: (1) there was irregularity depriving them of a fair trial in that defense counsel made a false representation in his closing argument; (2) there was misconduct at trial by the prevailing party in highlighting the alienage and national origin of plaintiff Chee, thereby playing to the prejudices of the jury; (3) there was jury misconduct in that several of the jurors expressed strong prejudice against persons of the national origin, race, and alienage of Chee during jury deliberations and lied about having any such prejudice during jury selection; (4) there was manifest disregard by the jury of the court's instructions to evaluate the evidence and render a verdict based on the evidence; (5) inadequate damages were awarded appearing to have been given under the influence of passion or prejudice; (6) there was insufficient evidence to justify the verdict; and (7) the jurors' disregard for plaintiffs' uncontradicted evidence was motivated by their racial, ethnic, and xenophobic prejudice. The record indicates that plaintiff Chee is of Chinese extraction and was a resident alien in the United States, rather than a naturalized citizen, at the time of trial. As support for the motion, plaintiffs submitted two affidavits from one of the jurors, Glenn Turner, in which Turner claimed that some of the other jurors had expressed prejudice against aliens residing in the United States and that such prejudice adversely affected the damages awarded.

By order filed 9 December 1993, the trial court denied the motion. On 17 December 1993, plaintiffs filed a notice of appeal, which reads as follows:

> Plaintiffs . . . hereby give notice of appeal to the North Carolina Court of Appeals from the judgment rendered by the Honorable F. Fetzer Mills on August 13, 1993, in Guilford County Superior Court in which judgment was entered in favor of defendant

> Margaret Dudley Moses, but in favor of the plaintiff Manlin Chee against the defendant Kenneth Eugene Estes in the amount of $20,000.00. Appeal is made against both defendants.
>
> Said Notice of Appeal is timely, plaintiff Manlin Chee having filed a motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure which motion was denied on December 14, 1993, by the Honorable F. Fetzer Mills.

Plaintiffs' sole argument on appeal concerns the denial of their motion for new trial. The threshold issue presented by this appeal then is whether or not plaintiffs' notice of appeal is sufficient to confer jurisdiction on this Court over the 9 December 1993 order denying the motion for new trial. We conclude that it is not.

The appellate rules require that the notice of appeal "designate the judgment or order from which appeal is taken." N.C.R. App. P. 3(d). Proper notice of appeal is a jurisdictional requirement that may not be waived. *Farm Credit Bank v. Van Dorp*, 110 N.C. App. 759, 431 S.E.2d 222 (1993); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422 (1990). As a general rule, the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken. *Farm Credit*, 110 N.C. App. 759, 431 S.E.2d 222; *Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 411 S.E.2d 645 (1992); *Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422. As exceptions to the general rule, there are two situations in which the appellate court may liberally construe a notice of appeal to determine it has jurisdiction over a ruling not specified in the notice. *Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422. First, if the appellant made a mistake in designating the judgment intended to be appealed, then the appeal will not be dismissed if the intent to appeal from the judgment can be fairly inferred from the notice and the appellee was not misled by the mistake. *Id.* Second, if the appellant technically fails to comply with procedural requirements in filing papers with the court but accomplishes the functional equivalent of the requirement, then the court may find compliance with the rules. *Id.*

Neither of these exceptions is applicable here. Plaintiffs' notice of appeal indicates that an appeal was being taken from the judgment entered in accordance with the verdict and it cannot be fairly inferred from the notice that plaintiffs intended as well to appeal the denial of their motion for new trial. Although plaintiffs made reference to the denial of their motion for new trial in the notice, the reference was

made for the purpose of showing the timeliness of the notice and does not evidence an intent to appeal that ruling. Furthermore, this is not a situation in which the appellant technically failed to comply with requirements relating to the filing of the notice so as to render applicable the second exception to the general rule.

We find the present situation most similar to that addressed in *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422. In that case, this Court determined that a notice of appeal from an order denying a Rule 59 motion, which did not also specifically appeal the underlying judgment, did not present the underlying judgment for appellate review. The case at hand presents the converse situation and requires the same result. We conclude that the notice of appeal here, even when liberally construed, is not sufficient to give this Court jurisdiction to review the order denying plaintiffs' Rule 59 motion and instead presents for our review only the underlying judgment entered in accordance with the verdict. Since plaintiffs have failed to show any error in that judgment from which appeal was properly taken, we hereby affirm the judgment entered 20 August 1993. Furthermore, in our discretion and pursuant to Appellate Rule 21, we have considered the merits of the argument presented by plaintiffs concerning the denial of their motion for new trial and found no abuse of discretion in the denial of that motion. *See* N.C. Gen. Stat. § 8C-1, Rule 606(b) (1992); *Berrier v. Thrift*, 107 N.C. App. 356, 420 S.E.2d 206 (1992), *disc. review denied*, 333 N.C. 254, 424 S.E.2d 918 (1993) (holding that juror affidavits concerning internal influences affecting the verdict may not be used to impeach the verdict).

Affirmed.

Judges EAGLES and ORR concur.

UNISUN INSURANCE COMPANY, PLAINTIFF v. MAVIOUS GOODMAN, DELENA DAVIS, WILLFRED MCCULLOUGH, LEVI TONEY, ASA FINANCE COMPANY, INC., AND CARWELL CRAWFORD, D/B/A DO-IT-ALL CLEANING & PAINTING, DEFENDANTS

No. 9426SC141

(Filed 20 December 1994)

Insurance § 621 (NCI4th)— automobile insurance—premium financing—date of cancellation

An automobile insurance policy was cancelled on the date the insurer received notice of the cancellation mailed by the premium finance company, not on the date stated in the notice as the effective date of cancellation, where the record fails to show the date on which the premium finance company actually mailed the cancellation notice. N.C.G.S. § 58-35-85.

Am Jur 2d, Insurance §§ 380 et seq.

Appeal by plaintiff from order entered 9 December 1993 by Judge Zoro J. Guice in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 1994.

Wishart, Norris, Henniger & Pittman, P.A., by Kenneth R. Raynor for plaintiff-appellant.

Paul J. Williams for defendants-appellees, Mavious Goodman and Delena Davis.

Baucom, Claytor, Benton, Morgan, Wood & White by James F. Wood, III, for defendant-appellee Carwell Crawford, d/b/a DO-IT-ALL Cleaning & Painting.

WYNN, Judge.

On 31 March 1991, a taxi cab driven by defendant-appellee Willfred McCullough and owned by defendant-appellee Levi Toney, collided with an automobile driven by defendant-appellee Carwell Crawford and owned by Carwell Crawford d/b/a DO-IT-ALL Cleaning and Painting. Defendants-appellees Mavious Goodman and Delena Davis were passengers in the taxi.

Prior to the accident, plaintiff-appellant Unisun Insurance Company ("Unisun") issued Toney's taxi cab company an insurance policy. Toney financed the policy premium through ASA Finance Company, Inc. ("ASA"), a premium financing company, in accordance with

N.C. Gen. Stat. § 58-35, *et seq.* (1987). The financing arrangement required Toney to make a down payment on the policy premium and monthly payments. The arrangement further provided that in the event of default on the payments, ASA could request that Unisun cancel the policy pursuant to a Power of Attorney given by Toney, which ASA forwarded to Unisun.

Toney defaulted on the first payment due 1 March 1991. On 7 March 1991, ASA mailed a "Ten Day Notice" to Toney, notifying him that his continued failure to pay would result in ASA requesting that Unisun cancel the policy. Following Toney's failure to pay within the ten-day period, ASA mailed a "Notice of Cancellation" to Unisun dated 18 March 1991, requesting that Unisun cancel the policy—effective 25 March 1991. The record indicates that Unisun received the notice on 15 April 1991 and thereafter issued and mailed a "Notice of Cancellation of Commercial Non-Fleet Ceded Policy" to Toney on or about 15 April 1991. (While the notice from ASA was dated 18 March 1991, no evidence was presented as to the date on which the notice was actually mailed.).

On 18 July 1991, Goodman and Davis filed a complaint in Mecklenburg County Superior Court alleging that the 31 March 1991 collision was caused by McCullough's negligence which should be imputed to Toney, and, seeking to recover for personal injuries allegedly sustained as a result of the collision. In response, McCullough and Toney filed a third-party complaint bringing Crawford into the action. Crawford counterclaimed against McCullough and Toney alleging that he too sustained personal injuries in the collision. Unisun entered this matter by filing a declaratory judgment action seeking to have the court declare that it did not provide insurance to Toney at the time of the accident. The parties filed cross-motions for summary judgment which the trial court favorably granted for Crawford, Goodman, Davis and ASA, but denied for Unisun. Thereafter, Unisun filed Notice of Appeal against Crawford, Davis and Goodman, but not against ASA.

Unisun contends that the trial court erred by denying its motion for summary judgment and by granting defendants, Goodman, Davis and Crawford's motion for summary judgment because Unisun had effectively cancelled Toney's insurance policy when the accident occurred. We disagree.

The procedure for cancellation of an insurance policy where the premium is financed by a premium financing company, and, where

the insured defaults on the finance agreement, is governed by N.C. Gen. Stat. § 58-35-85(1). This statute provides, in part, that:

> When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract or contract listed in the agreement, the insurance contract or contracts shall not be cancelled unless such cancellation is effectuated in accordance with the following provisions:
>
> (1) Not less than 10 days' written notice be mailed to the last known address of the insured or insureds shown on the insurance premium finance agreement of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. A notice thereof shall also be mailed to the insurance agent.
>
> (2) After expiration of such period, the insurance premium finance company shall mail the insurer a request for cancellation including a copy of the power of attorney, and shall mail a copy of the request for cancellation to the insured at his last known address as shown on the insurance premium finance agreement.
>
> (3) Upon *receipt* of a copy of such request for cancellation notice by the insurer, the insurance contract shall be cancelled with the same force and effect as if the aforesaid request for cancellation had been submitted by the insured himself, without requiring the return of the insurance contract or contracts.
>
> (4) All statutory, regulatory, and contractual restrictions providing that the insured may not cancel his insurance contract unless he first satisfies such restrictions by giving a prescribed notice to a governmental agency, the insurance carrier, an individual, or a person designated to receive such notice for said governmental agency, insurance carrier, or individual shall apply where cancellation is effected under the provisions of this section.

(Emphasis added).

The pertinent issue in the subject case is whether Toney's insurance policy was cancelled on 25 March 1991, the date stated on the notice received by Unisun, or on 15 April 1991, the date that the record indicates Unisun received the notice.

Subsection (3) of N.C. Gen. Stat. § 58-35-85 provides that "Upon *receipt* of a copy of a . . . request for cancellation . . . the insurance

contract shall be cancelled with the same force and effect as if the aforesaid request for cancellation had been submitted by the insured himself." Thus, cancellation requested by a finance company occurs in the same manner as if the insured requested the cancellation.

The terms of the insurance contract govern when an insurance policy is cancelled by the insured. *See Daniels v. Nationwide Mut. Ins. Co.*, 258 N.C. 660, 129 S.E.2d 314 (1963). Most insurance policies are cancelled the day that the insured mails the cancellation notice. *See Hayes v. Hartford Acc. & Indemnity Co.*, 274 N.C. 73, 161 S.E.2d 552 (1968). In the case *sub judice*, however, the insurance policy in question is not included in the record and the parties make no mention of language within the policy that would apply to this issue. Even so, it is significant that the record does not indicate the date on which ASA actually mailed the cancellation notice. The only evidence contained in the record states that Unisun received the cancellation notice on 15 April 1991. We, therefore, are guided only by the language of N.C. Gen. Stat § 58-35-85, which states that "upon receipt of a copy of a . . . request for cancellation . . . the insurance contract shall be cancelled . . . ." Thus, we are limited to find that the insurance policy in the subject case was cancelled the day Unisun received the cancellation request from ASA—15 April 1991. Accordingly, the trial court's decision is,

AFFIRMED.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. WALTER BOBBY TURNER, JR.

No. COA94-771

(Filed 20 December 1994)

Automobiles and Other Vehicles § 849 (NCI4th)— streets in mobile home park as public streets—driving while impaired conviction proper

Defendant could properly be convicted of driving while impaired where he resided in a privately owned mobile home park; he drove his car to a neighbor's two trailers down; his blood alcohol level was .22; and the streets of the mobile home park,

which qualified as a subdivision, were open to public vehicular traffic. N.C.G.S. § 20-138.2(a) and (d); N.C.G.S. § 20-4.01(32).

Am Jur 2d, Automobiles and Highway Traffic § 300.

Appeal by defendant from judgment entered 25 January 1994 by Judge Robert D. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 December 1994.

On 31 January 1993, defendant, a resident of a privately-owned mobile home park known as the Timberline Mobile Home Park in Charlotte, drove his vehicle from his mobile home to a mobile home two homes away to assist a neighbor in starting an automobile. Defendant drove on Ann Elizabeth Drive, a privately-maintained paved road within the mobile home park. When defendant returned to his mobile home, he encountered an officer of the Charlotte Police Department, who asked defendant whether he had been drinking. Defendant responded affirmatively. The officer placed defendant under arrest and transported him to the intake center. Defendant subsequently registered a blood alcohol content reading of .22 on the intoxilyzer machine.

Defendant was charged by citation with driving while impaired. From a conviction in district court, he appealed to superior court, where he was found guilty of the offense by a jury. He appeals from a judgment suspending sentence imposed upon the conviction.

Attorney General Michael F. Easley, by Assistant Attorney General Joseph P. Dugdale, for the State.

Harkey, Lambeth, Nystrom & Fiorella, by Edward A. Fiorella, Jr., for defendant appellant.

ARNOLD, Chief Judge.

It is a misdemeanor to drive a vehicle upon "any highway, any street, or any public vehicular area within this State" while under the influence of an impairing substance, or, prior to 1 October 1993, at any relevant time after driving with an alcohol concentration of 0.10 (now 0.08). N.C. Gen. Stat. § 20-138.1(a) and (d) (1993). Defendant contends that he should have never been arrested or convicted of the offense because he never drove on a highway, street or public vehicular area, as the mobile home park is private property, and Ann Elizabeth Drive has never been dedicated to public use.

A "public vehicular area" is defined in N.C. Gen. Stat. § 20-4.01(32) (1993), in pertinent part, as follows:

> Any area within the State of North Carolina that is generally open to and used by the public for vehicular traffic, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot . . . .
>
> The term 'public vehicular area' shall also include . . . any road opened to vehicular traffic within or leading to a subdivision for use by subdivision residents, their guests, and members of the public, whether or not the subdivision roads have been offered for dedication to the public. The term 'public vehicular area' shall not be construed to mean any private property not generally open to and used by the public.

Black's Law Dictionary 1277 (5th ed. 1979) defines a "subdivision" as:

> Division into smaller parts of the same thing or subject-matter. The division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development.

The evidence shows that Timberline Mobile Home Park is owned by one individual, who has divided the property into lots for lease. The mobile home park thus fits within the foregoing definition of a subdivision. The evidence further shows that the streets are not marked by signs indicating the roads are private or by signs prohibiting trespassing, and that the streets are available for use by residents and their guests or other visitors. We therefore conclude that a jury could find that Ann Elizabeth Drive is a public vehicular area within the meaning of G.S. § 20-4.01(32).

We hold the trial court correctly denied defendant's motion to dismiss the charge.

No error.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. PAUL DURAND IKARD

No. 9425SC642

(Filed 20 December 1994)

Criminal Law § 1522 (NCI4th)— defendant's voluntary activation of sentence—no right to appeal

Where the trial court activated defendant's sentence upon his voluntary election to serve the sentence in lieu of the remainder of his probation and not as a result of a finding of a violation of probation, defendant had no right to appeal from his activated sentence. N.C.G.S. § 15A-1347.

Am Jur 2d, Criminal Law § 578.

Appeal by defendant from judgment entered 27 April 1994 by Judge James U. Downs in Catawba County Superior Court. Heard in the Court of Appeals 19 December 1994.

On 30 September 1992, defendant pled guilty to possession of cocaine. Pursuant to a plea arrangement as to sentence, the trial court sentenced defendant to five years in prison, suspended with supervised probation for five years. On 26 April 1994, defendant pled guilty to second degree murder committed on 21 July 1992. The trial court sentenced him to twenty-five years in prison. On 27 April 1994, defendant voluntarily elected to serve his sentence for possession of cocaine in lieu of probation. The trial court revoked defendant's probation, activated his sentence, and ordered the sentence to begin at the expiration of his sentence for second degree murder. Defendant appeals from the judgment and commitment upon revocation of probation.

Attorney General Michael F. Easley, by Assistant Attorney General Julia R. Hoke, for the State.

W. Thomas Portwood, Jr., for defendant appellant.

ARNOLD, Chief Judge.

Defendant argues that the trial court erred by ordering his activated sentence to be served consecutively to the previously entered sentence for second degree murder. Defendant contends the sentence should run concurrently because he elected to serve the prison sentence.

N.C. Gen. Stat. § 15A-1347 (1988) provides that "[w]hen a superior court judge, as a result of a finding of a violation of probation, activates a sentence . . . the defendant may appeal under G.S. 7A-27." In this case, the trial court activated defendant's sentence upon his voluntary election to serve the sentence in lieu of the remainder of his probation and not "as a result of a finding of a violation of probation." Therefore, defendant has no right to appeal from his activated sentence, and his appeal is dismissed.

Appeal dismissed.

Judges EAGLES and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 20 DECEMBER 1994

BAGGETT v. HARLICKA No. 947DC338	Nash (92CVD497)	Reversed
BARRETT v. BARRETT No. 9424DC133	Watauga (92CVD665)	Affirmed
BENNETT v. BENNETT No. 9422DC127	Iredell (91CVD755)	Reversed & Remanded
BODFORD BROS. CONSTR. CO. v. FORSYTH COUNTY ENVIR. AFFAIRS DEPT. No. 9421SC471	Forsyth (91CVS3830)	Affirmed
BUCHANAN TRUCKING CO. v. WEST FLORIDA TRUCK BROKERS No. 9428SC219	McDowell (91CVS203)	No Error
CARTNER v. CARTNER No. 9321DC1119	Forsyth (92CVD1687)	Vacated & Remanded
CHARLOTTE-MECKLENBURG HOSPITAL AUTH. v. LINDSAY No. 9426DC468	Mecklenburg (93CVD10610MRB)	Affirmed
COLE v. ETHERIDGE No. 9310SC500	Wake (89CVS5457)	Affirmed
CURRIN v. BRADDY No. 939SC1318	Granville (92CVS626)	Affirmed
DALE v. TOWN OF LONG VIEW No. 9425SC216	Catawba (92CVS1895)	Reversed
DAVIE COUNTY DEPT. SOCIAL SERVICES v. KEATON No. 9422DC194	Davie (92CVD464)	Affirmed
DAVIS v. LUMBERTON POLICE DEPT. No. 9416SC255	Robeson (93CVS2228)	Affirmed
DEMUTH v. ANSEL-EDMONT INDUSTRIAL No. COA94-752	Ind. Comm. (091468)	Affirmed
DODD v. LORRAINE KNITTING MILLS No. 9410IC617	Ind. Comm. (137616)	Affirmed
DOWD v. BELL No. 945DC342	New Hanover (93CVD1585)	Affirmed in part; Reversed in part

FLOYD v. FLOYD No. 9419DC214	Randolph (92CVD593)	Affirmed
FRASIER v. DUN-WELL JANITORIAL SERVICES No. 9410IC683	Ind. Comm. (960856)	Affirmed
FROST v. FROST No. 948DC243	Wayne (88CVD837)	Affirmed in part & Reversed in part
HAMBRIGHT v. EDWARDS No. 944SC129	Onslow (91CVS1176)	Reversed
HAND HELD PRODUCTS v. EXLIBRIS No. COA94-766	Mecklenburg (93SP2494)	Affirmed
HENDRIX v. HENDRIX No. 9421DC198	Forsyth (90CVD4183)	Remand for modification
IN RE APPEAL OF HOLIDAY TOURS No. 9310PTC1198	Property Tax Comm. (93PTC44) (93PTC43)	Affirmed
JONES v. HUSSMAN/SOUTHBEND No. 9310SC1206	Wake (92CVS4198)	Affirmed
MACCURDY v. BANKERS ASSURANCE, INC. No. 9426SC185	Mecklenburg (92CVS14173)	Reversed
MCCURRY v. LUIGI No. 9428DC136	Buncombe (93CVD3413)	Affirmed
MEDFORD v. HAYWOOD COUNTY HOSPITAL No. 9428SC218	Buncombe (93CVS3811)	Affirmed
NORTH HILLS PROPERTIES v. WOOTEN'S JEWELERS No. 9419DC644	Cabarrus (93CVD2665)	Affirmed
NURSEFINDERS OF CHARLOTTE v. PAYNE No. 9326DC1315	Mecklenburg (93CVD2710)	Affirmed
PINNER v. EAST CAROLINA BANK No. 942SC280	Tyrrell (92CVS59)	Affirmed
REUHLAND v. NEWTON No. 9421SC196	Forsyth (92CVS3647)	Reversed
RIVER RIDGE MARKET PLACE v. DUOMAR, INC. No. COA94-727	Wake (92CVD10258)	Affirmed

ROUNTREE v. N.C. MOBILE HOME CORP. No. 947SC285	Wilson (91CVS95)	Affirmed part; Vacated in part & Remanded
SERVICE OIL CO. v. CALHOUN No. 9416SC188	Scotland (93CVS224)	Reversed & Remanded
SLOAN v. POSTON No. 9427DC20	Cleveland (92CVD1208)	Affirmed
SMITH v. KEEVER No. 9422SC132	Alexander (92CVS338)	Appeal Dismissed
SPEARMAN FOOD DIST. v. DSH No. 9429SC197	Henderson (92CVS11)	Affirmed
STATE v. ALLIGOOD No. 9410SC375	Wake (93CRS076764)	No Error
STATE v. BOSWELL No. 9426SC703	Mecklenburg (92CRS82824)	No Error
STATE v. CHAMBERS No. 9318SC747	Guilford (91CRS51631)	No Error
STATE v. COOPER No. 947SC568	Edgecombe (91CRS4620) (91CRS4621) (91CRS4622)	Affirmed in part & Remanded in part
STATE v. DAVIS No. 9419SC611	Rowan (93CRS1326)	No Error
STATE v. DIXON No. 9418SC687	Guilford (92CRS71441) (92CRS71442)	No Error
STATE v. DRAYTON No. 9426SC554	Mecklenburg (93CRS29831) (93CRS29834)	No Error
STATE v. DUNN No. 9410SC296	Wake (92CRS67561) (92CRS67562) (92CRS67563)	No Error
STATE v. FERNANDEZ No. 9425SC648	Catawba (92CRS15505) (92CRS15603)	No Error
STATE v. FIELDS No. 9416SC161	Robeson (91CRS5148)	No Error

STATE v. HILL No. 9421SC588	Forsyth (93CRS23879)	No Error
STATE v. HOLMES No. 948SC524	Wayne (92CRS3226) (92CRS4906)	No Error
STATE v. HURST No. 9429SC302	McDowell (93CRS0047)	No Error
STATE v. JENKINS No. 943SC697	Pitt (93CRS21130) (93CRS21131)	No Error
STATE v. JENKINS No. 948SC590	Wayne (92CRS14725)	No Error
STATE v. KEASLING No. 9427SC613	Lincoln (90CRS5296) (90CRS5297)	No Error
STATE v. KEITT No. 9427SC598	Gaston (92CRS12580)	No Error
STATE v. KING No. 9412SC434	Cumberland (92CRS44923)	No Error
STATE v. LASSITER No. 9414SC451	Durham (92CRS29870) (92CRS29871) (92CRS30344)	No Error
STATE v. LEE No. 9422SC649	Alexander (92CRS1527)	No Error
STATE v. LOTT No. 9419SC672	Cabarrus (92CRS13498)	No Error
STATE v. LUNDQUIST No. COA94-718	Wake (93CRS68833)	No Error
STATE v. MASON No. 9326SC1208	Mecklenburg (92CRS32676) (92CRS34621)	Reversed & Remanded
STATE v. McCRAY No. COA94-806	Guilford (93CRS72870)	No Error
STATE v. MOONEY No. 948SC538	Wayne (92CRS14352)	Affirmed

STATE v. PENLAND No. COA 94-791	Buncombe (91CRS2579) (91CRS2580) (91CRS2581) (91CRS2582) (91CRS2583) (91CRS2584) (91CRS2585) (91CRS2586) (91CRS2587) (91CRS2588) (91CRS2589) (91CRS2590) (91CRS2591) (91CRS2592) (91CRS2593) (91CRS2368) (91CRS4509) (91CRS4510) (91CRS4511) (91CRS4512) (91CRS4515) (91CRS4528) (91CRS4529) (91CRS2759) (91CRS2760)	Vacated & Remanded
STATE v. PERRY No. 9311SC1226	Harnett (92CRS6136) (92CRS6138) (92CRS6601)	No Error
STATE v. PERRY No. 949SC684	Franklin (92CRS6010)	No Error in guilt innocence phase of trial; Remanded for resentencing
STATE v. PORTER No. 9329SC1049	Henderson (92CRS8783) (92CRS8822) (92CRS7769)	Remanded for resentencing
STATE v. REAVES No. COA94-707	Wake (93CRS68811) (93CRS68812) (93CRS68813) (93CRS68814)	No Error
STATE v. STEVENS No. 938SC1317	Wayne (92CRS16110)	No Error

STEED v. WEST MAIN ASSOC. No. 9414SC146	Durham (91CVS01564)	Dismissed
TURNER v. LA PETITE ACADEMY No. 9310SC746	Wake (92CVS546)	No Error
WALLACE v. PHILLIPS No. 9425SC74	Caldwell (91CVS1352)	Reversed & Remanded
WARD v. WARD No. 9426DC108	Mecklenburg (86CVD13570)	Affirmed
WILLIAM v. MOCARO INDUSTRIES No. 9410IC438	Ind. Comm. (047440)	Affirmed

DELBERT JOSEPH MUSE, JR., ADMINISTRATOR OF THE ESTATE OF DELBERT JOSEPH MUSE, III, AND JANE K. MUSE, PLAINTIFFS v. CHARTER HOSPITAL OF WINSTON-SALEM, INC. AND CHARTER MEDICAL CORPORATION, DEFENDANTS

No. 9318SC265

(Filed 3 January 1995)

1. Corporations § 5 (NCI4th)— instrumentality theory—separate issues against two entities—submission error

The result of finding a corporation to be a mere instrumentality of another is that the two are treated as one for purposes of assessing liability for the alleged wrong and are jointly and severally liable; therefore, submitting separate issues of punitive damages as to defendant Charter Hospital of Winston-Salem and as to defendant Charter Medical Corporation, whose liability was based on the instrumentality theory, was error.

Am Jur 2d, Corporations §§ 43 et seq.

Liability of corporation for torts of subsidiary. 7 ALR3d 1343.

2. Hospitals and Medical Facilities or Institutions § 64 (NCI4th)— duty of hospital not to institute policy interfering with medical judgment of doctor

Pursuant to the reasonable person standard, defendant Charter Hospital had a duty not to institute a policy or practice which required that patients be discharged when their insurance expired and which interfered with the medical judgment of deceased's treating physician.

Am Jur 2d, Hospitals and Asylums §§ 14 et seq.

3. Hospitals and Medical Facilities or Institutions § 64 (NCI4th)— discharge of patient when insurance ran out—hospital's practice interfering with doctor's exercise of medical judgment—sufficiency of evidence

In an action to recover for the wrongful death of plaintiff's intestate who was discharged from defendant hospital allegedly because his insurance ran out and not because his progress warranted it, evidence was sufficient to support the jury's finding that defendant hospital had a practice which interfered with the ability of the doctor to exercise his medical judgment and that defend-

ant acted knowingly and of set purpose and with reckless indifference to the rights of others.

Am Jur 2d, Hospitals and Asylums §§ 14 et seq.

4. Hospitals and Medical Facilities or Institutions § 64 (NCI4th)— suicidal patient discharged by hospital—negligence of parents and treating physician—no insulating negligence

The evidence was insufficient to support defendants' contention that the superseding negligence of plaintiff parents and their son's treating physician insulated the negligence of defendant hospital as a matter of law where it tended to show that the hospital had a policy of requiring the discharge of patients when their insurance expired; this policy interfered with the physician's medical judgment regarding the patient's discharge; and any negligence of the physician in discharging the patient and in not warning his parents, or of the parents in not properly supervising their son after discharge, did not turn aside the natural sequence of events set in motion by the hospital's misconduct.

Am Jur 2d, Hospitals and Asylums §§ 14 et seq.

5. Hospitals and Medical Facilities or Institutions § 64 (NCI4th)— suicidal patient—negligence by psychiatric hospital—suicide not superseding cause of death

Where a psychiatric hospital has assumed the care of a suicidal patient, and as a result of its negligence, the patient commits suicide, the hospital cannot claim that the suicide was a superseding cause, insulating the hospital from liability.

Am Jur 2d, Hospitals and Asylums §§ 14 et seq.

Liability of hospital, other than mental institution, for suicide of patient. 60 ALR3d 880.

6. Damages § 178 (NCI4th)— punitive damage award—court's post-judgment analysis

Defendants could not complain that the trial court must articulate a detailed post-judgment analysis of a jury's award of punitive damages and that failure to do so violates due process, since the court did give a detailed and thoughtful analysis regarding the propriety of the verdict.

Am Jur 2d, Damages §§ 1032 et seq.

7. Damages § 178 (NCI4th)— punitive damages six times compensatory damages—award not constitutionally unacceptable

There is no bright line between what is constitutionally acceptable and what is constitutionally unacceptable with regard to punitive damages; in this wrongful death action where defendant's willful and wanton conduct resulted in decedent's suicide, the award of punitive damages, which was six times the amount of the compensatory damages, was not unconstitutional.

Am Jur 2d, Damages §§ 1032 et seq.

Excessiveness or adequacy of punitive damages awarded in personal injury or death cases. 12 ALR5th 195.

8. Damages § 127 (NCI4th)— punitive damages—due process requirements

There was no merit to defendant's contention that due process required that punitive damages be based on conduct which was intentional or willful, that the burden of proof should be higher than a preponderance of the evidence, and that evidence of a defendant's net worth be excluded or allowed only after the determination has been made by a jury that punitive damages should be awarded.

Am Jur 2d, Damages §§ 762 et seq.

9. Trial § 555 (NCI4th)— alleged juror misconduct—new trial denied—no error

The trial court did not err in denying defendants' motion for a new trial based on juror misconduct where the juror allegedly failed to disclose information during voir dire, but the court found that all of the pertinent information was available to defendants in time for them to have the juror excused peremptorily or for cause.

Am Jur 2d, New Trial §§ 159 et seq.

Judge ORR dissenting.

Appeal by defendants from judgment entered 9 January 1992 and order filed 11 June 1992 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 6 January 1994.

Berry & Byrd, by Wade E. Byrd, for plaintiffs-appellees.

Smith Helms Mulliss & Moore, by Bynum M. Hunter and Alan W. Duncan; and Law Office of James R. Hubbard, by James R. Hubbard, for defendants-appellants.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Adam Stein; and Elizabeth F. Kuniholm for North Carolina Academy of Trial Lawyers, amicus curiae.

Poyner & Spruill, by John R. Jolly, Jr., Samuel O. Southern, Robert O. Crawford, III, and Benjamin P. Dean, for North Carolina Association of Defense Attorneys, amicus curiae.

Weissburg and Aronson, Inc., by Mark E. Reagan; and Clark C. Havighurst for Federation of American Health Systems, amicus curiae.

LEWIS, Judge.

This appeal arises from a judgment in favor of plaintiffs in an action for the wrongful death of Delbert Joseph Muse, III (hereinafter "Joe"). Joe was the son of Delbert Joseph Muse, Jr. (hereinafter "Mr. Muse") and Jane K. Muse (hereinafter "Mrs. Muse"), plaintiffs. The jury found that defendant Charter Hospital of Winston-Salem, Inc. (hereinafter "Charter Hospital" or "the hospital") was negligent in that, *inter alia*, it had a policy or practice which required physicians to discharge patients when their insurance expired and that this policy interfered with the exercise of the medical judgment of Joe's treating physician, Dr. L. Jarrett Barnhill, Jr. The jury awarded plaintiffs compensatory damages of approximately $1,000,000. The jury found that Mr. and Mrs. Muse were contributorily negligent, but that Charter Hospital's conduct was willful or wanton, and awarded punitive damages of $2,000,000 against Charter Hospital. Further, the jury found that Charter Hospital was an instrumentality of defendant Charter Medical Corporation (hereinafter "Charter Medical") and awarded punitive damages of $4,000,000 against Charter Medical.

The facts on which this case arose may be summarized as follows. On 12 June 1986, Joe, who was sixteen years old at the time, was admitted to Charter Hospital for treatment related to his depression and suicidal thoughts. Joe's treatment team consisted of Dr. Barnhill, as treating physician, Fernando Garzon, as nursing therapist, and Betsey Willard, as social worker. During his hospitalization, Joe experienced auditory hallucinations, suicidal and homicidal

thoughts, and major depression. Joe's insurance coverage was set to expire on 12 July 1986. As that date neared, Dr. Barnhill decided that a blood test was needed to determine the proper dosage of a drug he was administering to Joe. The blood test was scheduled for 13 July, the day after Joe's insurance was to expire. Dr. Barnhill requested that the hospital administrator allow Joe to stay at Charter Hospital two more days, until 14 July, with Mr. and Mrs. Muse signing a promissory note to pay for the two extra days. The test results did not come back from the lab until 15 July. Nevertheless, Joe was discharged on 14 July and was referred by Dr. Barnhill to the Guilford County Area Mental Health, Mental Retardation and Substance Abuse Authority (hereinafter "Mental Health Authority") for outpatient treatment. Plaintiffs' evidence tended to show that Joe's condition upon discharge was worse than when he entered the hospital. Defendants' evidence, however, tended to show that while his prognosis remained guarded, Joe's condition at discharge was improved. Upon his discharge, Joe went on a one-week family vacation. On 22 July he began outpatient treatment at the Mental Health Authority, where he was seen by Dr. David Slonaker, a clinical psychologist. Two days later, Joe again met with Dr. Slonaker. Joe failed to show up at his 30 July appointment, and the next day he took a fatal overdose of Desipramine, one of his prescribed drugs.

On appeal, defendants present numerous assignments of error. We find merit in one of defendants' arguments.

I.

[1] Defendants contend that the separate awards of punitive damages against Charter Hospital and Charter Medical were improper. Charter Medical's liability was based solely on the jury's finding that Charter Hospital was an instrumentality of Charter Medical. The trial court submitted to the jury two separate issues:

> 9) What amount of punitive damages, if any, does the jury, in its discretion, award against the Defendant, Charter Hospital of Winston-Salem, Inc., to the Plaintiff, Administrator?
>
> 10) What amount of punitive damages, if any, does the jury, in its discretion, award against the Defendant, Charter Medical Corporation, to the Plaintiff, Administrator?

The court instructed the jury that it could award punitive damages "against the defendant Charter Hospital of Winston-Salem in Issue 9 and/or against the defendant Charter Medical Corporation in Issue

10." We believe that the jury instructions and the issues submitted were error.

The instrumentality theory, upon which Charter Medical's liability was based, holds: " 'A corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of parent and subsidiary . . . may be disregarded.' " *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 8, 149 S.E.2d 570, 575 (1966) (quoting 19 Am. Jur. 2d *Corporations* § 717). That is, the parent and the subsidiary are treated as "one and the same person." *Henderson v. Security Mort. & Fin. Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). Our research has disclosed no case in which more than one sum has been awarded against two defendants under the instrumentality theory. *Cf. Postell v. B & D Constr. Co.*, 105 N.C. App. 1, 411 S.E.2d 413 (holding that the controlling individual was jointly and severally liable with the controlled corporation), *disc. review denied*, 331 N.C. 286, 417 S.E.2d 253 (1992). We conclude that the result of finding a corporation to be a mere instrumentality of another is that the two are treated as one for purposes of assessing liability for the alleged wrong, and are jointly and severally liable. Accordingly, submitting separate issues of punitive damages as to each defendant was error.

II.

[2] Defendants next argue that the trial court submitted the case to the jury on an erroneous theory of hospital liability that does not exist under the law of North Carolina. As to the theory in question, the trial court instructed: "[A] hospital is under a duty not to have policies or practices which operate in a way that interferes with the ability of a physician to exercise his medical judgment. A violation of this duty would be negligence." The jury found that there existed "a policy or practice which required physicians to discharge patients when their insurance benefits expire and which interfered with the exercise of Dr. Barnhill's medical judgment." Defendants contend that this theory of liability does not fall within any theories previously accepted by our courts.

In *Blanton v. Moses H. Cone Memorial Hospital, Inc.*, 319 N.C. 372, 354 S.E.2d 455 (1987), our Supreme Court held that the appropriate standard for determining whether a valid claim exists against a hospital is the standard of the ordinary, reasonable, and prudent person. *Id.* at 375, 354 S.E.2d at 457. The Court further stated:

> 'Actionable negligence is the failure of one owing a duty to another to do what a reasonable and prudent man would ordinarily have done, or doing what such a person would not have done, which omission or commission is the proximate cause of injury to another.'

Id. (quoting S. Speiser, et al., *The American Law of Torts* § 9.1, at 995 (1983)).

Our Supreme Court has recognized that hospitals in this state owe a duty of care to their patients. *Id.* In *Burns v. Forsyth County Hospital Authority, Inc.*, 81 N.C. App. 556, 563, 344 S.E.2d 839, 845 (1986), this Court held that a hospital has a duty to the patient to obey the instructions of a doctor, absent the instructions being obviously negligent or dangerous. Another recognized duty is the duty to make a reasonable effort to monitor and oversee the treatment prescribed and administered by doctors practicing at the hospital. *Bost v. Riley*, 44 N.C. App. 638, 647, 262 S.E.2d 391, 396, *disc. review denied*, 300 N.C. 194, 269 S.E.2d 621 (1980). In light of these holdings, it seems axiomatic that the hospital has the duty not to institute policies or practices which interfere with the doctor's medical judgment. We hold that pursuant to the reasonable person standard, Charter Hospital had a duty not to institute a policy or practice which required that patients be discharged when their insurance expired and which interfered with the medical judgment of Dr. Barnhill.

III.

[3] Defendants next argue that even if the theory of negligence submitted to the jury was proper, the jury's finding that Charter Hospital had such a practice was not supported by sufficient evidence. The issue before us is whether the trial court erred in denying defendants' motion for judgment notwithstanding the verdict. In reviewing the denial of a defendant's motion for judgment notwithstanding the verdict, the question is whether the evidence, when viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference, was sufficient to go to the jury. *Schwartzbach v. Apple Baking Co.*, 109 N.C. App. 216, 218, 426 S.E.2d 438, 439 (1993). We conclude that in the case at hand, the evidence was sufficient to go to the jury.

Plaintiffs' evidence included the testimony of Charter Hospital employees and outside experts. Fernando Garzon, Joe's nursing therapist at Charter Hospital, testified that the hospital had a policy of

discharging patients when their insurance expired. Specifically, when the issue of insurance came up in treatment team meetings, plans were made to discharge the patient. When Dr. Barnhill and the other psychiatrists and therapists spoke of insurance, they seemed to lack autonomy. For example, Garzon testified, they would state, "So and so is to be discharged. We must do this." Finally, Garzon testified that when he returned from a vacation, and Joe was no longer at the hospital, he asked several employees why Joe had been discharged and they all responded that he was discharged because his insurance had expired. Jane Sims, a former staff member at the hospital, testified that several employees expressed alarm about Joe's impending discharge, and that a therapist explained that Joe could no longer stay at the hospital because his insurance had expired. Sims also testified that Dr. Barnhill had misgivings about discharging Joe, and that Dr. Barnhill's frustration was apparent to everyone. One of plaintiffs' experts testified that based on a study regarding the length of patient stays at Charter Hospital, it was his opinion that patients were discharged based on insurance, regardless of their medical condition. Other experts testified that based on Joe's serious condition on the date of discharge, the expiration of insurance coverage must have caused Dr. Barnhill to discharge Joe. The experts further testified as to the relevant standard of care, and concluded that Charter Hospital's practices were below the standard of care and caused Joe's death. We hold that this evidence was sufficient to go to the jury.

Defendants further argue that the evidence was insufficient to support the jury's finding that Charter Hospital engaged in conduct that was willful or wanton. An act is willful when it is done purposely and deliberately in violation of the law, or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. *King v. Allred*, 76 N.C. App. 427, 431, 333 S.E.2d 758, 761, *disc. review denied*, 315 N.C. 184, 337 S.E.2d 857 (1985). It is wanton when it is done of wicked purpose, or when it is done needlessly, with reckless indifference to the rights of others. *Id.* at 432, 333 S.E.2d at 761. We conclude that the jury could have reasonably found from the above-stated evidence that Charter Hospital acted knowingly and of set purpose, and with reckless indifference to the rights of others. Therefore, we hold that the finding of willful or wanton conduct on the part of Charter Hospital was supported by sufficient evidence.

IV.

[4] Defendants' next argument is that the trial court erred in not granting their motion for judgment notwithstanding the verdict, on the ground that the negligent acts of the Muses and Dr. Barnhill were superseding causes of Joe's death. Defendants' contention is that the superseding negligence of the Muses and Dr. Barnhill insulated the negligence of Charter Hospital as a matter of law, and that, therefore, the hospital's negligence was not a proximate cause of the suicide.

The doctrine of superseding, or intervening, negligence is well established in our law. In order for an intervening cause to relieve the original wrongdoer of liability, the intervening cause must be a new cause, which intervenes between the original negligent act and the injury ultimately suffered, and which breaks the chain of causation set in motion by the original wrongdoer and becomes itself solely responsible for the injury. *Hayes v. City of Wilmington*, 243 N.C. 525, 540, 91 S.E.2d 673, 685 (1956). The intervening cause must be an independent force which turns aside the natural sequence of events set in motion by the original wrongdoer and produces a result which would not otherwise have followed, and which could not have been reasonably anticipated. *Id.* at 540-41, 91 S.E.2d at 685. The rule in this jurisdiction is that except in cases so clear that there can be no two opinions among fair-minded people, the question should be left for the jury to determine whether the intervening act and the resultant injury were such that the original wrongdoer could reasonably have expected them to occur as a result of his own negligence. *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 238, 311 S.E.2d 559, 567 (1984).

The evidence, when viewed in the light most favorable to plaintiffs, with all reasonable inferences being afforded to plaintiffs, tended to show that the hospital had a policy of requiring the discharge of patients when their insurance expired and that this policy interfered with Dr. Barnhill's medical judgment regarding Joe's discharge. Dr. Barnhill was thereby put in a position such that he could not disclose the severity of Joe's condition to the Muses. He then discharged Joe, transferring him to outpatient treatment at the public facility. Any negligence of Dr. Barnhill in discharging Joe and in not warning the Muses, or of the Muses, in not properly supervising Joe after discharge, did not turn aside the natural sequence of events set in motion by the hospital's misconduct. *See Hayes*, 243 N.C. at 540-41, 91 S.E.2d at 685. Rather, the alleged intervening acts, in the natural and

ordinary course of things, could have been anticipated by defendants as not entirely improbable. *Id.* at 541, 91 S.E.2d at 685. Thus, the hospital's negligence was not superseded, and thereby insulated, as a matter of law. Accordingly, the trial court properly denied defendants' motion for judgment notwithstanding the verdict.

Defendants also contend that the trial court erred in directing a verdict for plaintiffs on the issue of whether Dr. Slonaker's alleged negligence was a superseding cause of Joe's death. In reviewing the granting of a directed verdict, the question is whether the evidence, when viewed in the light most favorable to the non-movant, and giving the non-movant the benefit of every reasonable inference, was sufficient to go to the jury. *Parrish Funeral Home, Inc. v. Pittman*, 104 N.C. App. 268, 269, 409 S.E.2d 327, 329 (1991). When viewed in this light, the evidence tended to show that Joe saw Dr. Slonaker at the Mental Health Authority on two occasions after his discharge from Charter Hospital, that Dr. Slonaker had reviewed Joe's discharge summary, and that Joe reported to Dr. Slonaker that he was still having hallucinations. Further, one of plaintiffs' experts testified that Dr. Slonaker's treatment was "[s]o totally inadequate that he could possibly not have had [the documents in Joe's Charter Hospital file] to review, or if he did review them, he paid no damned attention to them." However, defendants have pointed to no evidence in the record which tends to show that Dr. Slonaker's treatment of Joe was a cause of Joe's suicide. Thus, there was not sufficient evidence to submit to the jury the issue of whether Dr. Slonaker's alleged negligence was a superseding cause of Joe's death, and the trial court did not err in directing a verdict for plaintiffs on this issue.

[5] Defendants next contend that Joe's suicide was a superseding cause of his death and that the trial court erred in granting summary judgment for plaintiffs on the issue. This question is apparently one of first impression in this state. However, we cannot agree with defendants' contention. The rule must be that where a psychiatric hospital has assumed the care of a suicidal patient, and as a result of its negligence, the patient commits suicide, the hospital cannot claim that the suicide was a superseding cause, insulating the hospital from liability. *See Cockrum v. State*, 843 S.W.2d 433 (Tenn. Ct. App. 1992) (*appeal denied* Dec. 7, 1992). Were the rule otherwise, the wrongdoer "could become indifferent to the performance of his duty [to care for the suicidal patient] knowing that the very eventuality that he was under a duty to prevent would, upon its occurrence, relieve him from responsibility." *Hunt v. King County*, 481 P.2d 593, 598 (Wash. Ct.

App.), *review denied*, 79 Wash. 2d 1001 (1971). Accordingly, we conclude that the trial court properly granted summary judgment in favor of plaintiffs on this issue.

V.

Defendants' next argument is that the contributory negligence of the Muses bars their recovery as beneficiaries of Joe's estate. This argument is without merit, however, as contributory negligence does not bar recovery in a wrongful death action where, as here, the defendants' conduct was found to be wanton or willful. *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971).

VI.

Defendants next contend that the trial court erred in admitting certain testimony by plaintiffs' experts. However, in each instance, the first time such testimony was offered, defendants failed to object. Thus, the subsequent admission of similar testimony over objection was not prejudicial error. *Fidelity Bank v. Garner*, 52 N.C. App. 60, 64, 277 S.E.2d 811, 813-14 (1981). Accordingly, defendants' contention is without merit.

VII.

[6] Next, we address defendants' arguments that the award of punitive damages violated due process. Defendants first argue that pursuant to *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 113 L. Ed. 2d 1 (1991), the trial court must articulate a detailed post-judgment analysis of a jury's award of punitive damages, and that the failure to do so violates due process. However, in the recent case of *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. —, 125 L. Ed. 2d 366 (1993), decided after the trial of the instant case, the Court held that such an articulation is not required by the Constitution. *Id.* at —, 125 L. Ed. 2d at 383-84. Moreover, in the present case, the trial court complied with defendants' request that it review the verdict. Contrary to defendants' assertions on appeal, the court did give a detailed and thoughtful analysis regarding the propriety of the verdict, listing the factors relevant to its decision.

Defendants next argue that North Carolina's limited post-judgment review of damages for excessiveness is constitutionally deficient. However, as previously stated, the trial court in the instant case conducted a detailed review of the jury's award of punitive damages, pursuant to defendants' request. Accordingly, defendants will

not be heard to complain that the traditional excessiveness review is unconstitutional since the trial court modified the procedure at defendants' request.

[7] Defendants further argue that the award of punitive damages in the present case was unconstitutional, as it was six times the award of compensatory damages. Defendants cite *Haslip* for the proposition that awards of punitive damages which are more than four times the amount of compensatory damages awarded are at the line of constitutional impropriety. However, the Court, in subsequently upholding an award of punitive damages in *TXO* which was more than 526 times greater than the actual damages awarded, held that there can be no bright line between what is constitutionally acceptable and what is constitutionally unacceptable. *TXO*, 509 U.S. at —, 125 L. Ed. 2d at 379. The Court stated that the concern is a general concern of reasonableness, taking into account the purposes of punitive damages, such as punishment and deterrence. *Id.* In the case at hand, we conclude that the award of punitive damages was reasonable, taking into account the facts of the case and the purposes of punitive damages.

[8] Defendants next argue that due process requires that punitive damages be based on conduct which is intentional or willful and that the burden of proof should be higher than a preponderance of the evidence. However, defendants' requested instruction on punitive damages stated that the burden of proof was "by the greater weight of the evidence" and that the award could be properly based on "gross, willful or wanton" conduct. Defendants may not now complain that the instruction was erroneous. *Blow v. Shaughnessy*, 88 N.C. App. 484, 492, 364 S.E.2d 444, 448 (1988). Furthermore, the Court in *Haslip* held that due process does not require more than a preponderance of the evidence. *Haslip*, 499 U.S. at 23 n.11, 113 L. Ed. 2d 1, at 23 n.11.

Defendants' next contention is that due process requires that evidence of a defendant's net worth be excluded, or only allowed in after the jury has determined that punitive damages should be awarded. In *TXO*, however, the Court held that under well-settled law, a defendant's net worth is properly considered in assessing punitive damages. *TXO*, 509 U.S. at — n.28, 125 L. Ed. 2d at 382 n.28. Furthermore, in the present case, the trial court only admitted evidence of defendants' net worth after it determined that plaintiffs had made a prima facie case warranting the imposition of punitive damages. We believe that this comports with the requirements of due process.

Defendants further argue that the verdict was based on bias and prejudice, as the jury was allowed to hear evidence of defendants' financial condition that was not current. After a *voir dire* of plaintiffs' witness who was to testify as to defendants' financial condition, the trial court ruled that certain evidence would not be relevant to a determination of defendants' current financial condition. The court ruled that other evidence, including that about which defendants now complain, was relevant. Specifically, defendants point to testimony regarding the per share value of Charter Medical's common stock as of 31 December 1989. However, the witness testified that this value was adopted by Charter Medical in its filings with the Securities and Exchange Commission for the fiscal year ending September 1990. We note that the complaint in this case was filed in August 1988, and the trial began in October 1991. Accordingly, we hold that the admission of the evidence in question was sufficiently current so as not to result in a verdict based on bias or prejudice.

VIII.

Defendants' next contention is that the trial court erred in granting plaintiffs' motion to reconsider an order of the court which granted summary judgment against plaintiffs on the issue of punitive damages. Pursuant to N.C.G.S. § 1A-1, Rules 59 and 60 (1990), plaintiffs filed a motion for reconsideration on the ground that they had newly discovered evidence which tended to prove their claim of punitive damages. After reviewing the motion and accompanying affidavits, the trial court granted plaintiffs' motion to reconsider. Upon reconsidering the order of summary judgment, the trial court reversed the order. Defendants contend that plaintiffs' motion for reconsideration under Rule 59 was not timely filed and was not based on newly discovered evidence. We disagree.

Defendants contend that entry of judgment occurred on 12 February 1991, when summary judgment was entered in open court, and that plaintiffs' motion for reconsideration was not filed until 1 March 1991, more than ten days after entry of judgment. We note that Rule 59 requires that the motion be served, not filed, within ten days after entry of judgment. Nevertheless, in this case the motion was both served and filed on 1 March. With the consent of the parties, the trial court delayed entry of summary judgment until 19 February 1991 for the specific purpose of giving plaintiffs more time to evaluate the newly discovered evidence to determine whether it supported a motion for reconsideration. On 19 February, the trial judge signed and

filed the written order of summary judgment. Thus, plaintiffs' 1 March motion was served within ten days of entry of judgment, as required by Rule 59(b).

Defendants also contend that the motion for reconsideration was not based on newly discovered evidence. Defendants, however, did not assert this contention as a ground for their assignment of error. Therefore, the issue is not properly before us. N.C.R. App. P. 10(c) (1994); *Kimmel v. Brett*, 92 N.C. App. 331, 374 S.E.2d 435 (1988). Nevertheless, we note that the standard of review when a new trial is granted pursuant to Rule 59 is whether the trial court abused its discretion, *Corwin v. Dickey*, 91 N.C. App. 725, 729, 373 S.E.2d 149, 151 (1988), *disc. review denied*, 324 N.C. 112, 377 S.E.2d 231 (1989). Defendants have shown no abuse of discretion in this case.

IX.

[9] Next, defendants contend that the trial court erred in not granting their motion for a new trial based on allegations of juror misconduct. Defendants argue that one of the jurors was prejudicially untruthful during *voir dire* in that she did not state that her daughter had experienced suicidal thoughts during adolescence, and that during the trial the juror told the other jurors this fact about her daughter. After the trial, the court held a hearing on the matter. The court found that during the *voir dire*, the juror in question

> was asked some very specific questions by the Court, which resulted in her disclosing that she had been the subject of physical abuse, that her daughter had had emotional problems, and that she had experience [sic] of having lost a family member by way of suicide. And all of that information was available to the defendants at the time that they had the prospective juror . . . under consideration, and could have made a motion for—to have her excused for cause or to have exercised a peremptory challenge.

We conclude that the trial court did not abuse its discretion, and therefore did not err in denying defendants' motion for a new trial.

X.

Finally, defendants contend that the cumulative effect of the errors committed by the trial court requires that defendants have a new trial. We find this argument to be without merit. As stated in section I. of this opinion, the trial court erred in instructing the jury on

punitive damages, and the case must be remanded for a new trial on the issue of punitive damages alone. Beyond this, however, defendants have shown no other error at trial.

For the reasons stated, we find no error in the judgment of the trial court, except for that part of the judgment awarding punitive damages, which is reversed and remanded for proceedings consistent with this opinion.

No error in part, reversed in part and remanded.

Judge WYNN concurs.

Judge ORR dissents.

Judge ORR dissenting.

After a careful review of the record and applicable law, I must respectfully dissent from the majority on the submission of the issue on wilful or wanton conduct. While recognizing the severe emotional impact of the facts surrounding the case, my research concludes that there was insufficient evidence to warrant the submission of wilful and wanton conduct by defendant to the jury. Therefore, in my opinion, the damage awards that were predicated on the jury's positive answer to the wilful or wanton conduct issue must fail.

Plaintiffs contend that acts of the defendant hospital constituted negligence in that (1) there was a policy or practice of requiring physicians to discharge patients from the hospital when their insurance benefits expired, and (2) defendant allowed this policy or practice to operate in a way that interfered with Dr. Barnhill's medical judgment, thereby causing Dr. Barnhill to discharge Joseph Muse, III in a medically-inappropriate manner.

For purposes of this analysis, we can assume that there was such a policy and that there was some evidence from which a jury could find that this policy influenced or interfered with Dr. Barnhill's medical judgment and his decision to discharge Joseph Muse, III. That being the case, plaintiff arguably has made out a case of negligence and the jury so determined. However, the crux of the case rests squarely on the issue of whether the evidence, taken in a light most favorable to the plaintiff, is sufficient to submit the further issue of wilful or wanton conduct to the jury.

Our Supreme Court in *Akzona, Inc. v. Southern Railway Co.*, 314 N.C. 488, 495-96, 334 S.E.2d 759, 763 (1985), defined wilful and wanton conduct as follows:

> An act is done wilfully when it is done purposely and deliberately in violation of law, or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. 'The true conceptions of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law.'
>
> An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.

(Citations omitted.) Further,

> While "[o]rdinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act," we have said "[w]anton and willful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results."

Id. at 496, 334 S.E.2d at 763-64 (citation omitted).

Turning now to the facts of this case, there is, as previously noted, evidence that defendant hospital had a policy or practice of discharging patients when their insurance ran out. This practice was obviously done for a business purpose; however, the evidence reveals that the policy was subject to being overridden on occasion by request of the treating physician or other financial consideration. Although there also was some evidence that this policy may have affected Dr. Barnhill's decision to discharge the plaintiffs' son, such evidence, while perhaps supporting a negligence theory, does not go beyond that.

Dr. Barnhill testified that the policy did not influence his decision, and more importantly, that a range of treatment options including a state psychiatric hospital were available for the patient. No evidence was presented that could lead a jury to conclude that the policy in question involved a deliberate purpose not to discharge some duty necessary to the safety of the person in question. While it can be said

that the policy to discharge was deliberate, there is no evidence that the hospital expected, anticipated or intended for the patient to be released in circumstances that put the person's safety in jeopardy. In fact, Joseph Muse, III was discharged into the custody and care of another physician and a community based mental health facility as well as the care of his parents with specific instructions for his care.

The trial court instructed the jury that ". . . a hospital is under a duty not to have policies or practices which operate in a way that interferes with the ability of a physician to exercise his medical . . . judgment. A violation of this duty would be negligence."

While the jury found that defendant was negligent, I find insufficient evidence to raise the defendant's conduct to the level required to submit the issue of wilful and wanton conduct to the jury. A policy to terminate a patient's hospitalization based upon insurance benefits ending in and of itself is not wilful or wanton conduct. To sustain plaintiff's contention there must be, according to our law, a deliberate purpose not to discharge a duty necessary for a person's safety. If the hospital had simply discharged the patient with no referral to another physician or medical facility, then a cognizable claim for wilful or wanton conduct would have been established. Such was not the case here, as I read the record, and although Dr. Barnhill's care in discharging the patient may well have been negligent, there is nothing to suggest that the hospital's policy or its implementation by Dr. Barnhill was done with reckless or deliberate disregard for the patient's safety. Therefore, I conclude that the trial court erred in submitting the issue of wilful and wanton conduct to the jury and would accordingly vote to reverse.

EDWARD VALVES, INC., A DELAWARE CORPORATION, PLAINTIFF-APPELLANT v. WAKE COUNTY, AND EMMETT CURL, IN HIS CAPACITY AS WAKE COUNTY ASSESSOR, DEFENDANTS-APPELLEES

No. 9410SC290

(Filed 3 January 1995)

1. Taxation § 92 (NCI4th)— self-created intangible property—distinction between property sold and similar property not sold—county's methodology unconstitutional

The Wake County methodology for taxing self-created intangible property is unconstitutional under both the Federal and

State Constitutions and also violates N.C.G.S. § 105-284(a), since the county distinguishes between intangible self-created property that is sold and similar property that is not sold, thus giving different tax treatment to taxpayers owning identical classes of property.

Am Jur 2d, State and Local Taxation §§ 150 et seq.

2. Taxation § 84 (NCI4th)— appeal of real property assessment—dispute about perfection of appeal—summary judgment improperly granted

The trial court erred in granting defendants' summary judgment motion of plaintiff's appeal of its real property assessment, since there was a factual dispute as to whether plaintiff properly perfected its appeal by failing to return a power of attorney signed by the property owner authorizing the representative's appearance before the Board of Equalization and Review.

Am Jur 2d, State and Local Taxation §§ 795 et seq.

Appeal by plaintiff from order entered 1 December 1993 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 26 October 1994.

Womble Carlyle Sandridge & Rice, a Professional Limited Liability Company, by Pressly M. Millen, for plaintiff-appellant.

Wake County Attorney's Office, by Deputy County Attorney Shelley T. Eason, for defendants-appellees.

JOHNSON, Judge.

Edward Valves (plaintiff) has operated a manufacturing facility employing approximately 210 persons on South Saunders Street in Raleigh since 1964. The company manufactures specialty valves for the nuclear and fossil fuel power plant industry. On 10 March 1989 all of the assets of plaintiff were sold to BTR-Dunlop, Inc. (BTR). Because the sale to BTR was an asset sale, plaintiff was required under federal law to allocate the consideration paid for all of the purchased assets. The firm of American Appraisal Associates, Inc. (American Appraisal) appraised all of the assets of plaintiff including approximately 200,000 engineering drawings on hand at the Raleigh facility. These engineering drawings contain technical engineering information needed to create the particular valve to reflect a customer's specific and unique requirements and are essentially exclu-

sive and custom-made. Plaintiff has retained every set of engineering drawings created since 1908. The drawings occupy approximately 110 file cabinets.

Before plaintiff became a part of BTR, the cost of creation of the engineering drawings was treated as a current expense by the company and written off by the company as a current cost of doing business. However, American Appraisal appraised the drawings currently being used based upon their reproduction cost in terms of their value as used in the continuing operation of plaintiff. Plaintiff alleged that no effort was made to determine the market value of the drawings. Accordingly, American Appraisal determined the reproduction cost of the drawings to be $12,827,900.00. The drawings were then placed on the balance sheet and federal income tax records as business property in Wake County. Because the drawings had been expensed in the past, they had never before appeared on the company's balance sheet or federal income tax records.

The 1990 listing form shows that plaintiff listed and affirmed its taxable personal property at $40,015,802.00 with approximately $12,827,900.00 attributable to engineering drawings. Taxes were then assessed on the basis of the value on the listing form. Plaintiff's Wake County business property listing for ad valorem tax purposes changed substantially from the 1989 listing.

Plaintiff contends that it listed the engineering drawings and the value of the engineering drawings as stated on the form because the Assessor's Office informed its employee, Mr. Kindsvatter, that the company was required to use the new acquisition costs rather than previous historical costs and that the engineering drawings had to be listed if they were on the company books. This resulted in an increase of $390,082.00 in plaintiff's tax bill. Only $7,824.00 was attributable to net additions to fixed assets prior to 1 January 1990. Over $190,000.00 of the increase was due to the inclusion of the value of the engineering drawings. After receiving the increased tax bill, plaintiff attempted to file an amended listing, using the historical costs. The amendment was rejected by Wake County. Plaintiff paid the assessed taxes under protest, made a formal post-payment demand for refund, and then brought this action. Plaintiff also later removed the engineering drawings from North Carolina.

Under the methodology used by the Wake County Assessor's Office, a business' intangible personal property and self-created intellectual property is taxed only if it is capitalized on the books of the

business. Wake County then depreciates that cost on a straight line basis according to the life of the asset as determined by the taxpayer. If an asset is not reflected on the books of a business, it is not taxed by Wake County. Typically, a business capitalizes such property only when it sells its assets. The Wake County Assessor acknowledges that to be the general practice.

The Assessor's Office had adopted no written guidelines concerning the taxation of intangible and self-created intellectual property prior to 1993 and none were furnished to Wake County's auditors. The Assistant Assessor is not aware of any other county in North Carolina which seeks to tax intangible personal property, or seeks to have the taxpayer list such property, apart from Wake County.

The 1990 Wake County Business Property Listing form which defendants furnished to plaintiff and all other businesses did not contain a schedule for the listing of intangible personal property or any instructions concerning listing of such property. The Assistant Assessor admitted that "there is nothing [on the form] to indicate that [the taxpayer] should list intangibles or self-created intellectual property." In fact, the 1990 form contained five schedules, A through E, seeking listing only of (A) Machinery & Equipment, Furniture & Fixtures; (B) Vehicles; (C) Supplies & Materials; (D) Equipment Owned by Others in Possession of Taxpayer; and (E) Leasehold Improvements. That listing form neither mentioned the word "intangibles" nor any of the categories of property that fall within the definition of intangibles. During the 1990 tax year, Wake County relied on taxpayers to voluntarily report property which its listing form did not seek. Moreover, during the 1990 tax year, there was no concerted effort by the assessor to discover intangibles, i.e., no operating audit program of any kind.

The total assessed value of all other discovered intangible property in Wake County for the tax year 1990, other than the $12,827,900.00 attributable to plaintiff's engineering drawing, was $2,414,926.00. Thus, plaintiff's engineering drawings resulted in payments on an assessed value more than twenty-seven times greater than the total amount paid by all other businesses on intangible property in Wake County combined.

The Business Personal Property Appraisal Manual provided to Wake County by the Ad Valorem Section of the Property Tax Division of the North Carolina Department of Revenue (State Manual) deals with the situation "where a new owner will acquire an existing busi-

ness." It points out that such an acquisition can occur as either a stock sale or an asset sale but that "[i]n each case, our first goal in making our appraisal is to use the actual historical cost." The counties are explicitly warned against "using selling price as the determinant of value."

On the 1993 Business Property Listing form, Wake County for the first time called for the listing of intangible personal property by business taxpayers. The form now contains a Schedule C calling for listing of "Intangible Personal Property" by type, year of acquisition, cost, and life year.

In early 1990, plaintiff appealed its real property assessment to the Wake County Board of Equalization and Review. On 28 February 1990, its agent wrote a letter to the Wake County Board of Equalization and Review placing plaintiff's real property assessment under appeal. The County Assessor's Office responded that the property owners must designate in writing any third party to represent them in appeals to the Wake County Board of Equalization and Review and enclosed a power of attorney form, an appeal form, and a copy of the property record card. Wake County claimed to have no record of any response from plaintiff or plaintiff's agent. Plaintiff contends, however, that defendants received a facsimile copy of a power of attorney form signed by Peter M. Smith of Debenham Tewson International, another tax consulting firm, and an unsigned document dated 26 March 1990 stating that BTR had appointed Debenham Tewson International to "undertake property tax audits for their United States portfolio." Plaintiff was never given a hearing on the assessment of its real property by the Wake County Board of Equalization and Review with respect to the 1990 tax year because Wake County believed the appeal to be unperfected.

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).

Motions for summary judgment are an appropriate method of testing the legal sufficiency of claims presented in a complaint, including complaints which assert constitutional claims. *See Britt v. N.C. State Board of Education*, 86 N.C. App. 282, 357 S.E.2d 432, *disc. review denied*, 320 N.C. 790, 361 S.E.2d 71 (1987); *Town of Beech*

Mountain v. County of Watauga, 91 N.C. App. 87, 370 S.E.2d 453 (1988), *aff'd*, 324 N.C. 409, 378 S.E.2d 780, *cert. denied*, 493 U.S. 954, 107 L.Ed.2d 351 (1989). Rule 56 eliminates formal trials where only questions of law are involved. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). Plaintiff contends that the trial court erred in granting summary judgment for defendants. Plaintiff also contends that Wake County's assessment of taxes on its engineering drawings violates state and federal constitutional equal protection and uniformity requirements. We agree.

North Carolina General Statutes Chapter 105, Subchapter II, the Machinery Act, sets forth the laws and procedures governing ad valorem property taxation in North Carolina. Our legislature has classified property for tax purposes and determined that no class of property may be taxed except by uniform rule. North Carolina General Statutes § 105-284(a) (Cum. Supp. 1994). The rule of uniformity regarding property taxation is coextensive with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Hajoca Corp. v. Clayton, Comr. of Revenue*, 277 N.C. 560, 178 S.E.2d 481 (1971).

All property in North Carolina, both real and personal, is subject to property tax unless it was excluded or exempted from taxation by statute or the Constitution. North Carolina General Statutes § 105-274 (1992). In addition, both tangible and intangible property is subject to property tax. North Carolina General Statutes §§ 105-276 and 105-317.1 (1992). All taxpayers are required to list taxable property for ad valorem taxes regardless of its classification. North Carolina General Statutes §§ 105-309 (Cum. Supp. 1994), 105-311 (Cum. Supp. 1992), and 105-285 (Cum. Supp. 1994). The uniform appraisal standard requires that property be listed for taxation at its "true value in money," meaning fair market value. North Carolina General Statutes § 105-283 (1992). The uniform assessment standard requires that "all property, real and personal, shall be assessed for taxation at its true value or use value as determined under G.S. 105-283 or G.S. 105-277.6, and taxes levied by all counties and municipalities shall be levied uniformly on assessments determined in accordance with this section." North Carolina General Statutes § 105-284(a).

If a taxpayer disagrees with a county's valuation of its property, the taxpayer must pursue and exhaust its administrative remedies before resorting to the courts. North Carolina General Statutes §§ 105-322, 105-290 (Cum. Supp. 1994). Questions concerning valua-

tion which are first presented directly to the courts are properly dismissed. *Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *disc. review denied*, 313 N.C. 508, 329 S.E.2d 392 (1985). However, a taxpayer may seek judicial review of an assessment directly in superior court by paying taxes and subsequently bringing suit against the taxing unit for a refund of taxes paid if the tax was imposed through clerical error, an illegal tax, or a tax collected for an illegal purpose. North Carolina General Statutes § 105-381 (1992).

Plaintiff chose to challenge the assessor's methodology in superior court by paying the taxes, and then filing an action for a refund in court. Plaintiff alleges that the taxation of its engineering drawings was an illegal tax imposed through clerical error and that it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Section 1983 of Title 42 of the U.S. Code and the uniformity requirements of the North Carolina Constitution and North Carolina General Statutes § 105-284(a).

Art. V, § 2(2) of the North Carolina Constitution provides:

> (2) *Classification.* Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

42 USC § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

North Carolina General Statutes § 105-284(a) provides:

> (a) Except as otherwise provided in this section, all property, real and personal, shall be assessed for taxation at its true value or use value as determined under G.S. 105-283 or G.S. 105-277.6, and taxes levied by all counties and municipalities shall be levied uniformly on assessments determined in accordance with this section.

Plaintiff alleges as clerical error that it mistakenly listed the engineering drawings because a clerk in the Wake County Assessor's Office told plaintiff that the engineering drawings should be listed. Plaintiff's only reference to this contention is in a footnote in its brief. Since plaintiff failed to cite authority or discuss this issue in its brief, that claim is deemed abandoned and will not be addressed. N.C.R. App. P. 28(b)(5).

[1] Plaintiff does not challenge the constitutionality or validity of a tax statute which imposes taxes on personal property, nor the valuation of the engineering drawings. Rather, plaintiff contends that the methodology which Wake County used in 1990 to tax plaintiff's engineering drawings is "illegal" and unconstitutional. Plaintiff bases that contention upon the fact that Wake County's methodology has the effect of singling out that intangible property for taxation that is in the hands of those businesses which have been the subject of asset sales. Plaintiff argues that Wake County, by following this methodology, gives different tax treatment to taxpayers owning identical classes of property. In fact, defendants admit that identical intangible self-created property which has not been the subject of an asset sale (and therefore not capitalized) has not been taxed at all.

Conversely, defendants argue that plaintiff voluntarily listed the engineering drawings and therefore plaintiff cannot complain that the property has been taxed. We do not agree. As plaintiff points out, an employee of Wake County instructed plaintiff's financial officer that plaintiff must list the engineering drawings and that the drawings must be listed at the value at which they appeared on plaintiff's balance sheet, to-wit, the acquisition cost. Moreover, despite the fact that Wake County routinely allows amendments to intangible property listings for "mistakes," it declined to allow the plaintiff's timely attempt to amend its listing.

Defendants also argue that it should not be penalized merely because Wake County "does not have a foolproof way to ensure that every taxpayer in Wake County properly lists business assets of this kind." Defendants misapprehend the objection to their methodology. The point of contention is not just that a few taxpayers failed to list their intangibles despite the insistence of Wake County that they do so. It is rather that the very enforcement procedures by which Wake County has operated, indeed, the very message which Wake County has impliedly sent to its taxpayers, does not require the listing of self-created intangibles of the nature of engineering drawings, unless the

businesses have been sold. In fact, even after Wake County amended its tax listing form in 1993, it continued to distinguish in its enforcement practices between intangible self-created property that is sold and similar property that is not sold.

This is not a situation in which occasional inequities resulting from the application of the statute should not defeat the law unless they result from hostile discrimination of the kind described in *Leonard v. Maxwell, Comr. of Revenue*, 216 N.C. 89, 35 S.E.2d 316, *appeal dismissed*, 308 U.S. 516, 84 L.Ed.439 (1939). This was a purposeful, though somewhat informal, classification based upon an improper distinction between taxpayers who owned the same class of property, self-created intangibles that have been sold and similar intangibles that have not been sold.

While this is perhaps a case of first impression under North Carolina law, its governing principle is not new to federal jurisprudence. A holding of the United States Supreme Court is virtually dispositive here. In *Allegheny Pittsburgh Coal Co. v. Webster County Commission*, 488 U.S. 336, 102 L.Ed.2d 688 (1989), a group of coal companies challenged, under the Equal Protection Clause of the Fourteenth Amendment, a West Virginia county's assessments which were made at an assessment equal to 50% of the price paid for the property at a recent sale. The companies claimed that the methodology was unfair because comparable property that had not been recently sold was assessed at eight to thirty-five times less than the companies' property and the disparities were persistent. The Supreme Court held that the county's assessment methodology violated the Equal Protection Clause, which protects a taxpayer "from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Id.*, 488 U.S. at 345, 102 L.Ed.2d at 698 (*quoting Hillsborough v. Cromwell*, 326 U.S. 620, 623, 90 L.Ed. 358, 363 (1946)).

Defendants argue that a recent United States Supreme Court case upholding California's Proposition 13, *Nordlinger v. Hahn*, —— U.S. ——, 120 L.Ed.2d 1 (1992), may have overruled *Allegheny* by giving approval to California's adoption of an "acquisition cost" system for ad valorem property taxation. We do not agree. In fact, the majority in *Nordlinger* distinguished *Allegheny* as having properly struck down the West Virginia county's "assessment scheme" in light of the statutory and constitutional requirements of West Virginia that all property be taxed at its market value. North Carolina has the same

requirements as those of West Virginia. Our system is also based upon market value. North Carolina General Statutes 105-283. As was the case in *Allegheny*, the Wake County tax is discriminatory and "illegal" under North Carolina law.

Federal courts dealing with corporate claims under Section 1983 of Title 42 of the United States Code have held that a corporation can sue in its own right under that statute. *See e.g., Safeguard Mutual Insurance Co. v. Miller*, 472 F.2d 732 (3rd Cir. 1973). Conduct which infringes upon Fourteenth Amendment rights is actionable under Section 1983, when, as is the case here, it is done under color of law. *See Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 432 (2nd Cir. 1989) (recognizing that taxpayers may "attack the constitutionality of the assessment methodology [in] a § 1983 action in state court.").

We hold that the Wake County methodology for taxing self-created intangible property is unconstitutional under both the Federal and State Constitutions and also violates North Carolina General Statutes § 105-284(a) and 42 USC § 1983.

[2] Plaintiff finally argues that the trial court erred in granting defendants' summary judgment motion of plaintiff's appeal of their real property assessment. Plaintiff argues that the assessed value of its land and improvements exceeded its real value by $1,166,760.00. Defendants argue that plaintiff did not properly perfect its appeal by failing to return a power of attorney signed by the property owner authorizing the representative's appearance before the Board of Equalization and Review.

North Carolina General Statutes § 105-322(g)(2)(a) requires that a request for a hearing must be in writing or by personal appearance before the Board prior to adjournment. In the instant case, plaintiff authorized Marvin I. Poer & Company and Peter M. Smith, president of Debenham Tewson International, to act on behalf of plaintiff in matters related to the appeal of the real estate assessment. Mr. Smith, a duly authorized agent of BTR-plaintiff, on behalf of BTR, gave power of attorney to David Leach to make an appearance before the Board of Equalization and Review.

Nevertheless, there is a factual dispute between the parties. Defendants allege that Wake County did not receive the power of attorney form and that even if the form was returned the form was inadequate to authorize Poer's appearance before the Board of Equal-

ization and Review. Plaintiff alleges that the power of attorney form was returned and duly authorized by an agent of BTR-plaintiff. While we do not read North Carolina General Statutes § 105-322(g)(2) as requiring the filing of a power of attorney, this dispute raises genuine issues of material fact for which summary judgment was inappropriate. Thus, the trial court's order granting summary judgment on plaintiff's real property claim in favor of defendant was in error.

For the reasons stated above the trial court's summary judgment order dismissing the action is reversed and the action is remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

Judges LEWIS and THOMPSON concur.

SUSAN ROSE MORRISON-TIFFIN, AND CHARLES MARK TIFFIN, PLAINTIFFS v. TREVOR HAMPTON, IN HIS PERSONAL AND OFFICIAL CAPACITY AS CHIEF, CITY OF DURHAM POLICE DEPARTMENT; WILEY DAVIS, IN HIS PERSONAL AND OFFICIAL CAPACITY AS CAREER DEVELOPMENT MANAGER OF THE DURHAM POLICE DEPARTMENT; ORVILLE POWELL, IN HIS PERSONAL AND OFFICIAL CAPACITY AS DURHAM CITY MANAGER; JACKIE MCNEIL, IN HIS PERSONAL AND OFFICIAL CAPACITY AS POLICE CHIEF OF THE CITY OF DURHAM POLICE DEPARTMENT; UNKNOWN CITY OF DURHAM EMPLOYEES IN THEIR PERSONAL AND OFFICIAL CAPACITIES; AND THE CITY OF DURHAM INC.

No. 9414SC12

(Filed 3 January 1995)

1. Limitations, Repose, and Laches §§ 19, 92 (NCI4th)— civil rights action—intentional infliction of emotional distress—three-year statute of limitations applicable

The three-year statute of limitations applied in plaintiff police officer's action for violation of her civil rights under 42 U.S.C. § 1983 and for intentional infliction of emotional distress based on incidents of alleged sexual harassment and discrimination occurring at work. Therefore, events occurring more than three years before the complaint was filed could not form the basis of plaintiff's claims.

Am Jur 2d, Limitation of Actions §§ 61 et seq.

What statute of limitations is applicable to civil rights action brought under 42 USCS § 1983. 45 ALR Fed. 548.

2. Constitutional Law § 86 (NCI4th)— civil rights claim—equal protection—failure to promote plaintiff—insufficient evidence

A female police officer failed to make a showing of discriminatory intent necessary to overcome a qualified immunity defense in her 42 U.S.C. § 1983 action against a city and police department personnel based upon equal protection where she failed to present any specific evidence, either direct or circumstantial, that defendants' failure to promote or transfer her was motivated by an improper desire to discriminate against her because of her gender.

Am Jur 2d, Civil Rights §§ 3, 4.

Sex discrimination in law enforcement and corrections employment. 53 ALR Fed. 31.

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. Constitutional Law § 86 (NCI4th)— civil rights action—support of wife—gender discrimination—insufficient evidence

A male police officer could not recover under 42 U.S.C. § 1983 for an alleged violation of his equal protection rights based upon allegations that he was passed over for promotions, targeted for disproportionate punishments and harassed because he supported his wife, also a police officer, in her efforts to correct gender discrimination by defendants since the right to be free from retaliation for protesting sexual harassment or discrimination is created by Title VII of the Civil Rights Act of 1964, not the equal protection clause.

Am Jur 2d, Civil Rights §§ 3, 4.

Sex discrimination in law enforcement and corrections employment. 53 ALR Fed. 31.

Construction and application of provisions of Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.) making sex discrimination in employment unlawful. 12 ALR Fed. 15.

4. Constitutional Law § 115 (NCI4th)— freedom of expression—failure to show defendants' actions improperly motivated

Summary judgment was properly granted for defendants on plaintiffs' § 1983 claim that defendants deprived them of their First Amendment protections when they allegedly retaliated against plaintiffs for protesting sexual discrimination and harassment in the police department and when they intimidated potential witnesses, since, to surmount defendants' claims of qualified immunity, plaintiffs had to show that defendants' actions were improperly motivated, and plaintiffs failed to put forth specific evidence of such motive or intent.

Am Jur 2d, Constitutional Law §§ 496 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.

5. Constitutional Law § 86 (NCI4th)— discrimination policy of defendant—insufficiency of evidence

Since plaintiffs produced no evidence that the City of Durham had a formal policy or well-established custom of discriminating against or harassing females or of retaliating against those who speak out on matters of public concern, plaintiffs' § 1983 claim against the City and City officials in their official capacities must fail.

Am Jur 2d, Civil Rights §§ 3, 4.

6. Public Officers and Employees § 35 (NCI4th)— officer sued in individual capacity—insufficiency of allegations

Defendant police chief and defendant city manager were immune from liability in their individual capacities on a claim for negligent hiring or retention because they could not be held liable for mere negligence, and plaintiffs did not argue that defendants' actions were corrupt or malicious or outside and beyond the scope of their duties.

Am Jur 2d, Public Officers and Employees §§ 358 et seq.

7. Municipal Corporations § 444 (NCI4th)— waiver of immunity through purchase of liability insurance—failure to allege

Plaintiffs failed to state a claim against defendant city manager for negligent hiring or retention in his official capacity where plaintiffs failed to allege a waiver of immunity through purchase of liability insurance.

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.

8. Intentional Infliction of Mental Distress § 2 (NCI4th)— discrimination alleged—insufficiency of allegations

Summary judgment was proper for defendants on plaintiffs' claim for intentional infliction of emotional distress where plaintiffs did not show extreme and outrageous conduct on the part of defendants in purposefully harassing or discriminating against plaintiffs.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4 et seq., 17.

Recovery of damages for emotional distress resulting from discrimination because of sex or marital status. 61 ALR3d 944.

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

9. Conspiracy § 12 (NCI4th)— overlooking claims of gender discrimination—insufficiency of evidence

The trial court properly entered summary judgment for defendants on plaintiffs' claim that defendants engaged in a conspiracy to overlook claims of gender discrimination and to ignore or put off plaintiffs' complaints since plaintiffs relied on mere conjecture and showed no facts sufficient to support their allegations of a common agreement and objective.

Am Jur 2d, Conspiracy §§ 68, 69.

MORRISON-TIFFIN v. HAMPTON

[117 N.C. App. 494 (1995)]

Appeal by plaintiffs from order and judgment filed 6 October 1993 by Judge A. Leon Stanback, Jr. in Durham County Superior Court. Heard in the Court of Appeals 27 September 1994.

Alan McSurely for plaintiffs-appellants.

Newsom, Graham, Hedrick, Kennon & Cheek, P.A., by William P. Daniell and Joel M. Craig, for defendants-appellees.

LEWIS, Judge.

Plaintiffs commenced this action for alleged violations of their constitutional rights under 42 U.S.C. § 1983, intentional infliction of emotional distress, civil conspiracy, and negligent hiring and retention. From entry of summary judgment for all defendants on all claims, plaintiffs appeal.

Plaintiff Charles Mark Tiffin (hereinafter "Tiffin") began working as a Durham Police Officer in 1979. Plaintiff Susan Rose Morrison-Tiffin (hereinafter "Morrison-Tiffin") began working as a Durham Police Officer in 1980. In 1982, Morrison-Tiffin resigned from the police department, but returned a few months later. That same year, plaintiffs married. Tiffin was promoted to corporal in 1982 and to sergeant in 1987. Morrison-Tiffin was promoted to corporal in 1987.

Defendant Orville Powell has been the Durham City Manager since 1983. Defendant Trevor Hampton was Durham's Chief of Police from 1988 until 1992. Defendant Jackie McNeil succeeded Hampton, becoming acting Chief of Police in 1992 and Chief of Police in 1993. Defendant Wiley Davis was the civilian Career Development Manager of the police department from 1988 until 1992.

In April 1989, Morrison-Tiffin applied for a posted sergeant's position. She failed to score within the top 40% after oral interviews and was therefore not eligible to be placed in the sergeant eligibility pool from 1989 to 1991. Later that month, Tiffin placed first on a lieutenant promotion list. Also in April, Morrison-Tiffin filed a charge of gender discrimination regarding the sergeant promotional process with the Equal Employment Opportunity Commission (hereinafter "EEOC"). The EEOC investigated and dismissed the charge. In January and February 1990, Morrison-Tiffin filed additional EEOC charges, when she was denied a transfer to the Traffic Accident Control Team and when she received a letter of reprimand from a captain concerning the filing of a homicide report. The EEOC investigated the charges and dismissed them for lack of evidence of discrimination or retaliation.

Tiffin also filed a series of EEOC charges with respect to his own employment. The EEOC found merit in one of the charges. That charge involved an incident where Tiffin was alleged to have improperly supervised another officer who used excessive force in effecting an arrest. A Police Board of Inquiry found that Tiffin had failed to properly supervise the officer and had given conflicting testimony during the investigation. The Board recommended that Tiffin be suspended for ten days and demoted. When Tiffin refused to sign a statement admitting that his testimony was inconsistent, Chief Hampton terminated him. Tiffin filed the EEOC claim and pursued the city's grievance procedure. The matter was resolved when Tiffin agreed to sign a letter of agreement and reconciliation admitting that his testimony was inconsistent. He was then reinstated and given a 30-day leave without pay.

During 1990 and 1991 Morrison-Tiffin applied for other positions at the police department but was not selected. Other women were selected for many of these positions. In 1993, Morrison-Tiffin was promoted to sergeant and Tiffin was promoted to lieutenant.

Preliminarily, we note that plaintiffs have failed to comply with Rule 28(b)(4) of the Rules of Appellate Procedure, which provides that an appellant's brief shall contain

> [a] full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

N.C.R. App. P. 28(b)(4) (1994). Plaintiffs' brief contains no statement of the facts. Instead, the brief states that "[t]he facts will be inserted throughout the argument below." Thus, the brief does not contain a "non-argumentative summary of all material facts." Plaintiffs' appeal is subject to dismissal for failure to comply with the requirements of Rule 28. *See Northwood Homeowners Ass'n, Inc. v. Town of Chapel Hill*, 112 N.C. App. 630, 436 S.E.2d 282 (1993). However, in our discretion we will review the merits of the appeal.

I. Statute of Limitations

[1] Plaintiffs' complaint alleges that incidents from 1980 until the time of the filing of the complaint amounted to sexual harassment and discrimination, and that these acts violated her constitutional

rights under 42 U.S.C. § 1983 and amounted to intentional infliction of emotional distress. The statute of limitations applicable to section 1983 actions is the state's statute governing personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 279, 85 L. Ed. 2d 254, 269 (1985). The applicable North Carolina statute is N.C.G.S. § 1-52 (Cum. Supp. 1994), a three-year statute of limitations. *Gentile v. Town of Kure Beach*, 91 N.C. App. 236, 240, 371 S.E.2d 302, 305 (1988). The statute of limitations for intentional infliction of emotional distress is also three years. *Waddle v. Sparks*, 331 N.C. 73, 85, 414 S.E.2d 22, 28 (1992). Plaintiffs filed their complaint 13 December 1991. Accordingly, those events occurring before 13 December 1988 may not form the basis of plaintiffs' claims for relief. Furthermore, we find no evidence to support the application of the "continuing wrong" doctrine. *See Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 108 N.C. App. 357, 424 S.E.2d 420, *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993). And finally, we note that of the individual defendants, only Powell, the City Manager, was even at his job before 1988.

II. Section 1983 Claims—Individual Capacities

We now address the propriety of summary judgment as to plaintiffs' section 1983 claims. First, plaintiffs claim that the acts of defendants deprived them of their Fourteenth Amendment rights of equal protection. The individual defendants have asserted the defense of qualified immunity.

A. Equal Protection

1. Morrison-Tiffin

[2] The equal protection clause of the Fourteenth Amendment confers a constitutional right to be free from gender discrimination that is not substantially related to important government objectives. *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994) (citing *Davis v. Passman*, 442 U.S. 228, 60 L. Ed. 2d 846 (1979)). This right is broad enough to prohibit state officials from engaging in intentional conduct designed to impede a person's career advancement because of gender. *Lindsey v. Shalmy*, 29 F.3d 1382, 1385 (9th Cir. 1994). It is well settled that a section 1983 equal protection violation requires a showing of intentional discrimination. *Dugan v. Ball State Univ.*, 815 F.2d 1132, 1135 n.1 (7th Cir. 1987).

A defendant sued under section 1983 in his individual capacity may assert the defense of qualified immunity. *Corum v. University of North Carolina*, 330 N.C. 761, 772, 413 S.E.2d 276, 283, *cert. denied*,

— U.S. —, 121 L. Ed. 2d 431 (1992). The test for qualified immunity was set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982): "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Although this standard is an objective one, the inquiry must become subjective, in part, where the official's motive or intent is an essential element of the constitutional right allegedly violated. *Corum*, 330 N.C. at 772-73, 413 S.E.2d at 284. Thus,

> where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to *specific evidence* that the officials' [sic] actions were improperly motivated. *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988) (emphasis supplied).

Id. at 774, 413 S.E.2d at 285. Mere conclusory assertions of discriminatory intent embodied in affidavits or deposition testimony are not sufficient to avert summary judgment. *Lindsey*, 29 F.3d at 1385. The court must satisfy itself that there is sufficient direct or circumstantial evidence of intent to create a genuine issue of fact for the jury, before it can deny summary judgment on the ground of immunity. *Id.*

Here Morrison-Tiffin has failed to point to specific evidence that the individual defendants were motivated by the improper desire to discriminate against her because she is a woman. With respect to the 1989 sergeant promotional process, Morrison-Tiffin was one of seventy-one applicants, about seven of whom were females, who took the initial written exam. Those applicants who scored in the top half were given oral interviews. Morrison-Tiffin scored eleventh out of the seventy-one applicants, and, along with three other females, made it to the oral interview stage. The oral interviews were conducted by a three-person panel, made up of two male out-of-town police officers and one civilian female from a private company. Plaintiff failed to score within the top 40% on the oral interview and therefore was not eligible to be in the sergeant eligibility pool. One female, however, did score high enough to make the pool. Similarly, regarding other occasions on which plaintiff applied for a promotion or transfer, although Morrison-Tiffin was not successful, other females were often successful. While we recognize that Morrison-Tiffin need not show that

defendants discriminated against all females, *see Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1187 (7th Cir. 1986), Morrison-Tiffin must still put forth evidence of defendants' improper motives to defeat their defense of qualified immunity. We conclude that Morrison-Tiffin has not shown specific evidence, either direct or circumstantial, of any improper motive. Her conclusory assertions of discriminatory intent cannot suffice, *Lindsey*, 29 F.3d at 1385, nor can her conclusory allegations regarding the lack of back-up she was provided on patrol surmount her burden of showing improper motive on the part of defendants.

2. Tiffin

[3] Tiffin also contends that his rights of equal protection were violated. He alleges that he was passed over for promotions, targeted for disproportionate punishments, and harassed because he "consistently supported his wife in her efforts to correct and expose the discriminatory acts" of defendants. Tiffin's allegations and proof, however, do not support an equal protection claim. To show a violation of the equal protection clause, a plaintiff must show that he has been discriminated against because he is a member of a particular class. *Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029, 108 L. Ed. 2d 613 (1990). A plaintiff's right to be free from retaliation for protesting sexual harassment and sexual discrimination is a right created by Title VII of the Civil Rights Act of 1964, not the equal protection clause. *Id.* Section 1983 provides a remedy for the deprivation of constitutional rights, not for violations of rights created by Title VII. *Id.* Accordingly, summary judgment was properly granted on Tiffin's equal protection claim.

B. First Amendment

[4] Plaintiffs also contend that defendants deprived them of their First Amendment protections when they allegedly retaliated against plaintiffs for protesting sexual discrimination and harassment in the police department and when they intimidated potential witnesses. It is well established that a governmental entity cannot "condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Corum*, 330 N.C. at 775, 413 S.E.2d at 285 (quoting *Connick v. Myers*, 461 U.S. 138, 142, 75 L. Ed. 2d 708, 716-17 (1983)). However, to surmount defendants' claims of qualified immunity, plaintiffs must show that defendants' actions were improperly motivated. *Id.* at 774, 413 S.E.2d at 284. Again, plaintiffs have failed to put forth specific evidence of such

motive or intent, and summary judgment was therefore properly granted on this claim.

C. Due Process

Plaintiffs next contend that their rights to due process were violated. However, plaintiffs state no authority or reason in their brief to support their argument on this issue. Therefore, this issue is deemed abandoned. N.C.R. App. P. 28(b)(5); *Byrne v. Bordeaux*, 85 N.C. App. 262, 265, 354 S.E.2d 277, 279 (1987).

III. Section 1983—Official Capacities and City's Liability

[5] By their amended complaint, plaintiffs' now only sue two defendants in their official capacities, McNeil and Powell. The City of Durham is also named as a defendant. A section 1983 claim against local government officials is essentially another way of pleading an action against the local government itself. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690 n.55, 56 L. Ed. 2d 611, 635 n.55 (1978). Under section 1983, a municipality may only be held liable for constitutional violations which were committed pursuant to formal policies or well-established customs of the municipality. *Monell*, 436 U.S. at 694, 56 L. Ed. 2d at 638. Plaintiffs have produced no evidence that the City of Durham had a formal policy or well-established custom of discriminating against or harassing females or of retaliating against those who speak out on matters of public concern. Thus, plaintiffs' claim against the City and the officials in their official capacities must fail.

IV. Negligent Hiring/Retention

Plaintiffs argue that there was sufficient evidence to establish triable issues of fact concerning Powell's negligent hiring/retention of Davis, Hampton, and McNeil, and of Hampton's negligent hiring/retention of Davis.

[6] We first discuss the liability, if any, of Powell and Hampton in their individual capacities. They have asserted immunity as a defense to the claim. 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). Both Hampton and Powell are public officials. *See Shuping v. Barber*, 89 N.C. App. 242, 248, 365 S.E.2d 712, 716 (1988) (police officers are pub-

lic officials); *Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236 (public official is one "whose position is created by the constitution or statutes of the sovereign"), *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990); N.C.G.S. § 160A-147(a) (1994) (establishing position of city manager). Plaintiffs' cause of action is one of negligence, and plaintiffs' do not argue that Hampton or Powell's actions were corrupt or malicious or outside and beyond the scope of their duties. Plaintiffs merely argue that Hampton and Powell failed to exercise reasonable care. Because they cannot be held liable for mere negligence, Hampton and Powell are immune from liability in their individual capacities.

[7] Powell has also been sued in his official capacity. 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 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). A city can waive its immunity, however, by purchasing liability insurance. N.C.G.S. § 160A-485(a) (1994); *Combs v. Town of Belhaven, N.C.*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992). 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, plaintiffs did not allege a waiver of immunity. Accordingly, plaintiffs failed to state a claim against Powell in his official capacity, and summary judgment was properly granted on the negligent hiring/retention claim.

V. Intentional Infliction of Emotional Distress

[8] The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct by the defendant (2) which is intended to cause and does cause (3) severe emotional distress. *Waddle*, 331 N.C. at 82, 414 S.E.2d at 27. If plaintiffs cannot forecast sufficient evidence of each element, summary judgment for defendants is proper. *Id.* Defendants argue that plaintiffs have failed to forecast sufficient evidence of extreme and outrageous conduct by defendants. We agree.

"[L]iability arises under this tort when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.' " *Stanback v.*

Stanback, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979) (quoting William L. Prosser, *Handbook of The Law of Torts* § 12, at 56 (4th ed. 1971)). As discussed in section II., plaintiffs have failed to show that any of the defendants purposefully harassed or discriminated against plaintiffs. We conclude that on the facts of this case, without such a showing, plaintiffs have not shown extreme and outrageous conduct on the part of defendants. Therefore, summary judgment for defendants was proper.

VI. Civil Conspiracy

[9] Plaintiffs next contend that defendants Hampton, Davis, and Powell engaged in a conspiracy to overlook claims of gender discrimination and to ignore or put off plaintiffs' complaints, and that the trial court erred in entering summary judgment for defendants on this claim.

"An action for civil conspiracy will lie when there is an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way, resulting in injury inflicted by one or more of the conspirators pursuant to a common scheme." *Daniel Boone Complex, Inc. v. Furst*, 43 N.C. App. 95, 103, 258 S.E.2d 379, 386 (1979), *disc. review denied*, 299 N.C. 120, 261 S.E.2d 923 (1980). Thus, to prevail, plaintiffs must show that an overt act was committed pursuant to a common agreement and in furtherance of a common objective. *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981). Although liability may be established by circumstantial evidence, the evidence of the agreement must be more than a suspicion or conjecture to justify submission of the issue to the jury. *Id.* An adequately supported motion for summary judgment by the defendant triggers the plaintiff's responsibility to produce facts, as distinguished from allegations, sufficient to show that he will be able to prove his claim at trial. *Id.* In the present case, plaintiffs rely on mere conjecture and have shown no facts sufficient to support their allegations of a common agreement and objective. Accordingly, the trial court properly entered summary judgment for defendants.

Finally, we note that plaintiffs begin their brief with a discussion of what are labeled "Threshold Questions." Their arguments relate to procedural issues involving the pleadings and discovery in this case. However, plaintiffs did not raise these issues before the trial court and have not made them the subject of assignments of error. Accordingly, the issues are not properly before this Court. N.C.R. App. P. 10.

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

Affirmed.

Judges JOHNSON and GREENE concur.

BATOUL ATASSI, PLAINTIFF-APPELLANT v. INAD ATASSI, DEFENDANT-APPELLEE

No. 9312DC1221

(Filed 3 January 1995)

Divorce and Separation § 560 (NCI4th); Domicil and Residence § 8 (NCI4th)— genuine issue of fact as to domicile—recognition of Syrian divorce by North Carolina courts—summary judgment improper

The trial court erred by granting partial summary judgment for defendant and dismissing plaintiff's claims for alimony and equitable distribution where there was a genuine issue of material fact as to whether defendant's domicile was North Carolina or Syria and therefore whether defendant's Syrian divorce should be given recognition by the courts of this state so as to bar plaintiff's claims.

Am Jur 2d, Divorce and Separation §§ 1104 et seq.; Domicil §§ 48 et seq.

Domestic recognition of divorce decree obtained in foreign country and attacked for lack of domicil or jurisdiction of parties. 13 ALR3d 1419.

Appeal by plaintiff from order entered 30 September 1993 by Judge Andrew R. Dempster in Cumberland County District Court. Heard in the Court of Appeals 12 September 1994.

Plaintiff wife, Batoul Atassi, filed a verified complaint in Cumberland County District Court against defendant husband, Dr. Inad Atassi, for alimony, alimony *pendente lite*, child custody and support, relief from domestic violence, and equitable distribution. Without filing an answer, defendant moved, pursuant to G.S. § 1A-1, Rule 12(b)(1), to dismiss the action for lack of subject matter jurisdiction. Subsequently, defendant moved, pursuant to G.S. § 1A-1, Rule 56, for

partial summary judgment dismissing all claims except child custody and support. The evidentiary materials before the court, consisting of the complaint, affidavits and the deposition of defendant, tend to show the following:

Defendant was born in Syria and maintains his Syrian citizenship. He is also a naturalized citizen of the United States, having become a citizen in 1984. Defendant is 47 years old and has been practicing neurosurgery in Fayetteville for the last thirteen years. For over twenty years, defendant has continuously resided in the United States, first completing his post-graduate medical training at various American hospitals and then beginning his practice in Fayetteville.

In December of 1990, defendant returned to Syria, where he arranged a meeting with, and later marriage to, plaintiff. Immediately following their February 1991 marriage in Syria, defendant returned to Fayetteville with his new wife, and another marriage ceremony was performed there on 26 March 1991 for the purpose of facilitating plaintiff's application for permanent residence. They have resided in Fayetteville since that time.

Prior to their marriage in Syria, plaintiff and defendant entered into a marriage contract pursuant to Syrian law, signed by defendant and by plaintiff's father. By the terms of that agreement, according to defendant, plaintiff became entitled to a dowry of 300,000 Syrian pounds upon marriage, and an additional 700,000 Syrian pounds in the event of divorce. Defendant also presented plaintiff with a premarital agreement in English on the day before their Syrian wedding. Plaintiff claims that she and her father refused to sign it on the advice of a Syrian attorney; defendant claims that plaintiff signed the document in Syria, though not before a notary.

According to plaintiff's affidavit, defendant began to pressure her to sign the premarital agreement shortly after his return to Fayetteville. Defendant allegedly threatened to return to Syria and divorce plaintiff, and then have her deported from the United States. Plaintiff capitulated and signed the agreement on 16 March 1991. On 18 March 1991, defendant took plaintiff to the offices of his attorney, where she was asked to acknowledge her signature on the agreement. At that time, plaintiff acknowledged her signature on the premarital agreement. She contends, however, that she was never asked by the notary when she had signed the document or whether she did so of her own accord.

Plaintiff and defendant had a son, Azmi, eleven months after their marriage. The marriage, however, does not appear from the record to have been a happy one, and at the end of October, 1992, defendant took the couple's nine-month old son and went to Atlanta in preparation for a return trip to Syria. Defendant called plaintiff from Atlanta and told her that she would have to return to Syria with him if she wished to see her son again. Plaintiff accompanied defendant and their son to Syria, where defendant told her to remain with her parents. They stayed in Syria approximately two weeks, after which time defendant returned to Fayetteville alone.

Upon his return, defendant obtained, through his attorney in Syria, a revocable divorce from plaintiff. The Syrian divorce was obtained, according to plaintiff, without her knowledge or consent, and she received no notice and made no appearance at any proceeding. She and her family in Syria received notice, after the fact, that defendant had divorced plaintiff on 25 November 1992, while he was in the United States. A few days later, defendant called plaintiff and her family to apologize. Defendant informed plaintiff that he had revoked the Syrian divorce and requested that she return to Fayetteville. Plaintiff did so and resumed the marital relationship in December of 1992.

For the next three months, defendant and plaintiff lived, travelled, and generally held themselves out as husband and wife, including a visit by plaintiff's father and a family trip to Washington, D.C. On 23 March 1993, defendant removed his wedding ring, threw it at plaintiff, and began a course of indignities directed at making plaintiff miserable enough to leave and return to Syria. Plaintiff filed the present action for relief on 4 June 1993.

The trial court granted defendant's motion for summary judgment on plaintiff's claims for alimony, alimony *pendente lite*, and equitable distribution. Plaintiff appeals. The remaining issues of child custody and support have proceeded separately in the court, and are not involved in this appeal.

Blackwell, Luedeke, Hicks & Burns, P.A., by John V. Blackwell, Jr., and The McLeod Law Firm, P.A., by Joe McLeod, for plaintiff-appellant.

Harris, Mitchell & Hancox, by Ronnie M. Mitchell, and Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by F. Thomas Holt, III, for defendant-appellee.

MARTIN, Judge.

Plaintiff's primary contention on appeal is that the trial court erred by granting partial summary judgment for defendant and dismissing her claims for alimony and equitable distribution. We agree with plaintiff, reverse the order, and remand the case to the district court for trial on those claims.

Although denominated partial summary judgment, the trial court's order finally determined plaintiff's claims for alimony and equitable distribution. G.S. § 1-277 provides that an appeal may be taken from an order or judgment of a superior or district court which affects a substantial right or "which constitutes a *final adjudication*, even when that determination disposes of only a part of the lawsuit." *Oestreicher v. Stores*, 290 N.C. 118, 124, 225 S.E.2d 797, 802 (1976). (Emphasis original.) Here, since the court's order constituted a final judgment as to alimony and equitable distribution, the order is immediately appealable. *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

Plaintiff argues the trial court erred in granting defendant partial summary judgment. 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. *Canady v. McLeod*, 116 N.C. App. 82, 446 S.E.2d 879 (1994). In ruling on a summary judgment 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. *Id.*

Though the trial judge did not specify the basis for its ruling, both parties argue the effect of the Syrian divorce allegedly obtained by defendant. Plaintiff contends the Syrian divorce should not be recognized and, therefore, should not act as a bar to plaintiff's claims for alimony and equitable distribution. Conversely, defendant argues that the Syrian decree cuts off plaintiff's right to maintain an action for alimony or equitable distribution. We agree with plaintiff that she has raised genuine issues of material fact as to whether the Syrian divorce bars her rights under North Carolina law, and thus, the foreign decree cannot serve as the basis for the trial court's order of partial summary judgment.

Under the United States Constitution, North Carolina is required by Article IV, Section 1, the "full faith and credit clause", to recognize divorce judgments from sister-states. *See Williams v. North Carolina*

(Williams I), 317 U.S. 287, 87 L.Ed. 279 (1942). However, this recognition is not absolute, and may be withheld from a sister-state divorce decree when there is an insufficient jurisdictional basis for granting the divorce. *See Williams v. North Carolina (Williams II)*, 325 U.S. 226, 89 L.Ed. 1577 (1945).

For divorces emanating from foreign countries, the full faith and credit clause has no application whatsoever. In *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E.2d 659, *disc. review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984), this State's seminal case on the subject of recognition of divorces obtained in foreign countries, this Court noted:

> Recognition of foreign decrees by a State of the Union is governed by principles of comity. Consequently, based on notions of sovereignty, comity can be applied without regard to a foreign country's jurisdictional basis for entering a judgment. More often than not, however, "many of the American states are likely to refuse recognition [to deny comity] to a divorce decree of a foreign country not founded on a sufficient jurisdictional basis." That is, "a foreign divorce decree will be recognized, if at all, not by reason of any obligation to recognize it, but upon considerations of utility and mutual convenience of nations. Recognition may be withheld in various circumstances, as where the jurisdiction or public policy of the forum has been evaded in obtaining the divorce." Since the power of a State of the Union to grant a divorce decree is dependent upon the existence of a sufficient jurisdictional basis—domicile or such a relationship between the parties [and] the State as would make it reasonable for the State to dissolve the marriage—it follows that the validity of a foreign divorce decree should depend upon an adequate jurisdictional basis.

Id. at 527-28, 311 S.E.2d at 663-64. (Citations omitted.) *See Note, "DOMESTIC RELATIONS—The Validity of Foreign Divorce Decrees in North Carolina:* Mayer v. Mayer," 20 WAKE FOREST L.R. 765 (1984); "*Divorce Law Around the World*," 9 FAMILY ADVOCATE 4 (Spring 1987); 1 R. Lee, *North Carolina Family Law* § 104 (4th ed. 1979); *Restatement (Second) of Conflict of Laws* §§ 11-21, 70-74, & 98 (1971); Peter N. Swisher, "*Foreign Migratory Divorces: A Reappraisal*," 21 J. FAM. L. 9 (1982-83).

In order to determine whether North Carolina will afford recognition to the Syrian divorce in this case, there must be a consideration of any jurisdictional questions which may exist. Jurisdiction in

divorce proceedings stems from the concept of domicile. "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil." *Williams II*, 325 U.S. at 229, 89 L.Ed. at 1581. "Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence . . . . It is the place where he intends to remain permanently, or for an indefinite length of time." *Farnsworth v. Jones*, 114 N.C. App. 182, 186, 441 S.E.2d 597, 600 (1994), quoting *Hall v. Wake County Bd. of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972). Although a person may have more than one residence, he can only have one domicile. *Davis v. Maryland Casualty Co.*, 76 N.C. App. 102, 331 S.E.2d 744 (1985). Domicile is a question of fact to be determined by the finder of fact. *Burke v. Harrington*, 35 N.C. App. 558, 241 S.E.2d 715 (1978).

In his affidavit, defendant maintains that his domicile is in Syria. As a Syrian domiciliary, defendant might likely expect North Carolina to recognize his Syrian divorce from plaintiff, since the jurisdictional requirement for comity would be met. However, the evidence before us raises a genuine issue of material fact as to whether defendant has changed his domicile to North Carolina.

In *Farnsworth, supra*, this Court discussed the determination of domicile when there is a dispute as to a change in domicile.

> Once an individual acquires a domicile, it is presumed to continue until a new domicile is established. "The burden of proof rests upon the person who alleges a change." We apply a three-part test to differentiate between a residence and a domicile. To establish a change of domicile, a person must show: (1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home . . . . We must consider the evidence of all the surrounding circumstances and the conduct of the person in determining whether he or she has effectuated a change in domicile.

Id. at 187, 441 S.E.2d at 600-01. (Citations omitted.) "A person's testimony regarding his intention with respect to acquiring a new domicile or retaining his old one is competent evidence, but it is not conclusive of the question. All of the surrounding circumstances and the conduct of the person must be taken into consideration." *Burke*, at 560, 241 S.E.2d at 717. (Citations omitted.)

After reviewing the surrounding circumstances and conduct of defendant as shown by the evidentiary materials before the court, we conclude there exists a genuine issue as to defendant's domicile, which is a material fact, and that summary judgment should not have been granted. Circumstances which would support a finding that defendant intended to abandon his original domicile of Syria and establish his new domicile in North Carolina are: (a) his consistent, actual residence in North Carolina for over thirteen years; (b) his former status as a permanent resident alien, and his more recent naturalization as an American citizen; (c) the location of his medical practice and all other sources of income, i.e. investments and real estate holdings in the United States; (d) his admissions in deposition and his stated intentions for the couple in the premarital agreement, to wit "we have agreed to marry and intend to reside together in North Carolina as husband and wife;" (e) his attempt to fashion a premarital agreement specifically in compliance with North Carolina General Statutes Chapter 52B; (f) his bringing his wife from Syria to live with him in this country; and (g) his general lifestyle and actions which, while demonstrating some connection to Syria, indicate that defendant intends to remain in North Carolina permanently or indefinitely.

Should the fact-finder conclude defendant has changed his domicile, it is clear that the Syrian divorce should not be given recognition by the courts of this State so as to bar plaintiff's claims. Our courts will not permit defendant, as an American citizen domiciled in North Carolina, to use his former status and relationship with Syria to evade the laws of North Carolina governing domestic relations. North Carolina's interest in the marriage would prevail over any foreign divorce. "Where one's domicile is, there will his marital status be also. The marriage relationship is interwoven with public policy to such an extent that it is dissolvable only by the law of the domicile." 1 R. Lee, *North Carolina Family Law* § 42, at 238 (4th ed. 1979). Our decision in *Mayer* noted that the "great weight of authority in this country is that divorces granted in foreign countries to persons who are domiciliaries of the United States are not valid and enforceable." *Mayer* at 529, 311 S.E.2d at 664.

Defendant also argues that North Carolina is bound by a national public policy to recognize the divorce under the Hague Convention on the Recognition of Divorces and Legal Separations. We find this argument specious in that the United States is not a signatory to this convention, and it does not have the force of law in this country. "*Divorce*

Law Around the World," 9 FAMILY ADVOCATE at 12; *Treaties in Force* (1 January 1994). There is no national policy concerning the recognition of foreign country divorces, which is demonstrated by the fact that a majority of states do not recognize them, while a minority do so, including New York, Connecticut, Tennessee, and Florida. *See Rosentiel v. Rosentiel,* 16 N.Y.2d 64, 209 N.E.2d 709 (1965); *"Divorce Law Around the World,"* 9 FAMILY ADVOCATE 4 (Spring 1987).

As an alternate basis for summary judgment, defendant argues that plaintiff's rights to alimony and equitable distribution are barred by (1) the Syrian marriage contract and (2) the North Carolina premarital agreement. We disagree. The Syrian contract cannot be viewed as a premarital agreement limiting plaintiff's relief under the laws of North Carolina. The contract, signed by plaintiff's father as her agent, does not meet the requirements of Chapter 52B of the North Carolina General Statutes, the Uniform Premarital Agreement Act. Moreover, genuine issues of material fact exist as to the validity of the North Carolina premarital agreement. Taken in the light most favorable to plaintiff, the materials before the trial court disclose factual issues which, pursuant to G.S. § 52B-7, would preclude enforcement of the agreement. These issues arise upon plaintiff's testimony that the agreement was signed under duress after the marriage date, as well as her contention that the agreement is unconscionable and that she could not reasonably have had adequate knowledge of defendant's property or financial obligations.

For these reasons, the trial court's order granting defendant's motion for summary judgment is reversed and this case is remanded to the district court for trial on plaintiff's claims for relief.

Reversed and remanded.

Chief Judge ARNOLD and Judge THOMPSON concur.

(Judge Thompson concurred prior to 30 December 1994.)

FRANK A. LUMSDEN AND WIFE FRANCES LUMSDEN, PLAINTIFFS v. RICHARD LAWING AND WIFE ANN LAWING, DEFENDANTS

No. 935SC1238

(Filed 3 January 1995)

1. **Cancellation and Rescission of Instruments § 13 (NCI4th)— reconveyance of property ordered as condition to restitution—property sold at foreclosure—jurisdiction of trial court to order Rule 60(b) relief**

The trial court erred in concluding that it did not have jurisdiction to alter or modify its earlier judgment which had been upheld on appeal where that judgment required that plaintiffs reconvey property to defendants and that defendants pay certain monies to plaintiffs, since, after the trial court rendered its judgment, the property was foreclosed upon, deeded to the Secretary of Veterans Affairs, and then deeded to several grantees so that it was impossible for plaintiffs to satisfy the requirement of reconveyance; the motion was properly addressed to the trial court, since the case had been remanded from the Court of Appeals to the trial court; and it was within the discretion of the trial court to determine what relief was appropriate.

Am Jur 2d, Cancellation of Instruments §§ 37 et seq.

2. **Cancellation and Rescission of Instruments § 22 (NCI4th)— reconveyance of property ordered as condition to restitution—property sold at foreclosure—refusal to grant relief from order—abuse of discretion**

The trial court abused its discretion in failing to grant plaintiffs relief from an earlier order requiring them to reconvey property to defendants as a condition of restitution, since the property had been sold at foreclosure with notice of foreclosure having been given to defendants; there was evidence that possession of the property itself may not have been significant to defendants; and granting them credit for the value of the property would cause them no harm.

Am Jur 2d, Cancellation of Instruments §§ 66 et seq.

Appeal by plaintiffs from order entered 12 April 1993 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 13 September 1994.

Shipman & Lea, by Gary K. Shipman, for plaintiffs-appellants.

Bain & Wertz, by Roy C. Bain, for defendants-appellees.

LEWIS, Judge.

Plaintiffs appeal from the denial of their Rule 60 motion for relief from the trial court's original judgment. Although the trial court's ruling on such a motion is within its sound discretion, for the reasons stated we find that the trial court abused its discretion in denying plaintiffs' motion and hereby reverse the order of the trial court.

The undisputed facts reveal that defendants sold real property to plaintiffs in 1987. The property, however, was unsuitable for use as a single family residence as warranted. On 24 August 1990, the trial court granted plaintiffs rescission of the contract and restitution, "provided that the Plaintiffs shall execute and deliver a Warranty Deed free of any outstanding encumbrances to the Defendants, reconveying the subject property." The court ordered defendants to pay to plaintiffs the full purchase price plus interest, ad valorem taxes and repair expenses, less the reasonable rental value of the property for the period that plaintiffs lived there. On 31 October 1990, the trial court amended its judgment to require plaintiffs to pay interest on the reasonable rental value of the premises.

Both parties appealed to this Court, but neither party sought or obtained a stay of the judgment. While the appeal was pending in this Court, plaintiffs made a mortgage payment for the last time, on 1 November 1991, and vacated the premises in June 1992. On 22 June 1992 Countrywide Funding Corporation (hereinafter "Countrywide") instituted foreclosure proceedings. The trial court denied plaintiffs' request to enjoin the foreclosure proceedings or to require defendants to satisfy the judgment or otherwise prevent foreclosure. Countrywide bought the property in on 17 August 1992. Foreclosure was concluded on 30 September 1992, and the property was then deeded to the Secretary of Veterans Affairs.

On 6 October 1992, this Court filed an opinion in which it affirmed the trial court's judgment ordering restitution and rescission upon reconveyance of the property. *Lumsden v. Lawing*, 107 N.C. App. 493, 421 S.E.2d 594 (1992). The case was heard by the Court on 16 October 1991; thus, the record did not contain information regarding the foreclosure. The Court modified the trial court's judgment by ordering that restitution should include sums expended on mortgage

interest and insurance premiums. Because it found insufficient evidence of the reasonable rental value of the property, the Court remanded for additional evidence on this issue.

In December 1992, the Secretary of Veterans Affairs deeded the property to third persons not involved in this lawsuit. On 5 March 1993 the trial court heard additional evidence on the reasonable rental value of the property and determined that $600 was a reasonable amount. On 17 March 1993, defendants filed a Rule 60 motion for relief from the 24 August 1990 judgment on the basis that the property had been foreclosed upon and plaintiffs could not reconvey the property as ordered by the trial court. Plaintiffs also filed a Rule 60 motion for relief, requesting that the trial court strike that portion of its judgment requiring them to reconvey the property and instead credit defendants with the value of the property.

On 12 April 1993 the trial court ruled on the parties' motions. The court noted that its judgment requiring reconveyance of the property by plaintiffs had been affirmed on appeal. The court found that plaintiffs had not reconveyed the property, and that the property is now owned and possessed by independent third persons. Further, the court found that the clerk of superior court had docketed the judgment so that it appeared to create a judgment lien against defendants in favor of plaintiffs, thereby interfering with defendants' business activities. Finding that the trial court did not intend to create an immediate unconditional obligation on defendants to pay restitution, but rather intended restitution to be effective only upon reconveyance of the property, the court cancelled the judgment entered 24 August 1990 "unless and until" plaintiffs reconveyed the property.

The court also found that it could not grant plaintiffs' request to modify the judgment to credit defendants with the value of the property. The court concluded as a matter of law that it lacked jurisdiction to "alter or modify its judgment which has been upheld on appeal." Thus, the court ordered that defendants would not be obligated to pay restitution to plaintiffs until plaintiffs actually reconveyed the property, notwithstanding the fact that plaintiffs no longer owned the property in question.

Plaintiffs now appeal the court's order allowing defendants' Rule 60 motion for relief and denying that of plaintiffs. The issues on appeal are (1) whether the trial court erred in concluding that it lacked jurisdiction to modify or alter its judgment; and (2) whether the court erred in denying plaintiffs' Rule 60 motion for relief.

I.

[1] Plaintiffs contend the trial court erred in concluding that it did not have jurisdiction to alter or modify its 24 August 1990 judgment since it had been upheld on appeal. We have found nothing to indicate that a judgment upheld on appeal would not be subject to the provisions of Rule 60 under appropriate circumstances. The only applicable section of Rule 60 is Rule 60(b)(6), which authorizes relief from final judgments for "[a]ny other reason justifying relief from the operation of the judgment." N.C.G.S. § 1A-1, Rule 60(b)(6) (1990). This subsection has been referred to as a "vast reservoir of equitable power." *Thacker v. Thacker*, 107 N.C. App. 479, 481, 420 S.E.2d 479, 480, *disc. review denied*, 332 N.C. 672, 424 S.E.2d 407 (1992).

In the case at hand, after the trial court rendered its judgment, the property was foreclosed upon, on 30 September 1992, and deeded to the Secretary of Veterans Affairs. After this Court entered its 6 October 1992 opinion, the Secretary of Veterans Affairs deeded the property to several grantees. Because the property is owned and possessed by independent third persons, it is impossible for plaintiffs to satisfy the requirement of reconveyance. We believe that this change in circumstances is a good example of a situation which would justify relief under Rule 60(b)(6). We note that the motion was properly addressed to the trial court, since the case had been remanded from this Court to the trial court.

Defendants argue, however, that by their motion plaintiffs sought to change an equitable remedy, rescission, to a legal remedy, damages. Defendants object on the basis that such a change would "completely alter the findings of the trial court," and would amount to a transformation rather than a modification of the trial court's judgment. Defendants claim that the trial court may not now receive evidence on the damages suffered by plaintiffs and argue that it would be inequitable to force them to accept credit for the value of the property.

We do not agree that giving credit to defendants for the value of the property would amount to an award of damages to plaintiffs. In an action for damages, plaintiffs would seek to recover, for example, the benefit of the bargain, *see, e.g., First Union Nat'l Bank v. Naylor*, 102 N.C. App. 719, 404 S.E.2d 161 (1991), or the difference between the value of the property as warranted and as received, *see, e.g., Mason v. Yontz*, 102 N.C. App. 817, 403 S.E.2d 536 (1991). Plaintiffs have not requested such damages, but have only requested the restitution to

which they are entitled under the trial court's August 1990 judgment. Crediting defendants with the value of the property is an equitable method of achieving restitution, because it would return defendants as close as possible to status quo, and would enable plaintiffs to recover the balance of the restitution ordered by the trial court. *See Hakala v. Illinois Dodge City Corp.*, 380 N.E.2d 1177 (Ill. App. 1978) (stating that where return to status quo impossible in rescission action because subject property sold, crediting defendants with purchase price an equitable solution under the circumstances). Furthermore, we see no merit to defendants' distinction between a "modification" and a "transformation" of a judgment. Rule 60 permits "relief," and leaves the trial court with the discretion to determine what relief is appropriate. *Cf. State ex rel. Envtl. Mgmnt. Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 400 S.E.2d 107 (may not use a Rule 60 request for relief to seek an amendment of a judgment), *disc. review denied*, 328 N.C. 576, 403 S.E.2d 521 (1991).

We find that the trial court erred as a matter of law in concluding that it lacked jurisdiction to alter or modify its judgment under these unusual circumstances.

II.

[2] Rule 60 motions are addressed to the sound discretion of the trial court and will not be disturbed absent a finding of abuse of discretion. *City Fin. Co. v. Boykin*, 86 N.C. App. 446, 358 S.E.2d 83 (1987). Having concluded that the trial court had the power to grant relief pursuant to Rule 60, we now examine whether the court abused its discretion in failing to do so. Relief is appropriate under Rule 60(b)(6) if "extraordinary circumstances exist" and "justice demands relief." *Thacker*, 107 N.C. App. at 481, 420 S.E.2d at 480. Plaintiffs contend that the trial court erroneously applied the rule that plaintiffs must restore defendants to status quo as a condition of restitution. Plaintiffs contend that there is no absolute requirement that they return defendants to status quo and that requiring plaintiffs to do so in this case would be inequitable.

Rescission of a contract implies the entire abrogation of the contract from the beginning. *Lumsden*, 107 N.C. App. at 502, 421 S.E.2d at 599. Caselaw indicates that "[a]s a general rule, a party is not allowed to rescind where he is not in a position to put the other in *statu quo* by restoring the consideration passed." *Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, 65, 344 S.E.2d 68, 74 (1986) (quoting *Bolich v. Prudential Ins. Co.*, 206 N.C. 144, 156, 173 S.E. 320, 327

(1934)), *disc. review improvidently allowed*, 319 N.C. 222, 353 S.E.2d 400 (1987). The trial court's order follows this rule by requiring plaintiffs to reconvey the property to defendants as a condition of restitution.

The rule requiring return to status quo ante is a general rule, not an absolute rule. *See id.; Gilbert v. West*, 211 N.C. 465, 466, 190 S.E. 727, 728 (1937) (stating that when a court cancels a contract or deed, it should seek to place the parties *as nearly as possible* in status quo); *see also Lumsden*, 107 N.C. App. at 503, 421 S.E.2d at 600 (this Court declining to strictly apply the rules of restitution). *But see Dean v. Mattox*, 250 N.C. 246, 108 S.E.2d 541 (1959) (applying general rule, noting that rescission of a timber deed, due to mutual mistake of parties, not an available remedy where timber already cut and return to status quo impossible). A preeminent authority on the law of contracts states that if complete restoration to status quo is impossible, the terms of a rescission remedy rest in the sound discretion of the courts. *Williston on Contracts* § 1460A, at 136 (Walter H. E. Jaeger, ed., 3d ed. 1970). *See also Jennings v. Lee*, 461 P.2d 161 (Ariz. 1969) (court allowed rescission even though return to status quo impossible, because strict application of the rule requiring complete restoration would be inequitable).

Although there is no North Carolina authority addressing a situation where the property which is the subject of a rescission action has been foreclosed upon, other jurisdictions have addressed such issues. For example, in *Jennings*, the court determined that the plaintiff was entitled to rescind, on the basis of fraud, a contract to purchase a restaurant. The defendants, however, argued that the plaintiff should not be permitted to rescind the transaction because she had allowed the mortgagee to foreclose upon the property in question, thereby preventing a return to status quo ante. The court disagreed and allowed rescission, noting that the defendants were aware of the plaintiff's desire to rescind and knew the consequences of failing to make mortgage payments. 461 P.2d at 166. In *Davey v. Brownson*, 478 P.2d 258 (Wash. App. 1970) (*review denied* 2 March 1971), the court allowed rescission even though the property had been forfeited by prior contract owners. The court noted that both the plaintiff and the defendant knew of the forfeiture, and stated that the plaintiff obviously could not rescind the transaction and still make the payments on the property. The court stated that the defendant "having knowledge of the action to rescind was in a position to have prevented forfeiture by the prior contract owner." 478 P.2d at 261.

We agree with plaintiffs that the extraordinary circumstances of this case require relief. Although plaintiffs no longer own the property and cannot reconvey it, they should be permitted to recover the balance awarded in restitution. To uphold the trial court's judgment would be to permit defendants to profit from their wrongdoing in conveying property unsuitable for single family residential purposes: because plaintiffs cannot reconvey, defendants would keep the payments they received. On the other hand, granting defendants credit for the value of the property would not work an inequity upon defendants, but would place defendants in nearly the same position they would have been in had plaintiffs reconveyed the property and recovered their money.

We note that plaintiffs had filed an action to enjoin the foreclosure proceedings or, alternatively, to require defendants to take appropriate action to prevent the foreclosure. Thus, as in *Jennings* and *Davey*, defendants in the case at hand knew of the foreclosure proceedings and knew the consequences of failing to make mortgage payments. We also note that plaintiffs presented evidence that defendants were interested in selling the property. Possession of the property itself may not have been significant to defendants, and granting them credit for the value of the property would cause them no harm. *See Hakala*, 380 N.E.2d at 1182 (crediting defendants with value of property caused no harm since defendants would have sold it anyway).

Instead of requiring the actual conveyance of the property to defendants in return for the purchase price and other amounts ordered as part of the restitution, we find that it would be equitable to credit defendants with the value of the property. Once defendants are credited with the value of the property, plaintiffs are entitled to the balance of the restitution as ordered by the trial court and this Court less the reasonable rental value, with interest, of the premises for the period of plaintiff's occupancy.

The trial court had the power, under Rule 60(b)(6), to grant plaintiffs relief from its original judgment. In light of the extraordinary circumstances of this case, we find that justice demands relief and that the trial court abused its discretion in failing to grant relief. We reverse the trial court's order denying plaintiffs' motion for relief and cancelling the judgment. We remand for a determination of the value of the property and a calculation of amounts owed plaintiffs, as pre-

viously ordered by this Court and the trial court, after crediting defendants with the value of the property and amounts for the reasonable rental value, with interest, of the premises. Because we are ruling in favor of plaintiffs, we find it unnecessary to address plaintiffs' other arguments on appeal.

Reversed and remanded.

Judges JOHNSON and GREENE concur.

BENJAMIN WHITE v. N.C. DEPARTMENT OF CORRECTION

No. 9312SC862

(Filed 3 January 1995)

1. Public Officers and Employees § 41 (NCI4th)— decision by State Personnel Commission—timeliness

Though the State Personnel Commission did not make its decision in this case within 90 days after receiving the official record, it did make its decision within 90 days of its next regularly scheduled meeting; therefore, the decision was timely, and the trial court properly refused to find that the decision was made on unlawful procedure. N.C.G.S. § 150B-44.

Am Jur 2d, Civil Service §§ 52 et seq.

2. Public Officers and Employees § 67 (NCI4th)— inability of petitioner to perform job responsibilities—sufficiency of evidence to support findings

There was no merit to petitioner's argument that the State Personnel Commission erred in finding that he was not able to perform all his duties as a correctional officer where correctional officers were required to rotate through all positions, and the physician who examined petitioner concluded that he could not perform all the duties listed in the job description for a correctional officer.

Am Jur 2d, Civil Service §§ 52 et seq.

3. Handicapped Persons § 25 (NCI4th)— inability to perform duties of correctional officer—risk to self and others—petitioner not qualified handicapped person—accommodations not required of respondent

Because petitioner could not perform the duties of the job of correctional officer as defined in the job description and petitioner's condition could create an unreasonable risk to himself, his fellow correctional officers, other inmates, and the public at large, petitioner was not a "qualified handicapped person," and respondent was under no duty to make accommodations for petitioner's physical condition. N.C.G.S. §§ 168A-3(4), 168A-3(9)(a).

Am Jur 2d, Job Discrimination §§ 111 et seq.

Accommodation requirement under state legislation forbidding job discrimination on account of handicap. 76 ALR4th 310.

What constitutes handicap under state legislation forbidding job discrimination on account of handicap. 82 ALR4th 26.

Who is "qualified" handicapped person protected from employment discrimination under Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.) and regulations promulgated thereunder. 80 ALR Fed. 830.

4. Public Officers and Employees § 67 (NCI4th)— State employee put on permanent leave without pay—suspension—just cause required

Respondent's placement of petitioner on permanent leave without pay amounted to a suspension under the State Personnel Act, and the case is remanded for a determination of whether such suspension was made for just cause. N.C.G.S. § 126-35.

Am Jur 2d, Civil Service §§ 52 et seq.

Appeal by petitioner from order entered 16 April 1993 by Judge Wiley F. Bowen in Cumberland County Superior Court. Heard in the Court of Appeals 21 April 1994.

Petitioner, a former employee of respondent N.C. Department of Correction, filed a grievance with respondent alleging that he had been placed on leave without pay discriminatorily because he had a handicapping condition and because he had earlier filed a grievance

concerning his work place. Following a contested case hearing, Administrative Law Judge Robert Reilly, Jr. made a recommended decision that petitioner be reinstated. The full State Personnel Commission (the Commission), however, rejected the ALJ's recommended decision and affirmed respondent's decision to place petitioner on leave without pay. Petitioner appealed this decision to the superior court. Following a hearing on the matter, Judge Bowen entered an order on 16 April 1993, affirming the Commission's order. From this order, petitioner appeals.

Reid, Lewis, Deese & Nance, by James R. Nance, Jr., for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Valerie L. Bateman, for respondent-appellee.

McCRODDEN, Judge.

Relying upon fifteen assignments of error, petitioner argues the trial court erred in (I) determining that the Commission's decision was not made upon unlawful procedure, (II) finding that the Commission's decision was supported by substantial competent evidence, and (III) determining that the Commission's order was not affected by error of law.

The facts are as follows. In June 1990, petitioner was employed by respondent as a correctional officer at Hoke Correctional Institution in McCain, North Carolina. For security reasons, that facility required all correctional officers to rotate among all of the custody positions.

On 22 June 1990, petitioner alleged that he pulled his back while trying to lift a trap door in one of the facility's guard towers, tower number 3. He requested that he not be assigned to work in that tower until the door was repaired. He subsequently requested not to be assigned to another tower which had a particularly long spiral staircase. On 29 June 1990, petitioner filed a written grievance after he was again assigned to work in tower number 3. In response to this, the Assistant Superintendent Wilford Shields met with petitioner on 3 July 1990. Shields informed petitioner that for the time being he would not be assigned to work in tower number 3, but that he would be required to undergo an examination by a medical specialist to determine whether he could continue to perform his duties as a correctional officer.

Petitioner continued to work, and on 24 July 1990, he was instructed that he should not report to work until the evaluation of his back had been performed. Petitioner then began to use his accumulated vacation and sick leave. On 7 August 1990, petitioner filed a claim with the N.C. Industrial Commission for workers' compensation benefits for the injury to his back allegedly sustained on 22 June 1990. However, respondent refused to accept liability for petitioner's claim because petitioner had failed to notify respondent of his injury immediately or within 30 days of the injury.

On 17 August 1990, Dr. J.N. Ellis, who had examined petitioner, wrote to respondent to report on petitioner's physical status, stating:

> In my opinion, based on his past injury and his current problems with degenerative joint disease in the spine, I do not think that he could perform all the duties listed in the job description of a Correctional Officer and [in the] Criminal Justice physical requirements, especially in regard to lifting, carrying and dragging heavy objects, and pursuing foot-fleeing subjects. . . . I would agree that he should be restricted from lifting greater than 25 pounds and should not do strenuous physical activity.

By 22 August 1990, petitioner had exhausted all of his vacation and sick leave, and respondent placed him on unpaid leave status. Dr. Ellis examined petitioner again and wrote a second letter to respondent stating that petitioner was not totally disabled and that he was "capable of maintaining a job that is not as strenuous as described in his job description."

In reviewing a trial court's consideration of an agency's final decision, our task is to determine whether the trial court properly applied the standard of review mandated by N.C. Gen. Stat. § 150B-51 (1991). *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 353 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). That statute provides that a reviewing court may reverse or modify an agency's decision if:

> [T]he substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> . . . .

(3) Made upon unlawful procedure;

(4) Affected by other error of law; [or]

(5) Unsupported by substantial evidence . . . in view of the entire record as submitted.

N.C.G.S. § 150B-51.

The standard of review the trial court applies depends upon the issues presented on appeal. *Brooks, Com'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). When an appellant alleges that the agency made an error of law, the trial court must review the matter *de novo*; however, when the issue is the sufficiency of the evidence to support the agency's order, it applies the whole record test. *Id.* The standard of review for administrative decisions is the same in the Court of Appeals as in superior court. *Teague v. Western Carolina University*, 108 N.C. App. 689, 691, 424 S.E.2d 684, 686, *disc. review denied*, 333 N.C. 466, 427 S.E.2d 627 (1993). We do not defer to the superior court's decision. *Id.*, at 691-92, 424 S.E.2d at 686.

I.

[1] Petitioner's first argument, that the Commission's decision was made upon unlawful procedure, implicates the *de novo* standard of review, and therefore allows us to substitute freely our judgment for that of the Commission. Nonetheless, we find that the Commission's decision was not grounded upon unlawful procedure.

Petitioner argues that the Commission rendered its decision outside the time allowed. An agency such as the Commission has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings, or 90 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in a case. N.C. Gen. Stat. § 150B-44 (1991). In this case, the Commission received the official record on 5 December 1991 and rendered its decision on 30 April 1991, more than 90 days after it received the record. However, the Commission's next regularly scheduled meeting after 5 December 1991 was 4 February. Petitioner concedes that the decision was rendered within 90 days of the 4 February meeting. Based on this admission, we conclude that the Commission timely made its decision and the trial court properly refused to find that the decision was made on unlawful procedure.

II.

[2] Petitioner next argues that certain of the Commission's findings were not supported by substantial evidence. We disagree.

In addressing this issue, we use the whole record test, which means that we must examine all the competent evidence, including that which contradicts the Commission's findings, to determine if the Commission's findings were supported by substantial evidence. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530-31, 372 S.E.2d 887, 889-90 (1988). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Thompson v. Board of Education*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (quoting *Commissioner of Insurance v. Rating Bureau*, 292 N.C. 70, 79, 231 S.E.2d 882, 888 (1977)). In applying the whole record test to this case, we are not allowed to replace the Commission's judgment as between two reasonably conflicting views of the evidence. *Id.* at 410, 233 S.E.2d at 541.

Petitioner argues that the Commission erred in finding that he was not able to perform all his duties both because he was able to work after his injury and because Dr. Ellis stated that he was not totally disabled and could perform some of the duties of a correctional officer. However, we find that the Commission's finding was well supported. In light of the fact that correctional officers at Hoke were required to rotate through all positions, Dr. Ellis' conclusion that petitioner could not perform all of the duties listed in the job description for a correctional officer, is certainly substantial evidence supporting the Commission's finding.

We find petitioner's further assertion, that the Commission erred in finding that his handicap renders him not fit by definition to be a correctional officer, similarly meritless. Dr. Ellis' opinion that respondent could not perform all of the duties of a correctional officer as listed in the job description adequately supports the Commission's finding.

III.

In his next three arguments, petitioner alleges errors of law, again requiring us to review the issues *de novo*. Petitioner argues that the Commission misapplied the law in determining that the respondent did not owe petitioner a duty to make reasonable accommodations for petitioner's condition. We disagree.

[3] When a "qualified handicapped person" requests that an accommodation be made for his handicapping condition, his employer must investigate whether there are reasonable accommodations that can be made and must make reasonable accommodations for the person's condition. N.C. Gen. Stat. § 168A-4 (1987). Assuming without deciding that petitioner is a "handicapped person," as that term is defined in N.C. Gen. Stat. § 168A-3(4) (1987), we conclude that petitioner is not a "*qualified* handicapped person." That term means:

> With regard to employment, a handicapped person who can satisfactorily perform the duties of the job in question, with or without reasonable accommodation, (i) provided that the handicapped person shall not be held to standards of performance different from other employees similarly employed, and (ii) further provided that the handicapping condition does not create an unreasonable risk to the safety or health of the handicapped person, other employees, the employer's customers, or the public.

N.C.G.S. 168A-3(9)(a). The evidence demonstrates that the petitioner could not perform the duties of the job of correctional officer as defined in the job description. Furthermore, given the fact that the job of correctional officer entails the supervision of inmates, we believe that petitioner's condition, which renders him unable to pursue foot-fleeing inmates or physically subdue them effectively, could create an unreasonable risk to himself, his fellow correctional officers, other inmates and the public at large. As petitioner was not a "qualified handicapped person," we conclude that respondent was under no duty to make accommodations for petitioner's physical condition.

Next, petitioner argues that the Commission misinterpreted the workers' compensation law in making its decision. The Commission found that "[p]etitioner did not file a worker's compensation claim about his alleged injury until August 7, 1990, even though departmental policy, about which he knew, required him to notify the agency immediately or, at the latest, within 30 days of his work-related injury."

Petitioner does not contend that he actually filed a claim within 30 days of his injury or that he did not know of the respondent's policy concerning workers' compensation claims. Rather, he claims that "[t]his finding adds nothing to the decision except to give the department an excuse as to why it didn't give [petitioner] an accommodation." We agree that this finding added nothing to the Commissions

order but, having determined that respondent did not owe petitioner the duty to make accommodation for his condition, find that its inclusion was harmless. We reject these assignments of error.

[4] Finally, petitioner argues that the Commission erred in failing to conclude, as the ALJ had determined, that by placing petitioner on unpaid leave, respondent actually suspended him without cause.

The Commission accepted the ALJ's finding that petitioner was a permanent State employee subject to the State Personnel Act, N.C. Gen. Stat. §§ 126-1 to -88 (1993). However, the Commission refused to adopt each of the ALJ's conclusions of law. In his first conclusion, the ALJ stated:

> The petitioner was a permanent State employee subject to the State Personnel Act. Involuntary placement on permanent leave without pay status for alleged inability to perform the duties of the job is the equivalent of being discharged, suspended and involuntarily separated for disciplinary reasons under GS 126-35. The respondent is required to establish just cause. The respondent failed to establish the required substantive just cause. Furthermore, the respondent failed to afford the petitioner the benefits of progressive warnings required by GS 126-35. It is arbitrary and capricious to deny the petitioner the opportunity to establish that he is able to perform the essential duties of a correctional officer despite his back injury.

State agencies may not discharge or suspend a permanent State employee except for just cause. N.C.G.S. § 126-35. Before subjecting a State employee to such disciplinary action, the State shall furnish him with a written statement of the grounds for the action and of the employee's appeal rights. *Id.* This section requires that a State employee be given three warnings before he may be terminated. *Jones v. Dept. of Human Resources*, 300 N.C. 687, 691, 268 S.E.2d 500, 502 (1980). It is uncontested that petitioner received no such warning.

Thus, the question presented for our *de novo* review is: when respondent placed petitioner on leave without pay, was this the equivalent of suspension for disciplinary reasons within the meaning of N.C.G.S. § 126-35? We conclude that it was.

Respondent asserts that leave without pay is not a sanction but a benefit offered to State employees. It is true that Subchapter 1E of Title 25 of the North Carolina Administrative Code, which contains the regulation relating to leave without pay, is entitled "Employee

Benefits." It is also true that a State agency is required to reinstate an employee who takes leave without pay at his previous position or at one of like seniority, status and pay. N.C. Admin. Code tit. 25, r. 1E.1104 (January 1994). However, the leave without pay described in Subchapter 1E is voluntary leave, initiated by the employee. *See* N.C. Admin. Code tit. 25, r. 1E.1103 ("The employee shall apply in writing to his supervisor for leave without pay.").

In this case, petitioner made no application for leave without pay. Instead, respondent placed him involuntarily on sick leave until his accumulated time elapsed, then required him to expend his accumulated vacation, and finally placed him on leave without pay. This was, in essence, a suspension, which could not be made without just cause.

Neither the Commission nor the trial court made any findings relative to the issue of whether respondent suspended petitioner without just cause. Having concluded that the respondent's placement of petitioner on permanent leave without pay amounted to a suspension under the State Personnel Act, we remand the case for a determination of whether such suspension was made for just cause.

Remanded.

Chief Judge ARNOLD and Judge GREENE concur.

Opinion written and concurred in prior to 16 December 1994.

FAGEN'S OF NORTH CAROLINA, INC., FORMERLY E.L. MORRISON LUMBER COMPANY, INC. v. ROCKY RIVER REAL ESTATE COMPANY, JAMES BANKS MYERS, III, A/K/A JAMES B. MYERS, III AND KATHY GORDON PEYTON

No. 9426SC244

(Filed 3 January 1995)

1. Guaranty § 13 (NCI4th)— guaranty agreement—terms prevail over general guaranty law

The terms of the parties' guaranty agreement prevailed over general guaranty law so that defendant could be held liable as guarantor only if he was found to have benefited from the extension of credit to the borrower company or was found to be an officer of the borrower company.

Am Jur 2d, Guaranty §§ 26 et seq.

2. Guaranty § 13 (NCI4th)— no personal benefit from extension of credit—defendant not personally liable

Under the terms of the parties' guaranty agreement, defendant was not jointly or severally liable under either a contract or quantum meruit theory because the evidence was insufficient to support the trial court's finding that defendant personally benefited from the extension of credit to defendant company where such evidence tended to show that defendant had no interest in defendant company at the time of the credit application; assets of defendant company were subsequently transferred to a business in which defendant had an interest, but such transfer did not demonstrate that only benefit passed to the business upon the extension of credit by plaintiff to defendant company; and there was nothing in the record to suggest that defendant company and defendant's business interest, at the time credit was extended, were anything but separate and distinct business entities.

Am Jur 2d, Guaranty §§ 26 et seq.

Judge WYNN dissenting.

Appeal by defendant James Banks Myers, III, from judgment entered 2 November 1993 in Mecklenburg County Superior Court by Judge Robert M. Burroughs. Heard in the Court of Appeals 21 October 1994.

Reginald L. Yates for plaintiff-appellee.

John E. Hodge, Jr., and Burris & MacMillan, by Robert N. Burris, for defendant-appellant James B. Myers, III.

GREENE, Judge.

James B. Myers, III (Myers) appeals from a judgment for Fagen's of North Carolina, Inc. (plaintiff), decreeing him liable as a guarantor for a debt of Rocky River Real Estate Company (Rocky River).

Plaintiff sued defendants Myers, Rocky River and Kathy Peyton (Peyton) for $19,425.68, representing principal and interest due for nonpayment of building materials sold by plaintiff to Rocky River. The evidence reveals that the plaintiff accepted two credit applications from Rocky River, the first dated 10 July 1989 and the second dated 26 February 1990, both of which, the plaintiff alleges, are signed by Myers as "Guarantor and Pledgee." The credit applications provided in part:

> In consideration of credit being extended by [plaintiff] to me/us/it, I . . . certify the truthfulness and veracity of the statement appearing on opposite side, and I . . . guarantee and bind [myself] to the faithful payment of all amounts purchased or now owing, by us or either of us, or any other person, firm or corporation *for our benefit.* If credit is extended to a corporation in which we, or I am an officer, or in which an interest exists I . . . will personally faithfully guarantee the payment of all credit extended to said corporation.

[Emphasis added.] Myers testified that, at the time of both credit applications, he was neither a partner nor an officer in Rocky River as he had transferred his interest in Rocky River to Peyton on 3 January 1989. The evidence also shows that at some time prior to 3 January 1989 the assets of Rocky River were transferred to LADM Group (LADM), a business entity partially owned by Myers.

Jewel Kee (Kee), plaintiff's credit manager, testified that, during a "mid-1990" meeting with Myers, he asked Kee to "hold the credit limit to $20,000 because he felt that was the maximum amount he could be personally liable for."

In a non-jury trial, the trial court found that Myers signed both guaranty agreements and that Myers "accepted and benefited from the extension of credit by the plaintiff." The trial court then concluded that Myers is jointly and severally, with Rocky River and Peyton, liable to plaintiff on theories of contract and quantum meruit.

The issues on appeal are (I) whether the terms of this guaranty agreement prevail over general guaranty law; and if so, (II) whether the evidence supports the finding of the trial court that Myers benefited from the credit extended to the plaintiff.

I

[1] Myers argues that he can be held liable as guarantor only if he is found to have benefited from the extension of credit to Rocky River or is found to be an officer of Rocky River. The plaintiff contends that "it is not necessary that the promisor [sic] receive consideration or something of value himself" in order to hold Myers responsible as guarantor. We agree with Myers.

Although it is not generally necessary for a guarantor to receive a personal benefit to support a contract of guaranty, *see Forsyth Co. Hosp. Auth., Inc. v. Sales*, 82 N.C. App. 265, 267, 346 S.E.2d 212, 214

(discussing nature of contract of guaranty), *disc. rev. denied*, 318 N.C. 415, 349 S.E.2d 594 (1986); *Howard v. Hamilton*, 28 N.C. App. 670, 674, 222 S.E.2d 913, 917 (1976) (discussing the main purpose rule), specific contractual terms and intent, as opposed to general statements of law, control any agreement. *See Poole & Kent Corp. v. C.E. Thurston & Sons*, 286 N.C. 121, 129, 209 S.E.2d 450, 455 (1974).

In the present case, the plaintiff and Myers entered a contract for guaranty which only bound Myers if he received a personal benefit from the plaintiff's extension of credit or if he were an officer of the corporation receiving the credit.[1] Thus we determine Myers' liability under the terms of this contract.

II

[2] Although there was no finding by the trial court as to Myers' status as an officer of Rocky River, the trial court did make a factual finding that Myers personally benefited from the credit extension. The question therefore is whether there is any competent evidence in the record to support this finding. *Weston v. Carolina Medicorp, Inc.*, 102 N.C. App. 370, 372, 402 S.E.2d 653, 654, *dismissal allowed, disc. rev. denied*, 330 N.C. 123, 409 S.E.2d 611 (1991).

The plaintiff argues that Myers did benefit from the extension of credit to Rocky River because the "assets of Rocky River Real Estate were transferred to LADM Group, another business interest of Myers." We disagree. Myers had no interest in Rocky River at the time of the credit application. He had previously transferred his stock to Peyton. Furthermore, LADM's ownership of the assets once owned by Rocky River does not demonstrate that any benefit passed to LADM upon the extension of credit by the plaintiff to Rocky River. There is nothing in this record to suggest that Rocky River and LADM, at the time the credit was extended by plaintiff to Rocky River, were anything but separate and distinct business entities. Accordingly, the finding of the trial court that Myers benefited from the extension of credit to Rocky River is not supported by competent evidence. It thus

1. Even if we were to construe the agreement, as does the dissent, that Myers is liable on the guaranty agreement if either he or Peyton received a benefit from the extension of credit by plaintiff to Rocky River or if either was an officer in Rocky River at the time of the credit extension, the trial court must nevertheless be reversed. There are no findings in the order of the trial court that Peyton received any benefit from the extension of credit to Rocky River or was an officer of Rocky River.

follows that the trial court's conclusion that Myers' is jointly and severally liable as a guarantor for the principal amount of Rocky River's debt is without support.

The trial court's conclusion of law that Myers is bound to plaintiff on the alternative theory of quantum meruit is likewise without support, because that theory would also require some benefit passing to Myers upon the extension of credit to Rocky River. *See Bales v. Evans*, 94 N.C. App. 179, 181, 379 S.E.2d 698, 699 (1989) (to recover on the theory of quantum meruit, plaintiff must show that nongratuitous services were rendered *to defendant).* We also reject the plaintiff's contention that the judgment must be affirmed on the basis that the "mid-1990" conversation between Kee and Myers created an oral contract of guaranty. This theory is not supported by the trial court's findings of fact and the uncontroverted evidence in the record cannot support this Court entering the findings of fact required to sustain recovery on this basis. *See Harris v. N.C. Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988) (appellate courts can draw inferences from undisputed facts when no findings are made by the trial court). Thus we do not further address that argument.

For these reasons the judgment of the trial court is

Reversed.

Judge JOHN concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I respectfully dissent because I disagree with the majority's conclusion that the guaranty contract in the instant case binds Mr. Myers only if he "received a personal benefit from plaintiff's extension of credit or was an officer of the corporation receiving the credit." I find that the contract establishes an unconditional personal obligation on the part of Mr. Myers to guarantee repayment to plaintiff for credit extended to Rocky River Real Estate Co. (Rocky River). Contracts of guaranty and contracts of suretyship are two methods in which a party can become obligated on a debt.

> A guaranty is a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is himself primarily liable for such payment or per-

> formance. A surety is a person who is primarily liable for the payment of the debt or the performance of the obligation of another. While both kinds of promises are forms of security, they differ in the nature of the promissor's liability. A guarantor's duty of performance is triggered at the time of the default of another. On the other hand, a surety is primarily liable for the discharge of the underlying obligation, and is engaged in a direct and original undertaking which is independent of any default.

Hofler v. Hill, 311 N.C. 325, 332, 317 S.E.2d 670, 674 (1984) (quoting *Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 52-53, 117 S.E.2d 117, 122 (1980)).

In the instant case, the relevant contract language reads as follows:

> In consideration of credit being extended by MORRISON BROTHERS to me/us/it, I and/or we certify the truthfulness and veracity of the statement appearing on opposite side, and I and/or we guarantee and bind ourselves to the faithful payment of all amounts purchased or now owing by us or either of us, or any other person, firm or corporation for our benefit.

This contract was signed by Kathy Gordon Peyton and Mr. Myers. Mr. Myers argued before the trial court that his signature was a forgery. The trial court, however, found as fact that Mr. Myers executed the contract and this finding is supported by credible evidence.

The contractual language provides that in exchange for the credit provided by plaintiff to Rocky River, Ms. Peyton and Mr. Myers "guarantee and bind ourselves to the faithful payment of all amounts purchased or now owing." This language is simply an unconditional promise by Ms. Peyton and Mr. Myers to repay any debt incurred by Rocky River.

The majority, however, construes this language to mean that Mr. Myers would be bound by the guaranty only "if he received a personal benefit from plaintiff's extension of credit." I cannot discern this meaning from the language.[1] Rather, it is my view that this language simply provides that Mr. Myers and/or Ms. Peyton guarantee payment

1. The majority's footnote suggests that this dissent supports a benefit analysis. Instead, the focus here is that Mr. Myers incurred a personal obligation to repay plaintiff for credit extended to Rocky River. This contention is further supported by noting that Rocky River possessed no assets of its own, therefore, Ms. Peyton and Mr. Myers had to make personal guarantees to repay plaintiff in order for it to give Rocky River a line of credit.

of "all amounts purchased or now owing" (1) by both of them—"us" *or* either of them—"either of us", *or* (2) by any other entity that purchases or owes such amounts for Myers/Peyton's benefit—"any other person, firm or corporation for our benefit".

In further support of my contention that this contract provides for an unconditional promise of payments, the contract provides:

> *If* credit is extended to a corporation in which we, or I am an officer, or in which an interest exists I and/or we will *personally faithfully guarantee* the payment of all credit extended to said corporation.

(Emphasis added). I read this sentence to mean that Mr. Myers and/or Ms. Peyton *also* agreed to guarantee amounts owed by a corporation in which either is an officer or has an interest in.

In sum, because Ms. Peyton and Mr. Myers made an unconditional promise to repay plaintiff for any credit which it extended, I believe that the trial court correctly found that Rocky River, Ms. Peyton and Mr. Myers were jointly and severally liable to plaintiff. I, therefore, vote to affirm that part of the trial judge's ruling.

I, however, find error regarding another issue presented in this case which is not reached by the majority regarding the payment of late charges. Plaintiff concedes that the trial judge erred in awarding late charges at an interest rate of 18% because the contract did not provide an interest rate in the event of default. Therefore, this matter should be remanded to the trial court to modify his judgment and award interest at the legal rate. For the foregoing reasons, I respectfully dissent.

BRIDGESTONE/FIRESTONE, INC. v. WILMINGTON MALL REALTY CORP.

No. 945SC39

(Filed 3 January 1995)

Landlord and Tenant § 47 (NCI4th)— lease option—terms

Plaintiff tenant, pursuant to the lease between the parties, had the option to renew the lease on the basis of the same rental rate as "for the original term," since the "fixed price" option

granted to the tenant controlled and was not conditioned or modified in any manner by the "first refusal" option in the lease.

Am Jur 2d, Landlord and Tenant §§ 1160 et seq.

Judge LEWIS dissenting.

Appeal by defendant from judgment entered 27 August 1993 in New Hanover Superior Court by Judge Ernest B. Fullwood. Heard in the Court of Appeals 28 September 1994.

Marshall, Williams & Gorham, L.L.P., by John D. Martin, for plaintiff-appellee.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Michael Murchison, for defendant-appellant.

GREENE, Judge.

Wilmington Mall Realty Corporation (LANDLORD) appeals from a judgment entered in the Superior Court of New Hanover County, pursuant to a declaratory judgment action filed by Bridgestone/Firestone, Inc. (TENANT), granting TENANT the right to renew its lease for four successive five-year terms at the same rental rate as its original lease.

On 7 June 1972, TENANT entered a lease with Lat W. Purser and Ruth B. Purser to lease property in the Long Leaf Shopping Center in Wilmington, North Carolina. Sometime subsequent to the lease, the LANDLORD acquired title to the leased property. The lease, drafted by TENANT, extended from 1 June 1973 until 31 May 1993, and provided for a fixed rental rate during the twenty-year term. The lease provided the following renewal provisions:

> 33. RENEWAL TENANT shall have the right to renew or extend the within lease for a period of five (5) years following the expiration of the original term hereof, at a rental rate the same as for the original term hereof, and under the same terms and conditions as for the original term as set out herein, except for this option. In the event TENANT exercises this option to renew or extend, written notice thereof shall be given LANDLORD at least six (6) months prior to the commencement of such renewal or extension period.

[34-36 contain language identical to 33, but each provides that the right will become effective at the expiration of the renewed term under the respective, preceding paragraphs.]

37. FIRST REFUSAL TO LEASE. During TENANT'S occupancy under this lease, or its renewal or extension, TENANT shall have first refusal option to lease the demised premises only for an additional term upon the same terms and conditions as contained in any valid, acceptable, bona fide lease offer LANDLORD, or any subsequent LANDLORD, may receive. TENANT shall have fifteen (15) days after receipt from LANDLORD of written notice of such offer (with certified full written statement of such offer or certified copy thereof) within which time to exercise said option and accept any such lease.

On 5 October 1992, prior to the expiration of the original term, the LANDLORD gave notice that it had received bona fide offers to lease the property from third parties, and its intention to relet the property at a higher rate. On 11 November 1992, before receiving any specific terms from the LANDLORD, the TENANT notified LANDLORD of its intention to renew the lease, on the original terms, under paragraph 33 of the lease. LANDLORD then filed this declaratory judgment action, seeking a determination of the parties respective rights under the lease. The trial court determined that the language in paragraph 37 of the lease was "not a limitation of the TENANT'S rights, but . . . an extension of TENANT'S rights" and declared that the TENANT was therefore entitled to renew the lease "under the same terms and conditions" as set forth in the original lease.

The sole issue is whether the lease gives the TENANT the option to renew the lease on the basis of the same rental rate as "for the original term."

The LANDLORD argues that the language in paragraph 37 of the lease "shows a clear intent of the parties to limit TENANT'S rights under paragraph 33 through 36." Therefore, the LANDLORD contends, the TENANT, if it receives written notice from the LANDLORD of a bona fide third-party offer, can renew the lease for an additional term "only . . . upon the same terms and conditions" contained in the third-party offer. We disagree.

We have been unable to locate, nor have the parties cited, any North Carolina cases specifically addressing the issue presented in this appeal. There are cases addressing the effect of "right of first

refusal" and "fixed price" clauses in the context of *purchase* options and we believe they can be appropriately used to guide our decision in this *lease* option case. *E.g.*, *Texaco, Inc. v. Creel*, 310 N.C. 695, 704, 314 S.E.2d 506, 511 (1984). In the *Texaco* case, our Supreme Court held that a lease agreement granting the lessee the right to purchase the leased property at a "fixed price" accompanied by a "right of first refusal" option entitles the lessee to purchase at the "fixed price" even if the lessee fails to meet a bona fide offer to purchase made to the lessor for a larger sum. The relevant provisions in the lease presented to the *Texaco* Court provided:

> (11)—Option to Purchase. Lessor hereby grants to lessee the exclusive right, at lessee's option, to purchase the demised premises, free and clear of all liens and encumbrances, including leases, (which were not on the premises at the date of this lease) at any time during the term of this lease or any extension or renewal thereof,
>
> (a) for the sum of *Fifty Thousand* dollars; it being understood that if any part of said premises be condemned, the amount of damages awarded to or accepted by lessor as a result thereof shall be deducted from such price,
>
> (b) On the same terms and at the same price as any bona fide offer for said premises received by lessor and which offer lessor desires to accept. Upon receipt of a bona fide offer, and each time any such offer is received, lessor (or his assigns) shall immediately notify lessee, in writing, of the full details of such offer, including the name and address of any offeror, whereupon lessee shall have thirty (30) days after receipt of such notice in which to elect to exercise lessee's prior right to purchase.

Texaco, 310 N.C. at 697, 314 S.E.2d at 507 (1984) (emphasis in original). The Court in evaluating the obvious conflict in the two provisions, noted that a Rhode Island Supreme Court opinion, *Butler v. Richardson*, 60 A.2d 718 (R.I. 1948), had concluded that the "fixed price" option provision controlled because it was "clear, explicit, and not coupled with or conditioned upon any other agreement." *Texaco*, 310 N.C. at 703, 314 S.E.2d at 510. The Court quoted with approval from the *Butler* opinion that the "first refusal" provision "has no effect whatever" upon the "fixed price" option and that the "fixed price" option "remains unimpaired." *Id.* Applying the principles of the *Texaco* case to this case, we hold that the "fixed price" option grant-

ed to the TENANT in paragraph 33 of the lease agreement controls and is not conditioned or modified in any manner by the "first refusal" option granted in paragraph 37 of the lease. Thus, the judgment of the trial court is

Affirmed.

Judge JOHNSON concurs.

Judge LEWIS dissents

Judge LEWIS dissenting.

I respectfully dissent. The majority relies on *Texaco, Inc. v. Creel*, and I do not believe that case is controlling here. In *Texaco*, the Supreme Court construed two provisions dealing with an option to purchase, not an option to renew or re-lease. Several aspects of the *Texaco* case serve to distinguish it from the case before us.

First, the Court in *Texaco* found it important that, by the terms of the lease, any option granted was "*continuing and pre-emptive*" and "*the failure of [the tenant] to exercise same in any one case shall not affect [the tenant's] right to exercise such option in other cases thereafter arising* during the term of this lease or any extension or renewal thereof. [Emphasis added.]" 310 N.C. at 700, 314 S.E.2d at 508-09. The Court agreed with the South Dakota Supreme Court that a proper interpretation of the lease would give effect to each provision in the lease. *Id.* at 703, 314 S.E.2d at 510. The Court further agreed that the quoted language would be nullified if the tenant's failure to meet a bona fide offer could result in a termination of the tenant's right to exercise the fixed price option. *Id.* at 703-04, 314 S.E.2d at 510-11. The lease in the present case, however, contains no such language.

Second, the Court based its conclusion in part on the fact that the continuing viability of the first refusal provision would be beneficial to the landlords in that it would allow them to induce the tenant to buy the property at a price lower than the fixed price, should the landlords no longer wish to have their asset tied up in a long-term lease. *Id.* at 705, 314 S.E.2d at 511. This analysis is not apposite to the case at hand, however, as the lease at issue in this case involves options to renew or re-lease, not options to purchase.

Finally, the Court in *Texaco* stated that it was probable that the landlords viewed the fixed price of $50,000 as being reasonable even at the end of the lease. *Id.* In this case, the majority's conclusion would, in effect, allow the tenant to lease the premises for forty years for the same monthly rental fee. I do not believe the landlord or any one else could view that proposition as reasonable. I believe that the result reached by the Missouri Court of Appeals in *Nigro v. Firestone Tire & Rubber Co.*, 641 S.W.2d 180 (Mo. Ct. App. 1982) should be followed in this case. In *Nigro*, the court was presented with a lease which contained virtually identical provisions to those at issue here, and which was drafted by the same tenant as in this case. In that case, the original term was for fifteen years and there were three consecutive renewal provisions. The final renewal provision was followed, as here, by the right of first refusal provision. The issue before the court was the same as that of this case. That court concluded that the tenant's rights under the renewal provisions were limited and conditioned by the first refusal provision. *Id.* at 186.

One key to the court's decision was the language in the first sentence of the right of first refusal provision, which began, "During TENANTS occupancy under this lease, or its renewal or extension . . . ." This language made the first refusal provision operable during the term of the lease itself or any of its extensions. *Id.* at 185. The only reasonable construction of the first refusal provision, when read with the entire lease, was that the tenant's option to extend the lease was conditioned by the first refusal provision. *Id.* Thus, as the landlord contended, the parties intended the following: If the landlord received a bona fide offer to lease from a third party during the original term and the term under the offer was to begin at the end of the tenant's original term, the tenant had only one option and that was a first refusal option to lease the property as set out in the first refusal provision. *Id.* at 184. If no such other offer was received, then the tenant had the option of a five-year renewal under the first renewal provision. *Id.* If, during the renewal period, no bona fide offer was received, the same procedure would be followed. *Id.*

I believe the construction given the lease in *Nigro* is the proper one. I cannot agree with the majority's construction in the case at hand which, in effect, allows the tenant to lease the premises for forty years without an increase in rent. It is inconceivable that any business person, much less a freeholder or owner of real property such as the landlord, would make such a commitment. For the foregoing reasons, I respectfully dissent.

HEATHER M. FAIN v. STATE RESIDENCE COMMITTEE OF THE UNIVERSITY OF NORTH CAROLINA

No. 9310SC911

(Filed 3 January 1995)

Colleges and Universities § 29 (NCI4th); Domicil and Residence § 7 (NCI4th)— residency status for tuition—residence of parents—no prima facie evidence of student's legal residence

Even though a college student's parents live in Vermont, where the student had lived in North Carolina for five years preceding her enrollment in UNC-CH, the college could not rely on the presumption of N.C.G.S. § 6-143.1(e) that the residence of the student's parents was *prima facie* evidence of the student's own legal residence.

Am Jur 2d, Colleges and Universities § 21; Domicil § 43.

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

Appeal by respondent from order entered 8 July 1993 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 10 May 1994.

On 10 August 1992, petitioner Heather M. Fain sought judicial review of the decision by the State Residence Committee of the University of North Carolina at Chapel Hill (the Committee) classifying her as an out-of-state resident for tuition purposes. On 8 July 1993, the Wake County Superior Court reversed the Committee's decision. From this order, the Committee appeals.

Attorney General Michael F. Easley, by Associate Attorney General Thomas O. Lawton III, for the State.

Bailey & Dixon, by J. Ruffin Bailey and Alan J. Miles, for the plaintiff.

McCRODDEN, Judge.

Relying on three assignments of error, the Committee presents one argument for our consideration. The Committee contends that the superior court erred in reversing its decision because that deci-

sion was legally correct, was supported by substantial evidence, and was not arbitrary or capricious.

The facts of the case are these. In September 1991, petitioner applied for admission for the fall 1992 term of the University of North Carolina at Chapel Hill (the University) and for classification as a North Carolina resident for tuition purposes. Her application for in-state residence status showed that she was born in Charlotte on 27 January 1974 and had lived in Charlotte her entire life. Although the application listed 2000 Dilworth Road East, Charlotte, as her family's permanent residence, it also indicated that her father would begin working for a power company in Vermont by the end of September 1991. In a supplementary statement, received by the admissions office on 8 October 1991, petitioner indicated that her parents were moving to Vermont by the end of 1991, and that she would remain in Charlotte at 3832 Sedgewood Circle and finish high school.

On 4 December 1991, petitioner's father executed a medical consent form authorizing Mr. and Mrs. Benjamin Seagle, III to act in place of petitioner's parents in case of a medical emergency. The form indicated that petitioner's father had financial responsibility for petitioner and that petitioner was covered by a health plan that was based in Vermont and sponsored by the father's employer in Vermont. The form also listed a doctor in Vermont as petitioner's primary care physician.

In December 1991, petitioner submitted a second application, which listed 3832 Sedgewood Circle as her current mailing address and Shelburne, Vermont as her and her parents' permanent residence. The application stated that her parents had moved to their permanent residence in Vermont on 8 December 1991. According to this second application, petitioner's father would claim her as a dependent on 1992 tax returns for both North Carolina and Vermont. The application also indicated that petitioner had acquired a North Carolina driver's license in February 1990, drove a car registered in North Carolina, maintained 95% of her personal property in Charlotte, and worked at two summer jobs that provided her with 0.5% of her living expenses.

In January 1992, the Office of Undergraduate Admissions denied petitioner's application for resident status for tuition purposes. She appealed this decision to the Resident Status Committee and then to the State Residence Committee (Committee). Both upheld the deci-

sion classifying her as an out-of-state resident. Petitioner then appealed to the superior court, which reversed the agency decision.

This Court's review of a trial court's consideration of a final agency decision is to determine whether the trial court properly applied the review standard articulated in N.C. Gen. Stat. § 150B-51 (1991) of the Administrative Procedures Act. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 353 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). The superior court may reverse or modify an agency decision if:

> [T]he substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . .
>
> (6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b).

The proper standard the trial court applies depends on the issues presented on appeal. *Walker*, 100 N.C. App. at 502, 397 S.E.2d at 354. A *de novo* review is required for allegations that error of law affected an agency decision. *Brooks, Com'r. of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). The trial court reviews allegations that an agency decision is not supported by the evidence or is arbitrary or capricious under the whole record test. *Id.* That test requires the trial court to examine the entire record to determine whether there is substantial evidence in the record to support the agency's conclusions. *Walker*, 100 N.C. App. at 503, 397 S.E.2d at 354. Substantial evidence is evidence which a "reasonable mind would regard as adequately supporting a particular conclusion." *Id.*

The standard of review for administrative decisions is the same in the Court of Appeals as in superior court. *Teague v. Western Carolina University*, 108 N.C. App. 689, 691, 424 S.E.2d 684, 686, *disc. review denied*, 333 N.C. 466, 427 S.E.2d 627 (1993). We do not defer to the superior court's decision. *Id.* at 691-92, 424 S.E.2d at 686.

The Committee first claims that there was no error of law in its classification of petitioner as an out-of-state resident for tuition purposes. "To qualify as a resident for tuition purposes, a person must have established legal residence (domicile) in North Carolina and maintained that legal residence for at least twelve months immediately prior to his or her classification as a resident for tuition purposes." N.C. Gen. Stat. § 116-143.1(b) (Supp. 1993). In asserting that petitioner does not qualify as a resident, the Committee relies upon the common law presumption that a minor's domicile is the same as that of the minor's parents, *see Thayer v. Thayer*, 187 N.C. 573, 122 S.E.2d 307 (1924), and N.C.G.S. § 116.143.1.

For purposes of determining residence status for tuition purposes, the legislature has supplanted the common law presumption cited by the Committee by enactment of N.C.G.S. § 116-143.1. *See Biddix v. Henredon Furniture Industries*, 76 N.C. App. 30, 34, 331 S.E.2d 717, 720 (1985) ("[w]hen the General Assembly legislates with respect to the subject matter of a common law rule, the legislation supplants the common law"). Thus, we must confine our analysis of the question on appeal to N.C.G.S. § 116-143.1.

Sections 116-143.1(e), (j), and (k) establish criteria whereby an applicant whose parent or parents do not live in this state may obtain residency status. Only section 116-143.1(e) is relevant, providing:

> When an individual presents evidence that the individual has living parent(s) or court-appointed guardian of the person, the legal residence of such parent(s) or guardian shall be prima facie evidence of the individual's legal residence, which may be reinforced or rebutted relative to the age and general circumstances of the individual by the other evidence of legal residence required of or presented by the individual; *provided, that the legal residence of an individual whose parents are domiciled outside this State shall not be prima facie evidence of the individual's legal residence if the individual has lived in this State the five consecutive years prior to enrolling or reregistering at the institution of higher education at which resident status for tuition purposes is sought.*

(Emphasis added).

The Committee argues that, according to N.C.G.S. § 116-143.1(e), the residence of petitioner's parents is *prima facie* evidence of petitioner's own legal residence. This subsection, however, contains an

exception for individuals whose parents are domiciled outside of the state but who, themselves, have lived in the state for five consecutive years prior to enrolling in an institution of higher education. Under this exception, the legal residence of the parents is not *prima facie* evidence of the individual's domicile, and the individual must then present evidence to "establish that his or her presence in the State . . . is . . . for purposes of maintaining a bona fide domicile rather than . . . a . . . temporary residence." N.C. Gen. Stat. 116-143.1(c). Here, although petitioner's parents are domiciled outside North Carolina, the legal residence of her parents is not *prima facie* evidence of her legal residence since she has lived in this state five consecutive years prior to enrolling at the University.

We conclude that error of law affected the Committee's reliance on the presumption that petitioner's domicile was that of her parents and on the *prima facie* case which N.C.G.S. § 116-143.1(e) allows.

Although the record contains evidence that bears on petitioner's legal residence, we believe that it is the duty of the Committee to determine petitioner's status based upon a correct understanding of the law. Consequently, we vacate the order of the Superior Court and remand the case to it with directions to remand to the Committee for a determination of petitioner's legal residence in light of the principles of this case.

Vacated and remanded.

Chief Judge Arnold and Judge Greene concur.

Opinion written and concurred in prior to 16 December 1994.

MICHAEL DARWIN WHITE v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

No. 9310SC918

(Filed 3 January 1995)

Public Officers and Employees § 67 (NCI4th)— State employee dismissal for personal use of phone credit card—decision not arbitrary and capricious

The trial court erred in finding the State Personnel Commission's order that petitioner's dismissal had been for just cause was arbitrary and capricious, since respondent dismissed peti-

tioner for wilful and repeated misuse of State funds; the evidence showed that petitioner had charged a number of personal calls to the State Telephone Network credit card he had been issued; petitioner had notice that the card was not for personal use; and petitioner gave incomplete or evasive answers when questioned about the calls.

Am Jur 2d, Civil Service § 63.

Appeal by respondent from order entered 2 July 1993 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 10 May 1994.

Having concluded that he had misused his State Telephone Network credit card, respondent, the North Carolina Department of Environment, Health, and Natural Resources (DEHNR), dismissed petitioner from his employment as a Level 1 Dentist on 26 July 1990, for reasons of personal conduct. On 9 May 1991, petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings to protest his dismissal. On 14 February 1992, Administrative Law Judge Fred G. Morrison, Jr. filed his recommended decision that DEHNR's action be reversed and petitioner be reinstated with back pay and attorney's fees.

On 1 September 1992, the Full State Personnel Commission (the Commission) issued its decision and order declining to accept the recommended decision, finding that petitioner's dismissal had been for just cause and affirming the action of DEHNR. On 25 September 1992, petitioner filed a petition for judicial review of the Commission's order in Wake County Superior Court. Following a hearing on 19 April 1993, the court entered an order on 28 June 1993, reversing the Commission's order. From this order, respondent DEHNR appeals.

Thomas Hilliard, III for petitioner-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Mabel Y. Bullock, for respondent-appellant.

McCRODDEN, Judge.

Relying on six assignments of error, DEHNR offers four arguments, only one of which we need to review: whether the court erred in determining that the Commission's order was arbitrary and capricious. We believe that the trial court erred, and we reverse.

In reviewing a trial court's consideration of an agency's final decision, our task is to determine whether the trial court properly applied the standard of review mandated by N.C. Gen. Stat. § 150B-51 (1991). *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 353 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). That statute provides that a reviewing court may reverse or modify an agency's decision if:

> [T]he substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are [among other things]:
>
> . . . .
>
> (6) Arbitrary or capricious.

N.C.G.S. § 150B-51. The standard of review the trial court applies depends upon the issues presented. *Brooks, Com'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). When an appellant raises the question of whether the agency's decision was arbitrary and capricious, the appropriate review is the whole record test, which means an examination of all the competent evidence, including that which contradicts the agency's conclusion. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889-90 (1988). In applying the whole record test, the court may not replace the agency's judgment as between two reasonably conflicting views of the evidence. *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). Specifically, when a court is determining whether an agency's decision was arbitrary or capricious, it does not have the authority "to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989).

The standard of review of administrative decisions is the same in this Court as it is in superior court. *Teague v. Western Carolina University*, 108 N.C. App. 689, 691, 424 S.E.2d 684, 686, *disc. review denied*, 333 N.C. 466, 427 S.E.2d 627 (1993). We do not defer to the superior court's decision. *Id.* at 691-92, 424 S.E.2d at 686.

The arbitrary and capricious standard is a difficult one to meet. *Id.* at 692, 424 S.E.2d at 686. Agency actions have been found to be arbitrary and capricious when such actions are " 'whimsical' because they indicate a lack of fair and careful consideration; when they fail to indicate 'any course of reasoning and the exercise of judgment.' "

Comr. of Insurance v. Rate Bureau, 300 N.C. 381, 420, 269 S.E.2d 547, 573, (quoting *Board of Education v. Phillips*, 264 Ala. 603, 89 So.2d 96 (1956)), *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980).

We believe that the Commission's decision in this case did not lack fair and careful consideration. Respondent discharged petitioner for willful and repeated misuse of State funds. The evidence before the Commission showed that petitioner had charged a number of personal calls to the State Telephone Network credit card he had been issued. The card bore the inscription that "[a]ny use of this card other than official State business is a violation of N.C. General Statutes." The Fall, 1989 North Carolina State Capitol Telephone Directory issued to State employees contained the following statement in bold print: "Any use of the State Telephone Network for other than official State business is a violation of the tariffs filed with the North Carolina Utilities Commission. Misuse of the system may result in appropriate penalties, including dismissal." The evidence also showed that petitioner gave incomplete or evasive answers when questioned about the calls. All in all, there was substantial evidence before the Commission to support its conclusion that petitioner had willfully and repeatedly misused State funds.

It is the Commission's prerogative to determine the weight of the evidence and the credibility of the witnesses and to determine the facts therefrom. *Davis v. N.C. Dept of Human Resources*, 110 N.C. App. 730, 737, 432 S.E.2d 132, 136 (1993). There is nothing in the record to indicate that the Commission exercised its discretion other than in good faith and in accordance with the law. Hence, we find that the trial court erred in reversing the Commission.

We note petitioner's argument that the Commission's order was insufficiently specific and that N.C. Gen. Stat. § 126-35 (1993), which provides that permanent State employees may be discharged only for "just cause," is unconstitutionally vague. Petitioner, however, brought forward no cross-assignments of error as alternative grounds for the trial court's order. *See* N.C.R. App. P. 10. We decline to consider his arguments.

In conclusion, we find that the trial court erred in finding the Commission's order to be arbitrary and capricious. We reverse the trial court's order, and remand the case for entry of judgment in DEHNR's favor.

Reversed.

Chief Judge ARNOLD and Judge GREENE concur.

Opinion written and concurred in prior to 16 December 1994.

STATE OF NORTH CAROLINA v. WAYNE B. ANTOINE

No. 934SC1320

(Filed 3 January 1995)

Criminal Law § 1098 (NCI4th)— aggravating factor—same evidence as for conviction—finding of aggravating factor error

The trial court erred in finding as an aggravating factor for an armed robbery that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person where the evidence showed that defendant used a semi-automatic pistol to rob three persons and threatened to shoot a fourteen-year-old child if anything went wrong since this factor was based upon the same evidence used to prove an element of armed robbery. N.C.G.S. § 15A-1340.4(a)(1)g.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 19 August 1993 by Judge James R. Strickland in Onslow County Superior Court. Heard in the Court of Appeals 18 October 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Sue Y. Little, for the State.

Collins and Moore, By James L. Moore, Jr., for defendant-appellant.

THOMPSON, Judge.

The issue in this case is whether the trial court erred in finding as an aggravating factor that "the defendant knowingly created a great risk of death to more than one person by means of a weapon or

device which would normally be hazardous to the lives of more than one person." We find that the trial court erred in applying this factor.

On or about 18 April 1993 the defendant entered a Circle-K convenience store located on Western Boulevard in Jacksonville, North Carolina. The defendant took several items of merchandise to the cash register, pulled out a semi-automatic handgun and ordered the clerk to give him the money from the register. The clerk and another employee, Linda Wagnum, got down on the floor of the store, along with a customer and Ms. Wagnum's fourteen-year-old son. Defendant placed the gun behind the head of the boy and said he would blow the boy's head off if anything went wrong. Ms. Wagnum handed the defendant money from the register. Defendant then took money from her purse and, after pointing the gun toward the customer who was lying on the floor, took the customer's money also. The defendant pointed the handgun at each of the individuals present in the store; however, the defendant did not discharge the weapon during the course of the robbery.

While the gun used in the robbery was never recovered, the evidence revealed that the defendant robbed a Jim Dandy store earlier that night and used a "semi-automatic like handgun." The evidence also revealed that defendant robbed another Circle-K, subsequent to his robbery of the Circle-K on Western Boulevard, and used a ".45 caliber pistol."

Defendant was indicted on three counts of robbery with a dangerous weapon. He entered a plea of guilty to all three counts at the 16 August 1993 Criminal Session of Onslow County Superior Court. The Honorable James R. Strickland, Jr. imposed the mandatory minimum sentence of 14 years in two of the robbery cases, and, after finding statutory aggravating factor number seven as set out on AOC-Form CR-303 under N.C. Gen. Stat. § 15A-1340.4(a)(1)g, imposed a sentence of 35 years in the third robbery case. Defendant made a motion before the superior court session ended that the sentence therein be modified and the motion was denied. Defendant appeals.

On appeal the defendant contends that the trial court erred in finding as an aggravating factor that "the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person."

The statute in question is N.C. Gen. Stat. § 15A-1340.4(a)(1)g (repealed effective 1 October 1994; reenacted as N.C. Gen. Stat. § 15A-1340.16(d)(8) effective 1 October 1994). The North Carolina Supreme Court has stated that to impose this aggravating factor, the sentencing judge must focus on two considerations: (1) Whether the weapon in its normal use is hazardous to the lives of more than one person; and (2) Whether a great risk of death was knowingly created. *State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990); *State v. Carver*, 319 N.C. 665, 667, 356 S.E.2d 349, 351 (1987).

The defendant argues that the nature of the semi-automatic pistol, and the manner in which he used it, precluded the trial court from applying the aggravating factor. As support, the defendant relies on *State v. Jones*, 83 N.C. App. 593, 351 S.E.2d 122 (1986), *disc. review denied*, 319 N.C. 461, 356 S.E.2d 9 (1987) (.38 handgun fired at one person three times not normally hazardous to the lives of more than one person), and *State v. Bethea*, 71 N.C. App. 125, 321 S.E.2d 520 (1984) (30/30 lever action rifle fired once not normally hazardous to the lives of more than one person).

In *State v. Carver*, 319 N.C. 665, 356 S.E.2d 349 (1987), the North Carolina Supreme Court held that the trial court had not erred in finding this aggravating factor where the evidence showed that defendant fired multiple shots into a crowd of people with a semi-automatic rifle. The semi-automatic rifle was capable of firing eight bullets without being reloaded. In *Carver*, the Supreme Court stated:

> A semi-automatic rifle may be used normally to fire several bullets, in this case eight, in rapid succession. Several bullets fired in rapid succession are hazardous to the lives of more than one person; therefore, we hold that the evidence in this case supports a finding of the aggravating factor that the defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person.

Carver, 319 N.C. at 667-668, 356 S.E.2d at 351.

As was the case in *Carver* with a semi-automatic rifle, we find that a semi-automatic pistol in its normal use is hazardous to the lives of more than one person and is the type of weapon contemplated by N.C. Gen. Stat. § 15A-1340.4(a)(1)g. The issue then becomes whether defendant used the weapon in such a way as to create a great risk of

death to more than one person. We do not believe that this issue needs to be addressed in the case *sub judice.*

This appeal can be resolved by noting that "[e]vidence 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). Therefore, the trial court cannot apply this aggravating factor as to the three people who were robbed because the evidence used to prove the elements of armed robbery is the same evidence supporting the court's finding of a factor in aggravation. As to the fourteen-year-old child, the defendant's threat was used to perpetrate the robbery. Because this evidence was used to prove an element of the crime of armed robbery, it cannot also be used as a factor in aggravation. Therefore, it was error for the trial court to treat the defendant's ill-contrived acts as an aggravating factor in sentencing him under N.C. Gen. Stat. § 15A-1340.4(a)(1)g. We remand for new sentencing.

Reversed and remanded.

Judges JOHNSON and MARTIN concur.

This opinion was written and concurred in prior to December 29, 1994.

SUSAN SHAW, PLAINTIFF/APPELLEE v. KENNETH SHAW, DEFENDANT/APPELLANT

No. 9428DC80

(Filed 3 January 1995)

Divorce and Separation § 167 (NCI4th)— equitable distribution—lump sum award from thrift plan—failure of court to consider consequences

The trial court was required to make appropriate findings concerning defendant's thrift plan before ordering defendant to make a lump sum distributive award which, according to defendant's argument and the evidence before the trial court, must be made from defendant's thrift plan and which would result in the loss of employer contributions or harsh tax consequences.

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

Divorce: equitable distribution doctine. 41 ALR4th 481.

SHAW v. SHAW

[117 N.C. App. 552 (1995)]

Appeal by defendant from judgment entered 18 August 1993 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals on 29 September 1994.

John E. Shackleford for plaintiff appellee.

Hyler & Lopez, P.A., by Robert J. Lopez and Sybil G. Mann, for defendant appellant.

COZORT, Judge.

Defendant appeals from an equitable distribution judgment ordering defendant to pay a lump sum distributive award of $8,360.72 to plaintiff. We find the trial court failed to properly consider the non-liquid nature of defendant's thrift plan, the principle marital asset, and we remand the case for further findings and entry of an appropriate judgment.

Plaintiff-wife and defendant-husband were married on 20 June 1969 and separated on 6 April 1990. On 9 July 1990, plaintiff and defendant entered into a consent order, approved by the district court, which settled the issue of the marital homeplace by providing that defendant would pay to plaintiff $18,000.00, and the plaintiff would execute a deed in fee simple to the marital homeplace to the defendant. On 29 May 1991, plaintiff filed an action seeking absolute divorce from defendant based upon one year's separation. Plaintiff requested an equitable distribution of all real and personal property owned by the parties. On 8 July 1991, defendant filed an answer joining in the plea for absolute divorce and also requesting equitable distribution of the marital property. The trial court granted an absolute divorce on 11 July 1991. The trial court severed the equitable distribution action, which was to be heard at a later date.

The equitable distribution proceedings came on to be heard during the 30 November 1992 session of district court. The court's equitable distribution judgment was signed on 18 August 1993. In that judgment, the trial court provided that defendant's retirement account shall be divided by the execution of a qualified domestic relations order, giving the plaintiff 50% of the total pension value accrued from 20 June 1969 through 6 April 1990. After making provisions for the division of savings bonds, defendant's retirement account, and eighteen shares of Teneco [*sic*] stock, the trial court found the net value of the remaining marital property to be $23,311.00. The court found the plaintiff was in possession at the date of separation of mar-

ital property having a net value of $1,439.00. The court found the defendant to be in possession of the remaining marital property, including the thrift plan valued at $11,032.00. The court found that an equal division of property would be equitable and directed the defendant to pay plaintiff a distributive award of $8,360.72.

On 3 September 1993, defendant moved, pursuant to Rule 60 of the Rules of Civil Procedure, that the court modify the judgment. Defendant contended in that motion that the order directing defendant to pay plaintiff a lump sum distribution in excess of $8,000.00 would require the defendant to withdraw money from the thrift plan, causing harsh and extreme tax consequences. The defendant requested entry of a qualified domestic relations order as to the $8,360.72 to be paid by defendant to plaintiff. On 5 October 1993, the trial court entered an order denying defendant's motion. Defendant timely filed notice of appeal.

In his first three assignments of error, defendant contends the trial court erred by ordering the defendant to pay plaintiff a lump sum distribution of $8,362.72. Defendant contends that the only way he can make such a payment is to withdraw funds from the thrift plan which will cause the loss of employer contributions and cause extreme tax consequences. We find defendant's argument persuasive.

N.C. Gen. Stat. § 50-20(c) (1994 Cum. Supp.) provides that the trial court shall consider certain factors in determining how to distribute the marital property of parties. Those factors include

(9) The liquid or nonliquid character of all marital property;

* * * *

(11) The tax consequences to each party;

* * * *

(12) Any other factor which the court finds to be just and proper.

In his deposition, which was introduced in the trial court, the defendant testified that he participated in a thrift plan. The defendant testified that money was deducted from his check and that his employer made a contribution. The defendant further testified that there were penalties for making withdrawals from the account at unauthorized times. We find this evidence was sufficient to require the trial court to make appropriate findings concerning the thrift plan before ordering the defendant to make a lump sum distributive award

which, according to defendant's argument and the evidence before the trial court, must be made from the defendant's thrift plan. There was no evidence before the trial court that the defendant had liquid assets totaling $8,360.72. In fact, all of the evidence indicates that neither party had any substantial liquid assets. It appears, therefore, that the defendant would have to withdraw money from the thrift plan in order to make the distributive award. The defendant had placed evidence before the trial court that such a withdrawal would result in the loss of employer contributions or harsh tax consequences. The trial court must consider these issues before requiring the defendant to make the lump sum distributive award payment. This case must be remanded to the trial court for a determination of whether the defendant has assets, other than the thrift plan, from which he can make the distributive award payment. If he does not, the trial court must either (1) provide for some other means by which the defendant can pay $8,360.72 to the plaintiff; or (2) determine the consequences of withdrawing that amount from the thrift plan and adjust the award from defendant to plaintiff to offset the consequences.

Defendant's last two assignments of error are directed to the trial court's findings and conclusions regarding a marital debt owed to defendant's parents. We have reviewed those assignments of error, and we hold the findings made by the trial court are supported by competent evidence and are not erroneous as a matter of law. We affirm on that issue.

In sum, the trial court's order is reversed, and the case is remanded to the trial court for findings of fact concerning the source of funds for the defendant's payment of the $8,360.72 distributive award, the consequences if those funds must be taken from the defendant's thrift plan, and entry of an appropriate order equitably distributing the marital property.

Reversed and remanded.

Judge WYNN concurs.

Judge McCRODDEN concurred in this opinion prior to 15 December 1994.

FRIENDS OF HATTERAS ISLAND NATIONAL HISTORIC MARITIME FOREST LAND TRUST FOR PRESERVATION, INC., PETITIONER v. COASTAL RESOURCES COMMISSION OF THE STATE OF NORTH CAROLINA AND CAPE HATTERAS WATER ASSOCIATION, INC., RESPONDENTS

No. 941SC289

(Filed 17 January 1995)

1. Environmental Protection, Regulation, and Conservation § 37 (NCI4th)— appeals under Coastal Reserve Statute— court having subject matter jurisdiction

Construing N.C.G.S. § 113A-123(a) together with N.C.G.S. § 150B-43, the Court of Appeals finds that the legislature intended to confer jurisdiction over appeals pursuant to N.C.G.S. § 113A-123(a) on the superior court of the county where the land or any part thereof is located as well as the Superior Court of Wake County or of the county where the petitioner resides; further, the legislature intended to establish the superior court of the county where the land or any part thereof is located as the proper venue for appeals pursuant to N.C.G.S. § 113A-123(a).

Am Jur 2d, Administrative Law §§ 436, 437; Public Lands §§ 122-124.

2. Administrative Law and Procedure § 65 (NCI4th)— standard of review of agency decision

If a petitioner argues that an agency's decision was based on an error of law, "de novo" review is required, but a reviewing court must apply the "whole record" test if the petitioner questions whether the agency's decision was supported by the evidence or whether the decision was arbitrary or capricious.

Am Jur 2d, Administrative Law §§ 522, 585 et seq.

3. Environmental Protection, Regulation, and Conservation § 39 (NCI4th)— drilling wells in maritime forest—no public use—drilling prohibited

The placement of nine wells, together with associated underground utilities and access roads, on state-owned lands in the Buxton Woods Reserve to provide drinking water for the residents of Hatteras Island was not a use in the nature of public trust rights and thus was prohibited by N.C.G.S. § 113A-129.2(e), since the purpose of the statute is to preserve, improve, and maintain undeveloped coastal land and water areas in an undeveloped and

natural state so that these areas can serve important public purposes, the primary ones being research and education.

Am Jur 2d, Public Lands § 125.

Appeal by respondents from order entered 28 October 1993 by Judge William C. Griffin, Jr. in Dare County Superior Court. Heard in the Court of Appeals 26 October 1994.

Southern Environmental Law Center, by Derb S. Carter, Jr., J. David Farren and Lark Hayes, for petitioner-appellee.

Maupin Taylor Ellis & Adams, P.A., by Amos C. Dawson, III and Sean Callinicos; and Sharpe, Michael, Outten & Graham, by Robert L. Outten; for respondent-appellant Cape Hatteras Water Association.

Attorney General Michael F. Easley, by Assistant Attorney General Robin W. Smith, for respondent North Carolina Coastal Resources Commission.

THOMPSON, Judge.

Respondents Cape Hatteras Water Association (CHWA) and North Carolina Coastal Resources Commission (CRC) appeal from an order entered by Judge William C. Griffin, Jr. on 28 October 1993 which revoked the issuance of a Coastal Area Management Act (CAMA) Major Development Permit No. 152-91 to CHWA.

The issue presented by this appeal is whether the trial court erred in reversing a permit which the CRC had granted to CHWA to place nine wells, together with associated underground utilities and access roads, on state-owned lands in the Buxton Woods Reserve. Buxton Woods, located on Cape Hatteras Island in Dare County, is the largest remaining maritime forest in North Carolina. In 1987 the State began a program of acquisition of lands in Buxton Woods. Shortly thereafter, in April 1988, CRC created a State Coastal Reserve program that encompasses the existing Estuary Sanctuary components (Zeke's Island, Rachel Carson, Currituck Banks and Masonboro Island) and also includes Bermuda Island and Buxton Woods. *See* 15A N.C. Admin. Code tit. 15A, r.070.0100-.0105 (April 1988).[1] In 1989, two

1. The North Carolina Coastal Reserve was created by amendment to the Estuarine Sanctuary Rules, N.C. Admin. Code tit. 15A, r.070.0100-.0105 (July 1986). The principal purposes of the North Carolina Coastal Reserve and its supporting programs are to:

years after the State began its program of acquisition of Buxton Woods, the legislature established the North Carolina Coastal Reserve by the enactment of part V of the Coastal Area Management Act, N.C. Gen. Stat. § 113A-129.1 through .3 (1989) [Coastal Reserve Statute].[2] The legislature created the North Carolina Coastal Reserve System in recognition of the fact that the coastal area of North Carolina contains a number of important undeveloped natural areas and that "[i]mportant public purposes will be served by the preservation of certain of these areas in an undeveloped state." N.C. Gen. Stat. § 113A-129.1.[3] The system was created "for the purpose of acquiring,

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(1) preserve coastal ecosystems . . . and to make them available for continuous future study of the processes, functions, and influences which shape and sustain the coastal ecosystems;

(2) provide new information on coastal ecosystem processes to decisionmakers as a basis for the promotion of sound management of coastal resources;

(3) provide a focal point for educational activities that increase the public awareness and understanding of coastal ecosystems, effects of man on them and the importance of the coastal systems to the State and the Nation;

(4) accommodate traditional recreational activities, commercial fishing, and other uses of the Reserve as long as they do not disturb the Reserve environment and are compatible with the research and educational activities taking place there.

N.C. Admin. Code tit. 15A, r.070.0101 (amended April 1988).

The Coastal Reserve Program of the Division of Coastal Management is responsible for managing and protecting the North Carolina Coastal Reserve; for promoting and coordinating research and educational programs at the components while allowing for compatible traditional uses; for maintaining a management plan for the Reserve; for maintaining cooperative agreements with scientific, educational, and resource management agencies and private citizens that will assist in the management of the reserve; and for providing new information on coastal processes to coastal management decisionmakers.

N.C. Admin. Code tit. 15A, r.070.0103 (amended April 1988).

2. "The Coastal Area Management Act (CAMA), N.C. Gen. Stat. § 113A-100, *et. seq.*, was enacted to provide for the protection and continued productivity of the coastal resources, to manage competing uses of those resources, and to protect public trust rights in the lands and waters of the coastal area. CAMA directs and empowers the [CRC] to enforce the Act's provisions." *Ballance v. N.C. Coastal Resources Comm.*, 108 N.C. App. 288, 423 S.E.2d 815, 816 (1992), *disc. review denied*, 333 N.C. 536, 429 S.E.2d 553 (1993), *reconsideration dismissed*, 333 N.C. 789, 431 S.E.2d 21 (1993).

3. The system is administered by the Department of Environment, Health, and Natural Resources, with the consultation and advice of the Coastal Resources Commission. N.C. Gen. Stat. § 113A-129.2(b).

improving, and maintaining undeveloped coastal land and water areas in a natural state." N.C. Gen. Stat. § 113A-129.2(a). N.C. Gen. Stat. § 113A-129.2(e) restricts the use of the Reserve primarily for research and education but also allows "[o]ther public uses, such as hunting, fishing, navigation and recreation . . . to the extent consistent with these primary uses."

Respondent CHWA is a private, nonprofit corporation which has since 1969 provided the only public water supply to residents of south Hatteras from a well field on a tract which extends 12,000 feet at the west end of Buxton Woods. A second tract is conterminous with the first tract and extends approximately 8,000 feet. A third tract extends approximately 6,200 feet along the National Park Service boundary. The second and third tracts have been identified as future well fields. The aquifer beneath these tracts serves as the sole source of drinking water for the surrounding communities of Avon, Buxton, Frisco and Hatteras, as well as the national seashore recreation area. In 1977, before the State acquired Buxton Woods, the CRC designated CHWA's existing and future well field areas as a "Public Water Supply Well Field Area of Environmental Concern" pursuant to N.C. Gen. Stat. § 113A-113(b), which authorizes the CRC to designate any one or more areas enumerated therein as areas of environmental concern. N.C. Gen. Stat. § 113A-113 (1994); N.C. Admin. Code tit. 07H, r.0406(c)(1) (September 1977) (regulation designating CHWA's well field areas as public water supply well fields). The CRC defines public water supply well fields as "areas of well-drained sands that extend downward from the surface into the shallow ground water table which supplies the public with potable water . . . [and which] are confined to a readily definable geographic area . . . ." N.C. Admin. Code tit. 15A, r.07H.0406(a) (September 1977). Development within a Public Water Supply Well Field AEC (1) must be consistent with the minimum standards set forth in N.C. Admin. Code tit. 15A, r.07H.0406(b) and (2) requires a permit from the Commission or its duly authorized agent pursuant to N.C. Gen. Stat. § 113A-118(a) (1994), which states that "every person before undertaking any development in any Area of Environmental Concern shall obtain . . . a permit pursuant to the provisions of [Part 4 of Article 7 of CAMA]."

In 1990, out of concern that the existing wellfield had been pumped at or near its capacity, CHWA sought to expand into future well field areas located in the Buxton Woods Coastal Reserve. Since this would entail the drilling of wells in the future well field areas of the Public Well Field AEC, CHWA had to apply to the Department of

Environment, Health, and Natural Resources, Division of Coastal Management [DCM], for the issuance of a Major Development Permit to drill wells in the future well field areas. *See* N.C. Gen. Stat. § 113A-118(d)(1). "Major development" is

> any development which requires permission, licensing, approval, certification or authorization in any form from the Environmental Management Commission, the Department of Environment, Health, and Natural Resources . . .; or which occupies a land or water area in excess of 20 acres; *or which contemplates drilling for or excavating natural resources on land* or under water; or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

N.C. Gen. Stat. § 113A-118(d)(1) (emphasis added).[4]

CHWA's application, filed 30 November 1990, was submitted to nine state and federal agencies for review and comment. DCM Director Roger Schecter reviewed the application, comments, and information collected during evaluation of the application in light of N.C. Gen. Stat. § 113A-120(a)(1)-(10), which sets forth ten findings any one of which, if found by the responsible official or body, requires denial of the permit. In the absence of any such findings under section (a), N.C. Gen. Stat. § 113A-120(b) provides that the permit shall be granted.

DCM Director Schecter made a finding pursuant to N.C. Gen. Stat. § 113A-120(b) that the permit should be issued. Thereafter, CHWA was issued CAMA Major Development Permit no. 152-91 which contained 17 conditions to minimize impacts on maritime forest, wetlands vegetation, and swales. On 14 January 1992 the permit was amended to clarify the conditions in the original permit.

Thereafter, petitioner Friends of Hatteras Island National Historic Maritime Forest Land Trust for Preservation, Inc. (FOHI) filed a third party request for contested hearing on the issuance of the original and amended permits pursuant to N.C. Gen. Stat. § 113A-121.1(b). FOHI is a conservation organization based on Hatteras Island whose stated purpose is to promote responsible choices in the use of the island's natural resources.

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4. If the contemplated development constitutes "minor development," the permit shall be obtained from the appropriate city or county under an expedited procedure. N.C. Gen. Stat. § 113A-118(b). "Minor development" is defined as "any development other than 'major development.' " N.C. Gen. Stat. § 113A-118(d)(2).

In its request for a contested case hearing petitioner alleged, among other things, that the permit decision was inconsistent with the Coastal Reserve Statute, N.C. Gen. Stat. § 113A-129.1-.3, and with the rules adopted by the Department of Environment, Health, and Natural Resources pursuant thereto. By order entered 18 February 1992, T. Erie Haste, Jr., Vice Chairman of the CRC, granted petitioner's request for a contested case hearing on this issue.

Administrative Law Judge Thomas R. West conducted the administrative hearing beginning on 10 August 1992 and concluding on 1 September 1992. Judge West issued a decision recommending issuance of the CAMA permit with minor modifications. The CRC made a final decision in the contested case on 20 November 1992 based on consideration of the hearing record, Judge West's Recommended Decision, and oral arguments by the parties. The CRC's final order issuing the permit was entered on 9 December 1992.

The CRC considered the following issues:

(1) Whether CAMA Permit No. 152-91, which allows construction by the CHWA of nine wells for the production of water, together with the pertinent access and underground utilities, in a portion of the Cape Hatteras Well Field AEC within the Buxton Woods Coastal Reserve is consistent with N.C.G.S. 113A-120 and the applicable state guidelines as applied through N.C. Gen. Stat. § 113A-120(a)(8).

(2) Whether considering the engineering requirements and all economic costs, there is a practicable alternative that would accomplish the overall program purposes with less adverse impact on the public resources (thus requiring denial of the permit under N.C. Gen. Stat. § 113A-120(a)(9)).

(3) Whether the development allowed by Permit No. 152-91 would contribute to cumulative effects which would be inconsistent with applicable CAMA guidelines (thus requiring denial of the permit under N.C. Gen. Stat. § 113A-120(a)(10)).[5]

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5. N.C. Gen. Stat. § 113A-120(a)(8),(9) and (10) provide:

(a) The responsible official or body shall deny an application for permit upon finding:

* * *

(8) In any case, that the development is inconsistent with the State guidelines or the local land-use plans.

(9) In any case, that considering engineering requirements and all economic costs there is a practicable alternative that would accomplish the overall project purposes with less adverse impact on the public resources.

In affirming the issuance of the permit, the CRC made the following conclusions of law:

> 3. Withdrawal of water from the aquifer underlying the Buxton Woods Coastal Reserve . . . is a traditional use consistent with preservation of the area in an undeveloped state and consistent with the coastal reserve's primary use as a site for research and education. The improvements and alterations allowed by the Permit are consistent with these uses.
>
> 4. Withdrawal of water from the aquifer underlying the Buxton Woods Coastal Reserve by the [CHWA] . . . is a public use consistent with preservation of the area in an undeveloped state and consistent with the coastal reserve's primary use as a site for research and education, particularly as no other source of public drinking water exists in this area.
>
> 5. Withdrawal of water from the aquifer underlying the Buxton Woods Coastal Reserve by the [CHWA], as permitted and with the performance standard made applicable to Well No. 3, maintains the Coastal Reserve's essential natural character.
>
> 6. Disturbance or removal of vegetation as permitted is de minimis and as such is not proscribed by 15A NCAC 70.0202(6). The Commission further finds, alternatively, that the ALJ correctly concluded that 15A NCAC 70.0202(6) is written in such terms that the rule is inconsistent with N.C.G.S. 113A-129.1(b) and 113A-129.2(e) and thus is void as applied in this case because it is not within the statutory authority of the agency and is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.
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> * * *
>
> 8. Considering the engineering requirements and all economic costs, there is no practicable alternative that would accomplish the overall project purposes with less adverse impact on the public resources and thus there is no basis for finding that the proposed development is inconsistent with N.C.G.S. 113A-120(a)(9).
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(10) In any case, that the proposed development would contribute to cumulative effects that would be inconsistent with the guidelines set forth in subdivisions (1) through (9) of this subsection. Cumulative effects are impacts attributable to the collective effects of a number of projects . . . .

10. As permitted pursuant to this order, the propoposed wells and associated utilities and access roads or trails, will not contribute to cumulative effects that would be inconsistent with N.C.G.S. 113A-120(a)1-9, the State guidelines or the local land use plans and thus there is no basis for finding that the proposed development was inconsistent with N.C.G.S. 113A-120(a)(10). . . .

The CRC then decreed, in view of its findings of fact and conclusions of law, that the permit should be modified and that Permit No. 152-91, as modified, "is consistent in all respects with all applicable state guidelines, statutes and rules, including those governing the coastal reserves and shall be granted."

On 19 January 1993, FOHI filed a petition for judicial review in Wake County Superior Court. Petitioner excepted to the above conclusions of the CRC as erroneous and alleged that the CRC's decision was affected by error of law, not supported by substantial evidence, and arbitrary and capricious within the meaning of N.C. Gen. Stat. § 150B-51(b)(4),(5) and (6) (1991). Respondents CRC and CHWA moved to dismiss the petition for lack of subject matter jurisdiction. By order entered 29 April 1993, Judge Narley Cashwell denied respondents' motion to dismiss and ordered the action removed to Dare County.

Judge William C. Griffin, Jr. conducted a hearing on judicial review of the final CRC decision at the 13 September 1993 civil session of Dare County Superior Court. On 28 October 1993, Judge Griffin entered an order overruling the CRC's final decision and revoking the CAMA permit. Judge Griffin concluded, among other things, that "by enactment of N.C.G.S. 113A-129.1, *et. seq.*, the legislature pre-empted the Commission's authority to permit uses of the components of the Coastal Reserve System, except those specifically permitted by that statute," and essentially concluded that the CRC erred as a matter of law in the issuance of the permit because the statute did not permit the activities permitted by CAMA Permit No. 152-91.

I. Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction

[1] The superior court concluded that "the [c]ourt has jurisdiction of the subject matter and the parties pursuant to N.C.G.S. 113A-121.1(b) and 150[B]-43" and that "[p]etitioner has exhausted all available administrative remedies and has no other adequate procedure for

judicial review. Accordingly, petitioners are entitled to the full scope of judicial review provided by N.C.G.S. 150B-43 of the APA." Respondents assign error to the denial of their motion to dismiss the petition for lack of subject matter jurisdiction and to the above conclusions of law. Respondents argue that: (1) Wake County Superior Court lacked subject matter jurisdiction over petitioner's appeal and thus its order removing the case to Dare County Superior Court is null and void, (2) the Dare County Superior Court judgment is null and void for lack of subject matter jurisdiction because a court without jurisdiction cannot confer jurisdiction upon another court by transfer and (3) the Dare County Superior Court lacked jurisdiction over the subject matter and the parties because petitioner failed to file its petition for judicial review in Dare County Superior Court pursuant to N.C. Gen. Stat. § 113A-123(a) (1994). We hold that Wake County Superior Court had subject matter jurisdiction and thus affirm the denial of respondents' motion to dismiss.

Respondents' arguments are premised on their interpretation of N.C. Gen. Stat. § 113A-123(a) of CAMA and N.C. Gen. Stat. § 150B-43 of the Adminstrative Procedure Act (APA). N.C. Gen. Stat. § 113A-123(a) (1994) governs the procedure for judicial review of final decisions or orders of the Commission under Part 4 of CAMA, which consists of N.C. Gen. Stat. § 113A-116 through -128. N.C. Gen. Stat. § 113A-123(a) provides that:

> Any person directly affected by any final decision or order of the Commission under this Part *may* appeal such decision or order to the superior court of the county where the land or any part thereof is located, *pursuant to the provisions of Chapter 150B of the General Statutes.*

(emphasis added).

N.C. Gen. Stat. § 150B-43 (1991) of the APA provides, in pertinent part:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.

N.C. Gen. Stat. § 150B-45 (1991) provides that the person seeking judicial review of a final decision "must file a petition in the Superior

Court of Wake County or in the superior court of the county where the petitioner resides . . . within thirty days after the person is served with a written copy of the decision." Failure to file a petition within the required time waives the right to judicial review under Article 4 of the APA. N.C. Gen. Stat. § 150B-45. Moreover, failure to file in Wake County or in the county in which petitioner resides within 30 days of service of the CRC decision requires dismissal for lack of subject matter jurisdiction. *See Gummels v. N.C. Dept. of Human Resources*, 97 N.C. App. 245, 252, 388 S.E.2d 223, 227, *disc. review denied*, 326 N.C. 596, 393 S.E.2d 877 (1990).

Respondents contend that N.C. Gen. Stat. § 113A-123 provides adequate procedure for judicial review and thus judicial review is not available under the APA but only under N.C. Gen. Stat. § 113A-123. They further contend that since N.C. Gen. Stat. § 113A-123(a) provides adequate procedure for judicial review, that section of the statute is jurisdictional and confers subject matter jurisdiction over claims of this kind *solely* on the superior court of the county where the land or any part of the land is located, which in this case is Dare County.

Respondents' argument that N.C. Gen. Stat. § 113A-123(a) provides adequate procedure for judicial review is without merit. Adequate procedure for judicial review would exist under N.C. Gen. Stat. § 113A-123(a) only if the scope of review provided therein were at least equal to that provided by Article 4 of Chapter 150B. *See Commissioner of Insurance v. Rate Bureau*, 300 N.C. 381, 395, 269 S.E.2d 547, 559, *rehearing denied*, 301 N.C. 107, 273 S.E.2d 300 (1980) (adequate procedure for judicial review exists under N.C. Gen. Stat. § 58-9.6(b), which provides for judicial review of ratemaking cases, if the scope of review under that statute is equal to that under Article 4 of G.S. Chapter 150A, which has since been recodified as Chapter 150B). The scope of review provided by Article 4 of Chapter 150B is set forth in N.C. Gen. Stat. § 150B-51, entitled "Scope of Review." Section 150B-51 requires initial determinations in the review of certain cases and further provides that the court reviewing a final decision may:

> affirm the decision . . . or remand the case or further proceedings [and] may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissable under G.S. 150B- 29(a), 150B-30, or 150B-31 in view of the entire record as submitted;

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51 (1991). This is not even a close question; N.C. Gen. Stat. § 113A-123 does not set forth the scope of review but instead provides that judicial review is available pursuant to the provisions of Chapter 150B of the APA.

"[S]tatutes which are *in pari materia, i.e.*, which relate to or are applicable to the same matter or subject, although enacted at different times must be construed together in order to ascertain legislative intent." *Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984). Construing N.C. Gen. Stat. § 113A-123(a) together with N.C. Gen. Stat. § 150B-43, we find that the legislature intended to confer jurisdiction over appeals pursuant to N.C. Gen. Stat. § 113A-123(a) on the superior court of the county where the land or any part thereof is located as well as on the Superior Court of Wake County or of the county where the petitioner resides. We further find that the legislature intended to establish the superior court of the county where the land or any part thereof is located as the proper *venue* for appeals pursuant to N.C. Gen. Stat. § 113A-123(a). Thus, Wake County had subject matter jurisdiction over petitioner's appeal and properly transferred the appeal to Dare County.

II. STANDARD OF REVIEW

[2] Our review of a superior court's decision pursuant to N.C. Gen. Stat. § 150B-52 " 'is the same as in any other civil case—consideration of whether the court committed any error of law.' " *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675-76, 443 S.E.2d 114, 118-19 (1994) (*citing In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)). In reviewing the superior court's order for error of law, this Court first determines whether the trial court exercised the appropriate scope of review and, if appropriate,

determines whether the trial court properly did so. *Id.* at 675, 443 S.E.2d at 118-19.

The standard of review to be employed in review of an agency decision depends upon the nature of the alleged error. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). If the petitioner argues that the agency's decision was based on an error of law, "*de novo*" review is required. " '*De novo*' review requires a court to consider a question anew, as if not considered or decided by the agency." *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. The court may "freely substitute its own judgment for that of the agency." *Brooks, Commissioner of Labor v. Grading Co.*, 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981). Since incorrect statutory interpretation by an agency constitutes an error of law under N.C. Gen. Stat. § 150B-51(b)(4), when the issue on appeal is whether the state agency erred in interpreting a statutory term, " 'an appellate court may substitute its own judgment [for that of the agency] and employ *de novo* review.' " *Amanini*, 114 N.C. App. at 678, 443 S.E.2d at 120.

" 'If, however, the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.' " *Armanini*, 114 N.C. App. at 674, 443 S.E.2d at 118 (citation omitted). "The 'whole record' test requires the reviewing court to examine all competent evidence in order to determine whether the agency decision is supported by 'substantial evidence.' " *Id.* (citation omitted).

Where, as in the case *sub judice*, petitioner challenges the agency's decision as (1) affected by errors of law, (2) contrary to the evidence, and (3) arbitrary and capricious, the superior court may even utilize more than one standard of review. *See In Re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993).

Judge Griffin made the following conclusions, to which respondents assign error:

> 4. By enactment of N.C.G.S. 113A-129.1, *et. eq.*, the legislature pre-empted the Commission's authority to permit uses of the components of the Coastal Reserve System, except those specifically permitted by that statute.
>
> 5. To the extent the Commission relied on pronouncements made by politicians during the acquisition process about the uses to

which the acquisitions would be put, the Commission was in error as a matter of law.

6. Although the statute permits limited traditional public uses such as hunting, fishing, navigation and recreation, it specifically requires components of the Coastal Reserve System, including Buxton Woods to be preserved in an undeveloped state. The activities permitted by CAMA Permit No. 152-91 are not public uses within this meaning of the statute.

7. The Commission's conclusion that the authorized development is a public use consistent with the Coastal Reserve's primary uses of research and education within the meaning of the statute is error as a matter of law.

8. The Commission's conclusion that the activities permitted [sic] Permit No. 152-91 are consistent with preservation of the area in an undeveloped state is error as a matter of law.

9. The Commission erred as a matter of law in utilizing a de minimis analysis in applying the regulations of [DEHNR] prohibiting the removal or disturbance of vegetation within a Coastal Reserve.

10. The Commission erred as a matter of law in concluding that the regulation prohibiting removal or disturbance of vegetation was void under the facts of this case.

11. The Commission erred as a matter of law in considering whether or not a practicable alternative exists.

* * *

13. The [CRC] erred as a matter of law in the issuance of CAMA Permit No. 152-91.

III. Meaning of Public Use as Used in N.C Gen. Stat. § 113A-129.2(e)

[3] We first address the assignments of error relating to the court's conclusions 4 through 8 and number 13. With respect to those conclusions, respondents argue: (1) that the court erred in concluding that uses of the Coastal Reserve authorized by CAMA Permit No. 152-91 are not allowed by the Coastal Reserve Statute and thus the court erred in concluding that the CRC's authority to permit such uses of the components of the Coastal Reserve System is pre-empted by the Coastal Reserve Statute, (2) the CRC did not err in its reliance

on pronouncements made by politicians since the CRC was entitled to consider competent evidence in the Record regarding the history of the legislation and the circumstances surrounding its adoption, and (3) the CRC correctly concluded that the authorized development is a public use consistent with the Coastal Reserve's primary uses of research and education and with the statute's requirement that the area be preserved in an undeveloped state.

The primary issue raised by these assignments of error is whether the activity permitted by the CAMA Major Development Permit No. 152-91 is a "public use" within the meaning of N.C. Gen. Stat. § 113A-129.2(e) of the Coastal Reserve Statute.

N.C. Gen. Stat. § 113A-129.2(e) (1994) provides that:

> All lands and waters within the system shall be used primarily for research and education. *Other public uses, such as hunting, fishing, navigation and recreation, shall be allowed to the extent consistent with these primary uses.* Improvements and alterations to the lands shall be limited to those consistent with these uses.

(emphasis added).

Respondents argue that "other public uses" encompasses a broad range of uses which include the provision of water services to the residents of Cape Hatteras. On the other hand, petitioner argues that "other public uses" means uses in the nature of public trust rights, such as those enumerated in N.C. Gen. Stat. §§ 113A-129.1(a) and 113A-129.2(e). Petitioner further argues that the placement of nine wells, together with associated underground utilities and access roads, is not a use in the nature of public trust rights and is thus prohibited by N.C. Gen. Stat. § 113A-129.2(e). We agree with the petitioner.

In enacting the Coastal Reserve Statute, the legislature determined and declared by way of legislative finding that:

> [T]he coastal area of North Carolina contains a number of important undeveloped natural areas . . . [which] *are vital to* continued fishery and wildlife protection, water quality maintenance and improvement, preservation of unique and important coastal natural areas, aesthetic enjoyment, and *public trust rights such as hunting, fishing, navigation, and recreation.* Such land and water areas are necessary for the preservation of estuarine areas

> of the State, constitute important research facilities, and provide public access to waters of the State.

N.C. Gen. Stat. § 113A-129.1(a) (1994) (emphasis added). N.C. Gen. Stat. § 113A-129.1(b) provides:

> Important public purposes will be served by the preservation of certain of these areas in an undeveloped state. Such areas would thereafter be available for research, education, and other consistent public uses. These areas would also continue to contribute perpetually to the natural productivity and biological, economic, and aesthetic values of North Carolina's coastal area.

N.C. Gen. Stat. § 113A-129.2(a) proclaims that "[t]here is hereby created a North Carolina Coastal Reserve System for the purpose of acquiring, improving, and maintaining undeveloped coastal land and water areas in a natural state."

Thus, the purpose of the statute, as gleaned from N.C. Gen. Stat. §§ 113A-129.1 and 113A-129.2(a), is to preserve, improve, and maintain undeveloped coastal land and water areas in an undeveloped and natural state so that these areas can serve important public purposes. The primary public purpose or use served by the preservation of these areas in an undeveloped state is research and education. "Other public uses, such as hunting, fishing, navigation and recreation, shall be allowed to the extent consistent with these primary uses." N.C. Gen. Stat. § 113A-129.2(e).

The importance of the statute's purpose is emphasized by the association of the words "preservation," "improving" and "maintaining," which are more or less similarly defined, with the words "undeveloped" and "natural." The word "preservation," is defined as "[k]eeping safe from harm; avoiding injury, destruction, or decay; maintenance; . . . not creation, but the saving of that which already exists, and implies the continuance of what previously existed." *Black's Law Dictionary* 1066 (5th ed. 1979). "Improve" means "[t]o meliorate, make better, to increase the value or good qualities of, mend, repair. . . ." *Black's Law Dictionary* 682 (5th ed. 1979). The term "maintain," "is variously defined as acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition; bear the expense of; carry on; commence; continue; furnish means for subsistence or existence of; hold; hold or keep in an existing state or condition; . . . keep up; preserve; preserve from lapse,

decline, failure, or cessation. . . ." *Black's Law Dictionary* 859 (5th ed. 1979).

In support of its argument, respondents point to the broad interpetation of the phrases "public use" and "public purpose" under tax law and the law of eminent domain. Our Supreme Court has found that " '[f]or the most part the term "public purpose" is employed in the same sense in the law of taxation and in the law of eminent domain.' " *Mitchell v. Financing Authority*, 273 N.C. 137, 158, 159 S.E.2d 745, 760 (1968) (citation omitted). *Black's Law Dictionary* defines "public purpose in the law of taxation, eminent domain, etc." as:

> a term of classification to distinguish the objects for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private interest, inclination, or liberality. The constitutional requirement that the purpose of any tax . . . or particular exertion of the power of eminent domain, shall be the convenience, safety, or welfare of the entire community and not the welfare of a specific individual or class of persons.

Black's Law Dictionary 1107 (5th ed. 1979).

Under the law of eminent domain, "public use" has been broadly interpreted to allow government to take property for a variety of uses for which a benefit accrues to the public in common. *See City of Charlotte v. Heath*, 226 N.C. 750, 755-56, 40 S.E.2d 600, 605 (1946). Proper uses of eminent domain include power substations, microwave towers, public sewerage systems, public water supplies and pipelines for the transportation of various materials. N.C. Gen. Stat. § 40A-3(a)(1) (1984). "Public purpose" for taxation is similarly broad.[6]

In further support of its argument that "public use" should be broadly interpreted, respondents point to (1) certain facts and cir-

6. In arguing that the permitted activities fall within the meanings of "public use" and "public purpose" as interpreted in the law of eminent domain and tax law, respondents note that pursuant to N.C. Gen. Stat. § 130A-311, *et. seq.*, CHWA is defined and regulated as both a "public water system" and a "community water system." "Public water system" is defined as "a system for the provision to the public of piped water for human consumption if the system serves 15 or more service connections or which regularly serves 25 or more individuals." N.C. Gen. Stat. § 130A-313(10) (1992). Respondents further note that pursuant to N.C. Gen. Stat. §§ 153A-275 and 160A-312, respectively, counties and cities are given authority to operate and contract for the operation of public enterprises, which are defined to include "water supply and distribution systems."

cumstances regarding the State's purchase of Buxton Woods in 1987, (2) specific language of the statute, and (3) the highly limited application of "public trust rights."

The CRC in its findings of fact recites the following facts and circumstances regarding the purchase of Buxton Woods: (1) Governor Martin's 23 October 1987 press release which announced that the State would begin purchasing key portions of Buxton Woods for use as a natural area noted that protection of the community water supply was one of the goals of the acquisition program and that "[a]greements may also be reached that would allow portions of the acquired area to be used for community water supply," (2) the Environmental Assessment prepared for the purchase of Buxton Woods states under "Project Purposes" that "[f]uture uses of small portions of the area as well sites for a community water supply system is also possible," (3) the National Heritage Program of the Division of Parks and Recreation recognized that portions of Buxton Woods contemplated for acquisition might be used for future well sites, (4) when the State purchased the Foreman-Blades tract of Buxton Woods in January 1988, it did so with the express understanding that future water supply wells *might* be located on that property and that fact was incorporated into the Council of State's approval of the purchase, and (5) State officials involved in the acquisition of lands in Buxton Woods contemplated that portions of those lands could be used as well sites for the public water supply system, if the wells could be installed in an environmentally compatible manner.

The CRC further found that:

> During the State's acquisition of the lands currently in the Buxton Woods Coastal Reserve, it was made clear that future use of small portions of the state-owned property for wells for the public water supply system was contemplated as a possible future use. The state has continued to acquire and is currently attempting to acquire additional lands for the Buxton Woods Coastal Reserve. The State's contemplated acquisitions are intended to eventually include virtually all of the lands designated as the "future well field" in the Public Water Supply Well Field AEC. If the Water Association is to have access to the "future well field" for well sites, such access will necessarily have to be on State-owned lands.

Respondents contend that public trust rights, which refer to the public's right in land flowed by navigable waters, have no application to

lands such as Buxton Woods which are neither submerged nor immediately adjacent to navigable waters. Therefore, they argue, the legislature could not have intended to restrict "public uses" to uses in the nature of public trust rights. Respondents also argue that the following language in N.C. Gen. Stat. § 113A-129.1 reflects an intent to allow the permitted activity: "These areas are vital to . . . water quality maintenance and improvement . . . and provide public access to waters of the State."

"The primary function of a court in construing legislation is to insure that the purpose of the legislature in enacting it . . . is accomplished. The best indicia of that legislative purpose are 'the language of the statute, the spirit of the act, and what the act seeks to accomplish.' " *Comr. of Insurance v. Automobile Rate Office*, 293 N.C. 365, 392, 239 S.E.2d 48, 65 (1977) (citation omitted). We may also consider the circumstances surrounding a statute's adoption which throw light upon the evil sought to be remedied. *Id.* In fact, where language of a statute is ambiguous, courts may consider all facts and circumstances existing at the time of and leading up to the enactment of the statute. *Hyde Co. Board of Education v. Mann*, 250 N.C. 493, 498, 109 S.E.2d 175, 178-79 (1959).

"Courts should always construe provisions of a statute in a manner which will tend to prevent it from being circumvented." *Campbell v. Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979), *on remand*, 51 N.C. App. 393, 276 S.E.2d 712 (1981). "Words of a statute may not be interpreted out of context, but individual expressions must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *In re Hardy*, 294 N.C. 90, 95-96, 240 S.E.2d 367, 371-72 (1978). "When a statute on its face reveals legislative intent and purpose, its terms are to be given meaning consistent with that intent and purpose." *Turlington v. McLeod*, 323 N.C. 591, 597, 374 S.E.2d 394, 399 (1988). Thus, our construction of the term "public use" is controlled by the intent and purpose of the legislature, as expressly stated in the Coastal Reserve Statute.

We cannot interpret the term "public use" under the Coastal Reserve Statute in the broad manner suggested by respondents, for to do so would be to interpret the term out of context and would frustrate the purpose of the statute by allowing the reserves to be opened to a wide range of projects which may permit development of the area and alter its natural state. The enumerated examples of other public

uses in N.C. Gen. Stat. § 113A-129.2(e) and the clear intent and purpose of the statute lead us to conclude that the legislature did not intend the term "public use" to be employed in the same broad sense as the terms "public purpose" and "public use" are employed in tax law and the law of eminent domain. If the legislature had intended "public use" to encompass activities designed for the convenience, safety, or welfare of the entire community, as the term is employed in tax law and the law of eminent domain, it would not have listed hunting, fishing, navigation and recreation as specific examples of other "public uses." The word "such," which precedes "hunting, fishing, navigation and recreation" means "[o]f that kind, having particular quality or character specified[;] [i]dentical with, being the same as what has been mentioned[;] [a]like, similar, of the like kind." *Black's Law Dictionary* 1284 (5th ed. 1979). As codified in N.C. Gen. Stat. § 1-45.1 (1994), public trust rights are

> those rights held in trust by the State for the use and benefit of the people of the State in common . . . . They include, but are not limited to, the right to *navigate*, swim, *hunt*, *fish* and enjoy all *recreational activities* in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches.

(emphasis added) (providing that title to real property held by the State and subject to public trust rights may not be acquired by adverse possession).

The legislature recognized these rights in its legislative finding that the undeveloped natural areas on the North Carolina coast are "vital to . . . public trust rights such as hunting, fishing, navigation and recreation." N.C. Gen. Stat. § 113A-129.1(a).

The reference to those public trust rights as "other public uses" in N.C. Gen. Stat. § 113A-129.2(e) does not affect our interpretation. The term "public use" encompasses the primary uses of "research and education" and more specific uses in the nature of public trust rights. We conclude that the use of this term reflects the legislature's intent to restrict use of the Coastal Reserve primarily to "research and education" and secondarily to uses in the nature of public trust rights to the extent consistent with research and education.

Our interpretation of the statute is also unaffected by the fact that officials involved in the purchase of Buxton Woods contemplated the use of the area for public water supply. The legislature enacted the

Coastal Reserve Statute two years after the State's acquisition of Buxton Woods in order to develop a system for the preservation, maintenance, and improvement of the six areas within the Coastal Reserve program which the CRC had created in 1987 and of any areas which might be placed within the Reserve within the future. Respondents note that, whereas Buxton Woods is an upland area which has been significantly impacted by Hatteras Island's residents over a long period of time, the other five sites in the reserve system are relatively undisturbed estuarine areas. We cannot construe the statute, which applies to the present six Reserve areas and any future Reserve areas, as allowing the permitted activities simply because of circumstances unique to that one area of the Reserve. Any such interpretation would frustrate the clear intent of the statute. Moreover, assuming *arguendo* that the legislature was aware that officials involved in the purchase of Buxton Woods contemplated its possible use as a source of public water supply when it enacted the statute, its failure to make express provision for such use reflects an intent to subject the Buxton Woods area to the same use restrictions that apply to its relatively undisturbed counterparts. To the extent the CRC relied on such facts and circumstances regarding the purchase of Buxton Woods, its reliance was misplaced.

Our interpretation of the term "public use," adheres to the purpose of preserving, improving and maintaining the undeveloped coastal land and water areas in an undeveloped and natural state for important public purposes. *See* N.C. Gen. Stat. §§ 113A-129.1(b), 113A-129.2(a). Like research and education, hunting, fishing, navigation, and recreation are activities which preserve the land in an undeveloped and natural state. Hunting, fishing, navigation and recreation require only a temporary presence on the Reserve and do not necessitate alteration of the Reserve's undeveloped and natural state. They are recreational activities enjoyed by individuals. None require the placement of any structure on the Reserve. Thus, the impact of these activities on the natural resources of the area is minimal.

The nature and intensity of the activity contemplated by the CRC permit differ drastically from uses in the nature of public trust rights. To enable the CHWA to sell water to the surrounding communities, the permitted activities would require ground disturbance for the permanent installation of underground water and electrical lines and the clearing of trees to prepare the way for an access road. Unlike hunting, fishing, navigation and recreation, the permitted activities require the imposition of seventeen conditions to minimize the impact on

wetland vegetation and swales. These conditions require the placement of "monitoring wells" (in addition to "production wells") which must be continuously monitored. A synopsis of certain of the permit's conditions illustrates the magnitude of the difference between the permitted activities and those uses that are in the nature of public trust rights:

> Condition 9 imposes a performance standard to regulate lowering or drawdown of the water table in the surficial or water table aquifer at each pumping well in order to protect wetland vegetation and swales. If the standard is exceeded for more than a 48 hour period, pumping must be restricted for a period sufficient to allow recovery of the water table and compliance with the performance standard.
>
> Condition 10 requires the placement of six monitoring wells at production wells 5 and 6 for continuous monitoring over a two year period, after which time monitoring requirements and the performance standard will be reviewed and may be revised based on an assessment of the impact of withdrawals on the wetland vegetation and swales.
>
> Condition 11 requires continuous monitoring of production wells 4, 7, 8 and 9 in the event monitoring at production wells 5 and 6 shows significant contravention of the performance standard.
>
> Condition 12 requires the construction of a continuously monitored control well in the water table aquifer 25 feet from Buxton Woods Test Well No. 4 to measure background or ambient water table elevations.
>
> Condition 13 requires the placement and continuous monitoring of a staging station to measure surface water elevations in wetlands at a location approved by DCM in close proximity to the wellfield at the deepest known location where standing water can be expected for most of the year in order to directly assess the impact of wellfield withdrawals on surface water elevations in the wetlands. It also requires preparation of a one-foot contour map of the wellfield to determine wetland impacts resulting from a lowering of wetland surface water.
>
> Condition 14 requires the installation of a continuous recording rain gauge near production well 6 in order to differentiate

water table declines due to pumping from naturally occurring declines due to drought.

* * *

Condition 16 requires at least six months of monitoring data to be collected before the wellfield becomes operational.

By contrast, hunting, fishing, navigation and recreation have an insignificant impact and pose so little threat to the undeveloped and natural state of the Reserve that no complex monitoring scheme is required.

Respondents argue that the CRC properly concluded, based on its findings of fact regarding the insignificant impact of the permitted activities on the Reserve environment, that the permitted activities are consistent with the preservation of the area in an undeveloped state and with the primary uses of research and education. We disagree. In fact, the CRC's findings support our characterization of the permitted activities. The CRC's findings acknowledge that the permitted activities will require the cutting of a few large trees, the placement of access roads at a maximum of 15 feet wide, and the installation of underground water and electrical lines.[7] The CRC's findings also acknowledge that the permitted activities will have an impact, albeit an "insignificant" one, on the aquifer underlying Buxton Woods, the maritime forest, and wetlands.[8]

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7. The CRC found:

Only a few large growth trees, perhaps as few as three, will need to be cut to provide access to the permitted well sites. In addition, it is anticipated that grading will not be necessary. The access roads can only be 15 feet wide and it is anticipated that they will only be approximately 8 feet wide. . . . DCM staff will mark the final well sites and access alignments to insure that disturbance is minimal. The forest canopy will not be significantly disturbed and there will be no salt spray damage. . . . Short-term impacts from the installation of the underground water and electrical lines will be minimal. . . .

8. In this regard, the CRC found:

31. By the end of 1991, enough data existed to support the conclusion that the proposed wells would not have a significant impact on the aquifer. . . . Therefore, the permitted wells are expected to have even less impact on wetlands than the existing wells.

* * *

42. The disturbance of the Buxton Woods Coastal Reserve by the project as permitted will be *de minimis*. Only about one-third of one percent of the upland forested area will be impacted by the permitted activities. Only about 0.74 acres

Respondents' broad interpretation is not only in conflict with the clear purpose of the statute but is also in conflict with the CRC's Coastal Reserve regulations (adopted before the legislature's enactment of the Coastal Reserve Statute). The Reserve regulations impose use requirements on the Reserve which do not mention "public uses" but merely refer to "traditional recreational uses" and state that such uses "shall be allowed to continue as long as the activities do not disrupt the natural integrity of the Reserve or any research or educational projects." N.C. Admin. Code tit. 15A, r.070.0202(2) (July 1986). Moreover, the use requirements provide that "[u]sers of the Reserve shall not disturb or remove any live animals, except those allowed by state hunting and fishing rules as they apply to the Reserve, or vegetation within the Reserve unless such action is part of a research or educational project approved by the management agency" and prohibit "other acts or uses which are detrimental to the maintenance of the property in its natural condition . . . including, but not limited to, disturbances of the soil, mining, commercial or industrial uses, timber harvesting, ditching and draining, deposition of waste materials." N.C. Admin. Code tit. 15A, r.070.0202(6),(9). Contrary to the contention of the respondents, we read the regulations as consistent with the language and spirit of the Coastal Reserve Statute.

In conclusion, we find that the legislature intended to limit "other public uses" of the Reserve to uses in the nature of public trust rights in order to preserve the Reserve in an undeveloped and natural state and that the permitted activities do not constitute such uses. We therefore hold that the CRC erred in concluding that the "withdrawal of water from the aquifer underlying the [Reserve] . . . is a public use consistent with preservation of the area in an undeveloped state and consistent with the coastal reserve's primary use as a site for research and education" and affirm the court's conclusions number 4 through 8 and 13.

V. Review of Additional CRC Conclusions

Finally, we address respondents' assignments of error with respect to the court's conclusions 9 through 11. With respect to the

out of approximately 220 acres of upland forest will be disturbed. None of the approximately 240 acres of wetlands currently in the Coastal Reserve will be disturbed by the permitted activities. In addition, nearly half of the permitted activities will take place in an area of Buxton Woods which was clear-cut within the last approximately 20 years and which now contains much shrub growth. This small amount of disturbance will not have a significant impact on the maritime forest or the wetlands and will not lead to fragmentation of the Coastal Reserve's natural systems.

court's conclusions 9 and 10, respondents argue that the CRC correctly concluded that either the *de minimis* disturbance was not proscribed by N.C. Admin. Code tit. 15A, r.070.0202(6) (the regulation prohibiting the removal or disturbance of vegetation within a Coastal Reserve) or that such regulation was void under the facts of this case. Since respondents' argument is premised on its incorrect interpretation of the term "public use," we overrule these assignments of error. With respect to the court's conclusion number 11, that the CRC erred in determining that no practicable alternative exists, respondents argue that it was incorrect because the CRC's determination was supported by its findings of fact. We disagree. Respondents misconstrue the court's conclusion. The court did not conclude that the CRC's determination as to the absence of a practicable alternative was not supported by its findings of fact. Rather, the court implicitly concluded that, where the permitted activities are prohibited by the Coastal Reserve Statute, a permit should not be granted under N.C. Gen. Stat. § 113A-120(a).

In conclusion, we hold that Wake County had subject matter jurisdiction over petitioner's appeal and thus affirm the denial of respondents' motion to dismiss. We further hold that the activities permitted by Major Development Permit No. 152-91 are not "public uses" as that term is employed in N.C. Gen. Stat. § 113A-129.2(e) and are thus prohibited by the Coastal Reserve Statute. For this reason, we affirm the order entered 28 October 1993 by Judge Griffin in Dare County Superior Court which overrules the CRC's final decision and revokes the permit.

Affirmed.

Judges JOHNSON and MARTIN concur.

This opinion was written and concurred in prior to December 29, 1994.

PITTMAN v. BARKER

[117 N.C. App. 580 (1995)]

CRYSTAL DIANE PITTMAN, PLAINTIFF v. DAN TAYLOR BARKER, SR., TRUSTEE OF THE TRUST UNDER THE WILL OF R. L. PITTMAN, SR., RAYMOND LUPTON PITTMAN, III, JEANETTE GRACE PITTMAN (FORD), SARAH DELLA PITTMAN, AND SARAH GUY PITTMAN, EXECUTRIX OF THE ESTATE OF RAYMOND L. PITTMAN, JR. DEFENDANTS AND R. LUPTON PITTMAN, III, THIRD PARTY PLAINTIFF v. SARAH GUY PITTMAN, THIRD PARTY DEFENDANT

R. LUPTON PITTMAN, III, PLAINTIFF v. SARAH GUY PITTMAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF RAYMOND L. PITTMAN, JR., DEFENDANT

No. 9312SC1278

(Filed 17 January 1995)

1. **Trusts and Trustees § 274 (NCI4th)— breach of fiduciary duty of trustee—beneficiaries proper but not necessary parties**

Two remainder beneficiaries of a testamentary trust were proper but not necessary parties to an action by the third remainder beneficiary alleging that the trustee, who was the primary life beneficiary, breached his fiduciary duty by depleting the trust corpus in order to maximize the income of the trust for himself since they were not essential parties to the court's determination of the total damages caused by the trustee's breach of his fiduciary duty, and the court could determine, without their joinder, plaintiff beneficiary's share of the total damages because the trust is explicit in determining the proportionate share of each remainder beneficiary, and there is no unascertained interest in the trust. N.C.G.S. § 1A-1, Rule 19.

Am Jur 2d, Trusts §§ 672 et seq.

Trust beneficiaries as necessary parties to action relating to trust or its property. 9 ALR2d 10.

2. **Actions and Proceedings § 21 (NCI4th)— deeds not on exhibit list—admission proper**

In an action arising out of the distribution of an estate, the trial court did not err in allowing into evidence two deeds which had not been listed by plaintiff as exhibits in the pretrial order, since the deeds were not discovered until the trial was underway; defendant was a grantee in one of the deeds, and both were in her chain of title; and there was a recess after the deeds were introduced, allowing defendant additional time to examine the documents, explore the transactions, and meet the exhibits.

Am Jur 2d, Pretrial Conference and Procedure §§ 29 et seq.

3. Evidence and Witnesses § 2403 (NCI4th)— expert witness testimony excluded—offer of witness not timely

In an action involving breach of fiduciary duty by a trustee, the trial court did not err in excluding the testimony of one of defendant's expert witnesses on trust management where defendant designated the additional expert nearly a month after the date fixed by agreement for doing so, after all other experts for both sides had been deposed, and approximately ten business days prior to trial.

Am Jur 2d, Witnesses §§ 4, 74.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings. 58 ALR4th 653.

4. Trusts and Trustees § 260 (NCI4th)— trustee's exercise of fiduciary duty—prudent man standard applicable

The trial court did not err in applying the prudent man standard of N.C.G.S. § 36A-2 to a trustee's exercise of his fiduciary duty, and that standard was not superseded by a grant of discretion in the trust document; furthermore, the court did not err in finding that the trustee breached his duty by failing to balance the investment of the trust's assets between income and growth investments and by favoring the interests of the life beneficiaries over those of the remaindermen.

Am Jur 2d, Trusts §§ 391 et seq.

Duty of trustee to diversify investments, and liability for failure to do so. 24 ALR3d 730.

5. Trusts and Trustees § 291 (NCI4th)— breach of fiduciary duty—statute of limitations—time from which facts known by plaintiff—failure to make findings—remand

Plaintiff's cross-claim for breach of fiduciary duty must be remanded for a determination, from the evidence already presented, as to when plaintiff knew or by the exercise of due diligence should have known of the facts giving rise to his claim and for the legal conclusions to be drawn therefrom with respect to the affirmative defenses of the statute of limitations, estoppel, laches, ratification, and waiver.

Am Jur 2d, Trusts §§ 712 et seq.

Appeal by defendant Sarah G. Pittman from judgments entered 30 April 1993 and 24 May 1993 and from order entered 2 June 1993 by Judge Wiley F. Bowen in Cumberland County Superior Court. Heard in the Court of Appeals 26 September 1994.

The facts giving rise to these two actions which were consolidated in the trial court, and the procedural history leading to this appeal, follow: Dr. R. L. Pittman died testate in 1963. His will created a testamentary trust (hereinafter "the trust"), and he appointed his son, Raymond L. Pittman, Jr. (hereinafter "Raymond Pittman"), as trustee. The trust established three classes of beneficiaries: a minor class of life beneficiaries consisting of Dr. Pittman's sister and widow, whose interests are not an issue in this case; a main class of life beneficiaries consisting of Raymond Pittman, who was to receive no less than 75% of the trust income during his lifetime, and Raymond Pittman's children, who upon reaching designated ages were to receive the remaining trust income during the lifetime of Raymond Pittman; and a class of remainder beneficiaries, consisting of Raymond Pittman's children, who were to divide the trust corpus in specified shares upon his death. The trust instrument gave the trustee the power to manage the trust estate as he in his "sole discretion shall deem to be for the best interest of the beneficiaries . . ., and . . . to do any and all things whatsoever which [he] in [his] sole discretion may deem advisable or needful for the effectuation of the purposes of the trust and for the promotion, conservation and protection of the trust estate and the interest of the beneficiaries thereunder."

Raymond Pittman was first married to Jeannette S. Pittman, and they had two children before divorcing in 1966: Raymond Lupton Pittman, III (hereinafter "Lupton Pittman") and Jeannette G. Pittman (Ford) (hereinafter "Jeannette Ford"). Raymond Pittman then married Sarah Guy Pittman (hereinafter "Sarah Pittman"); they had one daughter, Sarah Della Pittman (hereinafter "Della Pittman"). Raymond Pittman also adopted Sarah Pittman's daughter from a previous marriage, Crystal Diane Pittman (hereinafter "Crystal Pittman").

In June 1991, Raymond Pittman instructed the custodian of the trust assets to begin making income distributions from the trust to Crystal Pittman. He died in August 1991, leaving his entire estate to his widow, Sarah Pittman, and appointing her as his executrix.

On 4 December 1991, Crystal Pittman instituted the first of these actions. She sued the successor trustee of the trust, the beneficiaries of the trust, and her mother, as executrix of the estate of Raymond

Pittman, seeking a remainderman's proportionate share of the trust corpus and such share of the income distributions of a life beneficiary as she would have been entitled had she been considered a natural child of Raymond Pittman. In their answers, Lupton Pittman and Jeannette Ford asserted crossclaims against Sarah Pittman, as executrix, alleging that Raymond Pittman had breached his fiduciary duty as trustee by directing income distributions to Crystal Pittman. Lupton Pittman also asserted crossclaims against the estate alleging that Raymond Pittman had breached his fiduciary duty by depleting the corpus of the trust in favor of the life beneficiaries to the detriment of the remaindermen, and that he had been negligent in the performance of his duties as trustee. In addition, Lupton Pittman filed a third party complaint against Sarah Pittman individually, alleging that she had convinced Raymond Pittman to include Crystal Pittman as an income beneficiary of the trust. Lupton Pittman sought to assert claims for undue influence, duress, tortious interference with a fiduciary relationship, and punitive damages.

On 5 June 1992, Lupton Pittman filed a second action, which is the other case involved in this appeal, against Sarah Pittman, individually and as executrix of the estate of Raymond Pittman. In this second action, Lupton Pittman alleged claims for breach of contract and conversion of certain property.

In October 1992, the parties to the suit brought by Crystal Pittman entered into a settlement agreement with respect to her interest in the trust. As a part of that agreement, Lupton Pittman dismissed with prejudice his crossclaims against the executrix for Raymond Pittman's negligence and breach of fiduciary duty for distributing trust income to Crystal Pittman. He also dismissed the claims contained in his third party complaint against Sarah Pittman, individually, for undue influence and duress. Jeannette Ford also dismissed her crossclaims against the executrix. Although no order appears in the record on appeal, the two cases were apparently consolidated and extensive discovery was conducted by the parties.

In February 1993, Sarah Pittman moved for summary judgment as to all of Lupton Pittman's remaining claims. In March 1993, Lupton Pittman voluntarily dismissed, without prejudice, the breach of contract claims contained in the second action. Approximately four weeks before the trial, Superior Court Judge Coy E. Brewer, Jr., denied summary judgment specifically as to the remaining claims in Lupton Pittman's third party complaint, entered various discovery

orders, and reserved the remaining summary judgment motions for Judge Bowen, who was assigned to preside at the trial commencing 12 April 1993.

On 8 April 1993, Sarah Pittman moved to dismiss Lupton Pittman's remaining claims pursuant to G.S. § 1A-1, Rule 12(b)(7) for failure to join Jeannette Ford and Della Pittman as necessary parties. She moved, alternatively, to continue the trial in order that the two could be joined as parties. Upon commencement of trial, and after hearing arguments on the pending motions, the trial judge announced that he would proceed with the evidence, implicitly denying the motion.

The trial was conducted by the court without a jury. At the conclusion of the evidence, the court dismissed the claims contained in Lupton Pittman's third party complaint against Sarah Pittman individually for tortious interference with fiduciary relationship and for punitive damages, as well as the claim for conversion contained in the complaint filed in the second suit. As to the sole remaining claim for relief contained in Lupton Pittman's crossclaim against Sarah Pittman in her capacity as executrix of Raymond Pittman's estate, the trial court found and concluded that Raymond Pittman had breached his fiduciary duty to the remainder beneficiaries of the trust and that Lupton Pittman had been damaged in the amount of $750,000. Judgment was entered in favor of Lupton Pittman against the Estate of Raymond Pittman in the amount of $750,000, and impressing a constructive trust on an undivided interest in certain real estate. The trial court subsequently found that Sarah Pittman had engaged in mismanagement and had acted in bad faith in the defense of the action and entered an additional judgment against her individually for Lupton Pittman's costs and attorneys' fees incurred in prosecuting the claim. Sarah Pittman's subsequent motions for relief from the judgments were denied and Lupton Pittman was awarded additional attorneys' fees. Sarah Pittman appeals.

Wyrick Robbins Yates & Ponton, L.L.P., by Samuel T. Wyrick, III, and L. Diane Tindall, for plaintiff-appellee.

The Law Firm of H. Terry Hutchens, by H. Terry Hutchens, and John M. Owens for defendant-appellant.

MARTIN (JOHN C.), Judge.

Sarah Pittman makes twenty-three separate assignments of error in the record on appeal and brings them forward in five arguments in

her brief. Because the trial court did not fully resolve the issues raised by the pleadings and the evidence, we must vacate the judgment and remand the case for further findings.

I.

[1] Sarah Pittman initially contends the trial court erred by failing to join Jeannette Ford and Della Pittman as necessary parties as required by G.S. § 1A-1, Rule 19. Sarah Pittman argues the sisters are united in interest with their brother in the trust estate, and therefore must be joined in his claim against Raymond Pittman's estate for his alleged breach of his fiduciary duty as trustee. We conclude their joinder was not required.

Rule 19 provides:

> (a) *Necessary joinder.*—. . . those who are united in interest must be joined as plaintiffs or defendants; . . .
>
> (b) *Joinder of parties not united in interest.*—The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

"Necessary parties" must be joined in an action, while "proper parties" may be joined. *Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 183 S.E.2d 834 (1971).

> A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence. A proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others. (Citation omitted.)

Id. at 451-52, 183 S.E.2d at 837. A proper party to an action means "a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties." *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968), quoting 67 *C.J.S., Parties* § 1. "A proper party is one whose interest may be affected by a judgment but whose presence is not essential for

adjudication of the action." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990).

Jeannette Ford and Della Pittman are proper parties to the action rather than necessary parties. The claim upon which Lupton Pittman prevailed was against his father's estate for his breach of fiduciary duty, as trustee, by depleting the trust corpus in order to maximize the income from the trust for himself, as the primary life beneficiary. Jeannette Ford and Della Pittman are not necessary parties for the court to determine the total amount of specific damage caused by Raymond's breach of fiduciary duty to the remaindermen, as their interests are no different than Lupton Pittman's. Nor are the sisters necessary parties in order to determine Lupton Pittman's percentage share of the total damages caused by Raymond Pittman's breach, because his share had already been predetermined by the trust document itself. Though they have undeniable interests which might have been affected by the outcome of this action, they were not essential parties in order for the court to adjudicate the rights of Lupton Pittman as against their father's estate.

Defendant relies on our decision in *Wall v. Sneed*, 13 N.C. App. 719, 187 S.E.2d 454 (1972), for the proposition that in the context of trust beneficiaries, all persons legally or beneficially interested in the subject matter of the suit, or who will be affected by a decree therein, are necessary parties. However, the holding in *Wall* is not so broad and that case is readily distinguishable from the case before us.

In *Wall*, a mother transferred, *inter vivos*, her interest in certain real estate to one of her sons, allegedly with instructions for him to hold the property in trust and divide it among her children who had not already been conveyed a portion of the property earlier. Upon the mother's death, the son instead attempted to purchase all his siblings' claims to the property in question.

The eleven plaintiffs sued to determine their rights to the property. On appeal, however, this Court identified several other siblings and relations with important interests. Four of the non-plaintiff siblings had allegedly been paid by the son for their interests in the property. Nevertheless, there was a deed in the record indicating that the four had transferred their interests to a daughter of one of the plaintiffs. Thus not only was there a dispute as to the existence of the trust, there was a controversy as to who held the interests of the unjoined siblings. As noted in the opinion, "it appears [the unjoined parties] have rights in the subject matter of this controversy which

must be ascertained and settled before the rights of the present plaintiffs and defendants can be completely and finally adjudicated and determined." *Id.* at 724-25, 187 S.E.2d at 457. Joinder of the other siblings was found to be necessary, and the case was remanded.

No such confusion exists here. The trust is explicit in determining the proportionate share to which each of the remainder beneficiaries is entitled. There is no unascertained interest in the trust. Whether or not the other remainder beneficiaries were parties to the action would have no impact on the amount of total damages determined by the court to have been caused by Raymond Pittman's breach nor the proportionate share of those damages to be awarded to Lupton Pittman. Though they are proper parties by their common interest in the trust corpus, Jeannette Ford and Della Pittman are not necessary parties, and the trial court was not obligated to join them under G.S. § 1A-1, Rule 19.

Whether proper parties will be ordered joined rests within the sound discretion of the trial court. *Carding Developments v. Gunter & Cooke, supra.* We note that both Jeannette Ford and Della Pittman were parties to the original suit brought by Crystal Pittman, in which Lupton Pittman advanced the crossclaim upon which he ultimately recovered. Each had an opportunity to join in the crossclaim; neither chose to do so. The record discloses no abuse of the trial court's discretion by denying the motion to join the sisters.

II.

[2] Sarah Pittman also argues that the trial court erred by allowing into evidence two deeds which had not been listed by Lupton Pittman as exhibits in the pretrial order. The deeds were both dated 21 April 1967 and conveyed an undivided interest in property, known as the Sykes Pond Property, from Raymond Pittman, as trustee, to himself individually, and, subsequently, from himself individually, to himself and Sarah Pittman as tenants by the entireties. The deeds were admitted during the examination of Sarah Pittman as an adverse witness by Lupton Pittman's counsel, over her objection on the grounds of unfair surprise. Lupton Pittman's counsel explained that the deeds had only been discovered the previous day during a title search with respect to the property and that Lupton Pittman had no knowledge of the existence or content of the deeds prior thereto. Sarah Pittman contends on appeal that she had no opportunity to prepare a defense to the presumption of fraud created by the exhibits.

The admissibility of such evidence is a matter committed to the sound discretion of the trial court, and its decision will not be reviewed unless an abuse of discretion is shown. *Matter of Will of Maynard*, 64 N.C. App. 211, 307 S.E.2d 416 (1983), *disc. review denied*, 310 N.C. 477, 312 S.E.2d 884 (1984). No abuse of discretion has been shown here. The deeds were not discovered until the trial was underway, thus, they could not have been listed in the pretrial order. Sarah Pittman was a grantor in one of the deeds; both deeds were in her chain of title. Her counsel was sufficiently familiar with the transaction to be able to cross-examine another of Lupton Pittman's witnesses about the division of the property. Moreover, the record reflects that after the exhibits were introduced on Friday, the trial was recessed until the following Monday afternoon, allowing Sarah Pittman additional time to examine the documents, explore the transactions evidenced by them, and meet the exhibits. Her assignments of error with respect to the admission into evidence of the deeds are overruled.

III.

Next Sarah Pittman contends that the trial court erred by finding that Raymond Pittman had breached his fiduciary duty as trustee. She argues (1) that the claim was barred by the statute of limitations and by the equitable defenses of estoppel, laches, ratification, and waiver; (2) that the trial court applied an erroneous standard to Raymond Pittman's actions as trustee; and (3) that the trial court unfairly excluded the testimony of one of her expert witnesses with respect to Raymond Pittman's management of the trust. We reject the latter two contentions. However, we are unable to review her first contention with respect to the affirmative defenses because the court's findings do not address or resolve those issues.

A.

[3] We consider first Sarah Pittman's argument that it was error for the trial court to exclude the testimony of one of her expert witnesses on trust management. We disagree.

The record reflects the following: The trial of these cases was set for December 1992, but was continued until 12 April 1993 upon motion of Sarah Pittman. Pursuant to discovery extensions agreed upon by the parties, expert witnesses were to be designated by 1 March 1993. The parties exchanged designations of expert witnesses on that date, with Lupton Pittman designating five experts and Sarah

Pittman designating four experts. Each completed the depositions of the other's designated expert witnesses by 25 March 1993. On that date, Sarah Pittman's counsel notified opposing counsel that a fifth expert, William Weiner, would testify. On 26 March 1993, Lupton Pittman moved *in limine* to exclude Mr. Weiner's testimony, contending unfair prejudice pursuant to G.S. § 8C-1, Rule 403. Prior to trial on 12 April 1993, the trial court granted the motion and excluded Mr. Weiner's testimony on the grounds of "undue delay" by Sarah Pittman and "unfair prejudice" to Lupton Pittman.

Sarah Pittman contends that because the trial court relied upon G.S. § 8C-1, Rule 403, in excluding the testimony of Mr. Weiner, it applied the wrong standard and its ruling should be overturned. She argues that Rule 403 is strictly an evidentiary rule and is not applicable to claims of delay and surprise in pre-trial disclosure procedures. Even assuming, *arguendo*, that Rule 403 has no application, we decline to disturb the trial court's exclusion of Mr. Weiner. Whether to exclude evidence under Rule 403 is within the sound discretion of the trial court, *Smith v. Pass*, 95 N.C. App. 243, 382 S.E.2d 781 (1989), as is a ruling with respect to whether a witness should be allowed to testify where the proffering party had not properly disclosed the witness' identity through discovery. *Denton v. Peacock*, 97 N.C. App. 97, 387 S.E.2d 75, *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990); *see also Peed v. Peed*, 72 N.C. App. 549, 325 S.E.2d 275, *cert. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985). "A discretionary ruling by the trial judge should not be disturbed on appeal unless the appellate court is convinced by the cold record that the ruling probably amounted to a substantial miscarriage of justice." *Boyd v. L. G. DeWitt Trucking Co.*, 103 N.C. App. 396, 406, 405 S.E.2d 914, 921, *disc. review denied*, 330 N.C. 193, 412 S.E.2d 53 (1991). We discern no "substantial miscarriage of justice" and no abuse of the trial court's discretion where Sarah Pittman designated the additional expert nearly a month after the date fixed by agreement for doing so, after all other experts for both sides had been deposed, and approximately ten business days prior to trial. This assignment of error is without merit.

B.

[4] We also reject Sarah Pittman's contention that because the trust instrument does not require the trustee to invest the trust assets so as to increase the value of the trust corpus for the remaindermen, the trial court erred by applying the prudent man standard to Raymond

Pittman's actions as trustee. By simply granting Raymond Pittman "sole discretion" to manage the trust corpus, the trust instrument did not obviate his obligation to the remaindermen as required by G.S. § 36A-2:

> (a) In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of another, a fiduciary shall observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent man of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary . . . .

The present case is similar to *Fortune v. First Union Nat. Bank*, 87 N.C. App. 1, 359 S.E.2d 801 (1987), *reversed on other grounds*, 323 N.C. 146, 371 S.E.2d 483 (1988). There, an executor acting as trustee for the beneficiaries was given "absolute discretion" to accumulate and distribute the estate's income and principal. Despite such language, this Court held that "an executor, in performing those duties related to managing the estate's assets, acts as a trustee to beneficiaries of the estate. As such, the executor is liable for the depreciation of assets which an ordinarily prudent fiduciary would not have allowed to occur." *Id.* at 5, 359 S.E.2d at 804. (Citations omitted.) *See also First National Bank of Catawba County v. Edens*, 55 N.C. App. 697, 286 S.E.2d 818 (1982).

The foregoing cases make clear that the prudent man fiduciary standard of G.S. § 36A-2 is not superseded by a grant of discretion in the trust document and is the proper standard by which to judge the conduct of Raymond Pittman as trustee. There is competent evidence in the record to support the trial court's findings and conclusion that Raymond Pittman violated the prudent man standard by failing to balance the investment of the trust's assets between income and growth investments and by favoring the interests of the life beneficiaries over those of the remaindermen. The trial court did not err in applying the prudent man standard to Raymond Pittman's exercise of his fiduciary duty, nor in its finding that he breached that duty.

C.

[5] In her answer to Lupton Pittman's crossclaim for breach of fiduciary duty, Sarah Pittman asserted the affirmative defenses of the statute of limitations, estoppel, laches, ratification and waiver. Because pledging a fiduciary duty to a trust is most similar to the acceptance of a contract, our Supreme Court has determined that the statute of limitations applicable to an action for breach of such a fidu-

ciary duty is the same as that applicable to an action for breach of contract, i.e., three years. *Tyson v. North Carolina National Bank*, 305 N.C. 136, 286 S.E.2d 561 (1982). The statute of limitations begins to run when the claimant "knew or, by due diligence, should have known" of the facts constituting the basis for the claim. *Hiatt v. Burlington Industries, Inc.*, 55 N.C. App. 523, 286 S.E.2d 566, *disc. review denied*, 305 N.C. 395, 290 S.E.2d 365 (1982). The equitable defenses of estoppel, laches, ratification, and waiver similarly require, *inter alia*, a determination of when Lupton Pittman knew of the breach. *See One North McDowell Assn. v. McDowell Development Company*, 98 N.C. App. 125, 389 S.E.2d 834 (1990) (estoppel); *Cieszko v. Clark*, 92 N.C. App. 290, 374 S.E.2d 456 (1988) (laches); *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971) (ratification); *and Fetner v. Granite Works*, 251 N.C. 296, 111 S.E.2d 324 (1959) (waiver).

The evidence at trial was conflicting. Lupton Pittman's evidence tended to show that he first became aware of the manner in which Raymond Pittman was managing the trust in the summer of 1990, when he consulted with a friend, Robert Warren, a stockbroker. Mr. Warren provided Lupton Pittman with a performance report of the trust's investments. Lupton Pittman testified that he had not been able to understand the annual reports from the trustee because they were confusing and difficult to understand, and that it was not until Mr. Warren compiled the analysis that it became apparent to him that Raymond Pittman had breached his duty to the remainder beneficiaries of the trust. His crossclaim was filed 4 February 1992, within three years of the time when he knew of the breach.

Sarah Pittman offered evidence tending to show that Lupton knew or should have known of the facts constituting the basis for his claim no later than the time of a meeting with Paul Weick, a trust officer with United Carolina Bank, on 30 October 1986. At that meeting, the trust's investments were reviewed, and Lupton Pittman indicated his understanding of, and disagreement with, the investment strategy. Paul Weick maintained contact with Lupton Pittman regarding the trust's investments and made himself available to answer any questions Lupton Pittman might have had.

"In a trial without a jury, it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment. *Small v. Small*, 107 N.C. App. 474, 477, 420 S.E.2d 678, 681 (1992). To resolve the issues raised by the affirmative defenses, the trial court was required to resolve the conflict in the evi-

dence as to when Lupton Pittman first knew or should have known of the facts giving rise to his claim for alleged breach of fiduciary duty. Without such findings, the judgment is incomplete, and we are unable to consider the arguments raised on appeal. "When all issues are not so resolved by the trial court, this Court has no option other than to vacate the order and remand the cause to the trial court for completion." *Id.* Thus, we must vacate the judgment and remand this case to the trial court for its findings of fact, from the evidence already presented, as to when Lupton Pittman knew, or by the exercise of due diligence, should have known, of the facts giving rise to his claim for breach of fiduciary duty, and the legal conclusions to be drawn therefrom with respect to the affirmative defenses raised by Sarah Pittman.

IV.

By additional assignments of error, Sarah Pittman contends that the trial court erred by entering judgment against Raymond Pittman's estate and against her, individually, for costs and attorneys' fees incurred by Lupton Pittman in prosecuting his claim, and by denying her motion for relief from the judgments pursuant to G.S. § 1A-1, Rule 60(b). The judgment for costs and attorneys' fees and the order denying the motion for relief from the judgment are both dependent upon the judgment entered upon Lupton Pittman's claim for fiduciary duty, which we have vacated. Thus, we must also vacate the judgment for attorneys' fees and the order denying Sarah Pittman's motions for relief. The assignments of error with respect thereto may or may not become moot, depending upon the trial court's findings upon remand, and we decline to address their merits at this time.

Because the trial court did not fully resolve the issues raised by the pleadings and the evidence, as above noted, we must vacate the judgment and remand the case for additional findings of fact, upon such evidence as the parties have presented at the trial of this matter, which will resolve those issues. The trial court will then enter judgment according to its findings and its conclusions of law drawn therefrom.

Vacated and Remanded.

Chief Judge ARNOLD and Judge THOMPSON concur.

Judge Thompson concurred prior to 30 December 1994.

MARYLAND CASUALTY COMPANY, PLAINTIFF v. RALPH L. SMITH AND WIFE, BARBARA SMITH, AND JOEL SMITH, DEFENDANTS

No. 9422SC207

(Filed 17 January 1995)

Insurance § 510 (NCI4th)— rejection of underinsured motorists coverage—statute amended and form revised—rejection invalid

The insured's rejection of underinsured motorists coverage, prior to the amendment of N.C.G.S. § 20-279.21(b)(4) and prior to the approval of the new form reflecting the substance of the statutory amendment, was no longer valid and effective with respect to an accident which occurred after the rejection form had been substantially revised and after the policy had been renewed.

Am Jur 2d, Automobile Insurance §§ 304 et seq.

Construction of statutory provisions governing rejection or waiver of uninsured motorist coverage. 55 ALR3d 216.

Appeal by plaintiff from order entered 17 December 1993 by Judge Lester P. Martin, Jr. in Davie County Superior Court. Heard in the Court of Appeals 20 October 1994.

On 1 February 1993, plaintiff Maryland Casualty Company filed this action seeking a declaratory judgment that a policy of automobile insurance no. TFO—00207498 issued to defendants Ralph L. Smith and Barbara Smith in 1991 did not provide underinsured motorists coverage on 2 May 1992 because the coverage had been expressly rejected by Ralph L. Smith. Plaintiff's complaint alleged that on or about 2 May 1992 the insureds' son, Joel Smith, was injured in an automobile collision and that Joel Smith had taken the position that, as a resident of the Smith's household, he was entitled to underinsured motorists coverage in an amount in excess of $10,000.00 under the policy issued to defendants Ralph and Barbara Smith. On 18 February 1993, plaintiff amended its complaint to add an alternative claim for a declaratory judgment that defendant Joel Smith is not entitled to stack his own personal underinsured motorists coverage with any underinsured motorists coverage which might have been provided by the policy of his parents.

Both parties filed motions for summary judgment, which motions were heard by the Honorable Lester P. Martin, Jr., at the 29 November 1993 session of Davie County Superior Court. By order entered 17 December 1993, Judge Martin allowed defendants' motion for summary judgment and denied plaintiff's motion, holding that the parents' policy does provide underinsured motorists coverage for the defendant Joel Smith's 2 May 1992 accident and that Joel Smith may stack such underinsured motorists coverage with the underinsured motorist coverage provided under his own policy of liability insurance. Plaintiff appeals.

Hendrick, Zotian, Bennett & Blancato, by Richard V. Bennett and Sherry R. Dawson, for plaintiff-appellant.

Snow & Skager, by Philip R. Skager, for defendants-appellees.

THOMPSON, Judge.

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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990).

Subsection (b)(4) of N.C. Gen. Stat. § 20-279.21, as it read at the time plaintiff first issued its policy to defendants, provided for underinsured motorists coverage but also provided that an insured might reject such coverage:

> (b) [An] owner's policy of liability insurance:
>
> * * *
>
> (4) Shall, in addition to the coverages set forth in subdvisions (2) and (3) of this subsection, provide underinsured motorist coverage, to be used only with policies that are written at limits that exceed those prescribed by subdivision (2) of this section, and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection in an amount equal to the policy limits for bodily injury liability as specified in the owners' policy.
>
> * * *
>
> The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage.

> If the named insured rejects the coverage required under this subdivision, the insurer shall not be required to offer the coverage in any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy unless the named insured makes a written request for the coverage. Rejection of this coverage for policies issued after October 1, 1986, shall be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.

N.C. Gen. Stat. § 20-279.21(b)(4) (1990). Plaintiff contends that it is entitled to summary judgment on its claim that the insurance policy did not provide underinsured motorists coverage on 2 May 1992 because, prior to that date, one of the named insureds, Ralph Smith, had executed a selection/rejection form in which he opted to reject underinsured motorists coverage. Neither Ralph nor Barbara Smith made a written request for underinsured motorists coverage until after 2 May 1992.

Selection/rejection form no. NC0185 which defendant Ralph Smith executed on 29 September 1991 was attached as Exhibit A to plaintiff's complaint. The form gave the insured the options of (1) rejecting uninsured/underinsured motorists coverage and selecting uninsured motorists coverage or (2) rejecting both uninsured and uninsured/underinsured motorists coverages. The following language preceded the list of options:

> Uninsured Motorists Coverage and Uninsured/Underinsured Motorists Coverage have been explained to me. I understand that the option I select will apply to any renewal, reinstatement, substitute, *amended, altered, modified, transfer or replacement policies with this company unless I notify you otherwise in writing.

The Smiths renewed their policy in March 1992 but did not request that underinsured motorists coverage be added at that time. Therefore, on 2 May 1992, the day of Joel Smith's accident, the insurance policy did not expressly provide for underinsured motorists coverage.

Defendants argue that summary judgment was properly granted in their favor because Ralph Smith's rejection was ineffective. Therefore, they say, underinsured coverage should be deemed to have been provided, despite the fact that no premium was paid for that cover-

age. The basis for defendants' contention that Mr. Smith's rejection was ineffective is that it was executed on a selection/rejection form which became out-dated after it was executed, because of an amendment to the governing statute (N.C. Gen. Stat. § 20-279.21(b)(4)). Defendants point out that the form had been revised and reissued prior to the date on which Mr. Smith renewed his policy.

Section 2 of N.C. Session Laws 1991, chapter 646, amended Section 20-279.21(b)(4) in late 1991 to allow insureds to select uninsured or combined uninsured/underinsured motorists coverage of up to $1,000,000.00. 1991 N.C. Sess. Laws ch. 646, § 2. N.C. Gen. Stat. § 20-279.21(b)(4), as revised at that time, provided:

> (b) [An] owner's policy of liability insurance:
>
> * * *
>
> (4) Shall, in addition to the coverages set forth in subdivisions (2) and (3) of this subsection, provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars ($1,000,000) as selected by the policy owner.
>
> * * *
>
> The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. Once the named insured exercises this option, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless the named insured makes a written request to exercise a different option. The selection or rejection of underinsured motorist coverage by a named insured is valid and binding on all insureds and vehicles under the policy.
>
> If the named insured rejects the coverage required under this subdivision, the insurer shall not be required to offer the coverage in any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy unless the named

> insured makes a written request for the coverage. Rejection of this coverage for policies issued after October 1, 1986, shall be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.

1991 N.C. Sess. Laws ch. 646, § 2; N.C. Gen. Stat. § 20-279.21(b)(4) (1991). To implement the changes to the statute, new selection/rejection forms NC0185 and NC0186 were promulgated and approved by the appropriate authorities. The 1991 amendment to N.C. Gen. Stat. § 20-279.21(b)(4) applied to "new and renewal policies written on and after the effective date of Sections 1 and 2 of this act." 1991 N.C. Sess. Laws ch. 646, § 4. Sections 1 and 2 of the act became effective on 5 November 1991.

At the same time that the optional policy limits for underinsured coverage were revised, Section 1 of chapter 646 forbade the stacking of uninsured coverage in any manner and Section 2 allowed stacking of underinsured coverage only between policies. 1991 N.C. Sess. Laws ch. 646, §§ 1 and 2. The effect of that change was to precipitate a substantial reduction in underinsured coverage premiums, which had recently soared on account of a court ruling that stacking was permissible within policies. *See Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *rehearing denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). Attorney General Lacy H. Thornburg's Opinion Letter dated 12 November 1991, addressed to Commissioner of Insurance James E. Long.

This is a case of first impression in North Carolina. The question is whether the insured's rejection of underinsured motorists coverage, prior to the statutory amendment and prior to the approval of the new form reflecting the substance of the statutory amendment, was still valid and effective with respect to an accident that occurred after the rejection form had been substantially revised and after the policy had been renewed. We conclude that Mr. Smith's rejection executed on 29 September 1991 was no longer valid and effective after the 1991 amendment and after the new selection/rejection form was issued.

"The provisions of the Financial Responsibility Act are 'written' into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail." *Nationwide Mutual Ins. Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977), *appeal after remand*, 298 N.C. 246, 258 S.E.2d 334 (1979). Provisions of insurance policies and

compulsory insurance statutes which extend coverage must be construed liberally so as to provide coverage whenever possible by liberal construction. *State Capital Insurance Co. v. Nationwide Mutual Insurance Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986).

Underinsured coverage is mandatory unless rejected by the insured in accordance with the provisions of N.C. Gen. Stat. § 20-279.21. N.C. Gen. Stat. § 20-279.21 (b)(4) (1993). Thus plaintiff is considered to have extended underinsured coverage to defendants in accordance with the terms of the statutory amendment unless Smith's rejection prior to the date the statute was amended continues to be effective after the amendment. The November 1991 amendment to the statute, after authorizing the insured for the first time to select policy limits for underinsured coverage as little as those amounts set forth in N.C. Gen. Stat. § 20-279.5 or as great as $1,000,000.00, provides that

> [a]n insured named in the policy may select different coverage limits as provided in this subdivision. Once the named insured exercises *this option*, the insurer is not required to offer the option in any renewal . . . policy unless the named insured makes a written request to exercise a different option.

N.C. Gen. Stat. § 20.279.21 (b)(4) (1991) (emphasis supplied).

By providing that the insurer is not required to offer the option to select different policy limits once the named insured has exercised that option, the legislature in effect provided that the insured must be given the opportunity to exercise that option initially. Plaintiff sent the defendants in the form of an endorsement to the renewal policy issued in March 1992, a blank copy of the revised form (NC0186) that had been prepared by the N.C. Rate Bureau and approved by the Commissioner of Insurance. That form, as well as the earlier form (NC0374), were also referred to by number in the Declarations section of the renewal policy, although without notation of any premium for underinsured coverage. This may well have been the means by which the plaintiff undertook to "offer" the insured the selection of policy limits provided for in the statutory amendment. If so, it was half-hearted at best and hardly calculated to provoke the insured's attention. *Cf. Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 90 N.C. App. 746, 370 S.E.2d 258 (1988), *affirmed*, 324 N.C. 221, 376 S.E.2d 761 (1989) (by requiring policyholder to request underinsured coverage, insurer failed to comply with N.C. Gen. Stat. § 20-279.21(b)(4)). Indeed, attaching the new endorsement form and referring to it in the

Declarations section of the policy was more likely to mislead the insured than to inform him.

The plaintiff revised defendants' policy at least one other time after the statute had been amended and the new form promulgated. In order to make changes in vehicles insured and named insureds, defendants' original policy was amended effective 15 November 1991, affording plaintiff another opportunity to advise defendants of the then recent changes in the law. Plaintiff failed to do so. At that time or at the time of the renewal, the insureds should have been permitted to make a fresh choice as to whether they wished to purchase underinsured coverage or reject it. Among the factors which they might logically have considered in deciding whether or not to accept the coverage were (1) the reduction in premiums resulting from the prohibition against stacking of coverage within a single policy; (2) the availability of minimal coverage as set forth in N.C. Gen. Stat. § 20-279.5, presumably at an even lower premium than that required in the original policy for an amount of coverage "equal to the policy limits for automobile bodily injury liability as specified in the owner's policy;" and (3) the availability of greater coverage than that previously allowed before the amendment of the statute. The new statute left the insurer with no other course of action than to inform the insureds of the new ground rules, if the interests of its insureds were to be served.

Although we have been unable to identify any North Carolina cases remotely pertinent to the question presented here, there is a Michigan Court of Appeals case which is strikingly similar to this case and somewhat instructive. In *Oatis v. Dairyland Insurance Company*, 20 Mich. App. 367, 174 N.W.2d 35 (1969), the plaintiff's husband applied for a policy of insurance with defendant insurance company. On 1 December 1965, in accordance with the terms of the statute then in force, he signed a form rejecting uninsured motorists coverage. *Id.* at 370, 174 N.W.2d at 36. The rejection was contained in an area of the application separated from the body of the form by a heavy dark line boxing in the words "I hereby reject the inclusion of Uninsured Motorist (Family Protection) coverage from this policy and its subsequent renewals." *Id.* On 1 January 1966, the governing statute was amended to require that all such automobile policies contain a notice in at least 8-point type that "such protection coverage was explained to [the insured] and that [the insured could] reject such coverage by notice in writing." *Id.* The amendment further provided that, unless the named insured requested such coverage in writing, it need not be

provided in a renewal policy where the named insured has rejected the coverage in connection with a policy previously issued to him by the same insurer. *Id.* at 370, 174 N.W.2d at 37. The policy was renewed on its anniversary date, 1 December 1966, without uninsured motorist coverage and without the required 8-point type notice provided for in the statutory amendment. *Id.* No premium was ever charged on either policy for uninsured motorist coverage. *Id.* at 371, 174 N.W.2d at 37. Plaintiff had an automobile accident with an uninsured motorist and brought a declaratory judgment action to determine if defendant Dairyland was liable. Dairyland's motion for summary judgment was granted. The Michigan Court of Appeals phrased the question presented in that case as follows: "whether the rejection of uninsured motorist coverage made in an application for a policy which was issued before the effective date of the statute had the legal effect of waiving such coverage for renewal policies issued after the statute went into effect." *Id.* at 371, 174 N.W.2d at 37. In reversing the lower court and holding that the insured was entitled to uninsured coverage, the Michigan court stated

> [I]t is argued that since uninsured motorist coverage was rejected in connection with a policy previously issued . . . by the same insurer, the rejection was effective. We disagree.
>
> It is hornbook law in Michigan that statutes must be read as a whole and that the duty of the courts is to implement legislative intent. As noted above, the policy of the legislature was to encourage the purchase of this coverage by requiring that it is only rejected after the insured is fully aware of what he is doing. To obtain this goal a specific procedure was set out in the statute, the following of which would greatly increase the chances that only knowledgable rejections are made.
>
> Reading the last sentence of the statute with those that precede it forces us to conclude that when the legislature excepted renewals of a 'policy previously issued' it referred only to policies previously issued in compliance with the statute. It was, therefore, incumbent upon Dairyland to issue the renewal policy of December, 1966, as if it were an original and in full conformance with the notice provisions of the statute.
>
> There are, of course, a vast number of automobile policies in effect in this state. If our holding were otherwise, the large number of policies which are automatically renewed each year and

which had their original policies issued before 1966 would never be affected by the statute.

Id. at 372-73, 174 N.W.2d at 37-38. As already pointed out, the original form NC0185 similarly stated that "Uninsured/Underinsured Motorists Coverage has been explained to me." After the statute was amended, this was no longer true.

We adopt the reasoning of the Michigan court in *Oatis* and hold that defendants are entitled to underinsured motorists coverage on their policy.

We find it unnecessary to consider the question of whether or not the policy of Joel Smith may be stacked with defendants' policy no. TFO—00207498, since plaintiff does not contest the superior court's ruling in its brief. *See* N.C.R. App. P. 28(b)(5) (1994).

The order of 29 November 1993 granting defendants' motion for summary judgment is

Affirmed.

Judges JOHNSON and MARTIN concur.

This opinion was written and concurred in prior to December 29, 1994.

LAUREL WOOD OF HENDERSON, INC., PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, RESPONDENT, AND PARK RIDGE HOSPITAL AND PIA-ASHEVILLE, INC., D/B/A/ APPALACHIAN HALL, INTERVENORS-RESPONDENTS

No. 9310SC1188

(Filed 17 January 1995)

Hospitals and Medical Facilities or Institutions § 17 (NCI4th)—CON in accordance with Supreme Court order—eating disorders—no treatment allowed in substance abuse/chemical dependency hospital

The certificate of need issued by DEHNR in accordance with *HCA Crossroads v. DEHNR*, 327 N.C. 573, did not permit petitioner to provide treatment for adolescents with eating disorders in substance abuse/chemical dependency beds, since the CON

allowed petitioner to construct and operate a 66-bed substance abuse/chemical dependency treatment hospital for adolescents; the issuance of the CON exactly fulfilled the Supreme Court order; and eating disorders are subsumed under the definition of mental illness and are not included in the terms chemical dependency or substance abuse.

Am Jur 2d, Hospitals and Asylums §§ 3 et seq.

Validity and construction of statute requiring establishment of "need" as precondition to operation of hospital or other facilities for the care of sick people. 61 ALR3d 278.

Judge LEWIS dissenting.

Appeal by petitioner from order filed 3 August 1993 in Wake County Superior Court by Judge Wiley F. Bowen. Heard in the Court of Appeals 1 September 1994.

Bode, Call & Green, by Robert V. Bode and Diana E. Ricketts, for petitioner-appellant.

Michael F. Easley, Attorney General, by James A. Wellons, Special Deputy Attorney General, for respondent Department of Human Resources, Division of Facility Services.

Petree Stockton, L.L.P., by Noah H. Huffstetler, III and Barbara B. Garlock, for intervenor/respondent-appellee Park Ridge Hospital.

Smith Helms Mulliss & Moore, L.L.P., by Maureen Demarest Murray and William K. Edwards, for intervenor-respondent PIA-Asheville, Inc., d/b/a/ Appalachian Hall.

GREENE, Judge.

Laurel Wood of Henderson, Inc. (petitioner) appeals from an order filed 3 August 1993 in Wake County Superior Court, affirming the declaratory ruling of the North Carolina Department of Human Resources' Division of Facility Services (the Department) that petitioner is not authorized to treat individuals with eating disorders in its substance abuse/chemical dependency beds.

N.C. Gen. Stat. § 131E-178(a) (1994) requires a person to obtain a Certificate of Need (CON) from the Department before offering or

developing "a new institutional health service," which is defined as the "construction, development, or other establishment of a new health service facility." N.C.G.S. § 131E-176(16)(a) (1994). On 16 May 1988, petitioner filed an application with the Department for a CON to develop a 66-bed substance abuse/chemical dependency facility for adolescents in Henderson County. Petitioner stated in its application it "will be dedicated to the treatment of adolescents suffering from the addictive diseases of chemical dependency and eating disorders." In determining whether a CON should be issued for the offering or development of a "new institutional health service," the service must "be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria" so that "only appropriate and needed institutional health services are made available in the area to be served." N.C.G.S. § 131E-175(7) (1994). The Department relies on the State Medical Facilities Plan (SMFP), the official statement of projected need for health services, to determine whether a new institutional health service is needed. The 1988 SMFP projected a need for chemical dependency beds in Health Service Area I, which includes Henderson County, and a net surplus of psychiatric beds.

On 21 November 1988, the Department denied petitioner's CON application; however, the Department issued its decision beyond the 150-day time limit imposed by N.C. Gen. Stat. § 131E-185. Petitioner filed a petition for a contested case in the Office of Administrative Hearings on 21 December 1988, and the Administrative Law Judge (ALJ) issued a decision recommending issuance of a CON to petitioner because the Department, by failing to act within the 150-day time limit, lost jurisdiction to deny petitioner's CON application. In its final decision, the Department rejected the ALJ's recommended decision and affirmed its denial of petitioner's application. On 1 March 1990, our Supreme Court granted discretionary review, *ex mero motu*, before a determination by this Court.

Our Supreme Court vacated the Department's final decision and determined that because the Department failed to act within the 150-day time limit, the Department "is deemed as a matter of law to have decided to approve the certificates of need in question, and that it lost jurisdiction over the subject matter of the applications in question for all purposes except the issuance of the certificates of need." *HCA Crossroads Residential Ctrs., Inc. v. Department of Human Resources*, 327 N.C. 573, 579, 398 S.E.2d 466, 470 (1990). The Court, therefore, ordered the Department to issue a CON based on petition-

er's "application to develop a 66-bed adolescent chemical dependency treatment facility." *Id.* at 575, 580, 398 S.E.2d at 468, 470-71.

On 11 January 1991, the Department sent petitioner a CON to "[c]onstruct and operate a 66 Bed Substance Abuse/Chemical Dependency Treatment Hospital for Adolescents (ages 12 through 17) with 60 treatment beds and 6 detoxification beds in Henderson County." Before a facility that has been issued a CON can be operated, it must be licensed by the Department. The Licensure Section of the Department informed petitioner that it could not issue a license allowing treatment of individuals with eating disorders in beds designated substance abuse/chemical dependency because only psychiatric beds could be used to treat eating disorders. Petitioner therefore requested the Director of the Division of Facility Services of the Department (the Director) to issue a declaratory ruling on the scope of services petitioner can provide under the CON issued by the Department. Petitioner sought a ruling that licensing the chemical dependency beds awarded to it included the treatment of eating disorders.

On 8 November 1991, the Director issued a declaratory ruling denying petitioner's request. Petitioner petitioned for review in the superior court, which affirmed the ruling.

The issue presented is whether the CON issued by the Department in accordance with *HCA Crossroads* permits petitioner to provide treatment for adolescents with eating disorders in substance abuse/chemical dependency beds.

Under N.C. Gen. Stat. § 150B-51(b), this Court may, in reviewing an administrative agency's decision, reverse or modify the decision if it is:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b) (1991); *see Brooks v. Ansco & Assocs.*, Inc., 114 N.C. App. 711, 715-16, 443 S.E.2d 89, 91-92 (1994). Where a petitioner alleges an agency's decision is based on an error of law, *de novo* review is required. *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). Where a petitioner alleges the agency's decision is not supported by substantial evidence, the whole record test applies. *Id.*

In this case, petitioner argues that the Department lost its jurisdiction to impose the restriction that eating disorders are properly treatable only in beds designated for psychiatric services when it failed to act within the 150-day time limit and our Supreme Court mandated that petitioner's "application, even with its alleged defects, had to be granted in toto." Petitioner, in the alternative, argues that the Department's determination that an eating disorder, as a psychiatric illness, is not allowed to be treated in a substance abuse bed is erroneous and not based on substantial evidence. We disagree with petitioner's contentions.

In *HCA Crossroads*, the only action our Supreme Court ordered the Department to do was to issue a CON based on petitioner's "application to develop a 66-bed adolescent chemical dependency treatment facility." *HCA Crossroads*, 327 N.C. at 575, 580, 398 S.E.2d at 468, 470-71. This order by our Supreme Court was exactly fulfilled by the Department on 11 January 1991 when it sent petitioner a CON to "[c]onstruct and operate a 66 Bed Substance Abuse/Chemical Dependency Treatment Hospital for Adolescents (ages 12 through 17) with 60 treatment beds and 6 detoxification beds in Henderson County." The question, therefore, is whether petitioner can properly treat eating disorders under the CON issued by the Department in accordance with *HCA Crossroads*.

Eating disorders are subsumed under the definition of mental illness, *see* N.C.G.S. § 122C-3(21) (1993) (for a minor, a mental condition that so impairs capacity to exercise age adequate self-control or judgment in conduct of activities and social relationships so that he needs treatment), and are not included in the terms "chemical dependency" or "substance abuse." *See* 1988 *State Medical Facilities Plan* at 41 ("chemical dependency" describes the abuse and/or addiction to alcohol or other drugs); N.C.G.S. § 122C-3(36) (1993) ("substance abuse" means pathological use or abuse of alcohol or other drugs in a way or degree that produces impairment in personal, social, or occupational functioning); N.C.G.S. § 90-87(12)(c) (1993)

(defines drugs as "substances (other than food) intended to affect the structure or any function of the body of man or other animals"). Therefore, treating eating disorders in substance abuse/chemical dependency treatment beds would constitute redistributing health service facility bed capacity to a new institutional health service, i.e., psychiatric service, which requires its own CON. *See* N.C.G.S. § 131E-178(a) (no person may offer or develop "new institutional health service" without obtaining certificate of need); N.C.G.S. § 131E-176(16)(a) ("new institutional health service" means construction, development, or other establishment of new health service facility); N.C.G.S. § 131E-176(9b) (1994) (new psychiatric facility is "health service facility"). For these reasons, the Department's decision that petitioner cannot treat eating disorders pursuant to its CON for substance abuse/chemical dependency treatment was not based on an error of law and is supported by substantial evidence. The decision of the trial court is therefore

Affirmed.

Judge JOHNSON concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent, as I believe petitioner is correct in its contention that the declaratory ruling was affected by error of law. When the Department of Human Resources denied petitioner's CON application, one of its reasons for doing so was that it concluded that eating disorders were not properly treatable in chemical dependency/substance abuse beds. The matter reached the Supreme Court, which held that the Department, by failing to act within 150 days, was "deemed as a matter of law to have decided to approve the [CON] in question". *HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 579, 398 S.E.2d 466, 470 (1990). The Court further held that the Department had "lost jurisdiction over the subject matter of the [CON application] for all purposes except the issuance of the [CON]." *Id.* Finally, the Court ordered that the Department "must now issue the [CON] *applied for*." *Id.* at 579-80, 398 S.E.2d at 470-71 (emphasis added). The CON applied for was for a facility "entirely devoted to the treatment of adolescents suffering from substance abuse, including programming and facilities devoted

exclusively to adolescent eating disorder patients." It is to be presumed that the Supreme Court was aware of the nature of the proposed facility, as the record before that Court contained the Department's denial of the CON application and its findings in support of its decision. The findings specifically addressed the proposed eating disorder aspect of the application. For example, the Department found that

> Laurel Wood's proposal to treat persons with eating disorders in licensed chemical dependency beds is not consistent with the Plan's [the State Medical Facilities Plan's] defined use for these beds. Instead, Laurel Wood should consider the establishment of psychiatric beds for the purpose of treating individuals who are not dependent on alcohol or other drugs but have an eating disorder.

The Supreme Court ordered the Department to issue the CON applied for, even though the Department had determined that several aspects of the application, including the proposed treatment of patients with eating disorders, were inconsistent with the policies of the SMFP and the CON law. I conclude that the Department's attempt to avoid the clear mandate of the Supreme Court was error.

Furthermore, I find additional support for this conclusion in the CON law, as highlighted in a letter from the Department to petitioner. The letter was sent to petitioner along with the CON after the Supreme Court's decision. The letter cautioned:

> Please be aware that pursuant to G.S. 131E-181(b), you are required to materially comply with the representations made in your application for a Certificate of Need. If you operate a service which materially differs from the representations made in your application for a Certificate of Need, . . . the Department may bring remedial action against the holder of the Certificate of Need pursuant to G.S. 131E-189 and 131E-190.

Thus, the holder of an approved CON application must develop its service consistent with the representations made in its CON application, or face having its CON withdrawn by the Department, *see* § 131E-189(b) (1994), or face an injunction requiring material compliance with the representations it made in its CON application. *See* § 131E-190(i) (1994). Having represented in its CON application that it intended to provide treatment for eating disorders, petitioner was required to do so once its CON was issued by the Department.

I conclude that, in light of the Supreme Court's decision in *HCA* and the CON law, the Department committed an error of law when it ruled that petitioner could not provide treatment for patients with eating disorders in chemical dependency/substance abuse beds. Thus, the trial court erred in finding no error of law. Accordingly, I would reverse the order of the trial court.

FORSYTH MEMORIAL HOSPITAL, INC., PLAINTIFF v. SHIRLEY B. CHISHOLM, DEFENDANT

No. 9421DC102

(Filed 17 January 1995)

Husband and Wife § 9 (NCI4th)— two-year separation—no recovery of husband's hospital costs from wife

Defendant wife could not be held liable under the necessaries doctrine for the unpaid medical bills of her husband when at the time her husband was admitted to the hospital and the services were rendered, she had been living separate and apart from her husband for a period of two years. It was irrelevant whether plaintiff had notice of the parties' separation at the time the services were rendered, and plaintiff had the burden of showing that the separation was the fault of defendant.

Am Jur 2d, Husband and Wife §§ 348 et seq.

Wife's liability for necessaries furnished husband. 11 ALR4th 1160.

Appeal by plaintiff from order entered 15 November 1994 by Judge Roland H. Hayes in Forsyth County District Court. Heard in the Court of Appeals 3 October 1994.

House & Blanco, P.A., by John S. Harrison, for plaintiff-appellant.

Bailey & Thomas, P.A., by Wesley Bailey, David W. Bailey, Jr. and John R. Fonda, for defendant-appellee.

THOMPSON, Judge.

The question presented by this appeal is whether or not a wife can be held liable under the necessaries doctrine for the unpaid medical bills of her husband when at the time her husband was admitted

to the hospital and the services were rendered she had been living separate and apart from her husband for a period of two years. We hold that under the circumstances present here the separation of the parties precludes the hospital from recovering the unpaid medical bills.

Shirley B. Chisholm (Ms. Chisholm) and Melvin Chisholm (Mr. Chisholm) were married in June of 1953. Ms. Chisholm and Mr. Chisholm were separated in January of 1990, at which time they were living in Boone, North Carolina. Ms. Chisholm then moved to Winston-Salem, North Carolina and has been a continuous resident of Forsyth County since that time. Mr. Chisholm remained in Boone and continued to be a resident of Watauga County until his death on 14 August 1992. Following the separation in January of 1990, Mr. Chisholm and Ms. Chisholm lived continuously separate and apart and at no time resumed the marital relationship.

On 31 July 1992 Mr. Chisholm was admitted to Forsyth Memorial Hospital, Inc. (the hospital). The hospital rendered medical treatment to Mr. Chisholm from 31 July 1992 until his death on 14 August 1992. At the time the medical services were rendered, Ms. Chisholm and Mr. Chisholm had lived continuously separate and apart for over two years. Each managed his or her own affairs and each maintained a separate bank account.

The hospital filed this action in Forsyth County District Court on 24 March 1993 seeking to recover $45,110.07 in unpaid hospital bills from Ms. Chisholm. The hospital bills reflected medical goods and services rendered to Mr. Chisholm. The hospital filed this action because it was unsuccessful in its efforts to obtain the payment of $45,110.07 from Mr. Chisholm's insurance company or his estate. Ms. Chisholm refused to make any payment on the account.

Ms. Chisholm served an answer denying liability for her late husband's hospital bills on the ground that, at the time the bills were incurred, she and Mr. Chisholm were living separate and apart.

The parties filed cross-motions for summary judgment with supporting affidavits. The motions were heard by the Honorable Roland H. Hayes at the 15 November 1993 Civil Session of Forsyth County District Court. After reviewing the record and hearing the arguments of counsel, Judge Hayes granted summary judgment in favor of Ms. Chisholm. The hospital appealed.

On appeal the hospital contends that the trial court erred in entering summary judgment for Ms. Chisholm because she is not entitled to benefit from what is recognized as the separation exception to the necessaries doctrine. Its basis for that contention is that Ms. Chisholm failed to notify the hospital of her separation at the time her husband was admitted to the hospital and the medical services were rendered; and also that she failed to show that the separation was due to the fault of Mr. Chisholm. We disagree. We hold that Ms. Chisholm had no obligation to notify the hospital of her separation, nor was she obliged to prove that the separation was the fault of Mr. Chisholm.

The doctrine of necessaries is based upon the common law duty of the husband to provide for the necessary expenses of his wife. *Bowen v. Daugherty*, 168 N.C. 242, 84 S.E. 265 (1915). Today, however, the doctrine of necessaries applies equally to both husband and wife. *N.C. Baptist Hospitals v. Harris*, 319 N.C. 347, 349, 354 S.E.2d 471, 472 (1987). North Carolina has limited the doctrine to situations in which the husband and wife live together or, if separated, are separated because of the fault of the spouse on whom the creditor seeks to impose liability. *Pool v. Everton*, 50 N.C. (5 Jones) 241 (1858); *Cole v. Adams*, 56 N.C. App. 714, 289 S.E.2d 918 (1982).

I.

With respect to defendant's contention that Ms. Chisholm is not entitled to benefit from the separation exception to the necessaries doctrine because she failed to notify the hospital of her separation at the time her husband was admitted to the hospital and the medical services rendered, the hospital cites *Pool v. Everton*, 50 N.C. (5 Jones) 241 (1858); *Cole v. Adams*, 56 N.C. App. 714, 289 S.E.2d 918 (1982); and *Memorial Hospital of Alamance County, Inc. v. Brown*, 50 N.C. App. 526, 274 S.E.2d 277 (1981). While in *Cole* and *Pool*, there is some evidence that the plaintiff tradesman or healthcare provider had reason to know of the separation, in neither of them is such knowledge the basis for denial of the claim against the spouse. In *Brown*, the issue of separation was not directly treated by the trial court. *Brown*, 50 N.C. App. at 531, 274 S.E.2d at 281.

In *Cole*, the court clearly based its holding on the reasoning that "[p]laintiff . . . had the burden of showing that the items purchased by Winfred were necessaries; and that Ben was without justifiable cause in denying his wife such items." 56 N.C. App. at 717, 289 S.E.2d at 920. In *Pool*, the court apparently based its holding on the reasoning that "[i]f he [plaintiff] is able to prove that the wife had good cause for the separation, he will recover the value of the articles furnished or of the

labor done." 50 N.C. at 243. None of the cases which plaintiff cites holds that in order for the defendant to avoid liability in a necessaries case, the defendant must show that the plaintiff had notice of the separation.

The *Cole* court, in what was a true necessaries case, noted that the necessaries doctrine was applied in *Pool v. Everton*, 50 N.C. (5 Jones) 241 (1858), and went on to cite the North Carolina Supreme Court's interpretation of the *Pool* holding in *Sibley v. Gilmer*, 124 N.C. 631, 32 S.E. 964 (1899) as follows:

> [I]n cases where the husband and wife had separated, no notice of separation need be given to prevent his liability for debts contracted by the wife during the separation—even for necessaries—the law being that if the separation was without good cause on the part of the wife, her debt contracted even for necessaries was not . . . binding on the husband. . . .

Cole, 56 N.C. App. at 716-717, 289 S.E.2d at 920. Thus *Sibley* supports the view that it is irrelevant whether the tradesman or healthcare provider had notice of the parties separation at the time the services were rendered.

Whether or not notice is relevant when a tradesman or healthcare provider seeks to impose liability on a spouse depends on whether the plaintiff proceeds under a true necessaries theory or under an agency theory. Recovery on an agency theory is based on consent of the principal. Recovery under the doctrine of necessaries does not require either that the spouse upon whom the plaintiff seeks to impose liability appoint the other spouse to receive the necessaries as an agent, or that the spouse upon whom the plaintiff seeks to impose liability be contractually bound on the obligation. 1 S. Reynolds, *Lee's North Carolina Family Law*, § 5.15 at 311 (5th ed. 1993). The doctrine of necessaries has nothing to do with the law of agency. *Id.*

Finally, Professor Suzanne Reynolds in 1 S. Reynolds, *Lee's North Carolina Family Law*, § 5.16 at 320, fn. 309 (5th ed. 1993), distinguishes the effect of separation under the two theories by analyzing the North Carolina Supreme Court's decision in *Sibley v. Gilmer*, 124 N.C. 631, 637, 32 S.E. 964, 965 (1899):

> In remanding for a new trial on an agency theory, the North Carolina Supreme Court observed in *Sibley*, 124 N.C. at 637-37 [sic], 32 S.E.2d at 965, that separation may preclude recovery on the theory of necessaries but is not relevant to an agency theory

> unless the creditor knew about the separation and knew that the separation would cause the principal to revoke consent.

Id. at 320, fn. 309.

The case at bar is a true necessaries case and it is irrelevant whether the hospital had notice of the parties separation at the time the services were rendered. It is also irrelevant whether any such notice was provided by the spouse upon whom the plaintiff seeks to impose liability, or ascertained by the plaintiff upon inquiry. To hold otherwise would require constant surveillance of a separated spouse by the spouse from which he or she is separated.

II.

Having determined that it is irrelevant whether the hospital had notice of the separation, the only remaining question is whether Mr. Chisholm had good cause for the separation, or in other words, whether the separation was the fault of Ms. Chisholm. The plaintiff contends that it is entitled to recover because Ms. Chisholm has the burden of proof on that issue. We disagree.

This Court has spoken directly to that issue. In *Cole v. Adams*, this Court stated:

> [I]n order to hold the husband liable, a person furnishing necessaries to a wife living separate and apart from her husband has the burden of showing that either by agreement or by the husband's fault or misconduct the wife was justified in living apart from the husband and that the husband had failed or neglected to supply her with necessaries or to make adequate provision for her support. . . . 41 C.J.S. *Husband and Wife* § 52a. at 516-517 (1944); Annot. 60 A.L.R.2d 7 (1958).

Cole, 56 N.C. App. at 716, 289 S.E.2d at 920. Clearly, the burden was with the plaintiff. Since the parties were separated, it was the plaintiff's obligation to demonstrate that the separation was the fault of Ms. Chisholm. Having failed to meet that burden, there was no genuine issue of material fact, and the trial court was correct in entering summary judgment in favor of the defendant.

Affirmed.

Judges Johnson and Martin concur.

This opinion was written and concurred in prior to December 29, 1994.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 JANUARY 1995

BATTLE v. LEE COUNTY No. 9311SC1262	Lee (92CVS249)	Affirmed
BATTLE v. NISSAN MOTOR CORP. No. 9411SC404	Lee (92CVS495)	Affirmed
BROOKWOOD UNIT OWNERSHIP ASSN. v. DELON No. 9315DC870	Orange (88CVD1101)	Reversed
CITY OF CHARLOTTE v. HELMS No. 9426SC229	Mecklenburg (92CVS14485) (92CVS8366)	Vacated & Remanded
DAVIS v. HEALY WHOLESALE No. 9310IC1310	Ind. Comm. (926911)	Reversed & Remanded
JIM WALTER HOMES v. PITMAN No. 946SC152	Bertie (93CVS185)	Reversed & Remanded
KANE PLAZA ASSOC. v. CHADWICK No. 933SC1142	Pitt (92CVS1129)	Dismissed
KIDD v. ALLEN No. 9319SC1257	Randolph (92CVS1273)	Affirmed
LEATHERS v. WILSON No. 9414DC556	Durham (93CVD03066)	Affirmed
MACKENZIE v. COLOMBO No. 9310SC1107	Wake (92CVS08475)	Affirmed
MEZUK v. MEZUK No. COA94-827	Rowan (90CVD90)	Affirmed
MICHAEL v. CURTISS No. 9327SC981	Cleveland (92CVS811)	Affirmed
NESBITT v. STARR No. 9410IC586	Ind. Comm. (166881)	Affirmed
NICHOLSON v. NICHOLSON No. 9427DC294	Lincoln (85CVD465)	Affirmed
PRICE v. SMITH No. 9318SC752	Guilford (89CVS565)	Affirmed
QUAKER STATE CORP. v. ALLIED OIL & MOTOR CO. No. 9328SC905	Buncombe (91CVS4154)	No Error

STATE v. CHRISTENBURY No. 941SC700	Gates (92CRS95) (92CRS141)	No Error
STATE v. DEVINS No. COA94-734	Guilford (93CRS050723)	No Error
STATE v. FIELDS No. COA94-762	Lenoir (93CRS4636)	No Error
STATE v. KARIM No. 9318SC1014	Guilford (90CRS65976) (91CRS20213)	No Error
STATE v. LARK No. 9318SC1053	Guilford (92CRS42771)	No Error
STATE v. MASSEY No. COA94-711	Mecklenburg (92CRS44683)	No Error
STATE v. PHILLIPS No. COA94-795	Haywood (92CRS2123)	No Error
STATE v. STALLINGS No. COA94-908	Durham (92CRS26426)	No Error
STATE v. TYSON No. 9318SC806	Guilford (92CRS71577) (92CRS71578) (92CRS71579)	No Error
STATE v. WILLIAMS No. 9411SC647	Harnett (93CRS4458) (93CRS4460)	No Error
STATE v. WILSON No. COA94-790	Forsyth (92CRS40877)	No Error
THALLER v. THALLER No. 9415DC67	Orange (92CVD846)	Reversed & Remanded
WALTON v. CITY OF RALEIGH No. 9310SC1028	Wake (91CVS03514)	Affirmed

FILED 17 JANUARY 1995

TRANSYLVANIA COUNTY v. HOWELL No. 94-351	Transylvania (89CVD205)	Affirmed in part, Vacated in part

HAWKINS v. STATE OF NORTH CAROLINA

[117 N.C. App. 615 (1995)]

JOHN HAWKINS, PLAINTIFF v. STATE OF NORTH CAROLINA; N.C. DEPARTMENT OF HUMAN RESOURCES; WESTERN CAROLINA CENTER; J. IVERSON RIDDLE, BOTH INDIVIDUALLY AND IN HIS REPRESENTATIVE CAPACITY AS DIRECTOR OF WESTERN CAROLINA CENTER; PHILLIP J. KIRK, JR., INDIVIDUALLY AND IN HIS REPRESENTATIVE CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES; EARLINE BOYD BROWN, INDIVIDUALLY AND IN HER REPRESENTATIVE CAPACITY, RHONDA BENGE, INDIVIDUALLY AND IN HER REPRESENTATIVE CAPACITY, SUZANNE WILLIAMS, INDIVIDUALLY AND IN HER CAPACITY, VICKI CASH, INDIVIDUALLY AND IN HER CAPACITY, AND RALPH KEATON, INDIVIDUALLY AND IN HIS CAPACITY, DEFENDANTS

No. 9225SC154

(Filed 7 February 1995)

1. Appeal and Error § 112 (NCI4th)— motion to dismiss—sovereign immunity—immediately appealable

Defendants' appeal from the trial court's denial of defendants' motion to dismiss was properly before the Court of Appeals where defendants asserted the defenses of absolute and qualified immunity. The doctrine of sovereign immunity presents a personal jurisdiction question and the denial of a motion to dismiss on that basis is immediately appealable.

Am Jur 2d, Appeal and Error §§ 87, 105 et seq.

2. Pleadings § 108 (NCI4th)— Rule 12(b)(6) motion to dismiss—test for motion

The trial court need only look to the face of the complaint when considering a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) to determine whether it reveals an insurmountable bar to plaintiff's recovery.

Am Jur 2d, Pleading §§ 226 et seq.

3. Limitations, Repose, and Laches § 139 (NCI4th)— voluntary dismissal of complaint—savings provision of Rule 41(a)(1)—good faith dismissal

The trial court did not err in denying defendants' amended motion to dismiss plaintiff's complaint based on the statute of limitations where defendant contended that plaintiff took a voluntary dismissal of his first action in bad faith. There is no evidence of record that plaintiff's sole intent in filing the first complaint was to dismiss it in order to gain another year in which to file a sufficient complaint.

Am Jur 2d, Limitation of Actions §§ 301 et seq.

4. Constitutional Law § 85 (NCI4th)— 42 U.S.C. 1983—state officials as persons—injunctive relief

The trial court erred by denying defendants' amended motion to dismiss plaintiff's federal claims under 42 U.S.C. 1983 because defendants in their official capacities are not "persons" within the meaning of section 1983 for recovering money damages. Plaintiff cannot contend that defendants in their official capacities are liable for alleged constitutional violations by arguing that defendants' actions were pursuant to a "governmental custom" because the cases on which plaintiff relies involve municipalities, which do not enjoy the same protections from liability that states enjoy. However, defendants are "persons" as to plaintiff's claim for injunctive relief and plaintiff may be able to obtain injunctive relief against defendants in their official capacities if he can state a claim under each of the alleged federal violations.

Am Jur 2d, Civil Rights §§ 264, 282.

Supreme Court's views as to who is "person" under civil rights statute (42 USCS § 1983) providing private right of action for violation of federal rights. 105 L. Ed. 2d 721.

5. Constitutional Law § 115 (NCI4th)— 42 U.S.C. 1983—free speech—refusal to give urine sample

The trial court erred by denying defendants' motion to dismiss as to plaintiff's free speech claim under 42 U.S.C. 1983 arising from his discharge from the Western Carolina Center following his refusal to submit a urine sample as a part of an investigation into missing drugs where the only allegation in plaintiff's complaint of any speech is his assertion that, when asked to give a urine sample, he said that defendants' actions violated his constitutionally protected rights. The record indicates that defendants fired plaintiff because he refused to give the sample, not for his speech. Simply saying that giving a urine sample violates one's rights is not a matter of public concern and does not satisfy the requirement to show that his speech was protected. Because plaintiff's speech was not protected, defendants are insulated from liability by the doctrine of qualified immunity.

Am Jur 2d, Civil Rights §§ 286, 287.

Supreme Court's construction of Civil Rights Act of 1871 (42 USCS § 1983) providing private right of action for violation of federal rights. 43 L. Ed. 2d 833.

6. Constitutional Law § 98 (NCI4th)— discharge of state employee—42 U.S.C. 1983 claim—no violation of due process

Defendants did not violate any clearly established due process rights in terminating plaintiff for refusing to supply a urine sample as part of an investigation into missing drugs and defendants are entitled to qualified immunity as to plaintiff's Fourteenth Amendment due process claim in an action under 42 U.S.C. 1983. Under the doctrine of qualified immunity, plaintiff bears the burden of establishing that the right violated was clearly established. The Administrative Law Judge found that plaintiff and defendants had stipulated that defendants fully complied with the procedural requirements of the state personnel manual relating to the discharge of a State employee and those procedures have been held to fully protect an employee's due process rights.

Am Jur 2d, Civil Rights § 268.

Supreme Court's construction of Civil Rights Act of 1871 (42 USCS § 1983) providing private right of action for violation of federal rights. 43 L. Ed. 2d 833.

7. Constitutional Law § 85 (NCI4th)— urine sample—search—42 U.S.C. 1983 claim

Defendants did not violate any clearly established right in 1986 when they required plaintiff to provide a urine sample as a part of an investigation into missing drugs at plaintiff's workplace. The United States Supreme Court did not declare that a urine test is a search under the Fourth Amendment until 1989; there was no clearly established law that restricted the taking of urine specimens when defendants asked plaintiff to provide a urine sample.

Am Jur 2d, Civil Rights § 1.

Supreme Court's construction of Civil Rights Act of 1871 (42 USCS § 1983) providing private right of action for violation of federal rights. 43 L. Ed. 2d 833.

8. Constitutional Law § 85 (NCI4th)— discharge from employment in 1986—42 U.S.C. 1981—not applicable

Plaintiff did not state a claim pursuant to 42 U.S.C. 1981 for discriminatory discharge from his employment in 1986 because section 1981 did not govern a discriminatory discharge action in

1986. Although the 1991 Civil Rights Act broadened the scope of section 1981, the Fourth Circuit has declined to apply the act retroactively.

Am Jur 2d, Civil Rights § 248.

Supreme Court's construction of Civil Rights Act of 1871 (42 USCS § 1983) providing private right of action for violation of federal rights. 43 L. Ed. 2d 833.

9. State § 19 (NCI4th)— action against state officials—sovereign immunity—no waiver

The State did not waive its immunity with respect to plaintiff's tort claim arising from his discharge as a state employee for refusing a urine test in a drug investigation and may assert absolute immunity as to that claim. Because a suit against public officials and public employees in their official capacities is considered a suit against the State, sovereign immunity protects these individuals from suit. Although the State entered into a contract of employment with plaintiff and the State impliedly consents to be sued for damages on the contract in the event it breaches the contract, neither of plaintiff's state claims are contract claims.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 70, 75 et seq.; States, Territories, and Dependencies §§ 104-107, 119.

10. Constitutional Law § 98 (NCI4th); Courts § 3 (NCI4th)— termination of State employee—state constitutional claim against officials—adequate state remedy

The trial court erred by denying defendants' amended motion to dismiss plaintiff's state constitutional due process claim arising from his dismissal as a state employee for refusing to submit a urine sample as a part of a drug investigation. Plaintiff cannot maintain this action against the State, its agencies, or employees in their official capacity because there exists an adequate state remedy in an administrative review of plaintiff's termination and judicial review in the superior court.

Am Jur 2d, Civil Rights § 267; Courts §§ 64 et seq.

Exhaustion of state administrative remedies as prerequisit to federal civil rights action based on 42 USCS § 1983. 47 ALR Fed. 15.

11. Public Officers and Employees §§ 35, 68 (NCI4th); Constitutional Law § 85 (NCI4th)— state officials and state employees—intentional tort claim—no individual immunity

The trial court did not err by denying defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress arising from plaintiff's dismissal as a state employee for refusing to submit a urine sample as part of a drug investigation where defendants argued that defendants in their individual capacities are immune under the doctrine of qualified immunity. If a party alleges an intentional tort claim, the doctrine of qualified immunity does not immunize public officials or public employees from suit in their individual capacities.

Am Jur 2d, Civil Rights § 268; Public Oficers and Employees §§ 358 et seq.

Supreme Court's views as to application or applicability of doctrine of qualified immunity in action under 42 USCS § 1983, or in *Bivins* action, seeking damages for alleged civil rights violations. 116 L. Ed. 2d 965.

12. Public Officers and Employees § 68 (NCI4th); Constitutional Law § 98 (NCI4th)— public officials—state constitutional due process claim—not recognized

The trial court did not err by denying defendants' amended motion to dismiss plaintiff's claims against defendants in their individual capacities for monetary and injunctive relief for alleged due process violations of the state constitution in firing plaintiff for refusing to submit a urine sample as part of a drug investigation. A plaintiff cannot maintain a claim against government employees in their individual capacities for alleged violations of state constitutional rights.

Am Jur 2d, Civil Rights §§ 264, 282; Public Officers and Employees §§ 358 et seq.

Immunity of public officials from personal liability in civil rights actions brought by public employees under 42 USCS § 1983. 63 ALR Fed. 744.

13. Appeal and Error § 111 (NCI4th)— denial of motion to dismiss—issue preclusion and exclusive remedy—interlocutory

Defendants' assignments of error relating to issue preclusion and exclusive remedy, other federal and state constitutional claims, and the statement of a claim for intentional infliction of emotional distress were interlocutory where they failed to show how the trial court's order denying their motion to dismiss deprives them of a substantial right.

Am Jur 2d, Appeal and Error §§ 105 et seq.

Appeal by defendants from order entered 30 November 1991 by Judge Beverly T. Beal in Burke County Superior Court. Heard in the Court of Appeals 14 January 1993; reconsidered and heard without oral argument per order dated 6 January 1995.

Plaintiff was an employee of the Western Carolina Center (hereinafter Center) in Morganton, North Carolina until 16 December 1986. The Center is a division of the North Carolina Department of Human Resources, which is a subdivision of the State of North Carolina. In December 1986, plaintiff was employed by the Center as a Developmental Technician. On 11 December 1986, Rhonda Benge (hereinafter Benge), a registered nurse, discovered that a valium tablet was missing from a medicine cabinet at the Center. A valium tablet had previously been stolen from the cabinet, so after Benge and two other employees could not locate the missing tablet, Benge called security. Plaintiff alleges that the Center's Security Chief, Ralph Keaton (hereinafter Keaton), questioned each of the Developmental Technicians. After the first tablet was stolen, all of the medicine in the cabinet had been dusted with a powder to detect unwarranted use. The nurses knew about the baited cabinet and Keaton considered them part of his "investigative team." When Keaton was called on 11 December, he requested that the Technicians, including plaintiff, wash their hands to determine whether purple dye would show up on their hands. No dye appeared on plaintiff's hands. Benge then asked each technician to give a urine sample. Keaton never asked the nurses to give urine samples. Plaintiff refused, contending that it violated his Fourth Amendment right against unlawful searches and seizures. After plaintiff refused to submit a urine specimen, the Personnel Manager for the Center, Suzanne Williams (hereinafter Williams), arrived and said that if plaintiff did not give a urine sample, he could be dismissed for insubordination. Plaintiff said he would provide a sample if everyone

else with access to the medicine cabinet also had to give urine samples. Williams responded that other employees would not be required to provide urine samples; plaintiff again refused. Plaintiff was subsequently dismissed from his employment with the Center on 16 December 1986.

Pursuant to Chapter 126 of the General Statutes, plaintiff appealed his dismissal to the Office of Administrative Hearings. Administrative Law Judge (hereinafter ALJ) Genie Rogers found that it was reasonable that Keaton did not ask the nurses to give urine samples because they were part of the investigative team. The ALJ also found that plaintiff's personnel file contained several written disciplinary warnings. The ALJ then concluded that although the taking of a urine sample is a search within the meaning of the Fourth Amendment, the attempt to take a urine sample here was not an unreasonable search because Keaton had a reasonable suspicion that someone had recently stolen the tablet and the scope of the testing was reasonably related to the circumstances of the reasonable suspicion. Accordingly, the ALJ recommended on 13 July 1988 that plaintiff's dismissal be upheld. The State Personnel Commission upheld plaintiff's dismissal on 21 February 1989.

Plaintiff filed a complaint on 15 December 1989 in Burke County Superior Court against the State; the North Carolina Department of Human Resources; the Center; J. Iverson Riddle, individually and in his representative capacity as Director of Western Carolina Center; Phillip J. Kirk, Jr., individually and in his representative capacity as Secretary of the North Carolina Department of Human Resources; Earline Boyd Brown; Benge; Suzanne Williams; Vicki Cash and Keaton. Pursuant to "28 U.S.C. Section 1983," plaintiff alleged violations of his First, Fourth, and Fourteenth Amendment rights and the applicable due process provisions of the North Carolina Constitution. Plaintiff also alleged violations of his rights under "28 U.S.C. Code Section 1981" and brought a claim for intentional infliction of emotional distress. Plaintiff asked for monetary and injunctive relief.

Two and one half months later on 28 February 1990, plaintiff took a voluntary dismissal without prejudice pursuant to G.S. 1A-1, Rule 41(a). Between the filing of the complaint in December and the voluntary dismissal in February, plaintiff never served any of the defendants with a copy of the complaint or summons. Plaintiff filed a second complaint on 27 February 1991. Defendants filed a motion to dismiss on 9 May 1991 claiming that the court lacked subject matter jurisdic-

tion of the claims and that the complaint failed to state claims upon which relief could be granted. Defendants filed an amended motion to dismiss on 29 May 1991 adding *inter alia* that the complaint was barred by the statute of limitations and that the defendants were protected from suit by absolute and qualified immunity. On 30 November 1991, Judge Beverly T. Beal denied defendants' motions to dismiss. Defendants appealed and moved the trial court to stay the action pending the appeal. The trial court denied defendants' motion to stay on 3 January 1992. On 13 January 1992, defendants filed a motion for temporary stay and petition for writ of supersedeas with this Court. We granted defendants' motion for temporary stay on 15 January 1992 and defendants' petition for writ of supersedeas on 4 February 1992.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General John R. Corne and Assistant Attorney General Victoria L. Voight, for the State.

C. Gary Triggs, P.A., for plaintiff-appellee John Hawkins.

EAGLES, Judge.

I.

[1] We note initially that the denial of a motion to dismiss is ordinarily not immediately appealable. *Faulkenbury v. Retirement System*, 108 N.C. App. 357, 365, 424 S.E.2d 420, 423, *aff'd*, 335 N.C. 158, 436 S.E.2d 821 (1993). Here, defendants asserted the defenses of absolute and qualified immunity to most of plaintiff's claims. This Court has previously held that the doctrine of sovereign immunity presents a personal jurisdiction question and that the denial of a motion to dismiss on that basis is immediately appealable. *See Faulkenbury* at 357, 424 S.E.2d at 423; *Zimmer v. North Carolina Dept. Of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 116-17 (1987). Accordingly, we hold that defendants' appeal from the trial court's denial of defendants' motions to dismiss is properly before us.

We also note initially that although plaintiff alleged in his complaint that defendants violated his rights under 28 U.S.C. §§ 1981 and 1983, both parties treated the claims as pursuant to 42 U.S.C. §§ 1981 and 1983. Accordingly, we treat the claims as pursuant to 42 U.S.C. §§ 1981 and 1983.

Standard of Review

[2] "When considering a Rule 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine

whether it reveals an insurmountable bar to plaintiff's recovery." *Locus v. Fayetteville State University*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991) (emphasis omitted).

II.

[3] Defendants first argue that the trial court erred in denying their amended motion to dismiss plaintiff's complaint because plaintiff's claims are barred by the statute of limitations. Plaintiff filed his first complaint on 15 December 1989, within the three year statute of limitations applicable to all of his claims. Plaintiff then voluntarily dismissed his first complaint on 29 February 1990. He filed the second complaint on 27 February 1991, which was within the one year "savings" provision provided by Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. Defendants argue that plaintiff was not entitled to another year in which to refile his complaint because he took a voluntary dismissal of his first action in bad faith. Defendants base their argument on our Supreme Court's decision in *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986). We disagree because *Estrada* is distinguishable.

In *Estrada*, the North Carolina Supreme Court stated that although "Rule 41(a)(1) does not, on its face, contain an explicit prerequisite of a good-faith filing with the intent to pursue the action, we find such a requirement implicit in the general spirit of the rules, as well as in the mandates of Rule 11(a)." *Estrada* at 323, 341 S.E.2d at 542. The Court concluded that a plaintiff cannot use the "savings" provision of Rule 41(a)(1) when the plaintiff files the first complaint solely with the "intention of dismissing it in order to avoid the lapse of the statute of limitations." *Estrada* at 325, 341 S.E.2d at 543. The Court concluded that the plaintiff in *Estrada* had filed the original complaint in bad faith and therefore was not entitled to the one year "savings" provision.

As the court in *Estrada* noted, "appellate court[s] cannot make findings of fact." *Id.* at 324, 341 S.E.2d at 543. However, in *Estrada*, the Court had before it the judicial admission of plaintiff's counsel that " '[c]learly there was an intent on our part not to prosecute [the first] action.' " *Estrada* at 325, 341 S.E.2d at 543. This admission enabled the Court to reach the conclusion that the plaintiff had a "bad" intent. Here, there is no evidence of record that plaintiff's sole intent in filing the first complaint was to dismiss it in order to gain another year in which to file a "sufficient" complaint. In *Estrada*, the plaintiff filed the first complaint at 4:28 p.m. on 18 June 1982, and

filed the notice of dismissal at 4:30 p.m., two minutes after he filed the original complaint. *Estrada* at 319, 341 S.E.2d at 539, 40. Here, plaintiff waited over two months to dismiss his original complaint. Here, too, there is no judicial admission that shows that plaintiff filed and dismissed his first complaint in bad faith. Accordingly, we hold that the "savings" provision of Rule 41(a)(1) properly applied to plaintiff's complaint and that his second complaint was not barred by the statute of limitations.

FEDERAL CLAIMS

III.

[4] Defendants argue that the trial court erred in denying defendants' amended motion to dismiss plaintiff's federal claims because the defendants in their official capacities are not "persons" within the meaning of 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 for redress.

42 U.S.C.A. § 1983 (West 1994). The United States Supreme Court held in *Will v. Michigan Dept. Of State Police*, 491 U.S. 58, 71, 105 L.Ed.2d 45, 58 (1989), that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." While the Court opined that state officials are "literally . . . persons," the opinion holds that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will*, 491 U.S. at 71, 105 L.Ed.2d at 58, *citing Brandon v. Holt*, 469 U.S. 464, 471, 83 L.Ed.2d 878, 884-85 (1985). "As such, it is no different from a suit against the State itself." *Will*, 491 U.S. at 71, 105 L.Ed.2d at 58. Because defendants in their official capacities are not "persons" within the meaning of section 1983 for recovering money damages, we hold that the trial court erred in denying defendants' amended motion to dismiss plaintiff's federal claims against defendants in their official capacities for monetary damages.

Plaintiff also argues that defendants are "persons" here and liable because their actions establish a "governmental custom" of Constitu-

tional and statutory violations. We are not persuaded. Plaintiff relies on language from cases dealing with municipal liability. Municipalities do not enjoy the same protections from liability that states enjoy. "[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983. In short, a municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury." *Leatherman v. Tarrant County Etc.*, 507 U.S. ---, ---, 122 L.Ed.2d 517, 523 (1993). Accordingly, plaintiff here cannot contend that defendants in their official capacities are liable for alleged Constitutional violations by arguing that defendants' actions were pursuant to a "governmental custom."

As to plaintiff's claim for injunctive relief under section 1983, defendants are "persons." *Will*, 491 U.S. at 71 n.10, 105 L.Ed.2d at 58 n.10. Accordingly, plaintiff may be able to obtain injunctive relief against defendants in their official capacities if he can state a claim under each of the alleged federal violations.

IV.

Defendants also argue that the trial court erred in denying defendants' amended motion to dismiss plaintiff's federal claims because defendants in their individual capacities are immune from suit under the doctrine of qualified immunity. "[S]tate governmental officials [may] be sued in their individual capacities for [monetary] damages under section 1983." *Corum v. University of North Carolina*, 330 N.C. 761, 772, 413 S.E.2d 276, 283, *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). Government officials sued under section 1983 may raise the defense of qualified immunity. *Id.* "To raise the defense, which does not apply to injunctive relief, the challenged conduct must not have violated a clearly established constitutional [or statutory] right of which a reasonable person would have known." *Truesdale v. Univ. Of North Carolina*, 91 N.C. App. 186, 193, 371 S.E.2d 503, 507 (1988), *review denied*, 323 N.C. 706, 377 S.E.2d 229, *cert. denied*, 493 U.S. 808, 107 L.Ed.2d 19 (1989), *overruled on other grounds by Corum*, 330 N.C. 761, 413 S.E.2d 276, *citing Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396 (1982). For clarity, we will address each of plaintiff's claims separately.

A. First Amendment Claim

[5] For plaintiff to maintain a free speech claim under section 1983, plaintiff must first establish that his speech was protected by show-

ing that "(i) the speech pertained to a matter of public concern and (ii) the public concern outweighed the governmental interest in efficient operations." *Lenzer v. Flaherty*, 106 N.C. App. 496, 507, 418 S.E.2d 276, 283, *review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992), *citing Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708 (1983). "The determination of whether the conduct is protected activity is a question of law." *Lenzer* at 507, 418 S.E.2d at 283, *citing Connick*, 461 U.S. at 148 n.7, 75 L.Ed.2d at 720 n.7. "A matter is of public concern if when fairly considered it relates 'to any matter of political, social, or other concern to the community.' " *Pressman v. University Of N.C. At Charlotte*, 78 N.C. App. 296, 300-01, 337 S.E.2d 644, 647 (1985), *review allowed*, 315 N.C. 589, 341 S.E.2d 28 (1986), *citing Connick*, 461 U.S. at 146, 75 L.Ed.2d at 719. We must look at the context, form, and content of the employee's speech to determine whether it is a matter of public concern. *Pressman* at 301, 337 S.E.2d at 647, *citing Connick*, 461 U.S. at 147-48, 75 L.Ed.2d at 720.

Here, the only allegation in plaintiff's complaint of any "speech" is plaintiff's assertion that when he was asked to give a urine sample, he said that the defendants' actions "violated his Constitutionally protected rights including his 4th, 5th and 6th Amendment[] [rights]." There is no indication from the record that defendants fired plaintiff for this "speech." The record indicates that defendants fired plaintiff because he refused to provide a urine sample. One's simply saying that giving a urine sample violates one's own Constitutional rights is not a matter of public concern. *Cf. Lenzer* at 508, 418 S.E.2d at 283 (holding that when a person reports cases of possible patient abuse, that speech is a matter of public concern). Accordingly, plaintiff does not satisfy the first requirement to show that his speech was protected and we need not address the second requirement.

Because we hold that plaintiff's "speech" here was not protected, we also find that defendants are insulated from liability by the doctrine of qualified immunity. Plaintiff failed to show that there was a "clearly established" right which defendants allegedly violated. Accordingly, we do not address the second prong of the qualified immunity doctrine as it relates to plaintiff's claim of a free speech violation. The trial court erred in denying defendants' motion to dismiss as to plaintiff's free speech claim.

B. Fourteenth Amendment Claim

[6] In his complaint, plaintiff alleges that his termination violated his due process rights guaranteed by the Fourteenth Amendment.

Defendants argue that plaintiff failed in his complaint and memorandum in opposition to defendants' motion to dismiss to show how his due process rights were violated. We agree. Under the doctrine of qualified immunity, the plaintiff bears the burden of establishing that the right violated was clearly established. *Clark v. Link*, 855 F.2d 156, 160 (4th Cir. 1988). In its recommended decision, the ALJ found that plaintiff and defendants had stipulated that defendants "fully complied with the procedural requirements of Chapter 126 . . . and Section 9 of the State Personnel Manual as they relate to the discharge of a full-time State employee." Chapter 126 sets out the procedures which a discharged employee must follow when contesting termination. This Court has previously stated that these procedures fully protect an employee's due process rights. *Sherrod v. N.C. Dept. Of Human Resources*, 105 N.C. App. 526, 531, 414 S.E.2d 50, 53 (1992). Accordingly, defendants did not violate any clearly established due process rights in terminating plaintiff and defendants are entitled to qualified immunity as to plaintiff's Fourteenth Amendment due process claim.

C. Fourth Amendment Claim

[7] Plaintiff also alleged in his complaint that defendants violated his rights by requiring him to provide a urine sample which, he argues, constitutes a search under the Fourth Amendment. However, the United States Supreme Court did not declare that a urine test is a search under the Fourth Amendment until 1989 in *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 103 L.Ed.2d 639 (1989). Defendants asked plaintiff to give a urine sample in 1986. "Only violations of those federal rights 'clearly recognized in existing case law' will support an award in damages under 42 U.S.C. § 1983." *Swanson v. Powers*, 937 F.2d 965, 968 (4th Cir. 1991), *cert. denied*, —— U.S. ——, 116 L.Ed.2d 777 (1992), *citing Danenberger v. Johnson*, 821 F.2d 361, 365 (7th Cir. 1987). When defendants asked plaintiff to provide a urine sample, there was no clearly established law that restricted the taking of urine specimens. "[A]lthough public officials may be 'charged with knowledge of constitutional developments, [they] are not required to predict the future course of constitutional law.' " *Swanson*, 937 F.2d at 968, *citing Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057, 107 L.Ed.2d 951 (1990). Accordingly, we hold that defendants did not violate any "clearly established" right in 1986 when they asked plaintiff to provide a urine sample.

D. 42 U.S.C. Section 1981 Claim

[8] Finally, plaintiff alleged in his complaint that he was "systematically discriminated against" because of his race in violation of 42 U.S.C. § 1981. However, at the time of defendants' alleged violations, section 1981 provided limited protections because it only forbade discrimination in the making and enforcement of contracts. *Williams v. First Union Nat. Bank Of N.C.*, 920 F.2d 232, 234 (4th Cir. 1990), *cert. denied*, 500 U.S. 953, 114 L.Ed.2d 712 (1991). Section 1981 did not govern a discriminatory discharge action. *Id.* Section 1981 also did not cover "postformation conduct by the employer relating to the terms and conditions of continuing employment." *Patterson v. McLean Credit Union*, 491 U.S. 164, 179, 105 L.Ed.2d 132, 152 (1989). Like the plaintiff in *Patterson*, plaintiff here alleged that he was discriminated against during his employment. Although the 1991 Civil Rights Act broadened the scope of section 1981, the Fourth Circuit has declined to apply the Act retroactively. *Percell v. International Business Machines, Inc.*, 785 F. Supp. 1229, 1231 (E.D.N.C. 1992), *aff'd*, 23 F.3d 402 (4th Cir. 1994). (We note that *Williams* and *Patterson* were superseded by the Act insofar as they define the present scope of section 1981.) Therefore, we hold that plaintiff here has not stated a claim pursuant to section 1981 because at the time of the alleged statutory violations, section 1981 did not cover the defendants' alleged actions. Accordingly, we need not address the immunity issue.

As to plaintiff's claim for injunctive relief, we hold that the trial court should have granted defendants' motion to dismiss plaintiff's First Amendment and section 1981 claims because, as we concluded above, plaintiff failed to state a claim. As to plaintiff's Fourth and Fourteenth Amendment claims, we hold that the trial court did not err in denying defendants' motion to dismiss.

STATE CLAIMS

V.

[9] Defendants argue that the trial court erred in denying defendants' amended motion to dismiss plaintiff's state claims because defendants in their official capacities are absolutely immune from suit. The doctrine of sovereign immunity protects the State from suit unless it consents to be sued. Because a suit against public officials and public employees in their official capacities is considered a suit against the State, sovereign immunity also protects these individuals from

suit. *Minneman v. Martin*, 114 N.C. App. 616, 618, 442 S.E.2d 564, 566 (1994).

Here, plaintiff argues that the State waived its immunity from suit by entering into a contract of employment with plaintiff. Plaintiff is correct that when the State "enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976). However, neither of plaintiff's two state claims here are contract claims. One is a tort claim and the other is a state constitutional law claim. Accordingly, plaintiff's argument is without merit. The State has not waived its immunity with respect to plaintiff's tort claim and may assert absolute immunity as to that claim.

[10] As to the state constitutional law claim, defendants also argue that plaintiff cannot maintain this action against the State, its agencies, or employees in their official capacity because there exists an adequate state remedy. Defendants are correct that a direct cause of action under the State Constitution is permitted only "in the absence of an adequate state remedy." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. Here, there is an adequate state remedy for plaintiff's alleged due process injury. Article 8 of Chapter 126 and Articles 3 and 4 of Chapter 150B of the General Statutes provide for an administrative review of plaintiff's termination and the right of judicial review of the agency's decision by the superior court. Accordingly, the trial court erred in denying defendants' amended motion to dismiss plaintiff's state constitutional law claim.

VI.

[11] Defendants also argue that the trial court erred in denying their amended motion to dismiss plaintiff's state claims because defendants in their individual capacities are immune from suit under the doctrine of qualified immunity.

A. Tort Claim

> "[A] public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. . . . [A]n official may not be held liable unless [the plaintiff] allege[s] and prove[s] that [the official's] act, or failure to act, was corrupt or malicious . . . or that he acted outside of and beyond the scope of his duties."

Smith v. State, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976), *quoting Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952). Unlike a public official, a public employee is " 'personally liable for his negligence in the performance of his duties proximately causing injury to another.' " *Harwood v. Johnson*, 92 N.C. App. 306, 309-10, 374 S.E.2d 401, 404 (1988), *review allowed*, 324 N.C. 247, 377 S.E.2d 754 (1989), *aff'd in part, rev'd in part on other grounds*, 326 N.C. 231, 388 S.E.2d 439 (1990), *quoting Givens v. Sellars*, 273 N.C. 44, 49, 159 S.E.2d 530, 534-35 (1968). "Malice" is defined as "[t]he intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent." *Blacks Law Dictionary* 1109 (6th ed. 1990). Because malice encompasses intent, we conclude that if a party alleges an intentional tort claim, the doctrine of qualified immunity does not immunize public officials or public employees from suit in their individual capacities. Here, plaintiff alleged that defendants' actions constituted intentional infliction of emotional distress. Accordingly, the trial court did not err in denying defendants' motion to dismiss plaintiff's tort claim.

B. State Constitutional Law Claim

[12] As to plaintiff's state constitution due process claim, defendants argue that North Carolina does not recognize a state claim against state officials in their individual capacities for alleged violations of state constitutional rights. We agree. Our Supreme Court has held that a plaintiff cannot maintain a claim against government employees in their individual capacities for alleged violations of state constitutional free speech rights. *Corum v. University Of North Carolina*, 330 N.C. 761, 789, 413 S.E.2d 276, 293, *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). Based on the Court's discussion in *Corum*, we hold that the Court's holding applies equally to alleged violations of other state constitutional rights. *See Lenzer v. Flaherty*, 106 N.C. App. 496, 514, 418 S.E.2d 276, 287 (1992) (agreeing that *Corum* holds that "State constitutional claims are not cognizable against State actors in their individual capacity"). Accordingly, the trial court erred in denying defendants' amended motion to dismiss plaintiff's claims against defendants in their individual capacities for monetary and injunctive relief for alleged violations of the state constitution.

VII.

[13] Defendants also argue that the trial court erred in denying their motion to dismiss plaintiff's claims because they are barred by the doctrines of issue preclusion and exclusive remedy. As we discussed in I., *supra*, the denial of a motion to dismiss is ordinarily not immediately appealable. *Faulkenbury v. Retirement System*, 108 N.C. App. 357, 365, 424 S.E.2d 420, 423 (1993). Although interlocutory in nature, an appellate court may address an interlocutory order when it " 'deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.' " *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994), *quoting Southern Uniform Rentals, Inc. v. Iowa Nat'l Mut. Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988). The appellant has the burden to show how it will be deprived of a substantial right absent immediate appeal. *Jeffreys* at 379, 444 S.E.2d at 253. As to defendants' seventh and eighth assignments of error which deal with issue preclusion and the doctrine of exclusive remedy, defendants have failed to show how the trial court's order deprives them of a substantial right. "It is not the duty of this Court to construct arguments for or find support for [defendants'] right to appeal from an interlocutory order." *Id.* at 380, 444 S.E.2d at 254. Accordingly, we decline to address these two assignments of error.

VIII.

In defendants' ninth through twelfth assignments of error, defendants claim that the trial court erred in denying defendants' motion to dismiss because plaintiff's complaint fails to state a claim under the First, Fourth, and Fourteenth Amendments to the United States Constitution, under the North Carolina Constitution, or under 42 U.S.C. § 1981. We have already concluded that plaintiff fails to state a claim pursuant to 42 U.S.C. § 1981 and pursuant to the First Amendment of the United States Constitution. As to defendants' contentions concerning plaintiff's other federal and state constitutional claims, we once again note that the order from which defendants appeal is interlocutory. On this record we hold that defendants will not be deprived of any substantial right by waiting until trial to present their defenses to plaintiff's remaining constitutional law claims.

IX.

Defendants also argue that plaintiff's complaint fails to state a claim for intentional infliction of emotional distress and that the trial

court erred in signing the order because "it is contrary to law." Because the trial court's order is interlocutory and there has been no showing how defendants will be deprived of a substantial right by waiting for a final determination of plaintiff's emotional distress claim, we do not address these assignments of error.

X.

In summary, the trial court did not err: (1) in denying defendants' amended motion to dismiss plaintiff's Fourth and Fourteenth Amendment claims for injunctive relief against defendants in their official and individual capacities, and (2) in denying defendants' amended motion to dismiss plaintiff's state tort claim as to all defendants in their individual capacities.

The trial court erred in failing to dismiss: (1) plaintiff's First Amendment and section 1981 claims for injunctive relief against defendants in their official and individual capacities, (2) plaintiff's federal claims for monetary damages against defendants in their official capacities and in their individual capacities, (3) plaintiff's state tort and constitutional claims against defendants in their official capacities, and (4) plaintiff's state constitution claim against all defendants in their individual capacities. The remaining issues on appeal are interlocutory and premature. This case is remanded to the trial court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Chief Judge ARNOLD and Judge WYNN concur.

THE DEMOCRATIC PARTY OF GUILFORD COUNTY AND ELLEN EMERSON, INDIVIDUALLY AND AS CHAIRPERSON OF THE DEMOCRATIC PARTY OF GUILFORD COUNTY, AND AFRICA S. HAKEEM, PLAINTIFFS v. GUILFORD COUNTY BOARD OF ELECTIONS, B. J. PEARCE, JAMES PFAFF AND ROBERT NEWSOME, III; AND GEORGE GILBERT, SUPERVISOR OF THE GUILFORD COUNTY BOARD OF ELECTIONS, DEFENDANTS

No. 9118SC1144

(Filed 7 February 1995)

1. Appeal and Error § 203 (NCI4th)— temporary restraining order and subsequent order—notice of appeal from order only

In an action arising from an election in which plaintiff obtained a temporary restraining order to extend voting hours by one hour, defendant subsequently sought as damages the cost of the extra hour, and the court entered an order denying those damages, arguments relating to the validity of the temporary restraining order were not properly before the Court of Appeals because the notice of appeal appealed only the subsequent order. The issue of jurisdiction to issue the temporary restraining order is not decided.

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

2. Injunctions § 41 (NCI4th)— election hours—temporary restraining order extending—motion to vacate—expiration of order

There was no error in the court's refusal to vacate a temporary restraining order extending voting hours because the TRO expired by operation of law prior to the motion to vacate. There was no TRO in existence at the time of the motion for the court to vacate. N.C.G.S. § 1A-1, Rule 65(b).

Am Jur 2d, Injunctions §§ 323 et seq.

3. Injunctions § 44 (NCI4th)— election—temporary restraining order extending hours—subsequent voluntary dismissal—no admission of voluntary restraint

A voluntary dismissal of a complaint which had sought a temporary restraining order extending voting hours was not a *per se* admission of wrongful restraint which automatically entitled the defendants to damages because the plaintiffs obtained the only relief they sought, a one hour extension of voting time, and there

was nothing left to be determined when plaintiffs took their voluntary dismissal. It would be illogical to conclude that a later voluntary dismissal, which did nothing more than terminate the action, could be construed as an acknowledgment that plaintiffs were not entitled to the relief already won.

Am Jur 2d, Injunctions § 291.

Effect of nonsuit, dismissal, or discontinuance of action on previous orders. 11 ALR2d 1407.

4. Injunctions § 43 (NCI4th)— election—restraining order extending election hours—damages

Judge Freeman used the wrong standard of review in considering defendants' request for damages arising from the issuance of a temporary restraining order extending election hours in Guilford County in a 1990 election and the matter was remanded where Judge Freeman considered only the information presented to the judge who granted the injunction, Judge John, and not all of the information available, including the ultimate merits of the action. Although there was ample evidence to support Judge Freeman's conclusion that defendants are not entitled to damages when considering only the evidence before Judge John, plaintiffs and defendants presented to Judge Freeman conflicting evidence on the issue of the degree of severity of the lines waiting to register to vote and how many people were being disenfranchised because of the long lines.

Am Jur 2d, Injunctions §§ 323 et seq.

Judge ORR dissenting prior to 30 December 1994.

Appeal by defendants from order entered 16 May 1991 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 17 November 1992.

Smith Helms Mulliss & Moore, by McNeill Smith, Benjamin F. Davis, Jr., and Andrew S. Chamberlin, for plaintiff appellees.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, Robert W. Fuller and J. Daniel Bishop, for defendant appellants.

COZORT, Judge.

At approximately 7:00 p.m. on 6 November 1990, plaintiff Democratic Party of Guilford County sought and obtained from Guilford

County Superior Court Judge Joseph R. John a temporary restraining order directing the defendant Guilford County Board of Elections to extend the hours of the voting polls in Guilford County by one hour, from 7:30 p.m. until 8:30 p.m. A month later, on 6 December 1990, plaintiffs filed a Rule 41 voluntary dismissal of their action without prejudice. On or about the same day, defendants filed a motion to vacate the temporary restraining order and a request for damages for unlawful restraint. In an order filed 13 May 1991, Superior Court Judge William H. Freeman denied defendants' motion. Defendants appeal. We affirm the denial of the motion to vacate; we remand the issue of damages. A more detailed recitation of the facts and procedural history follows:

On 6 November 1990, North Carolina held a general election. The Guilford County Board of Elections had published notices informing voters that the polls would be open from 6:30 a.m. until 7:30 p.m. On election day, defendant George Gilbert, the Guilford County Supervisor of Elections, received several complaints concerning the length of lines at several polling locations in the county. At approximately 11:00 a.m., plaintiff Ellen Emerson, Chair of the Guilford County Democratic Party, filed a formal written complaint with the Guilford County Board of Elections, requesting an extension of the voting hours until 8:30 p.m. In her request, Ms. Emerson listed 21 specific complaints, alleging various problems including broken machines, and several precincts where the use of only one registration book was causing very long lines for voters to sign in to vote. Supervisor Gilbert personally visited five precincts. The defendant Board took no immediate action on plaintiff Emerson's request. At approximately 3:00 p.m., plaintiff Emerson filed a second written request for an extension of the voting hours. In the second request, plaintiff Emerson requested that the polls remain open until 12:00 midnight.

The defendant Board, consisting of two Republicans and one Democrat, met in the late afternoon hours. Sometime between 4:00 p.m. and 5:00 p.m., Supervisor Gilbert reported the complaints to the Board and informed the Board that steps had been taken in an effort to remedy the problems. At approximately 5:00 p.m., defendant Board member Robert Newsome, III, made a motion to extend the election hours until 8:30 p.m. His motion failed for lack of a second. Neither Mr. Gilbert nor the Board of Elections formally responded to plaintiffs' written complaints. Plaintiffs learned shortly after 5:00 p.m. that the Board of Elections would take no action on plaintiff Emerson's written requests. Shortly after 7:00 p.m., plaintiffs delivered to the

home of Superior Court Judge Joseph R. John a written complaint and motion requesting a temporary restraining order and a preliminary injunction directing the Board of Elections to keep the polls open at all precincts until 10:00 p.m. and that paper ballots be provided to facilitate the process. Plaintiffs presented to Judge John some information, concerning long lines, which had been gathered after 5:00 p.m., when the defendant Board last considered and took no action on plaintiffs' request. At about 7:25 p.m., Judge John signed a temporary restraining order directing the Guilford County Board of Elections to keep the polls open until 8:30 p.m. Judge John immediately telephoned the defendant Board of Elections to inform the Board of his order. Supervisor Gilbert and his staff tried to contact all precincts to instruct them to remain open as ordered by Judge John. Most precincts were contacted before 7:30. Between 391 and 431 voters arrived to vote after 7:30 p.m. and before 8:30 p.m. Between 317 and 349 voters were allowed to vote. Several complaints about the extension of the voting time were heard by the Guilford County Board of Elections. All of the election results from Guilford County were eventually certified by the State Board of Elections.

On or about 6 December 1990, plaintiffs filed a notice of dismissal of their action without prejudice, pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. On or about the same day, defendants filed a motion to vacate Judge John's temporary restraining order and a request for damages resulting from the issuance of the temporary restraining order. Defendants' motion came on to be heard at the 4 February 1991 Civil Term of Guilford County Superior Court. At that hearing, defendants presented evidence that they were damaged in the amount of $12,593.12. The damages included overtime pay for poll workers, overtime pay for building maintenance workers at the Board of Elections, overtime pay for the supervisor and the assistant supervisor of elections, and the cost for conducting the hearings resulting from the complaints filed concerning the polls being open an additional hour. In an order filed 13 May 1991, Judge William H. Freeman denied defendants' motion. In that order, Judge Freeman made 21 findings of fact, consistent with the facts just recited. Judge Freeman made 12 conclusions of law, as follows:

> 1. That based on the information before the Board of Election as reported to it by defendant Gilbert at or before 5:00 PM, it did not abuse its discretion in denying the plaintiffs' request, and that its actions in this regard were not arbitrary or capricious.

2. That the plaintiffs exhausted all of their effective administrative remedies available at that time and any further attempts to exhaust administrative or other judicial remedies would have been futile.

3. That plaintiffs had legal standing to request equitable remedies and/or judicial review from the Superior Court in Guilford County.

4. That based on the information before the plaintiffs at the time the complaint was filed, they had a reasonable basis for and acted in good faith in requesting equitable relief and/or judicial review from the Superior Court in Guilford County.

5. That based on the information before Judge John, he did not abuse his discretion in issuing the temporary restraining order and that his actions were neither arbitrary nor capricious.

6. That Judge John had the jurisdiction and authority to review the actions of the Board of Elections, to issue the temporary restraining order, and to reverse the decision of the Board of Elections. The Guilford County Board of Elections is a state agency. Under the circumstances its denial of plaintiffs' requests was final agency action and Guilford Superior Court was a proper Court to hear plaintiffs' complaint seeking equitable relief.

7. That the plaintiffs did not wrongfully restrain the defendants.

8. That the voluntary dismissal filed by the plaintiffs and/or the expiration of the temporary restraining order by its own terms in 10 days moots the issue as to the dissolution of the temporary restraining order and the issue of the validity of the temporary restraining order.

9. That neither the voluntary dismissal nor the expiration of the temporary restraining order moots a review by this Court of the issue of whether the plaintiffs wrongfully restrained the defendants.

10. That the voluntary dismissal without prejudice filed by the plaintiffs is not a *per se* admission of wrongful restraint that automatically entitles the defendants to receive damages.

11. That the alleged damages presented by the defendants were part of their legal duty to supervise and conduct elections and are not recoverable from private citizens or groups.

12. That awarding damages against private citizens or groups would impermissibly repress their constitutional rights to contest election improprieties and to vote.

On 7 June 1991, defendants gave notice of appeal from the order entered by Judge Freeman on 13 May 1991. In the record on appeal defendants brought forward 13 assignments of error, which were then consolidated into five arguments in defendants' brief filed in this court. In their brief defendants contend:

(1) That Judge Freeman erred in denying defendants' motion to vacate the temporary restraining order after finding no improper or unlawful conduct, no arbitrary or capricious action, and no abuse of discretion by the Board of Elections;

(2) That Judge John erred in issuing the temporary restraining order absent any evidence of irreparable injury to plaintiffs and absent a bond;

(3) That defendants were entitled to relief as a matter of law under Rule 65(e) because plaintiffs abandoned their claim by voluntarily dismissing their complaint;

(4) That the Board was entitled to recover damages under Rule 65; and

(5) Independent of defendants' entitlement to damages relief, the claims of defendants pursuant to Rule 65(e) are not moot.

[1] We first consider the second argument made by defendant, contending that Judge John erred in issuing the temporary restraining order absent any evidence of irreparable injury to plaintiffs and absent a bond. This argument must be dismissed. The defendants' notice of appeal appealed only the order entered by Judge Freeman on 13 May 1991. The defendants did not appeal from the temporary restraining order issued by Judge John on 6 November 1990. "Proper notice of appeal requires that a party 'shall designate the judgment or order from which appeal is taken . . . .' N.C.R. App. P. 3(d) (Cum. Supp. 1989). 'Without proper notice of appeal, this Court acquires no jurisdiction.' " *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (quoting *Brooks, Com'r of Labor v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984). Therefore, all arguments made by defendants concerning the validity of Judge John's order are not properly before this Court.

We do not hold, as Judge Orr suggests in his dissent, that Judge John had jurisdiction to issue the temporary restraining order. We do not decide that issue, because defendants did not properly present that issue in this case. Judge Orr's reliance on *Payne v. Ramsey*, 262 N.C. 757, 138 S.E.2d 405 (1964), for vesting this court with jurisdiction to adjudicate the validity of Judge John's order is misplaced. In *Payne*, there was an appeal directly from the temporary restraining order, which is not the case here. In this case, defendants appealed only from Judge Freeman's order denying defendants' motion to vacate and defendants' motion for damages.

[2] We now turn to defendants' arguments concerning the order entered by Judge Freeman on 13 May 1991. Defendants essentially make two arguments: (1) that Judge Freeman should have vacated the temporary restraining order, and (2) that Judge Freeman should have awarded damages to defendants on the theory of unlawful restraint.

Under Rule 65(b) of the Rules of Civil Procedure, a temporary restraining order "shall expire by its terms within such time after entry, not to exceed 10 days, as the judge fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period." N.C. Gen. Stat. § 1A-1, Rule 65(b) (1990). Under this statute, the temporary restraining order entered by Judge John expired by operation of law on 16 November 1990, some twenty (20) days before the defendants filed their motion asking Judge Freeman to vacate Judge John's temporary restraining order. There was no temporary restraining order in existence at that time for Judge Freeman to vacate.

[3] The only remaining question is whether defendants were entitled to damages based on defendants' allegations that the temporary restraining order entered by Judge John constituted wrongful restraint which caused the Board of Elections to incur more than $12,000.00 in expenses. We first consider defendants' argument that plaintiffs' voluntary dismissal filed on 6 December 1990 constituted a *per se* admission of wrongful restraint which automatically entitled the defendants to receive damages. In support of that argument, defendants rely on *Pinehurst, Inc. v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 338 S.E.2d 918, *disc. review denied*, 316 N.C. 378, 342 S.E.2d 896 (1986). We find *Pinehurst* distinguishable. In that case, plaintiffs filed a tort action on 23 May 1983. In their answer, defendants asserted counterclaims and obtained an injunction staying fore-

closure proceedings. The case went on to trial and plaintiffs prevailed on one of their claims. Before ending their evidence, defendants took a voluntary dismissal without prejudice on their counterclaims. In entering judgment, the trial court dissolved the foreclosure injunction defendants had obtained. In finding the plaintiffs entitled to damages under Rule 65, we stated:

> Because the only purpose for obtaining the injunction was to have their rights fully adjudicated upon the trial of this case, defendants may not prevent the issue from being tried and then be heard to maintain that the judgment is erroneous because that issue has not been determined.

Id. at 65, 338 S.E.2d at 926.

The differences between *Pinehurst* and the case below are readily apparent. In this case, the plaintiffs obtained the only relief they sought, one hour's extension of voting time, on 6 November 1990. There was nothing left to be determined, as there was in the *Pinehurst* case, when the defendants took their voluntary dismissal on 6 December 1990. With the plaintiffs having won the only issue raised in their complaint, it would be illogical to conclude that a later voluntary dismissal, which did nothing more than terminate the action, could somehow be construed as an acknowledgment that plaintiff was not entitled to the relief it had already won.

[4] We next consider Judge Freeman's ultimate conclusion that defendants are not entitled to damages. We find that Judge Freeman used the wrong standard of review in considering defendants' request for damages. This court carefully reviewed the issue of damages for wrongful restraint in *Industrial Innovators, Inc. v. Myrick-White, Inc.*, 99 N.C. App. 42, 392 S.E.2d 425, *disc. review denied*, 327 N.C. 483, 397 S.E.2d 219 (1990). There we held that the trial court ruling on the issue of damages must consider the ultimate merits of the action, the final adjudication of the claim, and not just the information available to the judge who issues the restraining order on the ex parte hearing. *Id.* at 50, 392 S.E.2d at 431. Judge Freeman failed to consider the question of damages under this standard. His conclusion of law no. 5 ("That based on the information before Judge John, he did not abuse his discretion . . .") makes clear that he considered only the information presented to Judge John, and not all the information available, including the ultimate merits of the action, as we required in *Industrial Innovators*. We find ample evidence to support Judge Freeman's conclusion that defendants are not entitled to damages when considering only the evidence before Judge John. The evidence

before Judge John showed that because of long lines caused by only one registration book at some polls and faulty machines at others, potential voters were leaving the polls without voting. The evidence before Judge John supported his decision to extend the voting for one hour to prevent this potential disenfranchisement. However, our inquiry cannot stop there. Judge Freeman was required to consider all the evidence before him, including the final merits of the case. The matter must be remanded for a determination based on all the evidence, unless we can determine that the evidence before Judge Freeman was undisputed. *See Harris v. N.C. Farm Bureau Mutual Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988). After reviewing all the evidence, we find there is a dispute in the evidence which requires that the matter be remanded.

The evidence presented to Judge Freeman by plaintiffs showed that, on 6 November 1990, at least five precincts in Greensboro had only one registration book on election day, causing very long lines to register to vote, while the actual voting machine booths were empty. These long lines were causing some voters to leave without being able to register and vote. Further evidence showed that some machines were not working properly and that the Board of Elections was not promptly responding to requests for help to fix machines. Other evidence from plaintiffs showed that plaintiff Emerson, the County Democratic Party Chair, filed a written complaint, requesting an extension of the voting hours, with the defendant Board of Elections at 11:00 a.m. and again at 3:00 p.m. and that the defendant Board never took any formal action on either request. The plaintiffs learned after 5:00 p.m. that the Board would take no action on the Democratic Party Chair's requests.

The defendants presented evidence to Judge Freeman that Election Supervisor Gilbert personally visited five precincts on election day of 1990. Only one precinct had a line so long that it took as much as an hour to vote. Gilbert informed the Board of Elections of Ms. Emerson's complaints. He informed the Board that, in his opinion, the conditions were improving, and that he had not observed or heard of any lines exceeding 60 to 90 minutes. Gilbert and the Board were aware that state statutes then in effect (N.C. Gen. Stat. § 163-2) permitted but did not require the Board to extend the closing time by one hour to 8:30 p.m. in all precincts where voting machines were in use. In Gilbert's opinion the lines in 1990 were not as bad as in some previous elections, especially 1988. On the basis of their own observations and Gilbert's report, the Board declined Emerson's request to

extend the polling hours. On the issue of damages, Gilbert testified that after the election, eight challenges were filed over the polls staying open until 8:30 p.m. pursuant to Judge John's order. Gilbert calculated the Board's additional expenses incurred as a result of keeping the polls open until 8:30 p.m. Those expenses came to $12,593.12 and included overtime pay for poll workers, overtime pay for building maintenance workers at the Board of Elections, overtime pay for Gilbert and his assistant, and the cost for conducting the hearings resulting from the challenges filed after the election.

We find enough conflict in the evidence to require that the case be remanded for a new determination, based on all the evidence, of whether the plaintiffs' seeking a temporary restraining order amounted to wrongful restraint justifying damages. Plaintiffs and defendants presented to Judge Freeman conflicting evidence on the issue of the degree of severity of the lines waiting to register to vote and how many people were being disenfranchised because of the long lines. Since Judge Freeman conducted the first hearing under a misapprehension of law as to what evidence should be considered, both plaintiffs and defendants shall be permitted to introduce additional evidence on this issue. In summary, the portion of Judge Freeman's order denying defendants' motion to vacate the temporary restraining order is affirmed. The portion of Judge Freeman's order denying defendants' request for damages is remanded for a new hearing.

Affirmed in part and remanded in part.

Judge GREENE concurs.

Judge ORR dissents to this opinion prior to 30 December 1994.

Judge ORR dissenting.

I respectfully dissent in part from the majority's opinion. First, the majority declines to address the correctness of Judge John's issuance of the Temporary Restraining Order (TRO) on the grounds that the TRO was not appealed from. In light of the procedural and factual history of this case, I disagree with declining to address this question. In this regard, I do not find *Von Ramm* to be controlling. Here, the defendants properly appealed from the final order of Judge Freeman and set forth an assignment of error raising the question of the TRO's validity. Considering the language in our Supreme Court's Writ of Prohibition in *Payne v. Ramsey*, 262 N.C. 757, 138 S.E.2d 405 (1964), the question of the jurisdictional authority of Judge John to

grant the TRO should be reviewed. In *Payne*, the Supreme Court specifically stated in regard to a question concerning the grant of a TRO by a Superior Court Judge regarding certain election officials, "the Superior Court . . . as well as the Judge of the Superior Court who issued said two temporary restraining orders, do not have jurisdiction to institute and maintain said actions or to issue said restraining orders but that the remedy, if any, is . . . to appeal to the North Carolina State Board of Elections . . . ."

The reasoning in *Payne* is of particular significance when viewed in the light of the potential problems arising from the type of conduct at issue in the case *sub judice*. Under the majority's reasoning, anyone could appear in the waning hours of an election before any trial judge and obtain a TRO requiring a county board of elections to keep the polls open beyond the statutory limits and overrule the decision of the local board to not extend the hours. Such an action would appear, according to the majority, not only to be permissible, but would leave the Board without any recourse since the TRO's practical effect would terminate at the closing of the polls. Since there are numerous remedies for post-election relief if warranted under our laws, the rights of candidate and voters would be protected without the conduct complained of here.

Under my view of the law, I would conclude that Judge John did not have jurisdiction to stay the closing of the polls and extend the hours for voting. That, plus the lack of a bond being posted, would constitute wrongful restraint *per se*.

As *Pickard v. Castillo*, 550 S.W.2d 107 (1977) notes: "It has been a long established rule that once the election process commences, the courts of this State have no jurisdiction to interfere with the political rights of the people to hold an election" and "[f]urthermore, the entire election process is a matter for legislative regulation and control." (Citation omitted). "As to such matters, the law does not purport to substitute the judgment of a judge (or jury) for that of duly elected officials, and the judiciary should not, in the absence of a clear mandate, interfere in the conduct of an election after the election process has begun . . . ." *Id.* at 111.

Finally, I do not disagree with the conclusion of the majority that defendants' claim of wrongful restraint should be remanded because the trial court used the incorrect standard of review. I would, however, remand for a new hearing on the issue of damages only since, as

previously noted, the lack of jurisdiction to enter the TRO would constitute wrongful restraint *per se.*

STATE OF NORTH CAROLINA v. WELDON TAYLOR, DEFENDANT

No. 933SC1190

(Filed 7 February 1995)

1. Searches and Seizures § 80 (NCI4th)— lawfulness of investigatory stop

An officer had a particularized and objective basis to detain defendant pursuant to an investigatory stop where he saw defendant drop some items on the ground as the officer approached defendant in an area known for drug use and sales; the officer knew that defendant had a reputation in the community as a drug dealer; and the officer had unsuccessfully chased defendant on an earlier occasion.

Am Jur 2d, Searches and Seizures §§ 51, 78.

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity—Supreme Court cases. 104 L. Ed. 2d 1046.

2. Searches and Seizures § 43 (NCI4th)— items in defendant's mouth—seizure as incident to lawful arrest

When an officer determined that items dropped by defendant as the officer approached him were bags of marijuana, the officer lawfully arrested defendant, and individually wrapped pieces of crack cocaine held in defendant's mouth, which the officer ordered defendant to spit out, were lawfully seized as incident to the arrest.

Am Jur 2d, Searches and Seizures § 63.

3. Evidence and Witnesses § 1242 (NCI4th)— statement to officer—no custodial interrogation—Miranda warnings unnecessary

Defendant's statement to an officer after his arrest for drug offenses that he was not robbing or stealing but was "just trying

to make a living" was admissible even though no *Miranda* warnings had been given where the statement was made voluntarily and not in response to any question by an officer.

Am Jur 2d, Evidence § 749.

4. Evidence and Witnesses §§ 294, 302 (NCI4th)— defendant's earlier flight from officer—not inadmissible prior bad act—admissibility to show identity

An officer's testimony that a defendant charged with drug offenses had fled from him on an earlier occasion was not evidence of other crimes, wrongs or acts within the purview of N.C.G.S. § 8C-1, Rule 404(b). Even if defendant's flight from the officer was a prior bad act under Rule 404(b), this testimony was admissible to show that the officer was able to identify defendant.

Am Jur 2d, Evidence §§ 404 et seq., 452 et seq.

Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged. 41 ALR Fed. 497.

5. Evidence and Witnesses § 263 (NCI4th)— defendant's reputation as drug dealer—admission harmless error

The trial court erred by admitting testimony that a defendant on trial for possession of marijuana and cocaine with the intent to sell and deliver had a reputation in the community as a drug dealer when defendant had not offered character evidence, but this error was not prejudicial where defendant's guilt of the offenses charged could be found from his own testimony that he owned the bags of marijuana that he dropped on the ground and individually wrapped pieces of crack cocaine that he spit out of his mouth, and that although had sold drugs before, he didn't know whether he was going to sell the drugs seized from his possession or use them himself.

Am Jur 2d, Evidence §§ 365 et seq.

6. Evidence and Witnesses § 183 (NCI4th)— defendant's prearrest statements to officer—relevancy to show intent

Statements made by defendant to an officer prior to his arrest on the current drug charges that he was just a businessman who should be left alone and that officers "should concentrate on those drug dealers who ripped people off and shoot people" were

relevant on the issue of defendant's intent to sell and deliver drugs, and the trial court did not err by finding that the probative value of those statements outweighed any danger of unfair prejudice.

Am Jur 2d, Evidence §§ 556 et seq.

7. Narcotics, Controlled Substances, and Paraphernalia § 114 (NCI4th)— possession of drugs—intent to sell and deliver—sufficient evidence

The evidence was sufficient to permit the jury to find that defendant possessed marijuana and cocaine with the intent to sell and deliver, even though an officer admitted that he could not determine from the packaging whether defendant had packaged the drugs for sale or had recently purchased them, where the evidence tended to show that defendant dropped two "dime bags" of marijuana when officers approached him and had two or three individually wrapped pieces of crack cocaine in his mouth; defendant admitted on cross-examination that he had sold drugs before and had not decided at the time of his arrest whether he was going to sell the drugs in his possession or use them himself; and although defendant had been unemployed for six years, he possessed $261 in cash when arrested.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

8. Criminal Law § 546 (NCI4th)— prosecutor's remarks about appointed counsel—denial of mistrial

The trial court did not abuse its discretion in denying defendant's motion for a mistrial when the prosecutor stated during his closing argument that defendant's attorney did not pick this client and had no choice but to represent defendant because he was appointed by the court to do so where the trial court gave a curative instruction immediately after the prosecutor made these remarks.

Am Jur 2d, Trial § 685.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

Appeal by defendant from judgment entered 25 August 1993 by Judge Henry L. Stevens, III, in Craven County Superior Court. Heard

in the Court of Appeals 25 October 1994; reconsidered and heard without oral argument per order dated 24 January 1995.

Defendant was convicted of possession with intent to sell and deliver marijuana and possession with intent to sell and deliver cocaine. G.S. 90-95. These offenses were consolidated for judgment; defendant was sentenced to ten years imprisonment.

At trial, the State's evidence tended to show the following: On 24 December 1992, Officer Allan C. Wayman, a police officer with the New Bern Police Department, was patrolling in a marked police car when he saw defendant in Craven Terrace, an area known for drug trafficking, sales and use. Officer Wayman testified that he had previously seen defendant in this area and had unsuccessfully chased him. When defendant saw Officer Wayman's patrol car, defendant turned and left the area. Officer Wayman and his partner drove through Craven Terrace until they spotted defendant on foot near an intersection and stopped their car near him. As Officer Wayman got out of the vehicle and approached defendant, Officer Wayman saw defendant drop some items on the ground. These items were recovered and later determined to be two "dime bags" of marijuana. As Officer Wayman escorted defendant to his patrol car, he noticed that defendant was speaking in an abnormal manner. Suspecting that defendant may have had controlled substances in his mouth, Officer Wayman had him spit out whatever was in his mouth or he would obtain a search warrant. Defendant spit out two or three small bags which Officer Wayman identified as individually wrapped pieces of crack cocaine.

Defendant testified that it was his marijuana that was dropped on the ground. Defendant also admitted that he possessed crack cocaine in his mouth. On cross-examination, defendant stated that he did not deny that the drugs recovered from him at the time of his arrest were his drugs. Defendant also admitted that he had sold drugs before.

From judgment entered and sentence imposed, defendant appeals.

Attorney General Michael F. Easley, by Associate Attorney General Thomas O. Lawton, III, for the State.

Ward, Ward, Willey & Ward, by Joshua W. Willey, Jr., for defendant-appellant.

EAGLES, Judge.

Defendant brings forward several assignments of error. After careful review of the record and briefs, we find no prejudicial error.

I.

Defendant first contends that the trial court erred in denying defendant's motion to suppress the drugs recovered from him. In a related assignment of error, defendant also contends that the trial court erred in denying defendant's motion to suppress the statements he made to Officer Wayman at the time of his arrest. We disagree and find no error.

Defendant contends that the drugs and his statements should have been suppressed because he was illegally seized by Officer Wayman in violation of the Fourth Amendment. The Fourth Amendment's protection against unreasonable seizures applies to all seizures of the person including the brief detention or investigatory stop at issue here. *United States v. Cortez*, 449 U.S. 411, 66 L.Ed.2d 621 (1981). The Fourth Amendment requires that, considering the totality of the circumstances, detaining officers must have had a particularized and objective basis for suspecting that the person stopped was, or was about to be, engaged in criminal activity. *Id.* at 417, 66 L.Ed.2d at 628-29. Defendant argues that Officer Wayman detained him without an objective and particularized basis for believing he was engaged in criminal activity. Defendant further argues that since his seizure was illegal, the contraband recovered from his person and the statements made to Officer Wayman should have been suppressed under the "fruit of the poisonous tree" doctrine.

Officer Wayman testified on *voir dire* that he had learned when he was working with the narcotics unit of the New Bern Police Department, that defendant had been arrested for possession with intent to sell and deliver cocaine. Officer Wayman also testified that in speaking with residents of the Craven Terrace community, he learned that defendant had a reputation in the community as a drug dealer. Officer Wayman further testified that on one previous occasion, he had unsuccessfully chased defendant near his home. Officer Wayman testified that in this incident, he saw defendant in the Craven Terrace area standing around five or six other people. Craven Terrace was an area known for drug trafficking. As the officers approached in their marked police car, defendant turned around and left the area. The officers momentarily lost sight of defendant but then spotted him

at a nearby intersection. Defendant stopped as the police car approached him. As Officer Wayman got out of the car, defendant began walking toward him. As defendant was moving toward the police car, Officer Wayman saw defendant drop something on the ground. At that time, Officer Wayman approached defendant and brought him over to the patrol car.

[1] Defendant contends that his reputation as a drug dealer, his presence in an area known for drug use and sales, and Officer Wayman's previous encounters with defendant were insufficient to form an objective basis to believe that on this particular occasion defendant was or was about to be engaged in criminal activity. We need not decide here whether these factors standing alone are sufficient to warrant an investigatory stop. Even if we assume, without deciding, that these factors standing alone are insufficient, when Officer Wayman observed defendant drop something on the ground, this additional factor, in view of the totality of the circumstances, provided an objective and particularized basis to justify an investigatory stop.

[2] It is important to note that defendant dropped the marijuana before he was "seized." "[A] person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553, 64 L.Ed.2d 497, 509 (1980). A seizure does not occur if the person does not yield to the show of authority. *California v. Hodari D.*, 499 U.S. 621, 626, 113 L.Ed.2d 690, 697 (1991). Here, when defendant first saw Officer Wayman's marked patrol car, he exercised his freedom to leave. He eluded the officers momentarily, but stopped as the patrol car approached him at a nearby intersection. As defendant walked towards the car, he dropped the marijuana on the ground. At this point, there was not yet any show of authority such that a reasonable person would believe that he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed.2d 497 (1980). Accordingly, defendant was not seized at the time he dropped the marijuana. However, his actions in discarding the marijuana in front of Officer Wayman provided the objective basis for Officer Wayman to detain defendant pursuant to an investigatory stop. Since the marijuana was dropped prior to the seizure, the officers were free to recover it. Once Officer Wayman determined that the item that defendant dropped was marijuana, Officer Wayman arrested defendant. He then noticed that defendant was talking "funny" and ordered him to spit out whatever was in his mouth or he would obtain a search warrant. Defendant spit

out the individually wrapped pieces of crack cocaine. Even if defendant had not voluntarily spit out the cocaine, the cocaine is admissible as a search incident to a legal arrest. *State v. Hardy*, 299 N.C. 445, 455, 263 S.E.2d 711, 718 (1980). Accordingly, Officer Wayman's detention of defendant was not unreasonable and was lawful under the Fourth Amendment. Accordingly, the drug evidence seized was properly admitted.

[3] Defendant contends that the statements he made to Officer Wayman should have been suppressed because defendant's detention was unlawful. We have already concluded that his detention was lawful. Defendant also argues that his statements are excludable because they were made before he was advised of his Miranda rights. In fact, after defendant was arrested, defendant told Officer Wayman that he was not robbing or stealing, and that he was "just trying to make a living." Defendant made these statements voluntarily. The statements were not made in response to any question asked by Officer Wayman or any law enforcement officer. "Any statement given freely and voluntarily . . . is of course, admissible in evidence." *Miranda v. Arizona*, 384 U.S. 436, 478, 16 L.Ed.2d 694, 726 (1966). Accordingly, defendant's statements were properly admitted.

II.

[4] Defendant further contends that the trial court erred in admitting Officer Wayman's testimony that he had unsuccessfully chased defendant in the past and that defendant had a reputation in the community as a drug dealer. Defendant characterizes Officer Wayman's testimony that he had unsuccessfully chased defendant on an earlier date as testimony of a prior bad act under Rule 404(b) of the North Carolina Rules of Evidence. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

G.S. 8C-1, Rule 404(b). We are not persuaded that testimony of defendant's flight from Officer Wayman on an earlier occasion, without more, is evidence of other crimes, wrongs, or acts, within the purview of Rule 404(b). But even if we assume that the evidence of defendant's flight from Officer Wayman is a prior bad act under Rule 404(b), it is admissible to show identity. Officer Wayman testified that

he knew defendant personally from previous dealings with defendant in a law enforcement capacity. Officer Wayman testified that on one of these occasions he had unsuccessfully chased defendant. This evidence was admissible to show that Officer Wayman was able to identify defendant. Assuming without deciding that the evidence was prejudicial and not admissible pursuant to Rule 404(b), we conclude that the trial court did not abuse its discretion in admitting the evidence pursuant to Rule 403. The admissibility of this evidence depends on whether its probative value was substantially outweighed by the danger of unfair prejudice. G.S. 8C-1, Rule 403. "Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). Accordingly, this assignment of error fails.

[5] We agree that the trial court erred in admitting Officer Wayman's testimony regarding defendant's reputation as a drug dealer. Rule 404(a) of the North Carolina Rules of Evidence provides that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . ." G.S. 8C-1, Rule 404(a). Character evidence, however, is admissible when offered by the accused and the prosecution may offer evidence to rebut such a showing by defendant. G.S. 8C-1, Rule 404(a)(1). In *State v. Morgan*, 111 N.C. App. 662, 432 S.E.2d 877 (1993), this court held that the trial court erred in admitting evidence of the defendant's reputation in the community as a drug dealer.

> Again, Rule 404 prohibits the admission of character evidence for the purpose of showing that a person acted in conformity with that character trait, except that a criminal defendant may offer evidence of a pertinent character trait and the prosecution may offer evidence to rebut such a showing by a defendant. When evidence of that person's character is admissible, character may be shown by testimony as to the reputation of a person. However, until a defendant offers such evidence of his character, the State may not introduce evidence of his bad character. In this case, the State offered evidence as to defendant's reputation before defendant had put on any evidence, before he had "opened the door." Thus the State could not have offered the evidence of defendant's reputation as a drug dealer to rebut any claim of the defendant, and such evidence was clearly inadmissible.

Id. at 668, 432 S.E.2d at 881 (citations omitted).

Here, as in *Morgan*, the State introduced evidence of defendant's reputation as a drug dealer before defendant had put on any evidence. Since defendant did not put his character in issue, the trial court erred in admitting this testimony.

Defendant must also show, however, that he was prejudiced by the erroneous admission of this evidence. A defendant is prejudiced "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached . . . ." G.S. 15A-1443(a). There was ample evidence here other than Officer Wayman's testimony concerning defendant's reputation from which a jury could find that defendant was guilty of the counts charged in the indictment. Most notably, defendant himself testified that he owned the marijuana that he dropped on the ground and that he also owned the cocaine that he spit out of his mouth. On cross-examination, defendant stated that although he had sold drugs before, he didn't know whether he was going to sell the drugs seized from his possession or use them himself. Defendant's testimony alone is enough from which a reasonable juror could conclude that defendant possessed the marijuana and cocaine with the intent to sell and deliver. We conclude that defendant was not prejudiced by the admission of the character evidence against him.

III.

[6] Defendant next contends that the trial court erred in admitting the testimony of Lt. Michael Rice of the Craven County Sheriff's Department. Rice testified that about twenty days before defendant's arrest on the present charges, defendant approached him in his office and started a conversation. Rice testified that defendant told him that he had just been arrested on a drug round-up and had just gotten out of jail. Defendant also told Rice that:

> [H]e [defendant] was just a business man and he wasn't one of those terrorist who came in from out of town and ripped people off or shot people . . . and that he should be left alone and we should concentrate on those drug dealers who ripped people off and shoot people and things like that.

Here again, the admissibility of this evidence depends on whether its probative value is substantially outweighed by the danger of unfair prejudice. G.S. 8C-1, Rule 403. The trial court in its discretion found that Lt. Rice's testimony was relevant and that its probative value substantially outweighed any danger of unfair prejudice. Defendant's

statements were probative on the issue of defendant's intent to sell and deliver drugs. Accordingly, we find no abuse of discretion in the trial court's decision.

IV.

[7] Finally, defendant contends that the trial court erred in denying defendant's motion to dismiss for insufficiency of the evidence and in denying defendant's motion for mistrial. We disagree.

> The long-standing test of the sufficiency of the evidence to withstand a motion to dismiss in a criminal case is whether there is substantial evidence to support a finding of each element of the offense charged and a finding that defendant committed the offense. In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from that evidence. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

State v. Morgan, 111 N.C. App. 662, 664-65, 432 S.E.2d 877, 879 (1993) (citations omitted). Defendant contends that the small quantities of drugs found in his possession were insufficient to support a finding that he had an intent to sell and deliver drugs. Defendant argues that Officer Wayman admitted on cross-examination that although the drugs were packaged in the manner in which they are commonly sold, he could not determine from the packaging whether defendant had packaged it for sale or had recently purchased it. Defendant admitted on cross-examination that he had sold drugs before and had not decided whether he was going to sell the drugs in his possession before he was arrested. Although he had been unemployed for six years, defendant possessed $261 in cash at the time of his arrest. Viewing all the evidence in the light most favorable to the State, it is clear that a reasonable juror could conclude that defendant had the requisite intent to sell and deliver the drugs in his possession.

[8] Defendant's contention that the trial court erred in denying his motion for mistrial is also without merit. During closing arguments, the prosecutor stated that defendant's attorney was a good lawyer but that he "did not pick this case and did not pick this client. He had no choice but to represent [defendant] in this case because he was appointed to do so by the Court." A mistrial should only be granted "when there are improprieties . . . so serious that they substantially

and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990). The decision to grant a mistrial is within the sound discretion of the trial court. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). Here, the trial court gave a curative instruction to the jury immediately after the prosecutor made these inappropriate remarks. We find no abuse of discretion in denying defendant's motion for mistrial.

In sum, we hold that defendant received a fair trial free from prejudicial error.

No error.

Judges WALKER and MARTIN, MARK D., concur.

STATE OF NORTH CAROLINA v. JOANN MARGULIES SMITH SUGGS

No. 9410SC187

(Filed 7 February 1995)

1. Search and Seizure § 20 (NCI4th)— conspiracy to commit murder—telephone records—admissible

The trial court did not err in a prosecution arising from defendant hiring someone to kill her former husband and assault a woman whom he was dating and from an attack being carried out on the former husband by admitting telephone records which showed telephone calls from defendant to a co-conspirator testifying against her. Assuming standing under the North Carolina Constitution, defendant failed in her burden of showing sufficient action attributable to the State which would implicate the constitutional protections against unreasonable search and seizure. The records were originally recorded in the usual course of Southern Bell's business and not under some State directive, there is no subpoena in the record, and defendant's argument that sufficient action attributable to the State exists because the State called a Southern Bell employee to testify about and produce the records at trial was rejected.

Am Jur 2d, Evidence §§ 601, 646.

Interest in property as requisite of accused's standing to raise question of constitutionality of search and seizure. 4 L. Ed. 2d 1999.

2. Evidence and Witnesses § 1789.1 (NCI4th)— conspiracy to commit murder—mention of polygraph by witness—no mistrial

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in an prosecution resulting from defendant's attempt to hire someone to kill her former husband and a woman he was seeing where the person who was hired, testifying for the State, offered to take a polygraph test. The offer was unintentionally elicited by defendant after intense cross-examination and during a trial revealing inconsistencies in the witness's testimony, the trial court allowed the defendant's motion to strike the statement and immediately instructed the jury to disregard the statement, and the court further asked the jury if they could in fact disregard the statement, to which they answered in the affirmative.

Am Jur 2d, Evidence §§ 1007-1009.

3. Conspiracy § 32 (NCI4th)— solicitation of assault with a deadly weapon inflicting serious injury—no evidence of how injury to be inflicted—sufficient only for misdemeanor assault

The evidence was sufficient only for the lesser included offenses of conspiracy and solicitation of misdemeanor assault in a prosecution for conspiring and soliciting an assault upon the woman defendant's former husband was seeing where there was no evidence of how the co-conspirator was to inflict the severe injury on the victim. To hold a defendant liable for the substantive crime of solicitation, the State must prove a request to perform every essential element of the crime; the crime of assault with a deadly weapon inflicting serious injury requires that the State produce evidence that a deadly weapon was used in the assault. Contrary to the State's argument, the mere fact that the defendant asked the co-conspirator to inflict serious injury on the victim does not necessarily imply the use of a deadly weapon because serious injury can be inflicted without the use of a deadly weapon. However, in finding the defendant guilty of the charges of solicitation and conspiracy to commit assault with a deadly weapon inflicting serious injury, the jury necessarily found the

facts establishing the crimes of conspiracy and solicitation of misdemeanor assault.

Am Jur 2d, Conspiracy § 29.

Appeal by defendant from judgments entered 29 June 1993 in Wake County Superior Court by Judge J. B. Allen, Jr. Heard in the Court of Appeals 10 January 1995.

Attorney General Michael F. Easley, by Assistant Attorney General K. D. Sturgis, for the State.

Tharrington, Smith & Hargrove, by Roger W. Smith and E. Hardy Lewis, for defendant-appellant.

GREENE, Judge.

Joann Suggs (defendant) appeals from jury verdicts finding her guilty of conspiracy to commit the murder of J.R. Suggs (Suggs), aiding and abetting an assault on Suggs with a deadly weapon with intent to kill inflicting serious injury, in violation of N.C. Gen. Stat. § 14-32, conspiracy to commit an assault on Glenda Johnson (Johnson) with a deadly weapon inflicting serious injury, and solicitation to commit an assault on Johnson with a deadly weapon inflicting serious injury. After the jury verdicts, the trial court entered judgment on these convictions and sentenced the defendant to a total of nineteen years in prison.

Defendant was charged after William Bateman (Bateman) confessed to the shooting of Suggs, the defendant's former husband, on 4 December 1992, and then, on 9 December 1992, told detectives that the defendant hired him to kill Suggs. Bateman also later revealed that the defendant hired him to assault Johnson, a woman whom Suggs had been dating. The defendant was arrested and charged with a total of seven offenses; five related to Suggs' attack and two related to the intended attack on Johnson.

Bateman was the State's key witness at trial and his testimony reveals the two plans; one to attack Johnson and one to kill Suggs. At some point in the spring of 1992, Bateman was told by a friend that he could make some money "by beating somebody up." Following that, Bateman had a series of conversations with the defendant, during which she told him about Johnson and the two agreed that Bateman would "break [Johnson's] face" or break her legs or arms for $2,500, which the defendant later paid to Bateman.

Bateman also testified that after four months of Bateman stalling over Johnson, the defendant and Bateman agreed that Bateman would kill Suggs for $15,000, through a series of subsequent telephone conversations between the defendant and Bateman. No more was said about the arrangement to injure Johnson, and no assault on Johnson occurred. In mid-October 1992, the defendant advanced Bateman $2,000, and later gave Bateman a picture of Suggs and drove him by Suggs' house.

Bateman further testified that the defendant continued to call him and on four occasions prompted Bateman to kill Suggs, but Bateman was unable to carry out their plans on three occasions. Finally, on 3 December 1992, Bateman confronted Suggs, at Suggs' apartment, with a gun, and over the course of ten to twelve hours, Bateman kept Suggs hostage in Suggs' condominium and also drove around in Suggs' car, with Suggs in the trunk at times and in the passenger seat at other times. Bateman called the defendant and had her meet him, at which point Bateman shot at the trunk of Suggs' car, where he was keeping Suggs at the time, and left the scene with the defendant. A short time later, the police found Suggs' car, with five bullet holes in a tight circle in the trunk lid and Suggs in the trunk with blood on his hand and his hip.

During the cross-examination of Bateman, in the presence of the jury, the following exchange took place:

A. That's not a story; that's the truth.

Q. But you didn't tell it that way on the 9th, did you?

A. No, sir, I did not.

Q. And you remember it better today than you did then?

A. That's true. And I knew it then, too, I just did not tell it, sir.

I'll be more than happy to take a lie detector test right here in front of the jurors.

The defendant objected to this offer by Bateman, moved to strike the testimony, and moved for a mistrial. The trial judge allowed the defendant's motion to strike the testimony, but denied her motion for a mistrial and gave the following curative instruction:

> Ladies and gentlemen of the jury, before the Court sent you into the jury room, the witness upon being cross-examined by Mr. Smith made a statement something to the effect: I will be willing

to take a lie detector test right here before the jury. I have instructed you at the time to disregard that statement and to not consider it in any way. At this time I instruct you, ladies and gentlemen, that you are to disregard that statement and to disregard it in all respects and not consider that statement in any way.

Can all of you do so? If so, please raise your right hand.

Let the record show that all members of the jury raised their right hand indicating that they could follow the Court's order and the Court's instructions to disregard the statements made by the witness that he would be willing to take a lie detector test before the jury.

Again, ladies and gentlemen, you are not to consider that in any way. You are to disregard that.

The State, over the defendant's objection, introduced copies of telephone records obtained from Southern Bell Telephone Company, for the period of late August 1992 to early December 1992, listing every call made from and received by the defendant's telephone along with the date and time the calls were made. The defendant's objection asserted that the records were obtained in violation of her rights under the United States and North Carolina constitutions against unreasonable search and seizure. The defendant argues that she had standing to assert this right because the legislature has provided a required procedure governing the State's acquisition of all telephone records, N.C.G.S. § 15A-260 to -264 (1988), which creates, in North Carolina citizens, a reasonable expectation of privacy in telephone calls made and received on their private lines. During the hearing on the defendant's motion, the parties stipulated that these records were maintained by Southern Bell in the regular course of business, and the evidence shows that the information was used to generate customers' bills. The records of the defendant's calls show that some 228 calls were made from the number Bateman testified was the defendant's telephone number to the number Bateman testified was his.

At the close of the State's evidence, the defendant moved to dismiss charges of conspiracy to commit an assault on Johnson with a deadly weapon inflicting serious injury and solicitation to commit an assault on Johnson with a deadly weapon inflicting serious injury, on the grounds that the State did not produce sufficient evidence to sustain a jury verdict on the charges. The trial court denied the motion. The defendant offered no evidence.

The issues are whether (I) the record, which is devoid of any evidence regarding the State's acquisition of telephone records maintained by the telephone company, shows sufficient action attributable to the State to implicate the defendant's rights against unreasonable search and seizure; (II) the trial court erred in denying the defendant's motion for a mistrial, based on Bateman's offer, in the presence of the jury, to take a polygraph test; and (III) in the absence of any evidence that the use of a deadly weapon was contemplated, the State presented sufficient evidence to sustain convictions of solicitation and conspiracy to commit assault with a deadly weapon inflicting serious injury.

I

[1] The State argues that the defendant fails to show that her rights against unreasonable search and seizure have been implicated because the State was not involved in the maintenance or production of the telephone records, and that in any event, the defendant does not have standing to challenge the admissibility of the telephone records because she has no reasonable expectation of privacy. We agree with the State's argument that there is not sufficient action attributable to the State.

Assuming that the defendant has standing under the North Carolina Constitution, *see People v. Corr*, 682 P.2d 20, 27-28 (defendant had expectation of privacy in records of phone calls individually billed and the government's obtaining and using these records was a search, requiring a warrant), *cert. denied*, 469 U.S. 855, 83 L. Ed. 2d 115 (Colo. 1984); *State v. Hunt*, 450 A.2d 952, 955-57 (N.J. 1982) (because of New Jersey public policy, evidenced by statute criminalizing phone taps, telephone records that reveal numbers dialed from an individual's home are protected under the New Jersey constitution); *but see State v. Melvin*, 86 N.C. App. 291, 296, 357 S.E.2d 379, 382 (1987) (there is no expectation of privacy, under either United States or North Carolina constitutions, in bank records maintained in ordinary course of bank's business), she has failed in her burden of showing sufficient action attributable to the State which would implicate the constitutional protections against unreasonable search and seizure. *See State v. Sanders*, 327 N.C. 319, 331, 395 S.E.2d 412, 420 (1990) (protection against unreasonable search and seizure applies only to governmental actions and the "party challenging admission of the evidence has the burden to show sufficient government involvement in the private citizen's conduct to warrant fourth amendment

scrutiny"), *cert. denied Sanders v. North Carolina*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991). Assuming the State had obtained the telephone records prior to trial, which the record implies, there is no evidence of how they were obtained. The record does reveal that the telephone records were originally recorded in the usual course of Southern Bell's business and not under some State directive. *See State v. Kornegay*, 313 N.C. 1, 10, 326 S.E.2d 881, 890 (1985) ("Mere acceptance by the government of materials obtained in a private search is not a seizure so long as the materials are voluntarily relinquished to the government."). Even if the State acquired the records through its subpoena power, which the defendant contends would provide sufficient action attributable to the State, *see United States v. Miller*, 425 U.S. 435, 443, 48 L. Ed. 2d 71, 79 (1976) (federal act requiring banks to keep certain records may combine with government subpoena power to create state action in the government's acquisition of bank records), there is no such subpoena in the record. Furthermore, we reject the defendant's argument that sufficient action attributable to the State exists because the State called the Southern Bell employee to testify about and produce the records at trial. *See Kornegay*, 313 N.C. at 8-12, 326 S.E.2d at 889-91 (no state action where witness testified of her own volition at trial). Accordingly, there being no evidence of sufficient action attributable to the State in the record, the defendant's constitutional protection against unreasonable search and seizure is not implicated and the trial court did not err in admitting the telephone records at her trial.

II

[2] The defendant argues that Bateman's offer to take a polygraph test was prejudicial error, requiring a mistrial be granted and that the instruction given did not cure the error. The State, however, argues that any error was cured by the trial court's instructions to the jury. We agree with the State.

A mistrial should be granted "only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict," and such ruling is within the trial court's sound discretion. *State v. Harris*, 323 N.C. 112, 125, 371 S.E.2d 689, 697 (1988). Although parties may not introduce polygraph results directly or indirectly, "every reference to a polygraph test does not necessarily result in prejudicial error." *State v. Montgomery*, 291 N.C. 235, 244, 229 S.E.2d 904, 909 (1976) (defendant was not prejudiced where witnesses' reference to polygraph test was unintentionally elicited on

cross-examination, and the court allowed defendant's motion to strike and instructed the jury not to consider the statement).

Bateman's statement that he would take a polygraph test was unintentionally elicited by the defendant after intense cross-examination and during a trial revealing inconsistencies in Bateman's testimony. The trial court allowed the defendant's motion to strike Bateman's statement and immediately instructed the jury to disregard the statement, consistent with the trial court's action in *Montgomery*. The court further asked the jury if they could in fact disregard the statement, to which question the jury answered in the affirmative. "We assume, as our system for administration of justice requires, that the jurors in this case were possessed of sufficient character and intelligence to understand and comply with this instruction by the court." *Montgomery*, 291 N.C. at 244, 229 S.E.2d at 909. Thus, the trial court did not abuse its discretion in denying the defendant's motion for a mistrial.

III

[3] Solicitation requires a request of another to commit a crime, and conspiracy requires "an agreement [between] two or more persons to do an unlawful act." *State v. Richardson*, 100 N.C. App. 240, 247, 395 S.E.2d 143, 147-48 (comparing the crimes of solicitation and conspiracy), *appeal dismissed, disc. rev. denied*, 327 N.C. 641, 399 S.E.2d 332 (1990). Thus, to hold a defendant liable for the substantive crime of solicitation, the State must prove a request to perform every essential element of the crime. To hold a defendant liable for the substantive crime of conspiracy, the State must prove an agreement to perform every element of the crime. *See id.* (the State must show a request or agreement to commit *the crime or unlawful act*); *see also State v. Brown*, 67 N.C. App. 223, 235, 313 S.E.2d 183, 191 (sufficient evidence of a deadly weapon for conspiracy to commit felonious assault existed when the defendant gave his co-conspirator a knife before the assault), *appeal dismissed*, 311 N.C. 764, 321 S.E.2d 147 (1984).

The defendant was charged and tried for solicitation and conspiracy to commit assault with a deadly weapon inflicting serious injury on Johnson. The crime of assault with a deadly weapon inflicting serious injury requires that the State produce evidence that a deadly weapon was used in the assault. N.C.G.S. § 14-32 (1993). Thus, to survive the defendant's motion to dismiss, the solicitation and con-

spiracy charges required that the State produce substantial evidence, which considered in the light most favorable to the State, would allow a jury to find beyond a reasonable doubt that the defendant and Bateman contemplated the use of a deadly weapon in carrying out the assault on Johnson. *See State v. McConnaughey*, 66 N.C. App. 92, 94, 311 S.E.2d 26, 28 (1984). In this case, there is no evidence of how Bateman was to inflict the severe injury on Johnson. Furthermore, contrary to the State's argument, the mere fact that the defendant asked Bateman to inflict serious injury on Johnson does not necessarily imply the use of a deadly weapon. Our legislature has recognized that serious injury can be inflicted on a person without the use of a deadly weapon. *Compare* N.C.G.S. § 14-33(b)(1) (misdemeanor to assault another and inflict serious injury) *with* N.C.G.S. § 14-32(b) (class H felony to inflict serious injury by the use of a deadly weapon). Accordingly, the trial court erred in submitting the charges of conspiracy and solicitation to commit assault with a deadly weapon inflicting serious injury on Johnson to the jury.

This error, however, does not require, that we reverse the trial court's denial of her motion to dismiss, vacate the jury verdicts on these charges, and acquit her, as the defendant contends. In finding the defendant guilty of the charges of solicitation and conspiracy to commit assault with a deadly weapon inflicting serious injury on Johnson, the jury necessarily found the facts establishing the crimes of conspiracy and solicitation of misdemeanor assault. It follows, therefore, that the verdicts returned by the jury must be considered verdicts of guilty of conspiracy to commit misdemeanor assault on Johnson and solicitation of misdemeanor assault on Johnson. We therefore vacate the defendant's convictions of conspiracy to commit assault with a deadly weapon inflicting serious injury on Johnson and solicitation to commit assault with a deadly weapon inflicting serious injury on Johnson and remand this case for entry of judgment and re-sentencing on the lesser included offenses of conspiracy and solicitation of misdemeanor assault, under N.C. Gen. Stat. § 14-33(b). *See State v. Owens*, 65 N.C. App. 107, 109-10, 308 S.E.2d 494, 497 (1983); *see also State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) (remanding for re-sentencing on lesser included offense where evidence is insufficient for one element of greater offense and even though the lesser included offense was not originally submitted to the jury).

Nos. 92CRS92796, 92CRS92799, Suggs related offenses—No error.

Nos. 93CRS3146, 93CRS5602, Johnson related offenses—Remanded for re-sentencing.

Judges EAGLES and WALKER concur.

NORTH RIVER INSURANCE COMPANY AND UNITED STATES FIRE INSURANCE COMPANY, PLAINTIFFS V. JOEL R. YOUNG, CAMILLA A. YOUNG AND MATTHEW ASHWORTH YOUNG, THE GLENN POWELL INSURANCE AGENCY, INC., CATHY FRAZIER, AND RICHARD N. AYCOCK, III, DEFENDANTS

No. 9414SC175

(Filed 7 February 1995)

1. **Appeal and Error § 87 (NCI4th)— appeal from summary judgment—interlocutory—certification by trial court**

Although an appeal from a trial court's summary judgment was interlocutory because the judgment did not determine the entire controversy between the parties, the appeal was properly considered because the trial judge certified the order for appeal pursuant to N.C.G.S. § 1A-1, Rule 54(b).

Am Jur 2d, Appeal and Error 1§ 47 et seq.

Comment Note.—Formal requirements of judgment or order as regards appealability. 73 ALR2d 250.

2. **Insurance § 162 (NCI4th)— liability insurance—boating accident—reformation—reduction in coverage at renewal**

The trial court did not err by granting summary judgment for defendants in an action arising from a boating accident where plaintiff insurance companies filed a complaint seeking a declaration of their rights and duties under a homeowners policy, asserting that watercraft exclusions applied. Although plaintiffs contended that, while the prior policy would not have excluded the accident, the policy in effect at the time of the accident would have excluded coverage because it was a new contract, based on the face of the contract alone it is clear that the policy was a continuous renewal of the original policy. Where there is a standardized contract and the insured and insurer are in unequal bargaining positions, any exceptions, limitations, or exclusions that may vary from the original policy issued must clearly, conspicu-

ously and unambiguously be called to the insured's attention. The notice must be specific, especially where there is a reduction in coverage, and the reduction in coverage for watercraft in this case was not specifically set forth in the Homeowners Coverage Update.

Am Jur 2d, Insurance §§ 357 et seq.

3. Pleadings § 388 (NCI4th)— amended answer—shortly before summary judgment—no abuse of discretion

The trial court did not abuse its discretion in an action arising from a boating accident in allowing defendants to amend their answers to add a defense relating to notice of changes in a renewed policy where the motions were allowed over two years after the lawsuit commenced and one week before defendants' motions for summary judgment were heard. There is no time limit to move to amend under N.C.G.S. § 1A-1, Rule 15 and the fact that additional discovery may be required does not amount to prejudice or make the delay undue. Being the insurers, it seems likely that plaintiffs were either surprised or prejudiced by the additional basis for reformation of a policy.

Am Jur 2d, Pleading §§ 306 et seq.

Appeal by plaintiffs from order entered 7 September 1993 by Judge A. Leon Stanback, Jr. in Durham County Superior Court. Heard in the Court of Appeals 19 October 1994.

Appeal by plaintiffs from judgment entered 26 October 1993 by Judge Dexter Brooks in Durham County Superior Court. Heard in the Court of Appeals 19 October 1994.

On 15 August 1989, defendant Aycock was injured when he was struck by a Yamaha Waverunner (hereinafter "Waverunner") owned by defendant Joel Young and operated by his fourteen-year-old son, Matthew Young. On 8 August 1991, defendant Aycock commenced an action against defendants Young seeking damages for his personal injuries.

At the time of the accident, defendants Young had a homeowners insurance policy with plaintiff North River Insurance Company (North River) and a personal umbrella policy with plaintiff United States Fire Insurance Company (U.S. Fire). The original homeowners policy issued in 1986, Form 7-80, contained a narrow exclusion related to the ownership of watercraft under certain conditions, which

would not have applied to the accident at issue. However, based on changes approved by the Department of Insurance in 1987, another policy form, Form 4-84, replaced Form 7-80. Form 4-84 was issued to defendants Young for the period 14 June 1989 to 14 June 1990, which covered the time of the accident, and contained a broader exclusion regarding watercraft. The personal umbrella policy contained an exclusion for watercraft, but contained an exception to the exclusion where there is underlying insurance.

On 17 January 1991, in anticipation of a claim initiated by defendant Aycock against defendants Young, plaintiffs North River and U.S. Fire filed a complaint for declaratory relief requesting a judicial declaration of their respective rights and duties under the homeowners policy, Form 4-84, and umbrella policy issued to defendants Young. Plaintiffs asserted in their complaint that the watercraft exclusions in both policies applied, and thus, they owed no coverage for any injuries or damages suffered by Aycock. Defendants answered, alleging as a defense that the policies were reformed by representations, made by plaintiffs' employees and/or agents, Cathy Frazier and Glenn Powell Insurance Agency, Inc., that such policies did provide coverage. Plaintiffs amended their complaint on 4 November 1991 to add defendants Frazier and Glenn Powell, who are not parties to this appeal. Plaintiffs added Aycock as a defendant in a second amended complaint filed on 9 June 1992.

On 20 July 1993 and 13 August 1993 respectively, defendants Young and Aycock filed similar but separate motions to amend their answers. They sought to allege in the alternative and as another defense that the Form 4-84 policy should be reformed because evidence produced in discovery established that plaintiffs failed to notify defendants of specific reductions in coverage, which Form 7-80 formerly had provided and which was associated with the use of the Waverunner. The motions were allowed by order entered 7 September 1993.

Defendants Young and Aycock filed motions for summary judgment respectively on 3 September 1993 and 7 September 1993. These motions were heard along with plaintiffs' oral motion for summary judgment on 13 September 1993. On 26 October 1993, the court allowed defendants' motions and denied plaintiffs' motion.

Plaintiffs appeal the judgment allowing defendants' motions for summary judgment and denying plaintiffs' oral summary judgment motion and the order allowing defendants' motions to amend.

Poe, Hoof & Reinhardt, by J. Bruce Hoof and James C. Worthington, for plaintiffs appellants.

Pipkin & Knott, by Ashmead P. Pipkin, for defendants appellees Joel R. Young, Camilla A. Young and Matthew Ashworth Young.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Renee C. Rigsbee, for defendant appellee Richard N. Aycock, III.

ARNOLD, Chief Judge.

[1] This appeal is interlocutory because the trial court's summary judgment did not determine the entire controversy between the parties. *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). But, this interlocutory appeal is properly considered on appeal since the trial judge certified the order for appeal pursuant to N.C. Gen. Stat. § 1A-1 , Rule 54(b) (1990), which states "if there has been a final disposition as to one or more but fewer than all of the claims or parties in a case, the trial judge may certify that there is no just reason to delay appeal." *Taylor v. Brinkman*, 108 N.C. App. 767, 769, 425 S.E.2d 429, 431, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 30 (1993).

[2] Plaintiffs' first assignment of error is that the trial court erred in allowing defendants' respective motions for summary judgment and denying plaintiffs' oral motion for summary judgment. After amending their answers to include as an additional basis for reformation plaintiff North River's failure to adequately notify the insured of a reduction in coverage, defendants moved for summary judgment. Following a hearing, the trial court concluded that there was no genuine issue of material fact, and defendants were entitled to judgment as a matter of law on all plaintiffs' claims for declaratory relief. The trial court further ordered:

> In the alternative, because of Plaintiff North River Insurance Company's failure to call the Young Defendants' attention to the alleged reductions in its policy coverage in the June 1988 renewal of its homeowners insurance policy issued to the Young Defendants, the Young Defendants are entitled to reformation of the watercraft exclusion applicable to the liability coverages in Plaintiff North River Insurance Company's homeowners insurance policy described in Plaintiffs' Second Amended Complaint to read as described in Exhibit 9 to the Deposition of Denise Lorz Abels taken in this action.

Where a summary judgment motion has been granted the two critical questions of law on appeal are whether, on the basis of the materials presented to the trial court, (1) there is a genuine issue of material fact and, (2) whether the movant is entitled to judgment as a matter of law. *Berkeley Federal Savings and Loan Assn. v. Terra Del Sol*, 111 N.C. App. 692, 433 S.E.2d 449 (1993), *disc. review denied*, 335 N.C. 552, 441 S.E.2d 110 (1994). Review of summary judgment on appeal is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones. *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987). The purpose of summary judgment is to eliminate the need for a formal trial where only questions of law are involved, and a fatal weakness in the claim of a party, such as an unsurmountable affirmative defense or the nonexistence of an essential element, is exposed. *Hall v. Post*, 85 N.C. App. 610, 355 S.E.2d 819 (1987), *rev'd on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988).

The threshold issue in this case is the determination of whether the policy in effect at the time of the accident was a new contract or a renewal of the original policy. The significance of this determination was discussed in *Setzer v. Insurance Co.*, 257 N.C. 396, 126 S.E.2d 135 (1962):

> It is a matter of common knowledge that insurance companies from time to time change the terms of their policies. One may not assume that a new insurance contract of any kind will conform to the terms of a prior policy of the same type. However, a different rule applies to renewals and the law does not impose the same degree of care upon an insured to examine a renewal policy as it does to examine an original policy. With reference to renewals, Appleman states the rule to be as follows: "Unless otherwise provided, the rights of the parties are controlled by the terms of the original contract, and the insured is entitled to assume, unless he has notice to the contrary, that the terms of the renewal policy are the same as those of the original contract.

Id. at 403, 126 S.E.2d at 140.

Plaintiffs contend that the policy in effect at the time of the accident, Form 4-84, excluded liability coverage for bodily injury or property damages arising out of "the ownership, maintenance, use, loading or unloading of a watercraft . . . with inboard or inboard-outdrive motor power owned by an insured . . . ." They argue that although the prior policy, Form 7-80, would not have excluded the accident in question from coverage, the Form 4-84 policy issued in

1988 before the accident was a new contract, which the insured had a duty to read and to which he is bound. Defendants, however, argue that summary judgment should be upheld because Form 4-84 was merely a renewal of the prior policy, and therefore defendants had a right to rely on the assumption that, absent sufficient notice to the contrary, their renewal was the same in terms of coverage as the original; because plaintiffs failed to give adequate notice of the reduction in coverage from Form 7-80 to Form 4-84, defendants were entitled to reformation of Form 4-84 by applying the original policy exclusion, which provides liability insurance coverage for all sums owed by defendants Young to defendant Aycock.

The question of whether the policy at issue is a renewal of the original policy or a new contract is a question of law for the court, and thus proper for summary judgment. *See Borders v. Global Ins. Co.*, 430 S.E.2d 854 (Ga. App. 1993). Both parties cite to *Transit, Inc. v. Casualty Co.*, 20 N.C. App. 215, 201 S.E.2d 216 (1973), *aff'd*, 285 N.C. 541, 206 S.E.2d 155 (1974), in which this Court held that "in the renewal of an insurance contract, absent notice to the contrary, the insured has a right to expect that the coverage of the new policy will be substantially the same as that afforded by its predecessor." *Id.* at 223, 201 S.E.2d at 221; *see also Fireman's Fund Ins. Co. v. Williams Oil Co.*, 70 N.C. App. 484, 319 S.E.2d 679 (1984). The rationale behind the rule announced in *Transit, Inc.* is

> that if an insurance company knows that the renewal policy differs and does not inform the insured, it is guilty of fraud or unequitable conduct, or that if it does not know, it is because of a mistake, and in either event the insured, who has relied on the assumption that he is receiving a policy based on the same terms and conditions as the earlier one, is entitled to recover as though there had not been a change in the coverage in the renewal policy.

Id. at 222, 201 S.E.2d at 220 (quoting D.C. Barrett, Annotation, *Renewal Policy—Reduction in Coverage*, 91 A.L.R. 2d 546, 549 (1963)).

The trial court in the instant case found that plaintiff North River failed to give proper notice of the reductions in coverage in the June 1988 "renewal." After examining the record, we are satisfied that the trial court correctly determined that the contract at issue was a renewal. The declarations page of each insurance contract issued annually, subsequent to the original policy, had the word "Renewal" printed under the line "Reason for Issuance." The homeowners insurance policy number remained the same for each subsequent policy.

Furthermore, the "Homeowners Coverage Update" issued with the June 1988 renewal policy stated that the changes made on the current homeowners policy were "[e]ffective on your policy renewal date." Therefore, based on the face of the contract alone it is clear that the policy was a continuous renewal of the original policy.

Since the insurance policy issued was a renewal, the next question is whether the insurer gave sufficient notice of changes in coverage to eliminate the insured's right to rely on the terms of the original policy. "If, absent notice to the contrary, the insurer inserts an endorsement varying the original coverage, the renewal contract may be reformed to conform with the terms of the prior policy. Recovery may be had in that same action by the insured under the renewal contract as reformed." *Transit, Inc.*, 20 N.C. App. at 223, 201 S.E.2d at 221.

Both parties concede that a variance in coverage was made by the insured. When Form 4-84 was issued to defendants Young, a document called "Homeowners Coverage Update" accompanied the form. The update listed a few of the "important changes," but referred the insured to the policy or independent insurance agent for a "more complete picture." Among the listed changes in coverages was for watercraft and trailers; that change was described as "Increased to $1000. Subject to policy restrictions."

Plaintiff North River argues that it fulfilled its duty of providing notice, that the changes mandated by the Insurance Commission were too numerous to bring to the insured's attention in detail, and the most effective way to call the insured's attention to all areas of significant changes was to invite the insured to consult the policy itself. We disagree with plaintiffs and hold that reasonable minds cannot differ as to the sufficiency of notice given, and that the notice provided was insufficient. We adopt the rule that "a general admonition to read the policy for changes is insufficient [notice]." *Davis v. United Services Automobile Assoc.*, 273 Cal. Rptr. 224, 230 (Cal. App. 3d 1990); *see also* 13A John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 7648, at 456 (1976). Furthermore, although the case at bar differs from *Transit, Inc.* in that the endorsement changing coverage in the policies at issue in that case was accompanied by no notice whatsoever, the Homeowners Coverage Update provided in this case was so insufficient as to amount to no notice.

Few cases have determined the issue of what constitutes adequate notice to apprise the insured of a change contained in a renew-

al policy, however, the language in *Fields v. Blue Shield of California*, 209 Cal. Rptr. 781 (Cal. App. 3d 1985) is convincing. The *Fields* court stated:

> [I]n the case of 'standardized' (insurance) contracts, made between parties of unequal bargaining strength, exceptions and limitations on coverage the insured could reasonably expect must be called to the subscriber's attention clearly and plainly before the exclusion will be interpreted to relieve the insurer of the liability for performance.

Id. at 785-86 (citations omitted). In *Fields*, the court determined that an exclusion in a renewal policy was not contained in either section entitled "How Plan Changes" or "Exclusion," but rather the exclusion was placed in small print under a heading describing "Supplemental Benefits." The court held that the insurer failed to notify by a "clear, conspicuous notice in an expected place that coverage he originally had was now totally withdrawn." *Id.* at 786.

We likewise hold that where there is a standardized contract, such as the homeowners policy here, and the insured and insurer are in unequal bargaining positions, any exceptions, limitations, or exclusions that may vary from the original policy issued must clearly, conspicuously and unambiguously be called to the insured's attention. Especially where there is a reduction in coverage, the notice must be specific. Here, the reduction in coverage for watercraft, as defined in the policy, was not specifically set forth in the Homeowners Coverage Update. In fact, the statement, "Increased to $1000. Subject to policy restrictions," does not differentiate between property and liability coverage, and implies that coverage has been improved. The trial court therefore did not err in granting summary judgment for defendants, concluding that defendants were entitled to reformation of the watercraft exclusion, and denying plaintiffs' summary judgment motion.

[3] Plaintiffs' second assignment of error is that the trial court erred by allowing defendants to amend their respective answers to add the renewal/notice defense discussed above. A pleading may be amended after a responsive pleading has been filed "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990). Whether a motion to amend a pleading is allowed or denied is addressed to the sound discretion of the trial court and is accorded great deference. *Outer Banks Contractors v. Daniels & Daniels Con-*

struction, 111 N.C. App. 725, 433 S.E.2d 759 (1993). The party objecting to the amendment has the burden of establishing it will be materially prejudiced by the amendment. *Mauney v. Morris*, 316 N.C. 67, 340 S.E.2d 397 (1986).

Plaintiffs contend that they were prejudiced by undue delay, undue prejudice, and bad faith. *See Patrick v. Williams*, 102 N.C. App. 355, 402 S.E.2d 452 (1991) (Reasons justifying a denial of a motion to amend include undue delay, bad faith or dilatory tactics, and undue prejudice.). We disagree. Although the motions were allowed over two years after the lawsuit commenced and one week before defendants' motions for summary judgment were heard, there is no time limit to move to amend under Rule 15. *Watson v. Watson*, 49 N.C. App. 58, 270 S.E.2d 542 (1980). Nor does the fact that additional discovery may be required amount to prejudice or make the delay "undue." *Coffey v. Coffey*, 94 N.C. App. 717, 381 S.E.2d 467 (1989). Moreover, being the insurers, it seems unlikely that plaintiffs were either surprised or prejudiced by the additional renewal/notice basis for reformation. Finally, plaintiffs' blanket allegation that defendants' motions to amend on the renewal/notice theory was a "strategy . . . patently designed to deny Plaintiffs notice of this theory" is unsupported. Therefore, the trial court did not abuse its discretion in allowing defendants' motions to amend their answers in light of the attendant circumstances.

Affirmed.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. ROY SMITH, AKA GARFIELD ANDERSON, DEFENDANT

No. 9310SC1120

(Filed 7 February 1995)

1. Courts § 87 (NCI4th)— cocaine in defendant's luggage—suppression order—cocaine in coconspirator's luggage—second judge's refusal to suppress

One judge's suppression of cocaine found in the luggage of a defendant charged with trafficking in cocaine on the ground that officers made an unconstitutional stop of the vehicle in which he

was riding did not preclude a second judge's ruling, made after defendant was reindicted for conspiracy to traffic cocaine, that cocaine found in a coconspirator's luggage during the same stop was admissible in defendant's conspiracy trial, since the second judge was asked to rule on an entirely new and different matter, and he did not change or overrule the first judge's order.

Am Jur 2d, Courts § 191.

2. Evidence and Witnesses § 1561 (NCI4th)— unconstitutional stop—cocaine in coconspirator's luggage—no expectation of privacy by defendant

Even if the stop of a vehicle in which defendant and a coconspirator were riding was unconstitutional because officers did not have a reasonable, articulable suspicion of criminal activity, defendant did not have a reasonable expectation of privacy in the coconspirator's luggage where defendant did not assert any property interest in that luggage, and cocaine found in the coconspirator's luggage was admissible in defendant's trial for conspiracy to traffic cocaine.

Am Jur 2d, Evidence § 646.

Interest in property as requisite of accused's standing to raise question of constitutionality of search and seizure. 4 L. Ed. 2d 1999.

3. Evidence and Witnesses § 1594 (NCI4th)— statement by coconspirator—fruit of illegal stop—no standing by defendant to challenge

A defendant on trial for conspiracy to traffic cocaine had no standing to challenge the admissibility of a coconspirator's statement to the police on the ground that the statement was the fruit of an illegal stop since defendant cannot assert the Fourth Amendment rights of another.

Am Jur 2d, Evidence § 646.

Interest in property as requisite of accused's standing to raise question of constitutionality of search and seizure. 4 L. Ed. 2d 1999.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 27 July 1993 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 31 August 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth N. Strickland, for the State.

John T. Hall for defendant appellant.

COZORT, Judge.

Defendant Roy Smith was arrested on 4 June 1992 for allegedly trafficking cocaine; he was indicted on that charge on 21 July 1992. On 20 October 1992, defendant filed a motion to suppress all evidence seized from defendant during defendant's arrest, contending the stop of defendant was unconstitutional. On 19 November 1992, Judge Anthony M. Brannon granted defendant's motion, concluding the stop was unconstitutional. The State gave notice of appeal on 25 November 1992, but failed to perfect the appeal, withdrawing it on 27 July 1993. Meanwhile, defendant had been indicted on 8 June 1993 for conspiracy to traffic cocaine, based on the same transaction as the previous trafficking charge. Defendant moved again to suppress all physical evidence, statements, and potential testimony of a codefendant, Vinton St. Jew Campbell, who was arrested with defendant Smith on 4 June 1992. This motion was denied by Judge Donald W. Stephens on 27 July 1993. Defendant pled guilty to the conspiracy charge on 27 July 1993, reserving his right to appeal the ruling of Judge Stephens pursuant to N.C. Gen. Stat. § 15A-979(b) (1988). Defendant received a sentence of 18 years and a fine of $100,000.00. Defendant appeals, contending Judge Stephens erred in not suppressing the evidence which had been suppressed by Judge Brannon in the previous action. We disagree and affirm the ruling of Judge Stephens. The facts and procedural history follow.

On the morning of 4 June 1992, two detectives of the Narcotic Interdiction Unit of the Wake County Sheriff's Department were at the Raleigh train station where they observed two passengers (defendant Smith and Vinton St. Jew Campbell) emerge from the sleeper car of a train which had originated in Miami, Florida. The passengers hurriedly carried three suitcases to a waiting taxicab and left the station. The detectives knew from past experience that South Florida is a known source area for drugs in the Raleigh area and passengers in the sleeper car normally check their luggage instead of carrying it with them in the small compartment. The officers wished to speak with the two passengers.

Defendant Smith and Campbell entered the cab before the detectives could stop them, and the cab left the train station. The detec-

tives followed the cab on Interstate 40 towards Durham. When the officers realized that the cab was not exiting at the Raleigh-Durham Airport, they stopped the cab before it crossed the Wake/Durham County line. After identifying themselves as police officers, the detectives asked the passengers to exit the cab and produce their train tickets and identification. Defendant Smith and Campbell were then separated and questioned individually by the detectives, who discovered that the names on the train tickets did not match the names on the identification. After learning that the defendant and Campbell gave conflicting stories on how they acquired the train tickets, the detectives asked each man twice for permission to search the luggage. Both defendant Smith and Campbell granted permission for the search. In a piece of luggage which belonged to defendant Smith, the detectives found one baby powder bottle. There was also a baby powder bottle in the bag belonging to Campbell. Each bottle contained cocaine, and both men were placed under arrest for trafficking in cocaine. The stop lasted approximately five minutes before the men were placed under arrest.

In his order suppressing the cocaine seized from defendant Smith's bag, Judge Brannon concluded:

> To have a constitutional "stop" of a vehicle under the Fourth Amendment case law, the officers must have a reasonable articulatable [*sic*] suspicion of criminal conduct afoot.
>
> Objectively determined, as the law requires, the Court finds that the facts and circumstances known to the officer *before* they stopped the cab fall short of a "founded suspicion" of criminal conduct. The fact that their "hunch" was correct is not of constitutional significance. A stop/search cannot become constitutional by what is then discovered.
>
> . . . The volunteered statement of [defendant Smith] "how did you know we were coming" is admissible. (Emphasis in original.)

[1] The State appealed Judge Brannon's order, reindicted defendant Smith for conspiracy, and dropped the appeal of Judge Brannon's order. Prior to trial on the conspiracy charge, defendant Smith moved to suppress the physical evidence seized during the stop, statements made during the stop, and the potential testimony of Campbell. During the hearing on defendant's second motion to suppress the cocaine found in Campbell's possession, Judge Stephens correctly concluded that Judge Brannon's order was the "law of this case." However,

Judge Brannon's order governed only the evidence found in defendant Smith's possession. The subject of the second motion to suppress was the cocaine found in Campbell's possession. In general, one superior court judge may not modify, overrule, or change the judgment of another previously made in the same case. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). Because Judge Brannon's order dealt with the bag in defendant Smith's possession, it was not controlling in regard to Campbell's bag. Judge Stephens was asked to rule on an entirely new and different matter. Therefore, he did not change or overrule the order of Judge Brannon.

[2] When one voluntarily puts property under the control of another, he must be viewed as having relinquished any prior legitimate expectation of privacy with regard to that property. *State v. Jordan*, 40 N.C. App. 412, 415, 252 S.E.2d 857, 859 (1979). In *Jordan*, officers stopped defendant's car and found nothing after searching the car and defendant's person. However, a search of the pocketbook belonging to defendant's passenger revealed controlled substances. We held that even if the entire search was unreasonable and without lawful authority, the fruits of that search were nevertheless admissible against the defendant if they were not obtained in violation of *the defendant's* Fourth Amendment rights. *Id.* (emphasis in original).

The United States Supreme Court has recognized that a person can claim the protection of the Fourth Amendment if he had a legitimate expectation of privacy in the place searched. *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576 (1967). Applying *Katz* to the facts in *Jordan*, we held that the pocketbook of a passenger in an automobile is not an area in which the driver of the automobile would normally have a reasonable expectation of privacy. *Jordan*, 40 N.C. App. at 415, 252 S.E.2d at 859. Therefore, defendant's motion in *Jordan* to suppress the evidence found in the passenger's pocketbook was properly denied on the ground that the evidence was not obtained in violation of the defendant's rights under the Fourth Amendment. *Id.*

Similarly, in *State v. Hudson*, 103 N.C. App. 708, 407 S.E.2d 583 (1991), *disc. review denied*, 330 N.C. 615, 412 S.E.2d 91 (1992), we allowed the search of a briefcase that belonged to and was in the control of the defendant's passenger. In *Hudson*, the police officer stopped the defendant's vehicle because he could not read the expiration date on his 30-day tag. *Id.* at 710, 407 S.E.2d at 584. An assisting officer asked the defendant's passenger to step out of the vehicle, and when she did, he observed the butt of a gun in plain view. *Id.* at

712, 407 S.E.2d at 585. The officer then searched the passenger's briefcase and found two bags of cocaine and a revolver. *Id.* We ruled that the defendant did not have a sufficient ownership interest in the briefcase to contest the validity of the search. *Id.* at 719, 407 S.E.2d at 589.

In the present case, the stop was unconstitutional, according to Judge Brannon's unappealed order, because the officers did not have a reasonable, articulable suspicion to stop the taxi. Nonetheless, defendant Smith did not have a legitimate expectation of privacy in Campbell's bag, and any evidence found there is not the fruit of an illegal search. Fourth Amendment rights are personal and may not be asserted vicariously. *Jordan*, 40 N.C. App. at 414, 252 S.E.2d at 859. The motion to suppress evidence seized from Campbell was properly denied because defendant Smith has not at any time asserted a property interest in Campbell's bag.

[3] The physical evidence was not the sole subject of the second motion to suppress. The transcript of Campbell's guilty plea was attached as an exhibit to defendant's second motion to suppress. It contained Campbell's agreement to testify for the State on the conspiracy charge against defendant Smith. Also attached was a document entitled "Substance of Statements Made by Garfield Anderson." According to Campbell, defendant Smith told him that "[Smith] would pay [Campbell] to carry some of the cocaine [Smith] was planning to take to North Carolina" and that defendant Smith had one-half of a kilo of cocaine. It was Campbell's choice to plead guilty and testify against the defendant. He chose a guilty plea instead of pursuing his rights under the Fourth Amendment. Defendant Smith cannot assert those rights vicariously.

It is undetermined if Campbell would have agreed to plead guilty in exchange for his testimony had there not been an illegal stop. However, whether Campbell's potential testimony was the fruit of an illegal stop is not at issue in this case. The same Fourth Amendment standard applies to the testimony as to the search of Campbell's bag. A defendant has no standing to object to the admission of evidence obtained in violation of the Fourth Amendment rights of another. *Alderman v. United States*, 394 U.S. 165, 22 L.Ed.2d 176 (1969). The testimony, like the physical evidence, involves only the rights of Campbell. Defendant Smith has no constitutional interest in the guilty plea or testimony of Campbell. Judge Stephens' denial of the motion to exclude the cocaine found in Campbell's bag as well as the testi-

mony of Campbell did not violate defendant Smith's rights under the Fourth Amendment of the United States Constitution.

Affirmed.

Judge McCRODDEN concurred in this opinion prior to 15 December 1994.

Judge WYNN dissents.

Judge WYNN dissenting.

I respectfully dissent because I believe that Judge Brannon's ruling, which the State chose not to appeal, controls the outcome of this case. In his ruling on the original motion to suppress, Judge Brannon found that the law enforcement officers did not have a reasonable, articulable suspicion of criminal conduct to support a constitutional stop of the cab. Judge Brannon astutely recognized that reasonable suspicion, in the Fourth Amendment context, must be more than suspicion as it is understood in general terms. Thus, he made the following conclusion in his Order:

> Objectively determined, as the law requires, the Court finds that the facts and circumstances known to the officer *before* they stopped the cab fall short of a "founded suspicion" of criminal conduct. The fact that their "hunch" was correct is not of constitutional significance. A stop/search cannot become constitutional by what is then discovered.

Significantly, during the hearing on defendant's second motion to suppress the cocaine found in Campbell's possession, Judge Stephens correctly noted that Judge Brannon's order was the "law of the case." Judge Stephens, however, limited the applicability of Judge Brannon's ruling to be the law of the case only in regard to defendant's bag even though the previous order ruled the *entire stop* unconstitutional. I respectfully disagree with this determination and the majority's affirmance of it. If the cab stop was unconstitutional, then the fruits that flowed from this illegal stop are inadmissible and should be suppressed in this defendant's trial. This includes not only the bag belonging to defendant but also the other bag found in the trunk of the car.

If, for analogy, Judge Brannon had found that the cab stop itself was constitutional but the search of the defendant's bag was not,

defendant would not have been able to prevent the introduction of evidence obtained from Campbell's bag based on a separate ruling by Judge Stephens that the search of Campbell's bag was permissible. Recognizing that Judge Brannon's order established the illegality of the *entire stop*, the State attempted to put the same issue before another trial judge. In essence, what the State did was appeal an unfavorable ruling of one trial court to another. Moreover, by setting aside this ruling, Judge Stephens conducted appellate review, without jurisdiction to do so, and our Supreme Court has held that one Superior Court Judge may not modify, overrule, or change the judgment of another previously made in the same case. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). While the conspiracy action did not involve the same case as the trafficking action, it did involve the same transaction and occurrence. The physical evidence that was the subject of the second suppression motion was obtained in the same transaction and by the same means as the physical evidence that was the subject of the first suppression motion. If the State wanted to challenge Judge Brannon's ruling, the proper tribunal was this Court, not Superior Court. To hold otherwise, makes an inexplicable mockery of the original ruling by Judge Brannon.

JANETTE McFARLAND, ADMINISTRATRIX OF THE ESTATE OF KENNETH CARR, DECEASED, PLAINTIFF v. ROBERT CROMER, AKA ROBERT CHAD CROMER, DEFENDANT

No. 9419SC221

(Filed 7 February 1995)

1. Trial § 563 (NCI4th)— automobile accident—damages—refusal to set aside award—any error harmless

Any error by the jury in its award of damages in an automobile accident case was harmless where decedent died as a result of injuries sustained in an automobile accident in Idaho; the accident was caused by the negligence of a North Carolina resident; defendant admitted negligence and the case was tried solely on the issues of comparative negligence and damages; plaintiff's expert testified that the estate suffered a loss of $160,826, though he could not estimate the amount that plaintiff, decedent's mother and the administratrix of the estate, would have received in support from her son; plaintiff introduced medical expenses of $24,977.61 that had been paid by the Navy and funeral expenses of approximately $5,000; defendant testified that he and decedent

had been drinking on the day of the accident, that decedent had been aware of this when he agreed to ride with defendant, and that decedent had in the past consumed alcohol and ridden with other drivers who had been drinking; the jury was instructed to apply the law of Idaho, found defendant 51% at fault and decedent 49% and awarded plaintiff $2,890 in damages; and, after post-trial motions, the trial court added plaintiff's medical expenses of $24,977.61 to the jury award of $2,890, reduced the total by 49% to $14,212.48, and set off that amount against collateral sources totalling $86,677.61, and entered judgment that plaintiff recover nothing. The evidence of damages was conflicting, and the jury was free to believe or disbelieve plaintiff's evidence. There is nothing in the record to indicate that the jury award was influenced by passion or prejudice, any failure of the jury to award plaintiff an amount equal to the medical bills was cured by the trial court's additur, and, since a set-off of $86,677.61 from collateral sources was required, plaintiff's verdict would have to exceed this sum and any purported error by the jury in its failure to award medical and funeral expenses was harmless.

Am Jur 2d, New Trial §§ 393 et seq.

Unsatisfied claim and judgment statutes: validity and construction of provisions for deduction from award of sums collectible by claimant from other sources. 7 ALR3d 836.

2. Evidence and Witnesses § 185 (NCI4th)— automobile accident—intoxicated driver and passenger—action by passenger—evidence of passenger's past drinking habits—admissible

Evidence of a decedent's past drinking habits was admissible in an action arising from an automobile accident in which the decedent was the passenger, the driver and decedent had been drinking, and contributory negligence was an issue. Evidence of the deceased's drinking habits was relevant to his knowledge of the effects of alcohol. While plaintiff argued that the probative value was outweighed by the prejudicial effect of the evidence, there was other damaging testimony about the decedent's drinking habits to which plaintiff did not object. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 557.

3. Damages § 53 (NCI4th)— automobile accident in Idaho—Idaho law—collateral source—Navy subrogation

The trial court did not err by including the medical payment by the Navy as a collateral source where the decedent was in the Navy; died in an automobile accident in Idaho; medical expenses paid by the Navy were included as a collateral source under Idaho law; plaintiff contended that the medical payments should not be treated as a collateral source because the Navy is required to seek subrogation for the payment; but the Navy had taken no action beyond providing plaintiff's counsel with notice of its subrogation claim.

Am Jur 2d, Damages §§ 566 et seq.

Unsatisfied claim and judgment statutes: validity and construction of provisions for deduction from award of sums collectible by claimant from other sources. 7 ALR3d 836.

Appeal by plaintiff from judgment entered 28 October 1993 by Judge Judson D. DeRamus, Jr. and filed in Randolph County Superior Court. Heard in the Court of Appeals 10 January 1995.

Michael R. Nash for plaintiff-appellant.

Teague, Rotenstreich and Stanaland, by Stephen G. Teague, for defendant-appellee Cromer.

Pinto, Coates & Kyre, L.L.P., by Kenneth Kyre, Jr., for unnamed defendant-appellee.

WALKER, Judge.

Decedent Kenneth Carr died on 22 September 1990 as a result of injuries sustained in an automobile accident in Idaho on 20 September 1990. The accident was caused by the negligence of defendant Cromer, a resident of Randolph County, North Carolina. Carr and Cromer were then members of the United States Navy assigned to a nuclear systems training facility in Idaho. Decedent Carr's mother, Janette McFarland, qualified as administratrix of his estate. On 27 July 1992, McFarland filed suit in Randolph County Superior Court against defendant. The matter came on for jury trial and defendant admitted negligence causing the decedent's death. The case was tried solely on the issues of comparative negligence and damages.

Plaintiff's evidence showed that at the time of his death, her son was in excellent health, enjoyed the Navy, excelled in the nuclear power program, and that she and her son had enjoyed a close relationship. She also testified that her son would occasionally send her money from his Navy paycheck. Plaintiff's expert, Dr. Finley Lee, an economist, expressed the opinion that the Estate suffered an economic loss of $160,826.00 as a result of Carr's death, though he could not estimate what amount, if any, plaintiff would have received in the way of support from her son. Plaintiff also introduced medical expenses of $24,977.61 that had been paid by the United States Navy and funeral expenses of approximately $5,000.00 which included charges for flowers and a luncheon.

Defendant testified that he had become friends with Carr while both were serving in the Navy and that he, Carr, and other friends socialized together and sometimes drank alcoholic beverages together. Defendant testified that on the day of the fatal accident, he and Carr had been drinking and that Carr was aware of this fact when he agreed to ride with defendant to and from a desert shooting range. Further, defendant introduced, over plaintiff's objection, evidence that Carr had in the past consumed alcoholic beverages and had ridden with other drivers who had been drinking. Plaintiff's motion for a directed verdict on the issue of comparative negligence was denied.

The jury, after being instructed to apply the law of Idaho, awarded plaintiff $2,890.00 in damages, finding defendant 51% at fault and decedent Carr 49% at fault. Plaintiff's motion for a new trial was denied, and the trial court entered judgment in accordance with the jury verdict, subject to further proceedings if defendant filed post-trial motions. On 15 October 1993, plaintiff filed a motion for a new trial. Four days later, defendant filed motions to alter or amend the judgment and to strike plaintiff's motion on the ground that it had already been decided by the court.

All post-trial motions were heard on 28 October 1993. The trial court added plaintiff's medical expenses of $24,977.61 to the jury award of $2,890.00, reduced the total by 49% to $14,212.48, and set off this amount against collateral sources totalling $86,677.61 (including $24,977.61 in medical expenses paid by the Navy). The trial court then entered judgment that plaintiff recover nothing and signed an order denying plaintiff's motion for a new trial.

[1] Plaintiff's first assignment of error is that the trial court erred in refusing to set aside the jury award as inadequate as a matter of law

because the jury incorrectly omitted an award for medical expenses and other damages in spite of uncontradicted evidence of such damages, and gave an award for only part of the funeral expenses. Plaintiff argues that the inadequacy of the award suggests the verdict was the result of an impermissible compromise; therefore, a new trial on the issues of damages and comparative negligence should be granted.

Rule 59 of the North Carolina Rules of Civil Procedure provides that a new trial may be granted on the grounds of "[E]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice. . . ." N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) (1994). Whether to grant a Rule 59 motion for a new trial on the grounds of excessive or inadequate damages is within the sound discretion of the trial judge, and the judge's decision may be reversed on appeal only when such decision amounts to a "manifest abuse of discretion." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982).

Plaintiff relies on the case of *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974), in support of her motion for a new trial. In *Robertson*, the North Carolina Supreme Court reversed a trial court's denial of a motion for a new trial based on inadequate damages because it was clear that the jury had ignored uncontradicted proof of damages for pain and suffering. *Id.* at 568, 206 S.E.2d at 195. *Robertson* is distinguishable from the instant case in two significant ways. First, *Robertson* dealt exclusively with the issue of damages for pain and suffering. Under Idaho law, pain and suffering is not an element of damages recoverable in a wrongful death action. *See* Idaho Code § 5-311 (1994); *Vulk v. Haley*, 736 P.2d 1309, 1313 (1987); Idaho Pattern Jury Instruction 911-1. Second, the proof of pain and suffering in *Robertson* was uncontradicted, and the jury's failure to award damages for pain and suffering was determined by the Court to be arbitrary and improper. *Id.* at 566, 206 S.E.2d at 193-94. In the instant case, the jury heard evidence of the Navy's payment of Carr's medical expenses, of the funeral expenses incurred, and of the economic loss damages; however, it was for the jury to weigh this evidence and to determine what damages, if any, the plaintiff was entitled to recover. The evidence of damages was conflicting, and the jury was free to believe or disbelieve plaintiff's evidence. *Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979). There is nothing in the record to indicate that the jury award was influenced by passion or prejudice, as plaintiff claims. Therefore, under the standard enunciated in Rule

59, it was not a manifest abuse of discretion for the trial judge to uphold the jury's verdict and to deny plaintiff's motion for a new trial.

We note that any failure of the jury to award plaintiff an amount equal to the medical bills was cured by the trial court's additur of $24,977.61. Furthermore, since a set-off of $86,677.61 from collateral sources was required, obviously plaintiff's verdict would have to have exceeded this sum or she would recover nothing. Therefore, we agree with defendant that any purported error by the jury on its failure to award medical and funeral expenses was harmless.

[2] Plaintiff's second assignment of error is that the trial court erred in overruling plaintiff's objection to the admission of evidence of Carr's past drinking habits. Plaintiff claims that evidence of Carr's "prior, remote use of alcohol" was "irrelevant, prejudicial, and improper character evidence." Defendant responds that the evidence of Carr's drinking habits was relevant to the issue of Carr's knowledge of the effects of alcohol and as such was admissible under North Carolina Rule of Evidence 404(b). Defendant also asserts that the admission of the evidence was not prejudicial to plaintiff. Upon reviewing the record and prior case law from this Court, we hold that the challenged evidence was properly admitted.

Plaintiff first argues that the proffered evidence of Carr's drinking habits was irrelevant. 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 (1994). Evidence that is not relevant is inadmissible. N.C. Gen. Stat. § 8C-1, Rule 402 (1994).

Defendant contended that Carr was contributorily negligent in riding in the vehicle when he knew that defendant had been drinking. The trial judge instructed the jury that under Idaho law, "where [a] guest passenger [sic] voluntarily ride[s] with an operator who is impaired by alcohol and the guest passenger knew or should have known that the operator was so impaired the conduct of the guest passenger would be negligence within itself." Therefore, Carr's knowledge of alcohol and its effects was relevant to the outcome of this case.

Since Rule 404(b) states that evidence of other acts is admissible to show knowledge, we agree with defendant that evidence of Carr's prior use of alcohol would tend to show that Carr knew the effects of

alcohol consumption and that he knew or should have known that since defendant had been drinking throughout the day of this fatal accident, his ability to drive was impaired. While it is true, as plaintiff points out, that the proffered evidence does not by itself show that Carr knew defendant was under the influence, all of the evidence of Carr's drinking habits, along with the evidence of defendant's drinking habits, especially on the day of the accident, establishes that Carr's prior use of alcohol and his knowledge of its effects was relevant on the issue of contributory negligence.

A recent decision of this Court adds support to our holding that this evidence was relevant. In *Anderson v. Austin*, 115 N.C. App. 134, 443 S.E.2d 737 (1994), evidence of the plaintiff's previous acts and habit of drinking beer and using prohibited substances was admitted. The Court of Appeals upheld the admission of the evidence, noting that

> the evidence showed that plaintiff was taking the same risk on the night in question that he habitually took. The more often plaintiff took this risk, the greater the knowledge he had of the dangers inherent in taking the risk. . . .

Id. at 137-38; 443 S.E.2d at 739-40.

In the instant case, defendant contends that Carr's conduct constituted negligence, and knowledge of the "dangers inherent" in drinking and driving is surely relevant in evaluating Carr's decision to ride with an individual he knew had been drinking. Therefore, the trial court properly admitted evidence of Carr's prior drinking habits.

Plaintiff also argues that the probative value of the evidence of Carr's past drinking, if any, was outweighed by its prejudicial effect in that it "diminishe[d] the worth of the decedent in the eyes of the jurors." Plaintiff correctly notes that Rule 403 requires the trial court to balance probative value and prejudicial effect. However, there was other damaging testimony about Carr's drinking habits to which plaintiff did not object. For example, James Willie Brandon, an occupant of the vehicle involved in the fatal accident, testified that Carr was drinking beer at his apartment on the afternoon before the accident; that Carr drank probably eight or nine beers that afternoon; and that Carr drank a beer on the way to the shooting range that night. Defendant testified that he smelled alcohol on Carr's breath just before going to the desert and that everyone (including Carr) drank some beer at the apartment that evening. This evidence, along with other evidence of Carr's previous acts and habits with regard to the

consumption of alcoholic beverages, is relevant and permissible under *Anderson*. Plaintiff has not demonstrated that her case was unfairly prejudiced by the admission of the challenged evidence.

Finally, plaintiff argues that the evidence of Carr's past drinking habits was improper character evidence under Rule 404(b). The portion of the rule quoted by plaintiff in her brief does not support her argument. Because we have already ruled that this evidence was admissible under Rule 404(b) to show Carr's knowledge of the effects of alcohol as it related to the issue of contributory negligence, it was properly admitted.

[3] Plaintiff's final assignment of error is that the trial court erred in concluding that under Idaho law, which prohibits double recoveries from collateral sources, the Navy's payment of $24,977.61 in medical expenses was a collateral source which must be deducted from plaintiff's award.

The collateral sources which the trial court found to be subject to the Idaho statute included the following: $50,000.00 Persian Gulf Conflict Death Gratuity; $1,500.00 funeral benefits paid by Nationwide Mutual Insurance Company; $10,000.00 accidental death benefit paid by Nationwide Mutual Insurance Company; $200.00 social security death benefit; and $24,977.61 in medical expenses paid by the United States Navy.

Plaintiff does not dispute the trial court's decision to reduce her award by the first four collateral sources listed (amounts totalling $61,700.00). However, plaintiff claims that the $24,977.61 Navy payment should not be treated as a collateral source under the Idaho statute because the Navy is required by federal law to seek subrogation for the payment.

Although the Navy apparently did provide plaintiff's counsel with notice of its claim of subrogation lien, including a citation of the provisions of federal law which authorize such a lien, no further action has been taken by the Navy in this matter. Therefore, we cannot conclude that the trial court erred by including the medical payment by the Navy as a collateral source.

In the trial below we find

No error.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. BARBARA ANN CHASE, DEFENDANT

No. 9428SC341

(Filed 7 February 1995)

1. **Indictment, Information, and Criminal Pleadings § 8 (NCI4th)— gambling—sufficiency of misdemeanor statement of changes—case initiated in district court**

There was no error in a prosecution for gambling where defendant contended that the trial court had erred by failing to dismiss the misdemeanor statement of charges made by the State in superior court on the date of trial, but the case was initiated in district court, and N.C.G.S. § 7A-271(b) and N.C.G.S. § 7A-290 expressly provide the superior court with jurisdiction over appeals by defendant from district court.

Am Jur 2d, Indictments and Informations §§ 277 et seq.

2. **Indictment, Information, and Criminal Pleadings § 8 (NCI4th)— gambling—sufficiency of statement of charges**

A misdemeanor statement of charges was sufficient to charge defendant with two counts of gambling where the statement referred to violation of N.C.G.S. § 14-292, and states that defendant unlawfully and willfully operated a game of chance, "a poker machine by paying a player money for said player's score."

Am Jur 2d, Indictments and Informations §§ 66 et seq.

3. **Indictment, Information, and Criminal Pleadings § 8 (NCI4th)— gambling—new statement of charges—continuance denied**

There was no abuse of discretion in a gambling prosecution where the trial court granted defendant's motion to dismiss the warrants but allowed the State to file misdemeanor statements of charges and denied defendant's motion for a continuance because the statement of charges made no material change in the pleadings.

Am Jur 2d, Indictments and Informations §§ 29 et seq.

4. **Gambling § 34 (NCI4th)— poker machine—evidence sufficient**

There was sufficient evidence of gambling to conform to a misdemeanor statement of charges involving a poker machine where the evidence clearly showed that defendant, the employee

in charge of the station where the machines were located, operated a machine and there was testimony concerning cashing in points for money from defendant.

Am Jur 2d, Gambling §§ 147 et seq.

5. Gambling § 33 (NCI4th)— gambling—instructions—definition of betting

The trial court did not err in a gambling prosecution by failing to give the proposed jury instructions submitted by defendant and in failing to give jury instructions on the definition of "betting."

Am Jur 2d, Gambling § 169.

Appeal by defendant from judgment entered 5 October 1993 by Judge Chase B. Saunders in Buncombe County Superior Court. Heard in the Court of Appeals 9 January 1995.

Attorney General Michael F. Easley, by Associate Attorney General Michael S. Fox, for the State.

Russell L. McLean, III for defendant-appellant.

JOHNSON, Judge.

Defendant Barbara Ann Chase was tried and convicted of gambling in Buncombe County District Court; defendant appealed to Buncombe County Superior Court. At the start of the proceedings in superior court, defendant moved for a dismissal claiming that the warrants which charged defendant with gambling were "fatally defective" and "failed to put defendant on proper notice." The State argued that the warrants were sufficient; in the alternative, if the court ruled that the pleadings were insufficient, the State would file statements of charges pursuant to North Carolina General Statutes § 15A-922(e) (1988). The court granted defendant's motion and allowed the State to file misdemeanor statements of charges. Defendant then moved to dismiss the misdemeanor statements of charges, alleging under North Carolina General Statutes § 15A-923(1988) that either a bill of information or an indictment is required to proceed in cases which are initiated in superior court. The trial court dismissed defendant's motion. Defendant made other motions which were denied by the trial court which will be discussed more fully in this opinion.

At trial, the State presented evidence in the form of testimony from detective Robert Carraway of the Buncombe County Sheriff's Department. Mr. Carraway worked with the vice squad as an undercover agent; the vice squad is responsible for investigating gambling offenses, illegal liquor, and drugs. Mr. Carraway had approximately one and one-half years experience enforcing the gambling laws.

During January and February 1993, Mr. Carraway worked undercover at five different locations in Buncombe County for gambling offenses, one of which was the BP station on Highway 74 in Fairview. On these undercover operations, Mr. Carraway would enter the location in plain clothes and play the machines in question. While there, he would buy drinks and converse with the store operators and the other people playing the machines. On two specific dates, 5 February 1993 and 9 February 1993, Mr. Carraway observed defendant working as a clerk in the BP station in Fairview. Mr. Carraway identified defendant as the person who had been the clerk in the store on those evenings; he also identified defendant's sister and stated that he could tell the difference between the two sisters.

Mr. Carraway described the machine he played as a television screen which comes up with computer images of cherries and other objects which roll in several columns on the screen. A bet is placed on the game by inserting $1, $5, $10, or $20 into the machine. After the money is placed in the machine, the screen begins to roll with different symbols flashing on the screen. The symbols will eventually stop rolling on their own if no action is taken. There is also a button to stop the symbols, but they do not stop immediately after you hit the button. One of the actual machines Mr. Carraway played at the BP station in Fairview was identified and entered into evidence. Mr. Carraway demonstrated how to use the machine, how to place bets on the machine by betting a certain number of points, and how to accumulate credits by winning bets on the machine.

Mr. Carraway testified that he played this type of game at the BP station in Fairview on 5 February 1993. On that date, he entered the store through the front door and saw defendant behind the counter. He recognized her and knew her name because he had talked to her on previous occasions in the store. Mr. Carraway went to the counter and got change for $20 and proceeded to play the machine in the back corner. After he finished playing, he approached defendant and asked her to cash in his points. Defendant cleared the machine, came back to the register and gave Mr. Carraway $10 for his points. Mr. Carraway

spent approximately $15 to win the $10. Mr. Carraway went back to the same store on 9 February 1993, again saw defendant behind the register, bought some grapefruit juice and proceeded to play on one of the machines. He accumulated 200 points on the machine; he cashed this point total in for $10 which defendant paid him out of the cash register.

On cross-examination, Mr. Carraway testified that the machine which was used in court had a North Carolina Revenue Stamp attached to it. He also testified that certain types of these machines are legal if used for amusement and that a player can exchange points for up to $10 in coupons or prizes but not money. Mr. Carraway never saw any coupons or prizes being issued for points on the machines at the BP station.

Rebecca Reel, an employee for the accounting firm which does the payroll for the convenience stores where defendant worked, testified for defendant. Ms. Reel brought payroll records of defendant to court, indicating that defendant's first paycheck was written on 12 March 1993. On cross-examination, Ms. Reel testified that she had no first-hand knowledge of defendant's actual working hours or whether it was defendant who was actually paid for working at a store.

Defendant testified that she was primarily employed as a certified nursing assistant at the Black Mountain Center, a mental retardation institute. She has worked third shift at that facility for the past two years from 11:00 p.m. until 7:30 p.m. Defendant further testified that she also worked for C & F Convenience Stores and began work part-time in March 1993 as a cashier. Defendant testified that there are machines to play in the store in which she worked and that she was instructed to pay up to $10 in merchandise from the store for winners. This was paid by giving out a coupon or credit voucher. Defendant testified that she was not working in the store on either 5 February 1993 or 9 February 1993, and that she was working the third shift at Black Mountain Center on both of those days. Defendant testified that the only time she had seen Mr. Carraway was when he arrested her on 31 March 1993. Defendant testified that she has a sister who manages the BP station.

On cross-examination, defendant testified that she did not fill in at the BP station when someone was sick during the months of January and February in 1993. Defendant further testified that she has worked at her convenience store job and the Black Mountain Center on the same day and that there was nothing that would prevent her

from working at both places on the same day. Defendant also testified that she would not have been working at Black Mountain Center during the time, approximately 8:00 or 9:00 p.m., when Mr. Carraway testified the gambling incidents took place at the BP station.

The jury found defendant guilty of two counts of gambling. The trial judge consolidated the cases for sentencing and imposed a sentence of six months incarceration which was suspended for a period of five years, and placed defendant on supervised probation for one year with a $100 fine. Defendant has appealed to our Court.

[1] Defendant first argues on appeal that the trial court erred in failing to dismiss the misdemeanor statements of charges made by the State in superior court on the date of the trial in violation of North Carolina General Statutes § 15A-923. We disagree with defendant. We note that North Carolina General Statutes § 15A-923(a) clearly states that "[t]he pleading in felony cases and misdemeanor cases *initiated* in the superior court division must be a bill of indictment, unless there is a waiver of the bill of indictment as provided in G.S. § 15A-642. If there is a waiver, the pleading must be an information. . . . " (Emphasis added.) The instant case was initiated in district court. North Carolina General Statutes §§ 7A-271(b) (1989) and 7A-290 (1989) expressly provide the superior court with jurisdiction over appeals by a defendant from district court. Defendant's first assignment of error is overruled.

[2] Defendant next assigns as error the trial court failing to dismiss the misdemeanor statements of charges charging a violation of North Carolina General Statutes § 14-292 (1993) because the charges stated in the misdemeanor statements of charges failed to state a crime by failing to allege each and every element of the criminal charge referred to in the said statute. Defendant asserts that "[t]here was nothing in the misdemeanor statement[s] of charges alleged as an element that a bet was placed, which is an element of the charge and therefore one of the elements of the charge is missing." We disagree.

Defendant was charged with the offense of gambling, a violation of North Carolina General Statutes § 14-292, which reads:

> Except as provided in Part 2 of this Article, any person or organization that operates any game of chance or any person who plays at or bets on any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, shall be guilty of a misdemeanor.

Each misdemeanor statement of charges stated that "defendant did unlawfully and willfully operate a game of chance; to wit a poker machine by paying a player money for said player's score."

In *State v. Morgan*, 133 N.C. 743, 45 S.E. 1033 (1903), our Supreme Court was faced with a defendant's motion to quash an indictment because the indictment did not charge that the games being played were ones of chance and that they were played at a place or tables where games of chance were usually played. The Court held that

> [i]t was not necessary to charge in the indictment that the games played at the gaming-house were games of chance. That is sufficiently implied in charging that the defendant kept a common gaming-house, the word "gaming" having a definite meaning in law, i.e., gambling, the act of playing games for stakes or wagers.

Morgan at 744-45, 45 S.E. at 1034.

In the instant case, in each of the misdemeanor statements of charges, defendant is charged with the offense of gambling. The misdemeanor statements of charges reference the violation of North Carolina General Statutes § 14-292, and state that defendant unlawfully and willfully operated a game of chance, "a poker machine by paying a player money for said player's score." We find, with *Morgan* as our guide, that the misdemeanor statements of charges were sufficiently alleged so as to charge defendant with two counts of gambling. *See* North Carolina General Statutes § 15A-924(a)(5) (Cum. Supp. 1994), stating that a criminal pleading must contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." *See also State v. Jordan*, 75 N.C. App. 637, 331 S.E.2d 232, *disc. review denied*, 314 N.C. 544, 335 S.E.2d 23 (1985). Defendant's assignment of error is overruled.

[3] Defendant next argues that the trial court erred by failing to allow a continuance of the trial "to give the defendant an opportunity to prepare a defense to the new statement[s] of charges issued against her on the day of the trial in violation of her statutory rights, state and federal constitutional rights." We disagree. Pursuant to North Carolina General Statutes § 15A-922(b)(2) (1988),

> [u]pon appropriate motion, a defendant is entitled to a period of at least three working days for the preparation of his defense after a statement of charges is filed, or the time the defendant is first notified of the statement of charges, whichever is later, unless the judge finds that the statement of charges makes no material change in the pleadings and that no additional time is necessary.

In the case *sub judice*, the trial judge apparently found that the statements of charges made no material change in the pleadings and that no additional time was necessary. We will not disturb the trial judge's denial of a motion for a continuance absent an abuse of discretion. *State v. Martin*, 46 N.C. App. 514, 265 S.E.2d 456, *disc. review denied*, 301 N.C. 102 (1980). We find no such abuse in the instant case.

[4] Defendant next assigns as error the trial court's denial of defendant's motion to dismiss at the close of the State's evidence and all of the evidence and that the evidence was insufficient as a matter of law to go to the jury because the State's evidence failed to conform to the misdemeanor statements of charges. Defendant argues that there is no evidence that defendant operated the machine or that gambling took place. We disagree. We believe the evidence clearly shows that defendant, the employee in charge of the station where the machines were located, operated the machine. Evidence that gambling took place was presented in the form of Mr. Carraway's testimony of cashing in his points for money from defendant. We overrule this assignment of error.

[5] Finally, defendant argues that the trial court erred in its charge to the jury, specifically erring in failing to give the proposed jury instructions submitted by defendant and in failing to give jury instructions on the definition of "betting." We find the trial judge properly instructed the jury on the law arising on the evidence in this case. *State v. Moore*, 335 N.C. 567, 440 S.E.2d 797, *cert. denied*, — U.S. —, 130 L.Ed.2d 174 (1994).

Defendant's remaining assignment of error is abandoned. N.C.R. App. P. 28(b)(5).

No error.

Chief Judge ARNOLD and Judge MARTIN, MARK D. concur.

IN RE NOLEN

[117 N.C. App. 693 (1995)]

IN RE: CURTIS BROWN NOLEN, BORN DECEMBER 23, 1985; CAROLYN BRANDI NOLEN, BORN AUGUST 4, 1987

No. 9417DC93

(Filed 7 February 1995)

1. Parent and Child § 122 (NCI4th)— termination of parental rights—testimony of children in chambers not recorded—no showing of prejudice

There was no showing of prejudice in a termination of parental rights hearing where the court allowed the children to testify in chambers with all counsel present but the proceedings in chambers were not recorded. A violation of N.C.G.S. § 7A-198, which deals with recording civil trials, is not enough; respondent must show that the error was prejudicial.

Am Jur 2d, Parent and Child §§ 7, 11.

2. Evidence and Witnesses § 2747 (NCI4th)— termination of parental rights—child witnesses—testimony without oath

There was no prejudice in a termination of parental rights proceeding by allowing the children to testify without being sworn where respondent did not object to the error when given the opportunity to do so in the courtroom after the children testified. A defendant may not argue on appeal that the trial court erred in allowing a witness to testify without being sworn where the defendant did not object at trial.

Am Jur 2d, Appeal and Error §§ 545 et seq.; Witnesses §§ 413 et seq.

3. Evidence and Witnesses § 758 (NCI4th)— termination of parental rights—psychologist—opinion as to child's veracity—admitted elsewhere

There was no prejudice in a termination of parental rights proceeding where the psychologist of one of the children was allowed to answer, over objection, a question as to whether he felt that what the child told him was the way he truly felt and believed, but the immediately preceding questions had been whether he felt the child had been open and honest with him and whether there was anything to lead him to believe the child had been coached, both of which he answered. The admission of testimony over objection is ordinarily harmless error when testi-

mony of the same import has previously been admitted without objection.

Am Jur 2d, Appeal and Error § 806.

4. Parent and Child § 104 (NCI4th)— termination of parental rights—willfully leaving child in foster care; evidence sufficient

The evidence in a termination of parental rights case supported the trial court's findings of fact and conclusions of law as to N.C.G.S. § 7A-289.32(3) where DSS was first granted custody of the children on 7 August 1989, when respondent was arrested for drunk driving with the children in the car; respondent stated that she had drunk beer that night because she and her live-in boyfriend had had a fight and her boyfriend physically abused her every day; the children were returned to the physical custody of respondent at the five day hearing but she had to leave them with her mother in December because she was incarcerated for a controlled substance offense; respondent's mother subsequently turned them over to DSS; respondent entered into several service agreements with DSS in which she agreed to enroll in and complete the STEP ONE program, attend substance abuse counselling, attend AA meetings regularly and provide verification of her attendance, attend parenting classes and abstain from the use of alcohol; she did not enroll in and complete the STEP ONE program, attended substance abuse counselling only sporadically, did not attend AA meetings regularly and did not provide verification of her attendance, did not complete parenting classes, and did not abstain from the use of alcohol; respondent failed to keep DSS informed of where she was living so that DSS could contact her about the children; she showed up for visits with the children smelling of alcohol and appearing intoxicated; numerous police officers have responded to disturbance calls at respondent's residence; one officer who had answered between thirty and thirty-five calls at the residence testified that respondent appeared intoxicated on every occasion; the officer testified that the most recent incident was four days before the hearing, when the officer noted that the first room of the house was extremely dirty and in disarray and that there were beer bottles in the front yard; respondent told the officer that she had been assaulted and that she wanted to leave; respondent's medical records reveal a history of alcoholism and alcohol-related injuries; and respondent admitted that the children were often neglected when she was

under the influence of alcohol. Willfulness under N.C.G.S. § 7A-289.32(3) is something less than willful abandonment; a finding of willfulness is not precluded even if respondent has made some efforts to regain custody of the children. Here, respondent has had more than three and one-half times the statutory period in which to take steps to improve her situation, but has failed to do so. Extremely limited progress in correcting the conditions is not reasonable progress. Furthermore, respondent has not shown a positive response toward DSS's efforts to help her; implicit in the meaning of positive response is that positive efforts toward improving the situation have obtained or are obtaining positive results.

Am Jur 2d, Parent and Child § 11.

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

Parent's use of drugs as factor in award of custody of children, visitation rights, or termination of parental rights. 20 ALR5th 534.

5. Parent and Child § 97 (NCI4th)— termination of parental rights—grounds for termination—best interests of child—no abuse of discretion

The trial court did not abuse its discretion by terminating respondent's parental rights where the court had found that one or more of the grounds for termination in N.C.G.S. § 7A-289.32 exists, but respondent argued that it was in the best interests of the children to dismiss the petition.

Am Jur 2d, Parent and Child § 11.

Appeal by respondent from order filed 3 September 1993 by Judge Jerry Cash Martin in Stokes County District Court. Heard in the Court of Appeals 17 October 1994.

J. Tyrone Browder, P.A., by John L. McGrath, for petitioner-appellee Stokes County Department of Social Services.

Jill R. Howard, Guardian ad Litem for the minor children.

Jeffrey S. Lisson for respondent-appellant Tanya K. Joyce.

LEWIS, Judge.

Petitioner commenced this action to terminate the parental rights of respondent Tanya K. Joyce in her two minor children, Curtis Brown Nolen and Carolyn Brandi Nolen. The trial court ordered that respondent's parental rights be terminated, and respondent appeals.

[1] Respondent's first argument on appeal is that the trial court erred in allowing the two children to testify without being sworn and without a record made of their testimony. At the hearing, the children, then ages five and seven, were unwilling to take the witness stand. The judge then allowed the children to testify in chambers with all counsel present. The proceedings in chambers were not recorded. After the children testified, recording of the hearing resumed. At the request of respondent, the court summarized for the record the children's testimony.

N.C.G.S. § 7A-289.30(a) (1989) states that the reporting of the hearing on termination "shall be as provided by G.S. 7A-198 for reporting civil trials." Respondent argues that because the children's testimony was not recorded, respondent must receive a new hearing. However, showing a violation of section 7A-198 is not enough; respondent must also show that the error was prejudicial. *Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988). Because respondent does not argue any error in the unrecorded testimony itself, respondent has failed to show prejudice. *In re Lail*, 55 N.C. App. 238, 239, 284 S.E.2d 731, 732 (1981).

[2] Respondent next argues that it was reversible error to allow the children to testify without being sworn. However, respondent did not object to this error when given the opportunity to do so in the courtroom after the children testified. In *State v. Robinson*, 310 N.C. 530, 540, 313 S.E.2d 571, 578 (1984), our Supreme Court held that a defendant may not argue on appeal that the trial court erred in allowing a witness to testify without being sworn, where the defendant did not object at trial. The Court noted that a timely objection would have allowed the trial judge to correct the oversight by putting the witness under oath and allowing him to redeliver his testimony. *Id.* We believe that this rule applies with equal force in the case at hand. Accordingly, respondent's assignment of error on this issue is overruled.

[3] Respondent's next contention is that the trial court erred in allowing Dr. Michael McCullough, a psychologist who provided counselling services to Carolyn Brandi Nolen, to testify as to her veracity. Dr.

McCullough was allowed, over objection, to answer the following question: "So do you feel that what she told you was the way she truly believed and felt?" Respondent contends that Dr. McCullough's answer to the question amounted to an expression of opinion as to Brandi's veracity. However, immediately preceding the above question, Dr. McCullough was asked, "From your background and experience with working with so many children, do you believe that Brandi has been open and honest with you particularly in the last two sessions?" He responded, "Yes." He was then asked, "Was there anything about her behavior during these last two sessions that led you to believe that she had been coached in any way to say one thing or the other?" Dr. McCullough responded, "No."

The admission of testimony over objection is ordinarily harmless error when testimony of the same import has previously been admitted without objection or is thereafter introduced without objection. *In re McDonald*, 72 N.C. App. 234, 237, 324 S.E.2d 847, 849 (1984), *disc. review denied*, 314 N.C. 115, 332 S.E.2d 490 (1985). The above colloquy shows that testimony of the same import as that objected to had been admitted without objection just before the testimony in question. Accordingly, even if the testimony objected to was erroneously admitted, any error was harmless.

[4] Respondent's next argument is that there was insufficient evidence to support a termination of her parental rights under N.C.G.S. § 7A-289.32(3) and (4), the two grounds upon which the trial court based its decision. Section 7A-289.32(3) provides that the court may terminate parental rights upon a finding that

> [t]he parent has willfully left the child in foster care for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the child or without showing positive response within 12 months to the diligent efforts of a county Department of Social Services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the child on account of their poverty.

§ 7A-289.32(3) (Cum. Supp. 1994). The burden was on petitioner to prove the facts justifying termination by clear and convincing evidence. § 7A-289.32(3a); *In re Bishop*, 92 N.C. App. 662, 667, 375 S.E.2d 676, 680 (1989).

The Stokes County Department of Social Services (hereinafter "DSS") was first granted custody of the children on 7 August 1989. On that date, respondent had been arrested for drunk driving. The children, then ages two and three, had been in the car with respondent. The arrest was respondent's second for DWI. Respondent stated that she had drunk the beer on 7 August because she and her live-in boyfriend had had a fight. Respondent further admitted that her boyfriend physically abused her every day.

At the five day hearing, the children were returned to the physical custody of respondent. In December 1989, respondent had to leave the children with her mother because she was incarcerated for a controlled substance offense. Respondent's mother subsequently turned the children over to DSS, as she was unable to care for them. On 29 December 1989, DSS took physical custody of the children and has had custody since that date.

Respondent has entered several service agreements with DSS since the children were removed. In them, respondent agreed to enroll in and complete the STEP ONE program, to attend substance abuse counselling, to attend AA meetings regularly and provide verification of her attendance, to attend parenting classes, and to abstain from the use of alcohol. Respondent did not enroll in and complete the STEP ONE program; she attended substance abuse counselling only sporadically; she did not attend AA meetings regularly and did not provide verification of her attendance; she did not complete parenting classes; and she did not abstain from the use of alcohol. Respondent also failed to keep DSS informed of where she was living so that DSS could contact her about the children. Respondent showed up for visits with the children smelling of alcohol and appearing intoxicated. Numerous police officers have responded to disturbance calls at respondent's residence. One officer testified that in the two years preceding the hearing, she had answered between thirty and thirty-five calls at the residence and on every occasion, respondent appeared intoxicated. The most recent incident was four days before the final hearing in this matter. On that occasion, the responding officer noted that the first room of the house was extremely dirty and in disarray and that there were beer bottles in the front yard. Respondent told

the officer that she had been assaulted and that she wanted to leave. Further, respondent's medical records reveal a history of alcoholism and alcohol-related injuries. Finally, respondent admitted that when she was under the influence of alcohol, the children were often neglected.

As to the trial court's findings regarding section 7A-289.32(3), respondent concedes that the children were left in foster care for more than twelve months. Respondent contends, however, that she did not "willfully" leave the children in foster care. Respondent argues that her actions cannot be held to be willful, as, despite her transportation problems, she attended "several" AA meetings, went to parenting classes, received substance abuse treatment, and maintained contact with DSS, "though the contact was at times irregular."

In the context of a termination based on willful abandonment, *see* § 7A-289.32(8), this Court has held that the word "willful" connotes purpose and deliberation. *Bishop*, 92 N.C. App. at 668, 375 S.E.2d at 680. Willfulness under section 7A-289.32(3), however, is something less than willful abandonment. *Id.* A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children. *In re Becker*, 111 N.C. App. 85, 95, 431 S.E.2d 820, 826-27 (1993). Willfulness may be found where the parent, recognizing her inability to care for the children, voluntarily leaves the children in foster care. *Bishop*, 92 N.C. App. at 669, 375 S.E.2d at 681. In the present case, respondent has had more than three and one-half times the statutory period of twelve months in which to take steps to improve her situation, yet she has failed to do so. Accordingly, respondent's behavior supports a finding of willfulness.

In addition to finding that the parent has willfully left the children in foster care more than twelve months, under section 7A-289.32(3) the trial court must also find that the parent has failed (1) to make reasonable progress in correcting the conditions which led to the removal of the children; and (2) to show positive response to DSS's diligent efforts to encourage the parent to strengthen the parental relationship to the children or to make and follow through with constructive planning for the future of the children. § 7A-289.32(3); *In re Taylor*, 97 N.C. App. 57, 63-64, 387 S.E.2d 230, 233 (1990). Respondent contends that there was insufficient evidence of both (1) and (2).

It is clear that respondent has not made reasonable progress in correcting the conditions. As illustrated by the facts set out above, respondent's alcoholism and abusive living arrangement have contin-

ued throughout the more than three and one-half years the children have been in foster care with little or no signs of progress. Extremely limited progress is not reasonable progress. *See Bishop*, 92 N.C. App. at 670, 375 S.E.2d at 681. Further, respondent has not shown a "positive response" to DSS's efforts to help her in improving her situation. Implicit in the meaning of positive response is that not only must positive efforts be made towards improving the situation, but that these efforts are obtaining or have obtained positive results. *In re Tate*, 67 N.C. App. 89, 94, 312 S.E.2d 535, 539 (1984). Otherwise, a parent could forestall termination proceedings indefinitely by making sporadic efforts for that purpose. *Id.* It is clear that respondent has not obtained positive results from her sporadic efforts to improve her situation. Accordingly, respondent's argument is without merit.

We therefore hold that the evidence in this case supports the trial court's findings of fact and conclusion of law as to section 7A-289.32(3).

[5] Respondent next contends that the trial court abused its discretion in ordering that her parental rights be terminated. Even though the trial judge has found that one or more of the grounds for termination in section 7A-289.32 exists, he is not required to terminate a parent's rights. *Becker*, 111 N.C. App. at 97, 431 S.E.2d at 828. If the best interests of the children require that the parent's rights not be terminated, the court must dismiss the petition. N.C.G.S. § 7A-289.31(b) (1989). Respondent contends that the trial court abused its discretion in ordering termination, because termination was not in the best interests of the children. Since we conclude that the trial court properly determined that grounds for termination existed under section 7A-289.32(3), we hold that the trial court did not abuse its discretion in finding that it was in the best interests of the children to terminate respondent's parental rights. *See Becker*, 111 N.C. App. at 97, 431 S.E.2d at 828.

Finally, we note that the trial court also found grounds for termination under section 7A-289.32(4), and that respondent assigns error to that finding. However, a finding of any one of the grounds listed in section 7A-289.32 will support an order of termination. *Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34. Because we have held that the trial court's findings and conclusion as to section 7A-289.32(3) were proper, we need not address respondent's arguments regarding section 7A-289.32(4).

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

Affirmed.

Chief Judge ARNOLD and Judge COZORT concur.

STATE OF NORTH CAROLINA v. DEIDRA SOLOMON

No. 9410SC238

(Filed 7 February 1995)

1. **Constitutional Law § 184 (NCI4th)— possession of marijuana and paraphernalia—acquittal—prosecution for cocaine possession—collateral estoppel inapplicable**

Defendant's previous acquittal in the district court of misdemeanor charges of possession of marijuana and drug paraphernalia found in a cigarette case did not collaterally estop the State under double jeopardy principles from prosecuting defendant for felonious possession of cocaine also found in the cigarette case where no transcript was made of the district court proceedings, and the basis of defendant's acquittal of the misdemeanor charges is a matter of speculation.

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

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts—modern view. 6 ALR4th 802.

2. **Evidence and Witnesses § 364 (NCI4th)— cocaine possession—evidence of marijuana and rolling papers—chain of circumstances**

Marijuana and rolling papers were properly admitted in defendant's trial for felonious possession of cocaine, even though defendant had been acquitted of misdemeanor possession of the marijuana and paraphernalia, since the finding of the marijuana and rolling papers was linked in time and circumstances with the chain of events leading to defendant's arrest and formed an integral and natural part of an account of the crime of cocaine possession.

Am Jur 2d, Evidence §§ 448 et seq.

3. Narcotics, Controlled Substances, and Paraphernalia § 180 (NCI4th)— possession of controlled substances—instructions

The trial court's instructions on the elements of possession of a controlled substance did not constitute plain error where the court followed the pattern instruction on actual and constructive possession, and the instructions on constructive possession clearly placed the burden on the State to prove beyond a reasonable doubt that defendant possessed cocaine.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.5.

4. Criminal Law § 1057 (NCI4th)— sentencing—judge's comment—no right to new hearing

Defendant was not entitled to a new sentencing hearing for possession of cocaine because the trial judge commented before sentencing that the jury by its verdict did not believe defendant, particularly since the trial judge found as a mitigating factor that defendant was a person of good character who had a good reputation.

Am Jur 2d, Trial §§ 291 et seq.

Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused. 34 ALR3d 1313.

Appeal by defendant from judgment entered 30 June 1993 by Judge J.B. Allen in Wake County Superior Court. Heard in the Court of Appeals 10 January 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Don Wright, for the State.

Weber & Shatz, P.A., by Daniel Shatz, for defendant-appellant.

WALKER, Judge.

Defendant Deidra Solomon was convicted of possession of cocaine. The State's evidence tended to show that on 8 January 1992, Trooper Richard Maness stopped defendant's vehicle when he noticed that it was weaving erratically and that defendant appeared to be flagging him down. Trooper Maness noticed the smell of alcohol about defendant and her vehicle. Defendant admitted to having two alcoholic drinks (Bacardi Breezers) at a company function earlier that evening. Trooper Maness determined that defendant's drivers

license had been revoked and arrested her for driving while impaired and driving with a revoked license.

After the arrest, Trooper Maness searched defendant's vehicle. He discovered a cigarette case at the top of defendant's purse. The case contained two packs of rolling papers, four baggies containing marijuana, two baggie corners containing cocaine powder, and a partially smoked marijuana cigarette. When asked about these items, defendant said she had never seen the case or its contents. On 29 March 1993, defendant was tried in district court on charges of possession of marijuana and possession of drug paraphernalia and she was acquitted on both charges.

On 30 June 1993, defendant was tried in superior court, and Trooper Maness testified as to the events of 8 January 1992. During his testimony, the cocaine, marijuana, and rolling papers he had found in the cigarette case were introduced and passed to the jury without objection.

Defendant testified that she and Tara Brown, an employee of defendant's cleaning company, had attended a company dinner in Raleigh on 7 January 1992. They drove to the restaurant in a company vehicle loaded with cleaning equipment and supplies. There defendant drank the two Bacardi Breezers. After dinner, a company employee, known as Jimmy, drove this company vehicle to Durham, while defendant and Brown drove Jimmy's car back to Raleigh. While getting into the car, defendant noticed a cigarette case lodged between the driver and passenger seats. Defendant dropped Brown off at a relative's house in Raleigh. At this time, the cigarette case became dislodged and fell on the passenger side. Because it looked valuable, defendant picked it up and put it in her purse for safekeeping. After dropping off Brown, defendant began to experience car trouble while driving on I-40 and flagged down Trooper Maness, who later arrested her.

On cross-examination defendant denied telling Trooper Maness that she had never seen the cigarette case before, but stated she told him she was not aware of the contents of the case. Defendant admitted that she had prior convictions for driving with a revoked license and for damage to property.

Defendant was convicted of possession of cocaine, sentenced to four years in the Department of Corrections with the sentence suspended, and placed on five years' supervised probation. Defendant

petitioned this Court for a writ of certiorari, which was granted, allowing the appeal of her conviction.

[1] Defendant first argues that the trial court erred by denying her motions to dismiss the charge on the grounds of collateral estoppel. She claims that her previous acquittal on charges of possession of marijuana and drug paraphernalia precludes the State from prosecuting her for possession of cocaine.

The United States Supreme Court has held that the constitutional protection against double jeopardy requires that the principle of collateral estoppel be applied in criminal cases. *Ashe v. Swenson*, 397 U.S. 436, 443, 25 L.Ed.2d 469, 475 (1970). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* In criminal cases where the previous acquittal was based on a general verdict, collateral estoppel

> requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Id. at 444, 25 L.Ed.2d at 475-76 (citations omitted).

The *Ashe* decision was based in part upon the Court's unwillingness to allow the prosecution, after an acquittal of a defendant, to refine its presentation in order to obtain a conviction on a technically different charge based upon the same facts. *Ashe*, 397 U.S. at 447, 25 L.Ed.2d at 477. However, in *Dowling v. United States*, 493 U.S. 342, 107 L.Ed.2d 708 (1990), the Court declined to extend the theory of *Ashe* and the concept of collateral estoppel to exclude, in all circumstances, relevant evidence "simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Dowling*, 493 U.S. at 348, 107 L.Ed.2d at 717. Thus, *Dowling* stands for the proposition that collateral estoppel cannot be mechanically applied to all cases that may suggest it but must be applied only after careful analysis of each factual situation.

Under North Carolina law, the burden of persuasion on a collateral estoppel defense lies with the defendant. *State v. Edwards*, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984). The mere fact that the same evidence was introduced in a prior criminal trial does not make a

later criminal trial subject to collateral estoppel. *Id.* Rather, the determinative factor in a collateral estoppel defense is whether it is *absolutely necessary* to a defendant's conviction for the second offense that the second jury find against that defendant on an issue which was decided in his favor by the prior jury. *Id.* In making this determination,

> "unrealistic and artificial speculation about some far-fetched theory upon which the jury might have based its verdict of acquittal" is foreclosed; rather, a realistic inquiry is required into how a rational jury would consider the evidence presented in a particular case.

Id. (citations omitted).

In her brief defendant concedes that at trial she did not contest that Trooper Maness found marijuana and rolling papers in the cigarette case. Her defense was that she did not *knowingly* possess these items. Defendant now argues that the district court's acquittal on the marijuana and drug paraphernalia charges could only have been based on a reasonable doubt that she knowingly possessed the contents of the cigarette case. Therefore, defendant claims, since the issue of her knowledge of the contents of the case was necessarily decided in her favor in district court, the State should have been precluded from relitigating that issue in her later trial for possession of cocaine.

The district court made no transcript of the proceedings and defendant can only speculate as to the basis of her acquittal on the two misdemeanor charges. The application of collateral estoppel in a criminal case cannot be predicated on mere speculation. Therefore, we find that the trial court did not abuse its discretion in denying defendant's motions to dismiss based on her acquittal on the misdemeanor charges.

[2] Defendant's second argument is that the trial court erred in permitting the State to introduce into evidence the marijuana and rolling papers and then allowing them to be viewed by the jury. Since defendant did not object to the admission and circulation of this evidence at trial, she must show that the trial court's decision constituted plain error. In reviewing the trial court's decision for plain error, we must examine the entire record and determine if the decision had a probable impact on the jury's finding of guilt. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Defendant argues that the only purposes for introducing the marijuana and rolling papers were to convince the jury that she was guilty of possession of these items as well as the cocaine and to prejudice the jury. Defendant relies on *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990), where the defendant had been acquitted of possession of marijuana and, in a subsequent trial for possession of LSD, the arresting officer was allowed to testify about finding the marijuana on the defendant's person. *Id.* at 548, 391 S.E.2d at 174. The Court held that this testimony was a necessary part of the chain of circumstances leading to the defendant's arrest and to the search which located the LSD, and was admissible to avoid a logical gap in the officer's narrative. *Id.* The Court explained that

> "[e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."

Id. (citations omitted). Here, the finding of the marijuana and rolling papers was linked in time and circumstances with the chain of events leading to defendant's arrest and formed an integral and natural part of an account of the crime; the evidence was therefore admissible.

Furthermore, without conceding that admission of the evidence was improper, we do not believe the admission of this evidence was so fundamentally prejudicial as to constitute plain error. Based on our review of the record, it is not apparent that the jury would have reached a different result without this evidence before it.

[3] Defendant next argues that the trial court erred in its instruction to the jury on the elements of possession of a controlled substance. Defendant did not object to the instruction at trial, and she must again show that the instruction given amounted to plain error.

The preferred method of instructing the jury is the use of the approved guidelines of the North Carolina Pattern Jury Instructions. *Caudill v. Smith*, 117 N.C. App. 64, ——, 450 S.E.2d 8, 13 (1994). The challenged instruction follows the pattern jury instructions on actual and constructive possession. N.C.P.I.—Crim. 104.41. The instructions given in this case regarding constructive possession of a controlled substance accurately stated the law and clearly placed the burden on the State to prove beyond a reasonable doubt that defendant pos-

sessed the cocaine. Accordingly, we find that the challenged instructions did not amount to plain error.

[4] Finally, defendant argues that during the sentencing phase of the trial, the trial court commented about her credibility, entitling her to a new sentencing hearing.

Even though the trial judge commented before passing sentence that the jury by its verdict did not believe defendant, we find no evidence that this is reflected in defendant's sentence, particularly since the judge found as a mitigating factor that defendant was a person of good character who had a good reputation. In view of defendant's prior convictions, the trial court could impose a sentence greater than the presumptive if it determined that the aggravating factor outweighed the mitigating factor. Defendant received a fair trial free from prejudicial error and is not entitled to a new sentencing hearing.

No error.

Judges EAGLES and GREENE concur.

JAMES VANCE SILVER, EMPLOYEE, PLAINTIFF, v. ROBERTS WELDING CONTRACTORS, EMPLOYER, AND THE PMA GROUP, CARRIER, DEFENDANTS

No. 9410IC159

(Filed 7 February 1995)

1. Workers' Compensation § 236 (NCI4th)— maximum medical improvement—finding of permanent partial disability—wage-earning capacity

The Industrial Commission did not err in a workers' compensation action by finding that plaintiff was permanently partially disabled where plaintiff had been an iron worker helper; he was injured when two pieces of concrete fell on him, the first knocking off his hard hat and the second striking him directly on the head; he suffered brain damage as a result of the accident; he was not able to return to his former employer, intermittently worked a series of jobs, then worked as a security guard, a job which he felt he could handle; that job was transferred to another city which was not within a reasonable driving distance; and the Commission concluded that plaintiff was permanently partially disabled, and awarded benefits for temporary total disability and

temporary partial disability. Although plaintiff argued that the Commission erred by concluding that his right to continuing disability benefits ended when he reached maximum medical improvement, a finding of maximum medical improvement is simply the prerequisite to a determination of the amount of any permanent disability under N.C.G.S. § 97-31. The Commission's findings of permanent partial disability, which entitled him to an election of benefits, were supported by competent evidence.

Am Jur 2d, Workers' Compensation §§ 395-399.

2. Workers' Compensation § 236 (NCI4th)— permanent partial disability—wage-earning capacity—odd-lot doctrine

The Industrial Commission did err in a workers' compensation action by failing to apply the odd-lot doctrine, under which total disability may be found in workers who are not altogether incapacitated but who are so handicapped that they will not be employed regularly in any well-known branch of the labor market. Even if the odd-lot doctrine was recognized in North Carolina, the doctrine does not apply to this case since the Commission found that plaintiff could find suitable employment.

Am Jur 2d, Workers' Compensation §§ 395-399.

3. Workers' Compensation § 259 (NCI4th)— temporary disability compensation—findings—sufficient

The Industrial Commission's findings were sufficient to provide a sufficient chronology of the approximate times plaintiff was employed after his injury and support the amount of temporary disability compensation awarded by the Commission.

Am Jur 2d, Workers' Compensation §§ 382, 418 et seq.

4. Workers' Compensation § 215 (NCI4th)— vocational rehabilitation—findings—sufficient

The Industrial Commission did not err in a workers' compensation action by requiring defendant to provide further vocational rehabilitation assistance to plaintiff based upon findings that plaintiff was impaired as a result of his head injury and had to overcome resistance on the part of employers to obtain employment and that plaintiff required vocational rehabilitation to assist him in obtaining stable employment. The findings were supported by competent evidence.

Am Jur 2d, Workers' Compensation §§ 379, 435.

SILVER v. ROBERTS WELDING CONTRACTORS

[117 N.C. App. 707 (1995)]

Appeal by plaintiff and defendants from Opinion and Award entered 2 November 1993 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 October 1994.

Lore & McClearen, by R. Edwin McClearen, for plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by David A. Rhoades and Kari Lynn Russwurm.

WYNN, Judge.

Plaintiff, James Vance Silver, and defendants Roberts Welding Contractors (Roberts) and The PMA Group appeal from the opinion and award of the North Carolina Industrial Commission awarding plaintiff payments for temporary total disability and temporary partial disability and vocational rehabilitation services.

Plaintiff was employed by Roberts as an iron worker helper which required him to work with a welder on the steel frame of buildings. On 13 October 1987, plaintiff was injured when two pieces of concrete fell on him. The first piece of concrete knocked off his hard hat and the second piece struck him directly on the head. As a result of this accident, plaintiff suffered a skull fracture, a small epidermal hematoma, and some bleeding along the temporal lobe of the brain. Plaintiff was taken to the hospital and treated by a neurosurgeon. After being discharged from the hospital, plaintiff suffered from severe headaches and neck pains.

Plaintiff was examined by Dr. J. Ross Shuping who diagnosed him as having sustained brain damage as a result of the accident which impaired his reasoning abilities and short-term memory. Dr. Shuping believed plaintiff was not suited for heavy construction labor but released him to return to work on 20 April 1988. Plaintiff inquired about a position with Roberts and was told that nothing suitable was available.

Plaintiff intermittently worked a series of jobs from 1988 to 1991. He worked as a security guard for one month but his position was transferred to another city. While plaintiff felt he could handle the job, the new location was not within a reasonable driving distance.

The Commission found that plaintiff was permanently partially disabled and awarded benefits for temporary total disability and temporary partial disability. The Commission also concluded that defendants should provide vocational rehabilitation services to plaintiff.

Plaintiff appeals the benefit portion of the Commission's award and defendants cross-appeal the Commission's conclusion that they must provide vocational rehabilitation services.

I.

[1] Plaintiff first argues that the Commission erred by finding that temporary total disability ends when a claimant reaches maximum medical improvement. We disagree.

Appellate review of an award of the Industrial Commission is limited to two questions: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the Commission's findings of fact justify its legal conclusions. *Gilliam v. Perdue Farms*, 112 N.C. App. 535, 435 S.E.2d 780 (1993); *Gibbs v. Leggett and Platt, Inc.*, 112 N.C. App. 103, 434 S.E.2d 653 (1993). The Commissions's findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981); *Gilbert v. Entenmann's, Inc.*, 113 N.C. App. 619, 440 S.E.2d 115 (1993).

An employee injured in the course of employment is disabled under the Workers' Compensation Act (Act) if the injury results in an "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (1991). Disability is defined by the Act as an impairment of the injured employee's earning capacity rather than physical disablement. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986); *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 139 S.E.2d 857 (1965). The claimant bears the burden of proving the extent or degree of the disability suffered. *Little v. Anson County Schools Food Service*, 295 N.C. 527, 246 S.E.2d 743 (1978); *Bowden v. The Boling Co.*, 110 N.C. App. 226, 429 S.E.2d 394 (1993). Once the disability is proven, there is a presumption that it continues until the "employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971); *Radica v. Carolina Mills*, 113 N.C. App. 440, 439 S.E.2d 185 (1994).

In the instant case, the Commission made the following findings of fact:

> 15. As of August 29, 1991 plaintiff reached maximum medical improvement and was able to work at a moderate level as long as

he could avoid bending and stooping. He had wage earning capacity and was able to find suitable work as a security guard earning $170.00 per week. However, he was impaired as a result of this injury and had to overcome resistance on the part of the Employment Security Commission and potential employers in order to obtain employment. Furthermore, the job he found was temporary and he was soon unemployed.

16. Plaintiff requires vocational rehabilitation to assist him in obtaining employment.

17. As a result of the injury by accident giving rise to this claim, plaintiff has sustained permanent damage to his brain, an important internal organ, for which he would be entitled to $20,000.00 under the Workers' Compensation Act. He also was rendered permanently partially disabled. However, he did not become totally and permanently disabled as he has alleged. Because of that allegation, he did not make an election of benefits as between G.S. 97-30 and G.S. 97-31, and the amounts are so close that it is not clear which would provide the greater remedy.

Plaintiff argues that the Commission erred by concluding that his right to continuing disability benefits ended when he reached maximum medical improvement. Plaintiff cites this Court's decision in *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 374 S.E.2d 483 (1988), which held that a finding of maximum medical improvement is not equivalent to a finding that the employee is able to earn the same wage earned prior to injury and therefore does not dispose of plaintiff's claim. *Id.* at 476, 374 S.E.2d at 485. A finding of maximum medical improvement is simply the prerequisite to a determination of the amount of any permanent disability under N.C. Gen. Stat. § 97-31. *Id.*

In the case *sub judice*, however, the Commission rejected plaintiff's contention that he was totally disabled since he had wage-earning capacity and was able to find suitable employment as a security guard. Plaintiff testified that he was able to work as a security guard but that his position was relocated to another city that was not within a reasonable driving distance from his home. The Commission found that plaintiff was permanently partially disabled which entitled him to an election of benefits as provided by *Gupton v. Builders Transport*, 320 N.C. 38, 357 S.E.2d 674 (1987). The Commission's findings are supported by competent evidence and this assignment of error is overruled.

II.

[2] Plaintiff next argues that the Commission erred by failing to apply the "odd-lot" doctrine to his case. While the "odd-lot" doctrine has not been adopted in North Carolina, our Supreme Court, in *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 345 S.E.2d 374 (1986), discussed the doctrine in a footnote. The Court stated:

> Under the "odd-lot" doctrine, "total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor-market." 2 Larson *Workmen's Compensation*, § 57-51 (1983). Under this doctrine, if the claimant establishes a prima facie case that he is an odd-lot worker, the burden then shifts to the employer to show the existence of work that is regularly available to the claimant. *Id.*

Hendrix, 317 N.C. at 192, 345 S.E.2d at 381-2 n.2. The Court declined to adopt the "odd-lot" doctrine in *Hendrix* because the issue was not properly presented for appeal and the evidence did not require the doctrine's application. *Id.*

In the instant case, the Commission found that plaintiff had wage-earning capacity and was able to work at a moderate level as long as he could avoid bending and stooping. Even if the "odd-lot" doctrine was recognized in North Carolina, the doctrine does not apply to this case since the Commission found that plaintiff could find suitable employment. This assignment of error is overruled.

III.

[3] Plaintiff finally argues that the Commission failed to make specific factual findings regarding the amount of past temporary disability compensation to which plaintiff was entitled. We find that the Commission's findings of fact provide a sufficient chronology of the approximate times plaintiff was employed after his injury and support the Commission's award. This assignment of error is overruled.

Defendants' Cross-Appeal

[4] Defendants appeal the portion of the Commission's opinion and award requiring them to provide further vocational rehabilitation assistance to plaintiff. Defendants argue that there is no evidence in the record to support the Commission's conclusion that defendants

should have to provide vocational rehabilitation services and argue that plaintiff possessed wage-earning capacity after his injury and was able to find suitable work as a security guard. We disagree.

The Commission is vested with the exclusive authority to find facts and, on appeal, this Court is bound by the Commission's findings when they are supported by direct evidence or reasonable inferences drawn from the record. *Ivey v. Fasco Industries*, 109 N.C. App. 123, 425 S.E.2d 744, *disc. review denied*, 333 N.C. 574, 429 S.E.2d 570 (1993). The Commission found that plaintiff was impaired as a result of his head injury and had to overcome resistance on the part of potential employers in order to obtain employment. The Commission also found that plaintiff required vocational rehabilitation to assist him in obtaining stable employment. Dr. Terry White, a physician whose practice involves patients who have suffered head traumas, testified that plaintiff could benefit from vocational rehabilitation. We have reviewed the record and conclude that the Commission's findings are supported by competent evidence. This assignment of error is overruled.

Accordingly, for the foregoing reasons the opinion and award of the Industrial Commission is

Affirmed.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. TERRY BRUCE BALDWIN

No. COA94-941

(Filed 7 February 1995)

1. Automobiles and Other Vehicles § 818.1 (NCI4th)— habitual impaired driving—sufficiency of indictment

An indictment for felonious habitual impaired driving sufficiently alleged that defendant had previously been convicted of three driving while impaired offenses where it alleged that defendant was convicted of driving while impaired on 13 November 1989 and twice on 12 December 1989. Furthermore, no fatal variance was shown between the indictment and proof since

defendant's counsel stipulated to the convictions as alleged in the indictment.

Am Jur 2d, Automobiles and Highway Traffic § 310.

2. **Criminal Law § 1282 (NCI4th)— habitual felon—habitual impaired driving as predicate felony**

A conviction for habitual impaired driving may serve as a predicate felony for enhancement to habitual felon status under N.C.G.S. § 14-7.1.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 6 et seq.

Determination of character of former crime as a felony, so as to warrant punishment of accused as a second offender. 19 ALR2d 227.

3. **Criminal Law § 68 (NCI4th)— superior court jurisdiction—misdemeanor tried with felony**

Because habitual impaired driving is a substantive felony offense, the superior court had jurisdiction pursuant to N.C.G.S. § 7A-271 to also try defendant for the misdemeanor of driving while impaired.

Am Jur 2d, Criminal Law §§ 352-357.

4. **Appeal and Error § 155 (NCI4th)— failure to preserve issue for appeal**

Defendant waived his right to appellate review of the issue of variance between the indictment and proof by failing to raise this issue at trial. N.C. R. App. P. 10(b)(1).

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

5. **Automobiles and Other Vehicles § 143 (NCI4th)— driving while license permanently revoked—sufficiency of indictment**

An indictment alleging that defendant "unlawfully [and] willfully did drive a vehicle on a street or highway while the driver's license issued to him had been permanently revoked" was not defective for vagueness and was sufficient to charge a violation of N.C.G.S. § 20-28(b).

Am Jur 2d, Automobiles and Highway Traffic § 148.

STATE v. BALDWIN

[117 N.C. App. 713 (1995)]

Appeal by defendant from judgments entered 14 January 1994 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 17 January 1995.

Defendant was charged with felonious habitual impaired driving in violation of North Carolina General Statutes § 20-138.5 (1993), with driving while license permanently revoked in violation of North Carolina General Statutes § 20-28(b) (1993), and with habitual felon status in violation of North Carolina General Statutes § 14-7.1 (1993). A jury found defendant guilty of driving while impaired and driving while license permanently revoked. Counsel for defendant stipulated that defendant had three prior driving while impaired convictions in the previous seven years, and the trial court stated that judgment would therefore be entered for felonious habitual impaired driving. The jury then found defendant guilty of having attained habitual felon status based on the felony driving while impaired conviction. The trial court sentenced defendant to thirty years in prison for his habitual felon status and two years in prison for driving while license permanently revoked. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Joseph P. Dugdale, for the State.

Carol B. Andres for defendant-appellant.

JOHNSON, Judge.

[1] Defendant argues that the trial court erred because the indictment charging him with felonious habitual impaired driving was insufficient. Specifically, defendant contends the indictment only alleged that he had two prior driving while impaired convictions rather than the requisite three. We disagree.

North Carolina General Statutes § 20-138.5(a) provides:

> A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense.

In this case, the indictment for habitual impaired driving alleged that defendant was convicted of driving while impaired on 13 November 1989 and twice on 12 December 1989. At trial, defendant's counsel stipulated to the convictions as alleged in the indictment. Defendant

now contends that he was not convicted twice on 12 December 1989 and that the indictment only alleges two actual convictions.

Jurisdiction to try an accused for a felony depends upon a valid bill of indictment. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969). A valid bill of indictment must allege all essential elements of a statutory offense. *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975). In this case, the indictment alleged the essential elements of the offense since it alleged defendant had been previously convicted of three impaired driving offenses. The indictment was not insufficient to charge the crime.

Furthermore, no fatal variance was shown between the indictment and proof at trial since defendant's counsel stipulated to the previous convictions as set out in the indictment. Pursuant to North Carolina General Statutes § 15A-928(c) (1988), a defendant may admit a previous conviction and thereby establish an element of an offense. *State v. Smith*, 291 N.C. 438, 230 S.E.2d 644 (1976). Defendant has failed to show that he is entitled to any relief with regard to the indictment for felonious habitual impaired driving. Defendant's argument is without merit.

[2] Defendant also argues that the trial court erred by using habitual impaired driving "as a predicate felony conviction to enhance a sentence to habitual felon status." Defendant contends that habitual impaired driving is a status that cannot be used to further enhance a sentence. We disagree.

One of the three previous felonies utilized in this case as a basis for the habitual felon charge was habitual impaired driving. Habitual impaired driving is a substantive felony offense. *State v. Priddy*, 115 N.C. App. 547, 445 S.E.2d 610, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994). Therefore, a conviction for that offense may serve as the basis for enhancement to habitual felon status. Defendant's argument is meritless.

[3] Defendant also argues that the Superior Court did not have jurisdiction to try a "misdemeanor driving while impaired" charge. Defendant contends the enhancement to felonious habitual impaired driving did not vest jurisdiction in the Superior Court. Because felonious habitual impaired driving is a substantive felony offense, the Superior Court had jurisdiction pursuant to North Carolina General Statutes § 7A-271 (1989). *Id.*

[4] Defendant next argues that the habitual felon indictment showed "an incorrect charge and statute on felony conviction" and was therefore invalid. Defendant appears to contend that there was a variance between the evidence presented at trial and the allegations in the indictment. Defendant failed to set out an assignment of error in support of this argument in the record on appeal, and the issue is therefore not properly before this Court pursuant to N.C.R. App. P. 10(a). *See State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992).

Even assuming *arguendo* that the issue may be raised despite defendant's failure to assign error in support of it, defendant failed to raise the issue at trial. The issue of variance between the indictment and proof is properly raised by a motion to dismiss. *State v. Waddell*, 279 N.C. 442, 183 S.E.2d 644 (1971). Defendant moved to dismiss the habitual felon charge based upon double jeopardy and not based upon a variance between the indictment and proof. Defendant waived his right to raise this issue by failing to raise the issue at trial. N.C.R. App. P. 10(b)(1). We therefore decline to address the issue.

[5] Finally, defendant argues that the indictment for driving while license permanently revoked was defective. Specifically, defendant contends the indictment was vague and did not provide him with enough information to defend the charge. We disagree.

The indictment in question alleged that defendant "unlawfully [and] willfully did drive a vehicle on a street or highway while the driver's license issued to him had been permanently revoked." The language used in the indictment is clearly sufficient to charge an offense in violation of North Carolina General Statutes § 20-28(b) (1993). The indictment sufficiently apprised defendant of the conduct which was the subject of the accusation pursuant to North Carolina General Statutes § 15A-924(a)(5) (Cum. Supp. 1994). Defendant's argument is without merit.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges GREENE and WYNN concur.

STATE OF NORTH CAROLINA v. HIRAM WATSON SHANNON

No. 9429SC211

(Filed 7 February 1995)

Evidence and Witnesses § 2893 (NCI4th)— defendant's written statements to counselor—waiver of use by State—cross-examination as harmless error

In a prosecution of defendant for rape, sexual offenses and indecent liberties involving his stepdaughter, the State waived its right to cross-examine defendant about written statements he made to a counselor during sex therapy following a previous conviction for taking indecent liberties with his daughter when the State agreed at a pretrial suppression hearing that it would not use the statements unless it raised the issue at trial before defendant took the stand and it failed to raise the issue before defendant testified. However, error by the trial court in permitting the State to cross-examine defendant about the statements was not prejudicial in light of the other overwhelming evidence of defendant's guilt.

Am Jur 2d, Witnesses §§ 484 et seq.

Appeal by defendant from judgment entered 6 October 1993 by Judge Claude S. Sitton in Henderson County Superior Court. Heard in the Court of Appeals 26 October 1994.

Attorney General Michael F. Easley, by Associate Attorney General Daniel D. Addison and Investigative Law Clerk Paula A. Bridges, for the State.

Stepp & Groce, by Christopher S. Stepp, for defendant-appellant.

WYNN, Judge.

The State charged defendant with sexually abusing his stepdaughter who was eighteen years old at the time of the trial. He was indicted for one count of first degree rape, three counts of first degree sexual offense, and four counts of taking indecent liberties with a child.

The evidence at trial tended to show the following. The stepdaughter testified that defendant repeatedly sexually abused her

since she was eight years old. She stated that he regularly fondled her genitalia and made her engage in fellatio. The stepdaughter also testified that she noticed a mole on defendant's penis and a physician, Dr. James Irion, testified and confirmed that there was a mole on defendant's penis.

Defendant's daughter, who was thirteen years old at the time of the trial, testified that he engaged in oral sex with her since she was eight or nine years old. Both girls stated that defendant threatened them that if their mother would not love them anymore and they would become orphans.

Defendant testified and categorically denied ever sexually abusing his stepdaughter or daughter. He admitted to pleading guilty in 1990 to committing indecent liberties with his daughter, but testified that he did so because he did not want her to have to testify in court.

Defendant was convicted of second degree rape, three counts of first degree sexual offense, and four counts of taking indecent liberties with a child. The trial court sentenced him to an active term of imprisonment. From this judgment and sentence, he appeals.

Defendant argues that the trial court erred by permitting the State to cross-examine him with written statements that the State had waived the right to use. He contends that at the pre-trial hearing the State expressly waived the right to use written statements he had made in the course of sex offender therapy that he received after his 1990 conviction for taking indecent liberties with his daughter. We agree but conclude that this error was harmless.

Defendant made a pretrial motion to suppress the introduction of written statements he made to his counselor in the course of therapy which was part of his sentence for the 1990 indecent liberties conviction. Defendant argued in the motion that the statements were privileged communications given in the course of medical treatment. When the motion was heard before the trial court, there was the following exchange:

> MR. STEPP: [defendant's attorney] Your Honor, should he [defendant] elect to take the stand and testify, number one, I argue to you that it [the statements] would be privileged information.
>
> THE COURT: Well, you want to hear it then, as I understand it, so he can determine whether he wants to take the stand; is that what you're saying or getting ready to?

MR. STEPP: Yes, Your Honor.

THE COURT: Mr. D.A. isn't there a case that says the Court should make some ruling in regard to that, so it doesn't chill his rights to testify or not testify, so he knows whether or not it's going to be used or not used?

MR. EDWARDS: Your Honor, I believe that is correct. At this point, as I say, I don't intend to use it. And at the appropriate time I believe a hearing—he'd be entitled to one.

As I see it right now, I don't believe it's even going to become part of the case.

THE COURT: Well, if you desire to proceed that way, I'll proceed that way. But it may mean that the Court's saying in effect, if you go that way and he does testify the Court's not going to allow it unless I make some preliminary decision, so that he knows then that if he gets on the stand it's going to be used against him.

So my comment to you do you desire to hear it, Mr. District Attorney, or do you desire to waive your right to that Motion to Suppress understanding that you will not use it under any circumstances?

MR. EDWARDS: I would waive my right to use this statement and let the trial proceed as follows. I don't think it's worth the paper written on anyway.

THE COURT: All right, then with that statement that you do not intend to use it under any circumstances, the Court will not proceed, just say it's a moot question at this time.

At trial, defendant testified and specifically denied molesting his stepdaughter. Defendant also stated that he had pled guilty to committing indecent liberties with his daughter because "[he] did not want her to be interrogated." The State then sought to cross-examine defendant with the written statements that were the subject of his motion to suppress. Among other things, defendant had written that being touched and rubbed by his daughter gave him a feeling of control. After a *voir dire*, the trial court denied defendant's motion to suppress and permitted the State to cross-examine him regarding the written statements.

Defendant contends that he was prejudiced by the trial court's failure to rule on his motion to suppress the statements at the pretrial

hearing. Defendant also argues that the trial court erred by permitting the State to cross-examine defendant about the statements. We conclude that the exchange between the trial court, the State, and defendant's attorney shows that the State agreed that if it intended to use the written statements in its cross-examination of defendant, it would raise the issue during trial and *prior* to defendant taking the witness stand. Otherwise, the State would not use the contested statements. The State did not raise the issue prior to defendant taking the stand and therefore waived its right to use the defendant's written statements in its cross-examination. We find that the trial court erred by overruling defendant's objection and allowing the State to cross-examine defendant about the statements.

We hold, however, that this error was harmless. *See State v. McCarroll*, 336 N.C. 559, 445 S.E.2d 18 (1994); *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981); N.C. Gen. Stat. § 15A-1443 (1988). The burden is upon defendant to show that there is a reasonable probability that had the error in question not been committed, a different result would have been reached at trial. *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985). The evidence of defendant's guilt was overwhelming. His stepdaughter and daughter both testified that he repeatedly sexually abused them by fondling their genitalia and forcing them to engage in oral sex with him. The girls' mother testified that in 1982 she saw defendant in the nude "going back and forth on top of" his stepdaughter. The girls' testimony that defendant had a mole on his penis was corroborated by a physician who examined defendant. We conclude, therefore, that defendant has not meet his burden of showing that even if the State had not cross-examined him regarding his written statements, a reasonable probability exists that there would have been a different result at trial.

No error.

Judges GREENE and JOHN concur.

GEORGE MITCHELL HATEM v. JAMES ALEXANDER BRYAN, III

No. 9415SC240

(Filed 7 February 1995)

Limitations, Repose, and Laches § 22 (NCI4th)— medical malpractice—accrual of claim—jury question

An issue of fact for the jury was presented as to whether a claim for medical malpractice accrued on the date of defendant physician's last treatment of plaintiff or on the earlier date a second physician who examined plaintiff told him that defendant physician "should be hung by his balls," since the question of whether the second physician's statement was sufficient to charge plaintiff with notice that he had a cause of action is not so clear that it could be decided as a matter of law.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 321.

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

Appeal by plaintiff from order entered 10 November 1993 by Judge Robert H. Hobgood in Orange County Superior Court. Heard in the Court of Appeals 21 October 1994.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr. and Kenneth B. Oettinger, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by Bruce W. Berger and Suzanne S. Lever, for defendant-appellee.

WYNN, Judge.

Plaintiff, George M. Hatem, suffered from sarcoidosis, a chronic disease process of unknown cause which may affect any organ or tissue of the body, and sought treatment from defendant, Dr. James A. Bryan, III, in 1976. Plaintiff received regular treatment from defendant until the fall of 1986 when plaintiff's brother, Dr. Joseph Patrick Hatem, became concerned by plaintiff's continued illness. Dr. Hatem arranged for plaintiff to be evaluated by Dr. Peter Pappas, a physician and colleague of Dr. Hatem. Dr. Pappas examined plaintiff on 22 Sep-

tember 1986 and on 6 October 1986. Plaintiff testified to the following in his deposition regarding Dr. Pappas's examination:

> Q Do you recall Dr. Pappas, in any way, being critical of Dr. Bryan's care of you?
>
> A Yes, I do, and I can give you a quote, although it's vulgar.
>
> Q If you would.
>
> A "He should be hung by his balls."
>
> Q And Dr. Pappas said that to you and to Joe Pat [plaintiff's brother] in 1986?
>
> A Correct.
>
> Q Did he make any other comment about Dr. Bryan's care of you?
>
> A Not that I can recall. He may have.

Dr. Pappas referred plaintiff to Dr. W. Giles Allen, Jr. for an evaluation of plaintiff's fatigue and shortness of breath. Subsequently, defendant saw plaintiff on 7 January 1987 and 11 February 1987. Plaintiff then lost confidence in defendant's treatment and was treated on 11 March 1987 by Dr. Joseph W. Kittinger who diagnosed plaintiff as suffering from severe sarcoidosis with lung disease and prescribed high dose steroids to treat the condition. Plaintiff testified in his deposition that Dr. Kittinger criticized Dr. Bryan's treatment, but plaintiff could not recall exactly what Dr. Kittinger said.

Plaintiff's brother, Dr. Hatem, examined plaintiff's medical records while under defendant's care. Dr. Hatem discovered that defendant did not inform plaintiff of the results of his tests. Plaintiff then filed this action against defendant for medical malpractice on 1 February 1990.

Defendant moved for summary judgment on the basis that the action was barred by the applicable three-year statute of limitations of N.C. Gen. Stat. § 1-15(c). After a hearing, the trial court determined plaintiff's action was time barred and dismissed it with prejudice. From that order, plaintiff appeals.

Plaintiff argues that the trial court erred by dismissing plaintiff's action on the grounds that it was barred by the statute of limitations. We agree.

N.C. Gen. Stat. § 1-15(c) provides in pertinent part:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1-15(c) (1983).

This statute provides that the cause of action accrues and the statute of limitations begins to run at the time of the defendant's last act which gives rise to the cause of action. *Callahan v. Rogers*, 89 N.C. App. 250, 365 S.E.2d 717 (1988). "[T]he cause of action accrue[s] at the earlier of (1) the termination of defendant's treatment of plaintiff or (2) the time at which the plaintiff knew or should have known of his injury." *Ballenger v. Crowell*, 38 N.C. App. 50, 60, 247 S.E.2d 287, 294 (1978); *see Stallings v. Gunter*, 99 N.C. App. 710, 394 S.E.2d 212, *disc. review denied*, 327 N.C. 638, 399 S.E.2d 125 (1990). Whether a cause of action is barred by the statute of limitations is a mixed question of law and fact and when the facts are admitted or established the trial court may dismiss the action as a matter of law. *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974). When, however, the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury. *Id.* at 727, 208 S.E.2d at 668; *Calhoun v. Calhoun*, 76 N.C. App. 305, 332 S.E.2d 734, *disc. review denied*, 315 N.C. 586, 341 S.E.2d 23 (1985).

In the instant case, plaintiff argues that his cause of action accrued on 11 February 1987, the last date he was treated by defend-

ant. Defendant argues that plaintiff's cause of action accrued when Dr. Pappas told him that defendant "should be hung up by his balls." We find that the question of whether this statement was sufficient to charge plaintiff with notice that he had a cause of action is not so clear that it could be decided as a matter of law. Therefore, we conclude that the issue of when the limitations period expired is a question of fact for the jury. Accordingly, the judgment of the trial court is

Reversed.

Judges GREENE and JOHN concur.

HARVEY L. DAVIS AND WIFE, BONNIE W. DAVIS, PETITIONERS v. FORSYTH COUNTY, RESPONDENT

9421SC7

(Filed 7 February 1995)

Highways, Streets, and Roads § 18 (NCI4th)— cartway proceeding—claim against county

A cartway proceeding may be maintained against a county. Although respondent county contended that the term "other persons" as used in N.C.G.S. § 136-69 does not include bodies politic such as counties, N.C.G.S. § 136-68 refers to Chapter 40, the successor to which, N.C.G.S. § 40A-2, includes in its definition of person any legal entity capable of owning or having interest in land. Counties in North Carolina are established as legal entities and are empowered by law to acquire land and "other persons" as used in the cartway statute includes counties.

Am Jur 2d, Highways, Streets, and Bridges §§ 6, 340 et seq.

Appeal by Plaintiff from Order entered 25 October 1993 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 6 October 1994.

Isaacson, Isaacson & Grimes, by Henry H. Isaacson and L. Charles Grimes for petitioners-appellants.

Sapp, Mast & Stroud, by James Keith Stroud for respondent-appellee.

WYNN, Judge.

In September 1985, petitioners, Mr. and Mrs. Davis, purchased approximately 5.45 acres of land in Forsyth County, North Carolina. Afterwards, they discovered that the property was landlocked—it was not served by any road, path or cartway, public or private, and, there was no legal way onto or out of the property. This made it difficult for the petitioners to cut and sell the timber on the land, as was their intention.

In November 1992, the petitioners instituted a special proceeding before the Clerk of Court for Forsyth County seeking to establish cartway rights over the surrounding property owned by Forsyth County. On 2 July 1993, the Clerk found that the property was indeed landlocked and that the petitioners' intended use was as required under the cartway statute and, therefore, granted their petition to establish a cartway right. Respondent, Forsyth County, appealed the order to Forsyth County Superior Court and moved for dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief may be granted. Following a hearing on this matter, the trial court granted respondent's motion to dismiss. From this order, the petitioners appeal.

The petitioners contend that the trial court erred by ruling that they failed to state a claim upon which relief may be granted. Specifically, they argue that a cartway proceeding may be maintained against a county. We agree.

North Carolina law permits a landowner who has no reasonable access to his property to file a petition before the clerk of superior court and seek an easement imposed on the adjoining land to permit access to a public road. *Kanupp v. Land*, 248 N.C. 203, 102 S.E.2d 779 (1958); N.C. Gen. Stat. § 136-69 (1986). Section 136-69 states:

> If any person, firm, association, or corporation, shall be engaged in the cultivation of any land or the cutting and removing of any standing timber . . . or taking action preparatory to the operation of any such enterprises, to which there is leading no public road or other adequate means of transportation, other than a navigable waterway, affording necessary and proper means of ingress thereto and egress therefrom, such person, firm, association or corporation may institute a special proceeding as set out in the preceding section (G.S. 136-68), and if it shall be made to appear

> to the court necessary, reasonable and just that such person shall have a private way to a public road or watercourse or railroad over the lands of *other persons*, the court shall appoint a jury of view of three disinterested freeholders to view the premises and lay off a cartway.

N.C. Gen. Stat. § 136-69 (1986) (emphasis added). Thus, the statute provides that a person is entitled to a cartway right upon proof that: 1) the land in question is used for one of the purposes enumerated in the statute; 2) the land is without adequate access to a public road or other adequate means of transportation affording necessary and proper ingress and egress; and, 3) the granting of a private way over the lands of *other persons* is necessary, reasonable and just. *Campbell v. Conner*, 77 N.C. App. 627, 335 S.E.2d 788 (1985).

In the subject case, respondent contends that the term "other persons," as used in the cartway statute, does not include bodies politic such as counties. We, however, are guided by N.C. Gen. Stat. § 136-68 which provides that "the procedure established under Chapter 40 entitled 'Eminent Domain,' shall be followed in the conduct of [a special proceeding to establish a cartway right]." Under N.C. Gen. Stat. § 40A-2 (1984), the successor to Chapter 40, "person" is defined as "a natural person *and* any legal entity capable of owning or having interest in land." In North Carolina, counties are established as legal entities and are empowered by law to acquire land. *See* N.C. Gen. Stat. §§ 153A-11 and 153A-158 (1991). We, therefore, find that the term "other persons," as used in the cartway statute, does include counties.

Reversed.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. STEVEN GEORGE RITCHIE

No. 9324SC954

(Filed 7 February 1995)

Criminal Law § 762 (NCI4th)— reasonable doubt—instruction using moral certainty and substantial misgiving

The trial court's instruction on reasonable doubt which included the terms "moral certainty" and "honest substantial misgiving" did not violate due process.

Am Jur 2d, Trial § 1385.

Appealed by defendant from judgment entered 17 August 1993 by Judge Edward K. Washington in Watauga County Superior Court. Originally heard in the Court of Appeals 28 March 1994 and our Court first issued an opinion in this matter 21 June 1994. The State's petition for discretionary review pursuant to North Carolina General Statutes § 7A-31 (1989) was allowed by the Supreme Court which by order dated 8 September 1994 vacated the opinion of this Court and remanded the case to the Court of Appeals for reconsideration. Reconsidered in the Court of Appeals 5 January 1995.

Attorney General Michael F. Easley, by Associate Attorney General Robert T. Hargett, for the State.

Vincent L. Gable for defendant-appellant.

PER CURIAM.

This case has been remanded to our Court for our reconsideration in light of our Supreme Court's opinion in *State v. Bryant*, 337 N.C. 298, 446 S.E.2d 71 (1994) (*Bryant II*). Our initial opinion in this matter was reported at 115 N.C. App. 399, 445 S.E.2d 92 (1994) (unpublished). We briefly review the facts of this case.

Defendant was observed by Highway Patrol Trooper Kevin Bray operating a motor vehicle and was subsequently pulled over. Trooper Bray placed defendant under arrest for driving while impaired and transported defendant to the Watauga County Law Enforcement Center. At the Center, defendant performed a number of sobriety tests unsatisfactorily. Defendant was ultimately convicted following a jury trial of driving while impaired and appealed to our Court.

On appeal, we found that the trial court erred in its comments regarding reasonable doubt, pursuant to *Cage v. Louisiana*, 498 U.S. 39, 112 L.Ed.2d 339 (1990) and *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993) (*Bryant I*). However, because of our Supreme Court's reconsideration of this issue in *Bryant II* in light of *Victor v. Nebraska*, — U.S. —, 127 L.Ed.2d 583 (1994), we now reconsider this matter.

In Bryant II, our Supreme Court noted that

> the [U.S. Supreme] Court in *Victor* acknowledged the distinction drawn in *Cage* between "moral certainty" and "evidentiary certainty." *Victor*, 511 U.S. at —, 127 L.Ed.2d at 596. The Court stated, however, that in *Cage*, "the jurors were simply told that they had to be morally certain of the defendant's guilt; there was nothing else in the instruction to lend meaning to the phrase." *Id.* In *Victor*, the jury was explicitly told to base its conclusion on the evidence in the case, and there were other instructions which reinforced this message.
>
> Likewise, in the present case, the jury was instructed that a reasonable doubt existed "if, *after considering, comparing and weighing all the evidence*, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt." The jury was also instructed that a reasonable doubt is "a sane, rational doubt *arising out of the evidence or lack of evidence* or from its deficiency" and that it is "an honest substantial misgiving generated by the *insufficiency of the proof*." We therefore conclude that, under *Victor*, "there is no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case." *Victor*, 511 U.S. at —, 127 L.Ed.2d at 597. Thus, on remand, we hold, contrary to our previous decision in this case, that there is no *Cage* error entitling defendant to a new trial. *Id.*

337 N.C. at 306-07, 446 S.E.2d at 76.

The trial court in *Bryant* gave an instruction which was in pertinent part the exact language offered in the instant case. Therefore, as in *Bryant II*, on remand, we hold that there has been no *Cage* error in this matter entitling defendant to a new trial.

Defendant's remaining assignments of error all concern the trial court's comments to the jury during the instruction phase and the deliberation phase of the trial. We have carefully reviewed these assignments of error and have found them to be without merit.

No error.

Panel consisting of:

JOHNSON, EAGLES and COZORT

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 FEBRUARY 1995

BOWDEN v. LATTA No. 93-420	Durham (91CVS04270)	Reversed & Remanded
CARLISLE CHIROPRACTIC v. WETZEL No. 94-838	Mecklenburg (93CVD14173)	Dismissed
DAVIS v. WALKER No. 94-661	Randolph (93CVS1858)	Affirmed
DURHAM v. BRITT No. 94-249	Wayne (92CVS1)	Reversed & Remanded as to nuisance claim
EVANS v. BRAD RAGAN, INC. No. 94-630	Robeson (93CVS1236)	No Error
GALLOWAY v. CITY OF SHELBY No. 94-854	Cleveland (93CVS411)	Affirmed
HALL v. HALL No. 94-368	Catawba (88CVD1726)	Affirmed
HENDERSON v. CLIFTON HICKS BUILDERS, INC. No. 93-1161	Wake (89CVS8862)	No Error
HOOD v. DREXEL HERITAGE FURNISHINGS No. 94-392	Ind. Comm. (670011)	Dismissed
IN RE GLENAIRE, INC. No. 94-2	Property Tax Comm. (90PTC378) (92PTC12) (92PTC455)	Affirmed in part, Reversed in part
IN RE HARRINGTON No. 94-787	Cabarrus (91J36) (91J37)	Affirmed
IN RE HARTMAN-GOULDING CHILDREN No. 94-78	Mecklenburg (88J756) (88J757) (88J758)	Affirmed
IN RE THOMPSON No. 94-328	Wake (93J162)	Affirmed
IN RE WILSON No. 94-174	Catawba (88J95)	Affirmed

JACKSON v. SIGNAL DELIVERY SERVICE No. 94-799	Ind. Comm. (088263)	Affirmed
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SASSER v. SOUTHERLAND No. 94-273	Wayne (91CVS1640)	New Trial
STANLEY v. BCJ TRUCKING CO. No. 94-764	Ind. Comm. (101582)	Affirmed
STATE v. BELL No. 94-784	Pitt (92CRS12536ET AL)	No Error
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STATE v. COOPER No. 94-568	Edgecombe (91CRS4620) (91CRS4621) (91CRS4622)	Affirmed
STATE v. GILLIS No. 94-894	Wake (93CRS045383) (93CRS045384) (93CRS045385)	No Error
STATE v. HARRIS No. 94-900	Guilford (91CRS58831)	Dismissed
STATE v. HUNTLEY No. 94-626	Cabarrus (93CRS2010) (93CRS2011)	No Error
STATE v. JACKSON No. 94-637	Wake (93CRS77317) (JAC) (93CRS77318) (JON) (93CRS78628) (SUT)	No Error

STATE v. JOHNSON No. 94-29	Durham (93CRS8022) (93CRS8023)	No Prejudicial Error
STATE v. LOVE No. 94-1008	Union (93CRS8808)	No Error
STATE v. McDUFFIE No. 94-754	Forsyth (93CRS32870)	No Error
STATE v. MOUZON-HARRIS No. 94-880	Wake (93CRS61858)	No Error
STATE v. OATES No. 94-828	Sampson (93CRS403) (93CRS407)	No Error
STATE v. RICHARDSON No. 94-839	Wake (91CRS11606)	No Error
STATE v. SANCHEZ No. 94-899	Wilson (92CRS4496)	No Error
STATE v. SUMMERLIN No. 94-817	Wayne (93CRS9285)	Affirmed
STATE v. WARD No. 94-789	Forsyth (93CRS42547)	No Error
STATE v. WHITE No. 94-902	Wilkes (93CRS7330)	Dismissed
TERRY v. HOLDER No. 94-257	Alleghany (92CVS164)	Affirmed
WILSON v. N.C. MUT. INS. CO. No. 94-655	Stanly (93CVD225)	Affirmed
ZEMA v. PRINCE CHARLES DEVELOPMENT CO. No. 94-309	Cumberland (92CVS5669)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

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§ 32 (NCI4th). Sufficiency of evidence; conspiracies to assault

The evidence was sufficient only for the lesser-included offenses of conspiracy and solicitation of misdemeanor assault in a prosecution for conspiring and soliciting an assault upon the woman defendant's former husband was seeing where there was no evidence of how the coconspirator was to inflict the severe injury on the victim. **State v. Suggs,** 654.

CONSTITUTIONAL LAW

§ 85 (NCI4th). Fundamental rights and liberties; other rights and liberties

The trial court erred by denying defendants' amended motion to dismiss plaintiff's federal claims under 42 U.S.C. 1983 because defendants in their official capacities are not "persons" within the meaning of § 1983 for recovering money damages. **Hawkins v. State of North Carolina,** 615.

Defendants did not violate any clearly established right in 1986 when they required plaintiff to provide a urine sample as part of an investigation into missing drugs in plaintiff's workplace. **Ibid.**

Plaintiff did not state a claim pursuant to 42 U.S.C. 1981 for discriminatory discharge from his employment in 1986 because § 1981 did not govern a discriminatory discharge action in 1986. **Ibid.**

§ 86 (NCI4th). State and federal aspects of discrimination

A female police officer failed to make a showing of discriminatory intent necessary to overcome a qualified immunity defense in her 42 U.S.C. § 1983 action against a city and police department personnel based upon equal protection. **Morrison-Tiffin v. Hampton,** 494.

A male police officer could not recover under 42 U.S.C. § 1983 for an alleged violation of his equal protection rights based upon allegations that he was passed over for promotions, targeted for disproportionate punishments and harassed because he supported his wife, also a police officer, in her efforts to correct gender discrimination by defendants. **Ibid.**

Plaintiffs' § 1983 claim against a city and city officials in their official capacities must fail where plaintiffs produced no evidence that the city had a formal policy or established custom of discriminating against or harassing females or of retaliating against those who speak out on matters of public concern. **Ibid.**

§ 98 (NCI4th). Right to due process of law; state and federal aspects

Defendants did not violate any clearly established due process rights in terminating plaintiff for refusing to supply a urine sample as part of a drug investigation and were thus entitled to qualified immunity. **Hawkins v. State of North Carolina,** 615.

The trial court erred by denying defendants' amended motion to dismiss plaintiff's state constitutional due process claim against defendants in their official capacities arising from his dismissal as a state employee for refusing to submit a urine sample as part of a drug investigation. There exists an adequate state remedy in administrative review of plaintiff's termination and judicial review in the superior court. **Ibid.**

The trial court did not err by denying defendants' amended motion to dismiss plaintiff's claims against defendants in their individual capacities for monetary and injunctive relief for alleged due process violations of the state constitution in firing plaintiff for refusing to submit a urine sample as part of a drug investigation. **Ibid.**

COSTS

§ 26 (NCI4th). Effect of contractual provisions for attorney's fees

Attorney's fees were not allowable in a dispute arising out of a contract for the sale of real property since contractual provisions for such fees are invalid in the absence of statutory authority. **Forsyth Municipal ABC Board v. Folds,** 232.

COUNTIES

§ 91 (NCI4th). Police power; miscellaneous activities, instrumentalities, or materials

Although a provision of a county noise ordinance giving examples was unconstitutionally broad, a section of the ordinance prohibiting any "loud, raucous and disturbing noise" which is defined as any sound which "annoys, disturbs, injures or endangers the comfort, health, peace or safety of reasonable persons of ordinary sensibilities" was valid and separable from the unconstitutional provision. **State v. Garren,** 393.

COURTS

§ 15 (NCI4th). Grounds for personal jurisdiction; presence, domicil, or substantial activity within state

Plaintiff failed to show the necessary minimum contacts to give North Carolina personal jurisdiction over defendant New Jersey resident in an equitable distribution action where plaintiff built a house in North Carolina and had it titled in the names of both parties without defendant's agreement or acquiescence. **Shamley v. Shamley,** 175.

§ 74 (NCI4th). Jurisdiction to review rulings of another superior court judge generally

The trial court was not deprived of authority to dismiss plaintiff's equitable distribution claim for lack of jurisdiction over defendant because another judge had entered an earlier order continuing the case and enjoining both parties from using or disposing of any funds since the issues and materials considered by the second judge were not the same as those considered by the first judge. **Shamley v. Shamley,** 175.

§ 87 (NCI4th). Superior court jurisdiction to review rulings of another superior court judge; miscellaneous

One judge's suppression of cocaine found in the luggage of a defendant charged with trafficking in cocaine on the ground that officers made an unconstitutional stop of the vehicle in which he was riding did not preclude a second judge's ruling, made after defendant was indicted for conspiracy to traffic cocaine, that cocaine found in a coconspirator's luggage during the same stop was admissible in defendant's conspiracy trial. **State v. Smith,** 671.

CRIMINAL LAW

§ 68 (NCI4th). Jurisdiction; superior court; misdemeanors consolidated with felonies

Because habitual impaired driving is a substantive felony offense, the superior court had jurisdiction to also try defendant for the misdemeanor of driving while impaired. **State v. Baldwin,** 713.

DAMAGES

§ 53 (NCI4th). Collateral source rule generally

The trial court did not err by including a medical payment by the Navy as a collateral source where the Navy had taken no action beyond providing plaintiff's counsel with notice of his subrogation claim. **McFarland v. Cromer,** 678.

§ 127 (NCI4th). Punitive damages generally

Due process does not require that the burden of proof of punitive damages be greater than a preponderance of the evidence or that evidence of a defendant's net worth be excluded or allowed only after a determination has been made by a jury that punitive damages should be awarded. **Muse v. Charter Hospital of Winston-Salem,** 468.

§ 142 (NCI4th). Instructions to jury; future damages; use of mortuary tables

Though life expectancy may be determined from evidence of the plaintiff's health, constitution, habits and the like, as well as mortuary tables, the better practice is to introduce the mortuary tables in addition to other evidence. **Wooten v. Warren,** 350.

§ 165 (NCI4th). Instructions to jury; aggravation of preexisting injury

The evidence was sufficient to support an instruction on permanent injury but insufficient to support instructions on the aggravation or activation of a preexisting condition. **Wooten v. Warren,** 350.

§ 178 (NCI4th). Verdict generally; excessive or inadequate award

Failure of the trial court to articulate a detailed post-judgment analysis of a jury's award of punitive damages does not violate due process. **Muse v. Charter Hospital of Winston-Salem,** 468.

In a wrongful death action in which defendant's willful and wanton conduct resulted in decedent's suicide, an award of punitive damages which was six times the amount of the compensatory damages was not unconstitutional. **Ibid.**

DECLARATORY JUDGMENT ACTIONS

§ 20 (NCI4th). Parties

The trial court properly denied plaintiff's motions for a declaratory judgment that there was an agreement that defendant's liability insurer would pay its policy limit plus prejudgment interest in exchange for a complete release where the insurer was not a party to the action. **Welling v. Walker,** 445.

DEEDS

§ 120 (NCI4th). Sufficiency of evidence as to duress, undue influence, or mental incapacity

The evidence was sufficient to permit the jury reasonably to infer that defendant procured a deed by means of undue influence. **Caudill v. Smith,** 64.

DIVORCE AND ALIMONY

§ 112 (NCI4th). Equitable distribution; property subject to distribution, generally

The trial court did not err in denying plaintiff's motion to be declared sole owner of a house which he built in North Carolina and had titled in both parties' names since

plaintiff's motion was ancillary to his equitable distribution action, and the equitable distribution action was dismissed for lack of personal jurisdiction over defendant. **Shamley v. Shamley,** 175.

§ 129 (NCI4th). Distribution of marital property; pension, retirement, and other deferred compensation rights

The evidence supported the trial court's conclusion that plaintiff's "disability retirement benefits" above $97.75 per month which he began to receive during the course of the marriage were his separate property. **Johnson v. Johnson,** 410.

§ 167 (NCI4th). Distribution of marital property; pension, retirement, or deferred compensation benefits generally

The trial court was required to make findings concerning defendant's thrift plan before ordering defendant to make a lump sum distributive award where defendant's evidence showed that the award must be made from defendant's thrift plan and would result in the loss of employer contributions or harsh tax consequences. **Shaw v. Shaw,** 552.

§ 372 (NCI4th). Modification of custody order; particular circumstances as warranting modification; miscellaneous circumstances

The trial court's decision to suspend respondent's visitation rights with his children was not supported by the facts, the law, or public policy where the court based its findings of a substantial change in circumstances on the termination of respondent's parental rights, reversed elsewhere in this opinion; the expressed desire of the children to not visit with respondent and to be adopted by their stepfather, which does not support a finding of changed circumstances and a conclusion that it is in the best interest of the children to suspend respondent's visitation rights; and the finding that respondent has been absent from his children's lives, which was not supported by the evidence. **Bost v. Van Nortwick,** 1.

§ 377 (NCI4th). Visitation generally

The trial court did not err in modifying an earlier child custody order where only modification of visitation was sought and only visitation was modified. **Benedict v. Coe,** 369.

§ 378 (NCI4th). Visitation; findings required

The trial court's modification of child visitation on the ground that defendant mother was over-protective was improper, and the modification order was deficient where it contained insufficient findings and no conclusion that a substantial change of circumstances affecting the welfare of the child had occurred. **Benedict v. Coe,** 369.

§ 560 (NCI4th). Recognition and enforcement of divorce decrees rendered in foreign countries

A genuine issue of material fact existed as to whether defendant's domicile was North Carolina or Syria and thus whether defendant's Syrian divorce should be given recognition by the courts of this state so as to bar plaintiff's claims for alimony and equitable distribution. **Atassi v. Atassi,** 506.

DOMICIL AND RESIDENCE

§ 7 (NCI4th). Domicil or residence of children

Even though a college student's parents live in Vermont, where the student had lived in North Carolina for five years preceding her enrollment in UNC-CH, the college

ESTATES

§ 51 (NCI4th). Joint tenancy generally; survivorship by agreement

G.S. 41-2, which abolished the presumption of automatic right of survivorship and required a signed written agreement, did not apply to a promissory note made payable to testator and his wife "or their survivor" since the note contained the specific language necessary to create a right of survivorship, and the note was not part of testator's estate when he predeceased his wife. **Miller v. Miller,** 71.

Defendant wife's survivorship interest in a promissory note payable to testator and defendant "or their survivor" was not defeated by a premarital agreement in which she released all rights in testator's property which she "might have by reason of the marriage." **Ibid.**

ESTOPPEL

§ 20 (NCI4th). Reliance

Defendant was not equitably estopped from claiming the proceeds of a promissory note on which she was a joint payee because she listed the note as an asset of her husband's estate since plaintiff did not prove his reliance on defendant's conduct. **Miller v. Miller,** 71.

EVIDENCE AND WITNESSES

§ 183 (NCI4th). Facts indicating state of mind; intent in drug or narcotics cases

Statements made by defendant to an officer prior to his arrest on the current drug charges that he was just a businessman who should be left alone and that officers "should concentrate on those drug dealers who ripped people off and shoot people" were relevant on the issue of defendant's intent to sell and deliver drugs. **State v. Taylor,** 644.

§ 185 (NCI4th). Facts indicating knowledge generally

Evidence of a decedent's past drinking habits was admissible in an action arising from an automobile accident in which the decedent was a passenger, the driver and decedent had been drinking, and contributory negligence was an issue; evidence of the deceased's drinking habits was relevant to his knowledge of the effects of alcohol. **McFarland v. Cromer,** 678.

§ 200 (NCI4th). Mental and physical condition of testator to establish susceptibility to influence

The trial court properly admitted the testimony of the grantor's attendant and physician regarding her mental condition in this action to set aside a deed based on undue influence. **Caudill v. Smith,** 64.

§ 263 (NCI4th). Character or reputation of persons other than witness; defendant

The trial court erred by admitting testimony that a defendant on trial for drug offenses had a reputation in the community as a drug dealer when defendant had not offered character evidence, but this error was not prejudicial. **State v. Taylor,** 644.

§ 294 (NCI4th). Suggestion or implication of other crimes, wrongs, or acts

An officer's testimony that a defendant charged with drug offenses had fled from him on an earlier occasion was not evidence of other crimes, wrongs or acts within the purview of Rule 404(b). **State v. Taylor,** 644.

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

§ 2246 (NCI4th). Chiropractor as expert

The trial court did not err in allowing an expert in chiropractic to testify concerning his treatment of plaintiff, his diagnosis, and his opinion that her injuries in an accident caused her subsequent complaints. **Wooten v. Warren,** 350.

§ 2403 (NCI4th). Testimony by witness omitted from list provided

The trial court did not err in excluding the testimony of one of defendant's expert witnesses where defendant designated the additional expert nearly a month after the date fixed by agreement for doing so, after all other experts for both sides had been deposed, and approximately ten business days prior to trial. **Pittman v. Barker,** 580.

§ 2482 (NCI4th). Witnesses allowed in courtroom during minor child's testimony

The trial court did not err by excluding the mother of child rape and sexual offense victims from the courtroom during their testimony while not excluding social workers and therapists. **State v. Weaver,** 434.

§ 2542 (NCI4th). Competency of witnesses; age of child

The trial court did not err by permitting rape victims who were seven and nine years old to testify in defendant's trial. **State v. Weaver,** 434.

§ 2747 (NCI4th). Examination of witnesses; oath

There was no prejudice in a termination of parental rights proceeding by allowing the children to testify without being sworn where respondent did not object to the error when given the opportunity to do so in the courtroom after the children testified. **In re Nolen,** 693.

§ 2893 (NCI4th). Cross-examination as to particular matters; writings

In a prosecution of defendant for rape, sexual offenses and indecent liberties involving his stepdaughter, the State waived its right to cross-examine defendant about written statements he made to a counselor during sex therapy following a previous conviction for taking indecent liberties with his daughter when it failed to comply with its agreement at a pretrial suppression hearing that it would not use the statements unless it raised the issue at trial before defendant took the stand, but the trial court's error in permitting the State to cross-examine defendant about the statements was not prejudicial. **State v. Shannon,** 718.

FRAUD, DECEIT, AND MISREPRESENTATION

§ 24 (NCI4th). Complaint generally

Plaintiff's claims that defendant fraudulently procured his signature on a $100,000 promissory note and fraudulently induced him to purchase property and execute a $650,000 note failed to meet the particularity requirements for pleading fraud. **Trull v. Central Carolina Bank,** 220.

§ 41 (NCI4th). Circumstantial evidence; sufficiency

The evidence was sufficient to establish plaintiff's fraudulent conduct in entering into a contract for renovation of a building by misrepresenting to defendant that construction loan funds were available to pay for the work. **Post & Front Properties v. Roanoke Construction Co.,** 93.

GAMBLING

§ 33 (NCI4th). Slot machines, punch boards, and similar devices generally

Plaintiff's video card games were illegal slot machines not falling within the exception of G.S. 14-306. **Collins Coin Music Co. v. N.C. Alcoholic Beverage Control Comm.** 405.

The trial court did not err in a gambling prosecution by failing to give the proposed jury instructions submitted by defendant and in failing to give jury instructions on the definition of betting. **State v. Chase,** 686.

§ 34 (NCI4th). Slot machines, punchboards, and similar devices; possession or use

There was sufficient evidence of gambling to conform to a misdemeanor statement of charges involving a poker machine. **State v. Chase,** 686.

GUARANTY

§ 11 (NCI4th). Unauthorized guaranty

The evidence was sufficient to show that the person who signed a guaranty of an automobile lease on behalf of defendant corporation had no actual or apparent authority to do so. **Wachovia Bank v. Bob Dunn Jaguar,** 165.

The trial court did not err in failing to find agency by ratification or estoppel in an action to recover on a guaranty of an automobile lease. **Ibid.**

§ 13 (NCI4th). Construction of guaranty agreements, generally

The terms of the parties' guaranty agreement prevailed over general guaranty law so that defendant could be held liable as guarantor only if he benefited from the extension of credit to the borrower company or was an officer of the borrower company. **Fagen's of North Carolina v. Rocky River Real Estate Co.,** 529.

Under the terms of the parties' guaranty agreement, defendant was not jointly or severally liable under either a contract or quantum meruit theory because the evidence was insufficient to support a finding that defendant personally benefited from the extension of credit to defendant company. **Ibid.**

HANDICAPPED PERSONS

§ 25 (NCI4th). Qualified handicapped person

Because petitioner could not perform the duties of the job of correctional officer as defined in the job description and petitioner's condition could create an unreasonable risk to himself, his fellow correctional officers, inmates, and the public at large, petitioner was not a "qualified handicapped person" so that respondent was under no duty to make accommodations for petitioner's physical condition. **White v. N.C. Dept. of Correction,** 521.

HIGHWAYS, STREETS, AND ROADS

§ 18 (NCI4th). Cartways; establishment generally

A cartway proceeding may be maintained against a county. **Davis v. Forsyth County,** 725.

HOMICIDE

§ 583 (NCI4th). Instructions; acting in concert

The trial court erred in instructing the jury that it could find defendant guilty of involuntary manslaughter on the theory of acting in concert where the evidence tended to show that decedent was leaning into a vehicle in which defendant was a passenger, and the vehicle accelerated and eventually ran over decedent. **State v. Kaley,** 420.

§ 635 (NCI4th). Instructions; self-defense; duty to retreat; right to stand ground generally

The trial court in a first-degree murder case erred in failing to instruct that defendant had no duty to retreat where the evidence tended to show that defendant and the victim were shooting at each other from separate cars after the victim was the aggressor in the events preceding the first shooting. **State v. Nixon,** 141.

Evidence that defendant tried to leave her house on two occasions but was stopped by her husband and that she stabbed her husband with a butcher knife after he tried to choke her entitled defendant to an instruction on her right not to retreat. **State v. Brown,** 239.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 17 (NCI4th). Nature and scope of certificate of need

A certificate of need allowing petitioner to construct and operate a 66-bed substance abuse/chemical dependency treatment hospital for adolescents did not permit petitioner to provide treatment for adolescents with eating disorders. **Laurel Wood of Henderson, Inc. v. N.C. Dept. of Human Resources,** 601.

§ 64 (NCI4th). Tort liability; corporate negligence

Defendant hospital had a duty pursuant to the reasonable person standard not to institute a policy or practice which required that patients be discharged when their insurance expired. **Muse v. Charter Hospital of Winston-Salem,** 468.

In an action to recover for the wrongful death of a suicidal patient who was allegedly discharged from defendant hospital because his insurance ran out, the evidence was sufficient to support the jury's finding that defendant hospital had a practice which interfered with the ability of the doctor to exercise his medical judgment and that defendant acted knowingly and with reckless indifference to the rights of others. **Ibid.**

Any negligence by a physician in discharging his patient or by the parents in not properly supervising the patient after his discharge did not insulate the negligence of defendant hospital in discharging the patient when his insurance expired. **Ibid.**

Where a psychiatric hospital has assumed the care of a suicidal patient, and as a result of its negligence, the patient commits suicide, the hospital cannot claim that the suicide was a superseding cause which insulated it from liability. **Ibid.**

HOUSING

§ 74 (NCI4th). Condominium assessments and liens

The trial court erred in granting summary judgment for plaintiff in an action to recover maintenance fees on time share units where there was a genuine issue of material fact with regard to the meaning of "Unit Weeks then remaining unsold" in the context of all the circumstances surrounding defendant developer's initial sale and

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS—Continued

A misdemeanor statement of charges was sufficient to charge defendant with two counts of gambling. **Ibid.**

There was no abuse of discretion in a gambling prosecution where the trial court granted defendant's motion to dismiss warrants but allowed the State to file misdemeanor statements of charges and denied defendant's motion for a continuance. **Ibid.**

§ 39 (NCI4th). Amendment of date of alleged offense

The trial court properly allowed the State to change an habitual felon indictment to allege the correct date of the offense because the date was neither an essential nor a substantial fact as to the charge of habitual felon. **State v. Locklear,** 255.

INJUNCTIONS

§ 41 (NCI4th). Modification, dissolution, or vacation of temporary orders or preliminary injunctions

There was no error in the court's refusal to vacate a temporary restraining order extending voting hours because the TRO expired by expiration of law prior to the motion to vacate. **Democratic Party of Guilford Co. v. Guilford Co. Bd. of Elections,** 633.

§ 43 (NCI4th). Modification, dissolution, or vacation of temporary orders or preliminary injunctions; damages

The trial judge used the wrong standard of review in considering defendants' request for damages arising from the issuance of temporary restraining order extending election hours. **Democratic Party of Guilford Co. v. Guilford Co. Bd. of Elections,** 633.

§ 44 (NCI4th). Dismissal of action

A voluntary dismissal of a complaint which had sought a temporary restraining order extending voting hours was not a per se admission of wrongful restraint which automatically entitled the defendants to damages. **Democratic Party of Guilford Co. v. Guilford Co. Bd. of Elections,** 633.

INSURANCE

§ 162 (NCI4th). Effect of change in renewal policy not called to attention of insured

The trial court did not err by granting summary judgment for defendants in an action arising from a boating accident where plaintiff insurance companies filed a complaint seeking a declaration of their rights under a homeowners policy, contending that the policy in effect at the time of the accident would have excluded coverage because it was a new contract, although the prior policy would not have excluded the accident. The notice of change must be specific, especially where there is a reduction in coverage. **North River Ins. Co. v. Young,** 663.

§ 487 (NCI4th). Insurer's liability for punitive damages assessed against insured

Because there was no express exclusion of punitive damages in its automobile liability policy, defendant insurer was liable for punitive damages awarded plaintiff in an action against the insured, but the claim for punitive damages was barred by the statute of limitations. **Lavender v. State Farm Mut. Auto. Ins. Co.,** 135.

LANDLORD AND TENANT

§ 31 (NCI4th). Breach, generally; crossclaims and counterclaims

The trial court properly denied defendant franchisor's counterclaim alleging that plaintiff failed to deliver possession of the premises to defendant upon failure of the franchisees to pay the rent and properly held defendant franchisor liable for damages for breach of the lease agreement. **Westport 85 Limited Partnership v. Casto,** 198.

§ 47 (NCI4th). Construction of renewal or extension provision

Plaintiff tenant had the option to renew a lease on the basis of the same rental rate as "for the original term" since the "fixed price" option granted to the tenant controlled and was not conditioned or modified by the "first refusal" option in the lease. **Bridgestone/Firestone, Inc. v. Wilmington Mall Realty Corp.,** 535.

LIBEL AND SLANDER

§ 19 (NCI4th). Who has qualified privilege

Statements made by defendant board of education's communications officer to the superintendent concerning alleged actions by plaintiff assistant superintendent in attempting to have the superintendent's office broken into and directing janitors to search the superintendent's trash for embarrassing information were protected by a qualified privilege. **Phillips v. Winston-Salem/Forsyth County Bd. of Educ.,** 247.

Qualified privilege did not apply to a statement about plaintiff assistant superintendent made by defendant board of education's communications officer to a newspaper editor. **Ibid.**

§ 42 (NCI4th). Sufficiency of evidence to take issues to jury

A statement made by defendant board of education's communications officer to a newspaper editor, when asked about alleged actions of plaintiff assistant superintendent in attempting to have the superintendent's office broken into and directing janitors to search the superintendent's trash for embarrassing information, that "You'd be surprised about what went on around here" was not defamatory as a matter of law. **Phillips v. Winston-Salem/Forsyth County Bd. of Educ.,** 247.

LIMITATIONS, REPOSE, AND LACHES

§ 19 (NCI4th). Tort actions; emotional distress

The three-year statute of limitations applied in plaintiff police officer's action for intentional infliction of emotional distress based on incidents of alleged sexual harassment and discrimination occurring at work. **Morrison-Tiffin v. Hampton,** 494.

§ 22 (NCI4th). Accrual of causes of action; medical malpractice

An issue of fact for the jury was presented as to whether a claim for medical malpractice accrued on the date of defendant physician's last treatment of plaintiff or on the earlier date a second physician who examined plaintiff made a derogatory comment about defendant physician. **Hatem v. Bryan,** 722.

§ 92 (NCI4th). Miscellaneous actions involving the State and municipalities, generally

The three-year statute of limitations applied in plaintiff police officer's action against a city and police department personnel for violation of her civil rights under 42 U.S.C. § 1983 based on alleged sexual harassment and discrimination occurring at work. **Morrison-Tiffin v. Hampton,** 494.

LIMITATIONS, REPOSE, AND LACHES—Continued

§ 119 (NCI4th). Postponement or suspension of statute; disability or incapacity; cumulative disabilities

G.S. 1-17 tolled the six-month statute of limitations period provided by G.S. 30-2 for an incompetent wife to dissent from her husband's will. **In re Estate of Owens,** 118.

§ 139 (NCI4th). New action after failure of original suit

The trial court did not err in denying defendants' amended motion to dismiss plaintiff's complaint based on the statute of limitations where defendant contended that plaintiff took a voluntary dismissal of his first action in bad faith. **Hawkins v. State of North Carolina,** 615.

§ 149 (NCI4th). Amendment of process and correction of name

The trial court did not err by dismissing a negligence action based on the running of the statute of limitations where plaintiffs filed their original summons and complaint on 24 August 1992, the last date on which they could file a timely claim; they sued and served the wrong party since both the summons and complaint named Winn-Dixie Stores, Inc. as the defendant; plaintiffs filed an amended complaint naming Winn-Dixie of Raleigh, Inc. as the defendant seven months after the original complaint was filed and the statute of limitations had run; and plaintiffs served no corresponding summons on anyone, contending that the amended complaint merely corrected the name of a party already in court and thus related back; but plaintiffs' complaint does not relate back because defendant Winn-Dixie Raleigh would be unfairly prejudiced in that it would lose the benefit of the statute of limitations and the failure to name Winn-Dixie Raleigh originally was solely attributable to plaintiffs. **Franklin v. Winn Dixie Raleigh, Inc.,** 28.

MORTGAGES AND DEEDS OF TRUST

§ 117 (NCI4th). Deficiency and personal liability generally

The individual defendant could not argue that he could not be held liable for the deficiency after a foreclosure sale because he was not personally served with notice of the foreclosure hearing where he had actual knowledge of the foreclosure proceeding. **Fleet National Bank v. Raleigh Oaks Joint Venture,** 387.

Defendants in an action to recover a deficiency after a foreclosure of a leasehold interest were not permitted to assert the defense of G.S. 45-21.36 when the mortgagee is the purchaser that the property was worth the amount of the debt secured by it at the time of the sale since the leasehold interest was not "real estate" within the meaning of the statute. **Ibid.**

MUNICIPAL CORPORATIONS

§ 328 (NCI4th). Exercise of police power; control of nuisances

Although a provision of a county noise ordinance giving examples was unconstitutionally broad, a section of the ordinance prohibiting any "loud, raucous and disturbing noise" which is defined as any sound which "annoys, disturbs, injures or endangers the comfort, health, peace or safety of reasonable persons of ordinary sensibilities" was valid and separable from the unconstitutional provision. **State v. Garren,** 393.

MUNICIPAL CORPORATIONS—Continued

§ 412 (NCI4th). Tort liability based on nature of functions; sovereign immunity generally

Where plaintiffs asserted claims against defendant gas superintendent in his official capacity as an employee of defendant city, he was shielded from individual liability by the doctrine of sovereign immunity. **Gregory v. City of Kings Mountain,** 99.

§ 415 (NCI4th). Tort liability; proprietary functions

Defendant city, in operating a natural gas utility, was engaged in a proprietary rather than governmental function and was not immune from liability for any torts which were proximately caused by it in providing this service. **Gregory v. City of Kings Mountain,** 99.

§ 444 (NCI4th). Waiver of governmental immunity; effect of procuring liability insurance generally

Plaintiffs failed to state a claim against defendant city manager in his official capacity for negligent hiring or retention where they failed to allege a waiver of immunity through purchase of liability insurance. **Morrison-Tiffin v. Hampton,** 494.

§ 454 (NCI4th). Pleadings in relation to governmental immunity

Plaintiff's claim against a county for wrongful death occurring during a high-speed chase by a deputy sheriff was subject to dismissal because of plaintiff's failure to plead waiver of governmental immunity through the purchase of liability insurance. **Clark v. Burke County,** 85.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA

§ 114 (NCI4th). Sufficiency of evidence; possession of controlled substances with intent to sell, deliver, distribute, or manufacture; cocaine

The evidence as sufficient to permit the jury to find that defendant possessed marijuana and cocaine with the intent to sell and deliver where defendant dropped two "dime bags" of marijuana when officers approached him and had three individually wrapped pieces of crack cocaine in his mouth. **State v. Taylor,** 644.

§ 180 (NCI4th). Instructions to jury; necessity and sufficiency of definition and explanation of constructive possession

The trial court's instructions on constructive possession of a controlled substance did not constitute plain error. **State v. Solomon,** 701.

NEGLIGENCE

§ 151 (NCI4th). Premises liability; involving doors

The trial court did not err by denying defendant Carolina Door's motions for directed verdict and judgment notwithstanding the verdict or new trial where plaintiff was injured when she was knocked to the ground by an automatic door for which defendant Carolina Door had the service contract. **Madden v. Carolina Door Controls, Inc.** 56.

NEGOTIABLE INSTRUMENTS AND OTHER COMMERCIAL PAPER

PARENT AND CHILD

PUBLIC OFFICERS AND EMPLOYEES

ROBBERY—Continued

§ 164 (NCI4th). Robbery with firearms or other dangerous weapons; presumptive sentence; aggravating and mitigating factors

The trial court did not abuse its discretion by finding that defendant had lied about his record where the court did not find this as a separate aggravating factor but included it in the findings of prior convictions. **State v. Donnell,** 184.

SCHOOLS

§ 9 (NCI4th). *Validation of plans of consolidation and merger*

The General Assembly could not, by enacting legislation ratifying all school merger plans adopted during a specified period, make constitutional a Durham school merger plan which a court had ruled unconstitutional. **Cannon v. N.C. State Bd. of Education,** 399.

§ 175 (NCI4th). Liability of board of education under respondeat superior

Defendant board of education was not vicariously liable for statements made by its vice chairman to a newspaper editor concerning alleged conduct by plaintiff assistant superintendent where the vice chairman was not acting as an agent of the board when he made the statements. **Phillips v. Winston-Salem/Forsyth County Bd. of Educ.,** 274.

SEALS

§ 1 (NCI4th). Generally

The three-year statute of limitations applied to claims for maintenance fees on time share units where the operative instruments had a corporate seal affixed but lacked the requisite specialty language to make them sealed instruments to which the ten-year statute of limitations would apply. **Dunes South Homeowners Assn. v. First Flight Builders,** 360.

SEARCHES AND SEIZURES

§ 4 (NCI4th). Expectation of privacy; particular places or things—motor vehicles

An officer who stopped the speeding vehicle in which defendant was a passenger did not have probable cause to open an aspirin bottle which defendant handed him and look inside, and the trial court erred in denying defendant's motion to suppress rock cocaine found in the bottle. **State v. Wise,** 105.

§ 14 (NCI4th). Residential dwellings; curtilage of home

A police officer violated defendant's right against unreasonable searches and seizures by entering defendant's back porch, leaning over a couch, and looking through a crack in drawn curtains, and evidence seized from defendant's apartment must be excluded as fruit of an illegal search. **State v. Wooding,** 109.

§ 14 (NCI4th). Scope of protection; residential dwellings; curtilage of home

The actions of police officers in entering and securing defendant's residence while obtaining a search warrant based on independent information did not violate defendant's Fourth Amendment rights. **State v. Waterfield,** 295.

SEARCHES AND SEIZURES—Continued

§ 20 (NCI4th). Right to challenge lawfulness of search; standing; nature of interest in, or connection with, searched property generally

The trial court did not err in a prosecution arising from defendant hiring someone to kill her former husband and assault a woman whom he was dating by admitting telephone records which showed calls from defendant to the coconspirator testifying against her. **State v. Suggs,** 654.

§ 21 (NCI4th). Standing to challenge lawfulness of search; proprietary or possessory interest in searched property

Defendant did not have standing to object to the search of a briefcase found in his wife's car trunk when defendant never asserted an ownership or possessory interest in the briefcase. **State v. Cohen,** 265.

§ 43 (NCI4th). Search incident to arrest; probable cause to arrest; drug offenses

When an officer determined that items dropped by defendant as the officer approached him were bags of marijuana, the officer lawfully arrested defendant, and individually wrapped pieces of crack cocaine held in defendant's mouth were lawfully seized as incident to the arrest. **State v. Taylor,** 644.

§ 80 (NCI4th). Stop and frisk procedures; reasonable suspicion of criminal activity

An officer had a sufficient basis to detain defendant pursuant to an investigatory stop where he saw defendant drop some items on the ground as the officer approached defendant in an area known for drug use and sales. **State v. Taylor,** 644.

§ 109 (NCI4th). Probable cause for search warrant; sufficiency of particular affidavits of informants; drug cases

Probable cause existed for the issuance of a warrant to search defendant's home for drugs where there were three separate sources who stated that defendant sold and possessed drugs at his residence, including one who reported such activity within twenty-four hours before the warrant was obtained, and each source corroborated the same information regarding defendant's storage of marijuana in a padlocked cabinet in his bedroom. **State v. Waterfield,** 295.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

§ 13 (NCI4th). Civil and criminal liability generally

Governmental immunity does not preclude an action against the sheriff and officers sued in their official capacities because of the bond required of the sheriff. **Clark v. Burke County,** 85.

Waiver of a sheriff's official immunity may be shown by the county's purchase of liability insurance as well as by the existence of his official bond, and liability of a sheriff for negligence in the performance of his official duties is not limited to the amount of his bond where the county has purchased liability insurance. **Smith v. Phillips,** 378.

§ 21 (NCI4th). Liability for death or injuries caused by law enforcement officer

The evidence was insufficient to show that a deputy sheriff's actions during a high-speed chase were willful and wanton in an action to recover for the death of a

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS—Continued

passenger in the vehicle being chased when that vehicle crashed during the chase. **Clark v. Burke County,** 85.

§ 35 (NCI4th). Deputies and other employees generally

A county could not be liable for injury resulting from a deputy sheriff's actions during a high-speed pursuit of a vehicle in which plaintiffs' intestate was a passenger since the deputy was an employee of the sheriff, an elected official, and not the county. **Clark v. Burke County,** 85.

STATE

§ 19 (NCI4th). Sovereign or governmental immunity generally

The State did not waive its immunity with respect to plaintiff's tort claim arising from his discharge as a state employee for refusing a urine test in a drug investigation and may assert absolute immunity as to that claim. **Hawkins v. State of North Carolina,** 615.

TAXATION

§ 84 (NCI4th). Application for present use valuation; appeal of determination

The trial court erred in granting defendant county's summary judgment motion of plaintiff's appeal of its real property assessment since there was a factual dispute as to whether a power of attorney was adequate to authorize a representative's appearance before the Board of Equalization and Review. **Edward Valves, Inc. v. Wake County,** 484.

§ 92 (NCI4th). Valuation of intangible personal property

The Wake County methodology of giving different tax treatment to intangible self-created property that is sold and similar property that is not sold is unconstitutional and violates G.S. 105-284(a). **Edward Valves, Inc. v. Wake County,** 484.

§ 99 (NCI4th). Property Tax Commission; duties as to appeals from appraisals and assessments

Dismissal of an appeal for failure to follow rules of the Property Tax Commission is an appropriate sanction. **In re Appeal of Fayetteville Hotel Assoc.,** 285.

TRIAL

§ 261 (NCI4th). Relation of motion for directed verdict to motion for summary judgment

The earlier denial of a motion for summary judgment would not constitute a barrier to later consideration of a motion for directed verdict, but defendant was not prejudiced by the trial court's refusal to consider the directed verdict motion where plaintiff met her burden of proving that the action was instituted within the time period of the statute of limitations. **Wooten v. Warren,** 350.

§ 546 (NCI4th). Appellate review of motion for new trial

An assignment of error to a trial court's denial of a new trial following a negligence action was denied where there was no evidence of any abuse of discretion by the trial court. **Madden v. Carolina Door Controls, Inc.,** 56.

WILLS

§ 67 (NCI4th). Instructions as to undue influence

The trial court's instruction to the jury on undue influence was proper and did not prejudice defendant. **Caudill v. Smith,** 64.

WORKERS' COMPENSATION

§ 88 (NCI4th). Appointment of commissioners; disqualification from hearing case

An award of interest and costs, including attorney's fees, was void where it was rendered after the term of one commissioner, who was in the majority on a two-to-one vote, had expired. **Estes v. N.C. State University,** 126.

§ 215 (NCI4th). Components of award generally

The Industrial Commission did not err in a workers' compensation action by requiring defendant to provide further vocational rehabilitation assistance to plaintiff based upon findings that plaintiff was impaired as a result of his head injury, had to overcome resistance on the part of the employers, and required vocational rehabilitation. **Silver v. Roberts Welding Contractors,** 707.

§ 236 (NCI4th). Availability of employment as evidence of earning capacity

The Industrial Commission did not err in a workers' compensation action by finding that plaintiff was permanently partially disabled because, although plaintiff argued that the Commission erred by concluding that his right to continuing disability benefits ended when he reached maximum medical improvement, a finding of maximum medical improvement is simply the prerequisite to determination of the amount of any permanent disability. **Silver v. Roberts Welding Contractors,** 707.

The Industrial Commission did not err in a workers' compensation action by failing to apply the odd-lot doctrine, under which total disability may be found in workers who are not altogether incapacitated but who are so handicapped that they will not be employed regularly in any well-known branch of the labor market. **Ibid.**

§ 259 (NCI4th). Determination of partial disability in particular cases

The Industrial Commission's findings were sufficient to provide a sufficient chronology of the appropriate times plaintiff was employed after his injury and support the amount of temporary disability compensation awarded by the Commission. **Silver v. Roberts Welding Contractors,** 707.

§ 263 (NCI4th). Approximation of average weekly wage under exceptional circumstances

In determining the average weekly wage of a hauler of logs, it was proper to deduct certain business expenses from his income received from defendant, but the Industrial Commission erred by failing to consider a reasonable rate of depreciation on the employee's equipment as a business expense in determining his earnings. To determine the employee's actual compensation, the Commission might consider what he would have been required to pay someone else to perform his work or his income from similar work as reported on returns from earlier years. **Christian v. Riddle & Mendenhall Logging,** 261.

§ 378 (NCI4th). Burden of proof and presumptions regarding compensability

The Industrial Commission did not err in placing the burden on defendants to show that plaintiff was not disabled after 9 July 1990 and in finding that she continued

to be disabled after that date where plaintiff offered medical testimony that she had not reached maximum medical improvement and that she was capable of being employed only at nonstrenuous work. **Simmons v. Kroger Co.,** 440.

§ 412 (NCI4th). Review by Industrial Commission; right to and procedure for review, generally

The Industrial Commission has the inherent authority, in its discretion, to consider defendant's motion for relief due to excusable neglect so as to allow defendant's appeal to proceed to the Commission. **Allen v. Food Lion, Inc.,** 289.

§ 415 (NCI4th). Scope of review by Industrial Commission; reconsideration of findings of fact and conclusions of law

The full Industrial Commission failed to satisfy its duty to review the evidence and findings and to make specific findings and conclusions with respect to each relevant issue raised by the evidence where depositions containing the only medical testimony were missing from the file under review by the full Commission. **Slatton v. Metro Air Conditioning,** 226.

§ 477 (NCI4th). Award of costs and attorney's fees; unsuccessful appeal by workers' compensation insurer

The Industrial Commission could properly award plaintiff attorney's fees as part of the costs under G.S. 97-88 on two but not three appeals where two of the appeals were made by defendant, and both the full Commission and the court on appeal affirmed the award of benefits. **Estes v. N.C. State University,** 126.

WORD AND PHRASE INDEX

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